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

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
09 SEP 2026
REGISTRY
LUSAKA

2026/HP/EP/038

IN THE MATTER OF: ARTICLE 45 (2) (A) – (E) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2026 AS AMENDED BY ACT NO. 13 OF 2025

AND

IN THE MATTER OF: THE PARLIAMENTARY ELECTION HELD ON 13TH AUGUST, 2026 FOR ROMA CONSTITUENCY

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 29, 37, 50, 65, 68 (D), 71, 72, 73 AND 81 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 AS AMENDED BY ACT NO. 12 OF 2026

AND

IN THE MATTER OF: SECTIONS 97(1), (2)(B) AND (4) AS READ TOGETHER WITH SECTIONS 83 (2), 98(A) (B) AND 99(A) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 AS AMENDED BY ACT NO. 12 OF 2026

AND

IN THE MATTER OF: SECTION 4(1) AND (2) (A), (B) AND (C) OF THE ELECTORAL COMMISSION ACT NO. 25 OF 2026

AND

IN THE MATTER OF: PART III OF THE HIGH COURT (ELECTION PETITION) RULES, 2026 (SI NO. 31 OF 2026) OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE ELECTORAL PROCESS (CODE OF CONDUCT) REGULATIONS, 2011 STATUTORY INSTRUMENT NO. 52 OF 2011

BETWEEN:

CHILANDO CHITANGALA — PETITIONER

AND

ROSSI KASIKILI — 1ST RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA — 2ND RESPONDENT
ATTORNEY GENERAL — 3RD RESPONDENT

1ST RESPONDENT'S ANSWER TO PETITION

Filed Pursuant to Rule 10 (1) of the High Court (Election Petition) Rules, 2026 (SI No. 31 of 2026)

THE 1ST RESPONDENT ROSSI JOSPHAT KASIKILI RESPONDS TO THE PETITION BY WAY OF THIS ANSWER AS FOLLOWS:

1. The 1st Respondent admits the contents of paragraphs 1, 2, 3 and 4 of the Petitioner's Petition.

2. The contents of paragraphs 4 and 5 of the Petitioner's Petition are in her peculiar knowledge and the 1st Respondent makes no comment.

3. The 1st Respondent admits the contents of paragraph 6 of the Petitioner's Petition *insofaras* they speak to votes garnered by the 1st Respondent as a winner of the 13th August 2026 Parliamentary Elections for Roma Constituency compared to those obtained by the Petitioner who lost.

4. In answer to paragraph 7 of the Petitioner's Petition, the 1st Respondent shall aver that there were no electoral irregularities in the manner that the voting took place at University of Zambia (UNZA) polling station or indeed any other polling stations that contravened the Constitution and Electoral Act that are material to the determination of the validity or invalidity thereof, of the Roma Constituency Parliamentary elections. The 1st Respondent shall further aver that he was validly elected as Member of Parliament for Roma Constituency.

5. The contents of paragraphs 8, 9 and 10 of the Petitioner's Petition are in her peculiar knowledge and the 1st Respondent makes no comment.

6. The contents of paragraphs 11 and 12 of the Petitioner's Petition are totally denied as they are untrue and the 1st Respondent shall aver that that it is true that voting at UNZA polling station started at 06:00 hours and was due to close at 18:00 hours, but that the period for voting was extended beyond the 18:00 hours mark to allow the voters that were already lined up on the queues to exercise their constitutional right to vote and I further verily believe in truth that the law allows that after the 18:00 hours mark for closing the voting process, every person found to be on the queue should never be turned away but should be allowed to vote. It is therefore not true that by 17:00 hours all and/or majority of the voters had completed the voting process. Further, it is not true that the counting of the votes had commenced by 18:00 hours at UNZA polling station, instead the correct position is that the counting of votes only commenced at 23:00 hours and not 18:00 hours as alleged. The Petitioner shall be put to strict proof thereof at trial.

7. The contents of paragraphs 13, 14, 15 and 16 of the Petitioner's Petition are totally denied as they are untrue and the 1st Respondent will aver that neither the 1st Respondent nor his nominated agent or persons associated with the UPND ever demanded for the counting of votes to be

stopped so that the polling process could be reopened. The Petitioner shall be put to strict proof thereof at trial/hearing of the Petition.

8. In answer to the contents of paragraph 17 of the Petitioner's Petition, the 1st Respondent shall state no ballot papers were brought in during the counting process and no counting interruption was ever occasioned in order to permit further persons to vote after the official closing of the UNZA polling station or in any of the polling stations. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

9. In answer to the contents of paragraphs 18, 19 and 20 of the Petitioner's Petition, the 1st Respondent shall aver that he never received any reports or witnessed any person voting without verification on the voters' register at UNZA polling station or stream or indeed any of the **123 polling stations** in all the **five (5) wards** in Roma Constituency. Therefore, the Petitioner's claims that voters were allowed to vote after statutory time period had lapsed and that voters were issued with ballot papers without proper verification against the voter's register is totally unfounded and is not supported by any evidence, thus has no legal basis upon which such allegations can be sustained. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

10. In answer to the contents of paragraph 21 of the Petitioner's Petition, the 1st Respondent shall aver that there was no person(s) that was allowed to vote on the 14th August 2026 at all because counting of votes had already commenced by 23:00 hours on 13th August 2026 and continues through into the next day/14th August 2026, therefore there is no way that voting could have been allowed to continue. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

11. In answer to the contents of paragraphs 22, 23 and 24 of the Petitioner's Petition, the 1st Respondent shall aver that no counting and voting was conducted contemporaneously in any of the **123 polling stations** in all the **five (5) wards** in Roma Constituency. In any event, it is impossible for the process of counting to start while the voting process was underway. Further the 1st Respondent shall state that the schemes alleged to have been organized to procure students to vote for the 1st Respondent never existed at all. They are simply a fallacy and an imaginary scene by the Petitioner. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

12. In answer to the contents of paragraphs 25 and 26 of the Petitioner's Petition, the 1st Respondent shall aver that he never engaged himself or his appointed agent or any person associated with him, in acts involving any procuring or encouraging of any UNZA student to attend polling stations to vote and to later on post in any UPND groups, their evidence of having voted for the 1st Respondent in consideration for payment of any purported allowances. There was no such a thing, and the Petitioner must simply come to terms with her loss. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

13. In answer to the contents of paragraphs 27, 28 and 29 of the Petitioner's Petition, the 1st Respondent shall aver that he never engaged himself or his appointed agent or any person associated with him or acting with his consent and approval, in acts involving bribery or any payment of the purported K200 or K500 notes to any student so as to procure votes for himself. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

14. In answer to the contents of paragraph 30 of the Petitioner's Petition, the 1st Respondent shall aver that he never engaged himself or his appointed agent or any person associated with him, in acts involving obstruction and/or confrontation so as to create room for voters to vote forcibly outside the allowable voting period and/or the legally extended time for voting and closing of polls. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

15. In answer to the contents of paragraphs 31 and 32 of the Petitioner's Petition, the 1st Respondent shall aver that the Petitioner together with her agents had actually enjoyed the cordial voting and monitoring atmosphere as she and her agents were allowed access to all the 123 polling stations in Roma Constituency without any slightest of restrictions and without experiencing any intimidation from anyone at all. Further, there was no successive voting periods as alleged by the Petitioner. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

16. The contents of paragraphs 33, 34, 35 and 36 of the Petitioner's Petition are in her peculiar knowledge, save to state that the 1st Respondent is not aware of any discrepancies alleged because at the point the ballot boxes left the polling stations, the 1st Respondent had no access or control as to what happens to those materials. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

17. In answer to the contents of paragraph 37 of the Petitioner's Petition, the 1st Respondent shall aver that the Roma Constituency Parliamentary Elections were the most peaceful, free and fair elections ever as they were conducted in circumstances that allowed transparency for all parties involved. No irregularities, or malpractice or unequal treatment were ever witnessed. The Petitioner shall be put to strict proof thereof at trial/at the hearing of the Petition.

18. In further answer to the contents of paragraph 37 of the Petitioner's Petition, in respect of the reliefs sought by the Petitioner, the 1st Respondent shall aver that the Petitioner is not entitled to any of his reliefs sought as the same have no factual and/or legal basis upon which they can be sustained and/or at all.

19. Save as hereinbefore expressly admitted the 1st Respondent denies each and every allegation of fact contained in paragraphs 4 to 37 and the claims or reliefs sought by the Petitioner in her Petition as if the same were set forth herein and specifically traversed seriatim.

Dated at Lusaka the 09th day of **September 2026.**

Signed by: _____

ROSSI JOSPHAT KASIKILI
(THE PETITIONER)

This Answer to the Petition was filed by Counsel of: _____

Wallace & Co., Legal Practitioners
Plot 43, Unit 2, Makani Street
Off Central Street & Great East Road
Jesmondine
Lusaka – Zambia
Email: wallace@wallaceandco.co.zm
Advocates for the 1st Respondent

To: The Petitioner & Her Advocates
Messrs. Aongola & Co., Legal Practitioners
Plot No. 5873, Kasiya Cresent,
Off Lusemfwa Road
Kalundu
Lusaka, Zambia

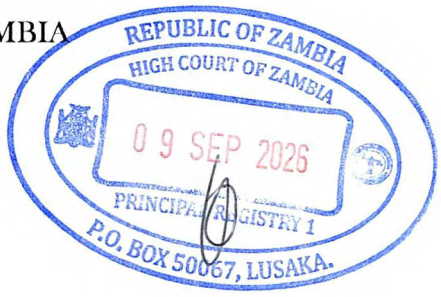
To: The 2nd Respondent
Electoral Commission of Zambia
Elections House, Haile Selassie Avenue,
Longacres,
P.O Box 50274
Lusaka, Zambia

IN THE HIGH COURT FOR ZAMBIA

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Elections Jurisdiction)



2026/HP/EP/038

IN THE MATTER OF: ARTICLE 45 (2) (A) - (E) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2026 AS AMENDED BY ACT NO. 13 OF 2025

AND

IN THE MATTER OF: THE PARLIAMENTARY ELECTION HELD ON 13TH AUGUST, 2026 FOR ROMA CONSTITUENCY

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 29, 37, 50, 65, 68 (D), 71, 72, 73 AND 81 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 AS AMENDED BY ACT NO. 12 OF 2026

AND

IN THE MATTER OF: SECTIONS 97(1), (2)(B) AND (4) AS READ TOGETHER WITH SECTIONS 83 (2), 98(A) (B) AND 99(A) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 AS AMENDED BY ACT NO. 12 OF 2026

AND

IN THE MATTER OF: SECTION 4(1) AND (2) (A), (B) AND (C) OF THE ELECTORAL COMMISSION ACT NO. 25 OF 2026

AND

IN THE MATTER OF: PART III OF THE HIGH COURT (ELECTION PETITION) RULES, 2026 (SI NO. 31 OF 2026) OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE ELECTORAL PROCESS (CODE OF CONDUCT) REGULATIONS, 2011 STATUTORY INSTRUMENT NO. 52 OF 2011

BETWEEN:

CHILANDO CHITANGALA	PETITIONER
AND	
ROSSI KASIKILI	1ST RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT

1ST RESPONDENT'S SKELETON ARGUMENTS IN SUPPORT OF ANSWER

Filed Pursuant to Rule 10 (2) (b) of the Hight Court (Election Petition) Rules, 2026 (SI No. 31 of 2026)

1.0 ARGUMENTS AND THE LAW:

1.1 **IF IT MAY PLEASE THIS HONOURABLE COURT** hereunder are the 1st Respondent's Skeleton Argument in support of the Answer and the Affidavit in Opposition.

1.2 It is settled law that the burden of proof in an election petition as in any civil matter rests on the Petitioner to establish his/her case on a fairly high degree of convincing clarity *(though not the standard of proof beyond reasonable doubt as is in criminal cases)* with respect to discharging the burden of proving the allegations of electoral malpractice against the Respondents. This is the law as established in the case of ***Abuid Kawangu vs. Elijah Muchima Appeal No. 8 of 2017*** where it was held that:

"...the standard remains higher and distinct from that required in an ordinary civil matter but lower than the standard of beyond reasonable doubt required in criminal matters. As the Supreme Court opined in the case of Lewanika & others, parliamentary election petitions are required to be proved to a standard higher than on a mere balance of convincing clarity."

1.3 **MY LORD/LADY**, the Constitutional Court's decisions following the 2016 parliamentary elections petitions illustrate this clearly in the case of ***Shabula vs. Monde [2018] ZMCC 16,*** where the Court accepted that misconduct had been established and could be attributed to the candidate, but held that the evidence did not establish the further statutory requirement that the misconduct was sufficiently widespread to prevent, or potentially prevent the majority of voters from electing their preferred candidate. In that case, the nullification of election by the High Court was hence reversed.

1.4 **MY LORD/LADY**, further in the case of ***Chrispin Siingwa v Stanley Kakubo (2016/CCA/A28; Appeal No. 7 of 2017) (20 August 2018)*** the Court intimated that: "***election nullification requires a named agent or candidate involvement and proof that malpractices affected the majority of voters".*** The Court emphasized further that: "***proof of an isolated inducement was insufficient without satisfying the statutory requirements concerning attribution and the effect on the majority of voters.***"

1.5 **MY LORD/LADY**, in the present case, all that the Petitioner has alleged are irregularities in the manner the voting process was conducted *(viz, extension of the voting period)* at one particular polling station, namely UNZA polling station, but ***has lamentably failed to demonstrate that the alleged irregularities in the manner the voting and counting process was done at the UNZA polling station was sufficiently widespread to prevent, or to potentially prevent the majority of voters from electing their preferred candidate in all the 123 polling***

stations in all the 5 wards in Roma Constituency. We submit therefore that failure to meet these statutory requirements cannot entitle the Petitioner to have the election of the 1st Respondent as duly elected Member of Parliament for Roma Constituency nullified or at all. We submit that in the present case the Petitioner has not provided sufficient material to show that the 1st Respondent or his election agent or any person acting with the knowledge, consent and approval of the 1st Respondent were involved in the alleged electoral malpractices whose effect would be to affect the majority of voters in the whole of Roma Constituency.

2.0 **CONCLUSION AND 1ST RESPONDENT'S PRAYER:**

2.1 **MY LORD/LADY**, it is our submission that the allegation of electoral offence alleged to have been committed by the 1st Respondent have not been proved by the Petitioner and therefore this Petition must be dismissed.

WE ARE MOST OBLIGED!

Dated at Lusaka the _____ day of _____ 2026.

The 1st Respondent's Skeleton Arguments were filed by Counsel of: _____

Wallace & Co., Legal Practitioners
Plot 43, Unit 2, Makani Street
Off Central Street & Great East Road
Jesmondine
Lusaka – Zambia
Email: wallace@wallaceandco.co.zm
Cell: +260 763-886-465
Advocates for the 1st Respondent

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

2026/HP/EP/038

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
09 SEP 2026
PRINCIPAL REGISTRY 1
P.O. BOX 50067, LUSAKA

IN THE MATTER OF: ARTICLE 45 (2) (A) – (E) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2026 AS AMENDED BY ACT NO. 13 OF 2025

AND

IN THE MATTER OF: THE PARLIAMENTARY ELECTION HELD ON 13TH AUGUST, 2026 FOR ROMA CONSTITUENCY

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 29, 37, 50, 65, 68 (D), 71, 72, 73 AND 81 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 AS AMENDED BY ACT NO. 12 OF 2026

AND

IN THE MATTER OF: SECTIONS 97(1), (2)(B) AND (4) AS READ TOGETHER WITH SECTIONS 83 (2), 98(A) (B) AND 99(A) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 AS AMENDED BY ACT NO. 12 OF 2026

AND

IN THE MATTER OF: SECTION 4(1) AND (2) (A), (B) AND (C) OF THE ELECTORAL COMMISSION ACT NO. 25 OF 2026

AND

IN THE MATTER OF: PART III OF THE HIGH COURT (ELECTION PETITION) RULES, 2026 (SI NO. 31 OF 2026) OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE ELECTORAL PROCESS (CODE OF CONDUCT) REGULATIONS, 2011 STATUTORY INSTRUMENT NO. 52 OF 2011

BETWEEN:

CHILANDO CHITANGALA	PETITIONER
AND	
ROSSI KASIKILI	1ST RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT

1ST RESPONDENT'S LIST AND DESCRIPTION OF DOCUMENTS TO BE RELIED ON

Filed Pursuant to Rule 10 (2)(d) of the High Court (Election Petition) Rules, 2026 (SI No. 31 of 2026)

The following is a list and description of documents relating to the Petition which are or have been in the possession or custody of the above-named 1st Respondent and which are to be relied on by the 1st Respondent at the hearing of this Petition:

No.	LIST AND DESCRIPTION OF DOCUMENTS	DATE
1	Copy of the Gen 20 forms and Declaration of the Results of the Poll	
2	Copy of Letter to ECZ confirming appointment of Election Agent.	
3	Any other documents relevant to the Petition by way of a Supplementary Bundle	

Dated at Lusaka this 09th day of **September, 2026.**

The 1st Respondent's List & Description of documents to be relied on was filed by: ____

Wallace & Co., Legal Practitioners
Plot 43, Unit 2, Makani Street
Off Central Street & Great East Road
Jesmondine
Lusaka – Zambia
Email: wallace@wallaceandco.co.zm
Advocates for the 1st Respondent

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

2026/HP/EP/038

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
09 SEP 2026
PRINCIPAL REGISTRY 1
P.O. BOX 50067, LUSAKA

IN THE MATTER OF: ARTICLE 45 (2) (A) - (E) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2026 AS AMENDED BY ACT NO. 13 OF 2025

AND

IN THE MATTER OF: THE PARLIAMENTARY ELECTION HELD ON 13TH AUGUST, 2026 FOR ROMA CONSTITUENCY

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 29, 37, 50, 65, 68 (D), 71, 72, 73 AND 81 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 AS AMENDED BY ACT NO. 12 OF 2026

AND

IN THE MATTER OF: SECTIONS 97(1), (2)(B) AND (4) AS READ TOGETHER WITH SECTIONS 83 (2), 98(A) (B) AND 99(A) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 AS AMENDED BY ACT NO. 12 OF 2026

AND

IN THE MATTER OF: SECTION 4(1) AND (2) (A), (B) AND (C) OF THE ELECTORAL COMMISSION ACT NO. 25 OF 2026

AND

IN THE MATTER OF: PART III OF THE HIGH COURT (ELECTION PETITION) RULES, 2026 (SI NO. 31 OF 2026) OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE ELECTORAL PROCESS (CODE OF CONDUCT) REGULATIONS, 2011 STATUTORY INSTRUMENT NO. 52 OF 2011

BETWEEN:

CHILANDO CHITANGALA	PETITIONER
AND	
ROSSI KASIKILI	1ST RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT

1ST RESPONDENT'S LIST OF AUTHORITIES AND COPIES OF AUTHORITIES

Pursuant to Rule 10 (2) (c) of the Hight Court (Election Petition) Rules, 2026 (SI No. 31 of 2026)

IF IT MAY PLEASE THIS HONOURABLE COURT, the 1st Respondent shall rely upon the following List of Authorities and copies thereof, of the court decisions and excerpt of relevant legislation in support of his Answer and Arguments as listed below:

LIST OF AUTHORITIES:

Cases Cited:

1. *Abuid Kawangu vs. Elijah Muchima - Appeal No. 8 of 2017.*
2. *Chrispin Siingwa v Stanley Kakubo (2016/CCA/A28; Appeal No. 7 of 2017) (20 August 2018).*
3. *Mwiya Mutapwe vs. Shomeno Dominic (2016/CC/A008, Appeal No. 19 of 2017.*

Dated at Lusaka the 09th day of **September** 2026.

1st Respondent's List of Authorities & copies thereof, were filed by Counsel of: _____

Wallace & Co., Legal Practitioners
Plot 43, Unit 2, Makani Street
Off Central Street & Great East Road
Jesmondine
Lusaka - Zambia
Email: wallace@wallaceandco.co.zm
Cell: +260 763-886-465
Advocates for the 1st Respondent

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

APPEAL NO. 8 of 2017
2016/CC/A039

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

AND

IN THE MATTER OF: SECTIONS 81 (1); 97 (2) (a) (i) and (ii) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.

AND

IN THE MATTER OF: THE IKELENG'I PARLIAMENTARY CONSTITUENCY ELECTION HELD ON 11TH AUGUST 2016

BETWEEN:

ABIUD KAWANGU APPELLANT

AND

ELIJAH MUCHIMA RESPONDENT

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
- 9 FEB 2018
REGISTRY 5
P O BOX 50067, LUSAKA

CORAM: Sitali, Mulenga, Mulembe, Mulonda and Munalula JJC on 13th July, 2017 and 9th February, 2018

For the Appellant: Mr. N Yalenga of Messrs Nganga Yalenga and Associates
For the Respondent: Mr. T Chilembo and Mr. L Banda of Messrs T. S Chilembo Chambers

---

JUDGMENT

Munalula JC, delivered the Judgment of the Court.

Cases referred to:

1. Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1
2. Anderson Mazoka and Others v Levy Mwanawasa and Others (2005) Z.R. 138
3. Albertina Bulongo Pota v Hastings Sililo Appeal No. 11 of 2012 (unreported)

4. Mushemi Mushemi v The People (1982) Z.R. 71 (S.C.)
5. Mlewa v Wightman (1995-97) Z.R. 171
6. Lewanika and others v Chiluba and Others (1998) Z.R. 79
7. Wilson Masauso Zulu v Avondale Housing Project (1982) Z. R. 172
8. Zvokuseka v Bilita, RDC (SC/13) 2015, ZWSC (Zimbabwe)
9. Stephen Katuka and Law Asssociation of Zambia v Attorney General and Ngosa Simbyakula and 63 Others 2016/CC/0010/0011 (unreported)
10. Mwalimu Simfukwe v Evaristo David Kasunga Appeal No.50 of 2013 (unreported)
11. Norris v United States C.C.A.Neb 86 F.2d 379 (8th Cir. 1936)
12. Reuben Mtolo Phiri v Lameck Mangani S.C.Z Judgment No. 2 of 2013 (unreported)
13. C & S Investments Limited, Ace Car Hire Limited, Sunday Maluba v The Attorney General (2004) Z.R. 216 (S.C)
14. Steven Masumba v Elliot Kamwendo Selected Judgment No. 53 of 2017
15. Ndongo v Moses Mulyango and Another (2011) 1 Z.R. 187
16. Samson Mbavu and Others v The People (1963-1964) Z. and N.R.L.R. 164 (C.A.)

Legislation referred to:

The Constitution of Zambia (Amendment) Act No. 2 of 2016

The Electoral Process Act No. 35 of 2016

The Electoral Act No. 12 of 2006 (repealed)

The Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia

Work referred to:

Halsbury's Laws of England, 4th Edn, Vol. 15.

The Appellant, Abiud Kawangu, who was the Petitioner in the court below, appeals against the Judgment of that court wherein the trial Judge

dismissed his Petition and declared that the Respondent was duly elected Member of Parliament for Ikeleng'i Constituency. The brief facts are that the Appellant was a candidate in the Ikeleng'i parliamentary elections held on 11th August, 2016 under the sponsorship of the Patriotic Front (PF) and polled a total of 1,929 votes. Among the other contenders was the Respondent who stood under the ticket of the United Party for National Development (UPND) and polled a total of 10,395 votes. The other candidates were Richard Kavwanda (whose party affiliation is unknown) who received 787 votes and Winfred Luwi of the Forum for Democracy and Development (FDD) who polled 187 votes. The Respondent was declared winner and duly elected Member of Parliament for the Ikeleng'i Constituency.

Dissatisfied, the Appellant petitioned the High Court alleging electoral misconduct on the part of the Respondent. The Appellant alleged in his Petition that the Respondent in April, 2016 had, together with the President of the UPND, held a rally at Lwakela Secondary School grounds and that after the rally, the Respondent had with his agents taken part in distributing certain household items to the entire population in the Constituency. He also alleged many other cases of vote buying at the Catholic Church in Nyakaseya and a place called Nkemba and that between July, 2016 and

11th August, 2016, the Respondent allegedly informed the people that the Appellant had received traditional charms from a person known as Francis Kanema with instructions that he uses the same for bathing at the grave yard, among other things, to enable him win the parliamentary election.

The Appellant also alleged that there were cases of his supporters being beaten up by the Respondent's supporters at several places in the constituency and that numerous cases were reported to the Ikeleng'i Police Station some of which were still before the courts of law.

The trial Judge found as a fact that the witnesses of the Respondent impressed him more than those of the Appellant. That the meeting at Lwakela actualized an understanding between the Respondent as the sitting Member of Parliament and his community in which he was to provide them with certain essential items whilst they provided manpower to carry out a local project. That the meeting was not a campaign rally. Further, that since only a small part of the community was affected, it had no bearing on the results of the whole Ikeleng'i Constituency.

The trial Judge further found that the meeting in Nyakaseya area had been organized by the executives of the UPND and Movement for Multi-party Democracy (MMD) who wanted to come together and support one

candidate. The Judge found that certain unauthorized persons who strayed into the meeting had perceived the hospitality extended to the delegates as treating, bribery and corruption perpetrated by the Respondent at the meeting. The Judge also found that this incident had happened outside the campaign period and before parliamentary candidates had filed in their nominations and thus the allegations lacked merit. He found that the Appellant had not proved the allegations against the Respondent. The trial Judge then dismissed the petition.

In appealing against the decision of the court below, the Appellant raised the following grounds which we quote verbatim:-

1. *The learned trial Judge erred in law and fact when he held that the meeting held at Lwakela Basic School where the Respondent distributed soap, salt, pots, plates and donated K5,000 was not a campaign rally and therefore the donations did not constitute electoral malpractice and corruption.*
2. *The learned trial Judge erred in law and fact when he held that the meetings held by the Respondent at the Catholic Church grounds in Nyakaseya village and Nkemba where the Respondent distributed pots, plates, meat and mealie meal was a consultative meeting and not a campaign rally and therefore the items distributed to the people therefore did not constitute electoral malpractice corrupt practices. (sic)*

3. *The Honourable Judge in the Court below erred in law and fact when he held the meeting of the Patriotic Front's supporters at Lwakela area by reasons persons in the Respondent's entourage did not constitute an electoral malpractice as it was not widespread and therefore did not prevent the meeting of the voters from electing a candidate of their choice. (sic)*
4. *That the learned trial Judge in the Court below erred in law and fact when he held that the Respondent did not publish falsehood about the Appellant as he did not find the Appellant evidence credible.*

The Appellant filed heads of argument in support of the first two grounds of appeal. In arguing ground one, Counsel submitted that the Appellant from the outset had indicated in his Petition that prior to the election date, the Respondent and his agents, with the intention of procuring votes from the electorate, had held a rally at Lwakela Secondary School where pots, plates and salt were distributed to the villagers. He argued that the Respondent on the other hand had denied distributing any items at the said school and swore an Affidavit to that effect.

It was contended that this denial was proved to be untrue by the testimony of Stanford Dilema, PW6, who had taken a video of the meeting in question where the Respondent is alleged to have been distributing the pots, plates, salt and soap.

Counsel argued that during trial, the Respondent told the court below that he attended the meeting at Lwakela Secondary School in his capacity as Member of Parliament under the MMD in April, 2016. That it was a developmental meeting for the construction of a secondary school by way of upgrading the then existing basic school and that the items given out could not constitute corruption or bribery as the people had asked for them in exchange for their labour. Additionally that the Respondent had denied having campaigned for the UPND or asking people to vote for him.

He submitted that during cross examination, the Respondent was shown the paragraph in the Petition dealing with the acts in question at Lwakela Basic School as well as his denial in his Answer and Affidavit. That the Respondent admitted having denied the allegations but maintained his testimony that he had in fact given out the aforesaid items to the people. That after further cross examination coupled with the video evidence earlier alluded to, it was clear that the Respondent admitted having campaigned and solicited for votes on the UPND ticket and not as an incumbent MMD Member of Parliament and that the meeting was not a developmental meeting. Counsel asked this Court to take judicial notice of the fact that the hand is the symbol for the UPND.

Counsel attacked the finding by the trial Judge that the allegation of treating and bribery failed to hold water and stated that it came with a sense of shock as it flew in the teeth of the evidence that was before the trial court. It was contended that the only other witness to testify on behalf of the Respondent, apart from the Respondent himself, was RW2, Henry Funina, who informed the trial court in his evidence in chief that people had asked the area Member of Parliament, the Respondent, for soap and salt as the work they were doing of ferrying bricks and sand was a dirty job. That the witness said that there was nothing else that the people asked for, from the Respondent. It was submitted that the said witness also testified to the effect that the Respondent had gone to 'sell' himself under the UPND. That in cross examination the RW2 stated that in fact the Respondent had gone on to bring the people pots and plates and that people voted for the Respondent because he had a merciful heart. He indicated that this witness in his reexamination stated that people could not vote for someone without a merciful heart. Based on the foregoing, Counsel submitted that the decision of the trial court was thus not supported by the evidence tendered into that court.

Counsel relied on the decision in the case of **Attorney General v Marcus Kampumba Achiume**[1] to argue that an appellate court will not

lightly interfere with the findings of fact made by the trial Judge unless it is established that firstly, the findings in question were either perverse or made in the absence of any relevant evidence; or the findings were made upon a misapprehension of the facts; or lastly that the findings were, on a proper view of the evidence, findings that no trial court acting correctly could reasonably make. He urged the Court to invoke its jurisdiction to reverse the findings of fact made by the trial court on the ground that they were perverse as they were based on a misapprehension of the facts.

Counsel further asked the Court to determine whether the fact that the meeting took place in April, 2016 which was outside the official campaign period entails that the same was outside the purview of the repealed Electoral Act of 2006. It was submitted that the so called developmental meeting ran afoul of section 81 (1) (c) of the Electoral Process Act No 35 of 2016 (henceforth referred to as the EPA, 2016) which almost word for word replicates section 79 (1) of the Electoral Act of 2006 and prohibits treating, bribery and corruption. He proceeded to cite **Anderson Mazoka and Others v Levy Mwanawasa and Others**[2] where the Supreme Court considered donations or other gifts made outside the election period by stating that the candidates cannot be said to be candidates in an election on nomination day as it would lead to an absurd situation of prospective

candidates engaging in corrupt activities or illegal practices prior to nomination only to stop on nomination day. He stated that this position was affirmed in the case of **Albertina Bulongo Pota v Hastings Sililo**[3] in which the court nullified the election of the Respondent for donations he had made prior to the campaign period.

Counsel asked this Court to take judicial notice of the fact that the official campaign period begun on 11th May, 2016. And that this Court should question why the Respondent would be donating money and other items so close to the election campaign period if not for purpose of being "remembered" by the electorate. It was contended that the court below should have made a finding regarding the credibility of the Respondent who was shown to have made contradictory statements from his answer about the happenings at the meetings. Counsel cited **Mushemi Mushemi v The People**[4] wherein it was stated that:-

> *The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The judgment of the trial court faced with such conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others.*

It was submitted that the acts of the Respondent were done with the election in mind to remind the voters of what he was capable of doing and in line with the decision in **Mlewa v Wightman**[5] where it was opined that

the satisfactory proof of even one act of electoral corruption is sufficient to nullify an election which position ought to justify the nullification of the Respondent's election.

Under, ground two, counsel submitted that the evidence on record shows that the Respondent had admitted to have already applied to stand on the UPND ticket even at the meeting he held at Nyakaseya village where there were about 200 to 300 people in attendance. That RW2 stated that the number was about 250 to 500 people. Counsel submitted that this number is far too many for a consultative meeting; and that it was in fact a campaign rally as there is evidence to show that the Respondent used it to solicit for votes.

Counsel indicated that the Respondent had stated that he applied for adoption under the UPND ticket sometime between March and April, 2016. That this was before the meeting and that RW2 confirmed that the Respondent had asked for votes after the consultative meeting. He stated that there was other contradictory evidence from RW6 who stated that the Respondent or MMD officials had indicated that it was better for him to stand on the UPND ticket in May, 2016. He ended by urging this Court to reverse the finding that what took place at Nyakaseya was a consultative meeting and instead hold that it was in fact a campaign rally and that it

included treating of voters, whether they be UPND or MMD, to meat, pots, plates and mealie meal. And that it be found to be a corrupt practice for the same reasons cited in ground one.

When the matter came up for hearing, Counsel for the Appellant, Mr. Yalenga, informed the Court that grounds three and four had since been abandoned

In his filed heads of argument in opposition Respondent's counsel begun with two issues; firstly that the Appellant had made five allegations in his petition but had abandoned two by not calling any evidence or witnesses regarding the same and secondly that the Appellant had admitted during the trial that all his allegations were purely hearsay. Counsel questioned the credibility and trustworthiness of the Appellant's witnesses and argued that the evidence did not meet the standard of proof in election petitions. He cited the case of **Mushemi Mushemi v The People**[4] in support.

Counsel submitted that on the guidance given in **Lewanika & Others v Chiluba and Others**[6] once allegations are made, they have to be proven to a fairly high degree of convincing clarity. He stated that all the grounds of appeal had not raised any points of law and that this amounts to the

Appellant asking this Court to play the role of a trial court. The case of **Wilson Masauso Zulu v Avondale Housing Project**[7] was cited to show that an appellate court cannot reverse the findings of fact of a trial court lightly.

The case of **Zvokuseka v Bilita and RDC**[8] a decision of the Supreme Court of Zimbabwe was also cited wherein it was stated that:-

> *An appeal to the Supreme Court must be based on points of law. What constitutes a point of law has been stated in a number of decisions of the Supreme Court. If an appeal is related to facts, there must usually be an allegation that there has been a misdirection of facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such decision. And a misdirection of facts is either a failure to appreciate all the facts at all, or a finding of fact that is contrary to the evidence actually presented.*

Based on this, Counsel argued that the meeting referred to in ground one took place in April, 2016 before Parliament was dissolved and before the election campaign period and that the Respondent had a duty towards his people in the constituency. Thus, the P.T.A meeting at Lwakela Secondary School was one such arrangement.

It was argued that none of the Appellant's witnesses in their evidence testified to confirm the allegation including PW2 and the Appellant himself. Counsel contended that the Appellant had not defined a political rally or

provided a legal basis to qualify the meeting at the school as such. It was also indicated that since corruption is a criminal offence proscribed under the Anti-Corruption Act No. 3 of 2012, it was unfair for the Respondent to be called corrupt without undergoing a legal process to confirm such accusation. Counsel stated that the Appellant had failed to elaborate on the legal nature of corruption so that this Court can apply it to the actions of the Respondent and neither had he proven how the Respondent's acts amounted to electoral malpractice.

Counsel submitted that in order for an action to amount to electoral malpractice, it must have occurred during the campaign period and that providing of essential items by an MP to the people of Lwakela outside the campaign period is called responsible leadership which was not prohibited by the Electoral Act of 2006 or the EPA, 2016.

The Respondent's Counsel averred that section 81 (1) (c) of the EPA, 2016 and section 79 (1) of the Electoral Act of 2006 are not similar and stated that the **Mazoka and Others v Mwanawasa and Others**[2] case cited preceded the 2016 Constitutional amendment and the enactment of the EPA, 2016. The Republican President previously used to set the time and date for the elections as the election period was not prescribed. As a result, it was argued, election candidates would be caught up in electoral

malpractices once the President declared the date of the election. Counsel averred that things had changed and the election period relating to the impugned meetings ran from 15th May, 2016 to 9th August, 2016. Thus the Respondent's actions were legitimate and outside of the campaign period. They could not be termed electoral malpractice. It was submitted that a person could not be punished on the basis of old law and this Court is bound by the Constitution as it stands now and not by the repealed law on which the **Albertina Bulongo v Hastings Sililo**[3] case was based.

Counsel argued in opposition to ground two that the meeting at Nyakaseya grounds was arranged by the UPND and MMD in the process of forming an alliance and the agenda of the meeting at the Catholic Church was to endorse a candidate for the 2016 parliamentary elections. It was averred that 230 delegates were invited to represent the wards at the meeting in accordance with the inter-party democracy alliance they wanted to form. The Respondent was present as Member of Parliament for the Constituency and the money raised went to providing food for the delegates as well as cooking utensils. That evidence of the event was used by the Appellant to allege that there was treating for purposes of the campaign. That the Appellant had failed to establish his allegations through the evidence in the court below.

It was contended that the Appellant had not demonstrated how the trial court's findings of fact were perverse, in order to warrant a reversal. The cases of **Attorney General v Marcus Kampumba Achiume**[1] and **Wilson Masauso Zulu v Avondale Housing Project Limited**[7] were cited. Counsel ended by quoting the latter case where it was held that:-

> *I think that it is accepted that where a plaintiff .....makes any allegations, 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. As we said in Khalid Mohamed v The Attorney-General, quite clearly a defendant in such circumstances would not even need a defence.*

At the hearing counsel for the Appellant, Mr Yalenga, augmented grounds one and two orally. He averred that even though the literal interpretation of section 97 of the EPA, 2016 demands that an election can only be nullified upon proof that the majority of voters were or may have been prevented from electing a candidate of their choice as a result of the said illegal act, this Court should go further and apply other rules of statutory interpretation for purposes of removing from the electoral process the mischief of most politicians engaging in illegal or corrupt practices. Further, Counsel informed this Court that he was not aware of any statutory definition of a campaign or political rally but was relying on the case of **Mazoka and Others v Mwanawasa and Others**[2] and **Albertina Bulongo**

Pota v Sililo[3], to argue that a candidate is not a candidate only after filing of his nomination papers. When the Court prodded further, counsel conceded that no evidence was led to show that the majority of voters were affected by the meeting at Lwakela.

The Respondent's Counsel, in their oral response, relied upon their filed submissions. By way of addition, Mr. Banda, relying on articles 1, 8 and 267 of the Constitution as amended, argued that the Members of Parliament had a duty to their Constituency and their mandate extended to carrying out the aspirations and wishes of the people. He argued therefore that there was need to respect the wishes of the majority of the people in the Constituency. He contended that from the evidence on record, the Respondent had received over 10, 000 votes as against the Appellant's 1, 000 votes showing that the majority will had been expressed in the results. That this expression of will placed a higher burden on the Appellant to show how over 90% of the electorate were swayed by an electoral malpractice. He submitted that the appeal must fail as the Appellant did not demonstrate with sufficient clarity which provisions of the law had been breached.

In his brief reply, Mr. Yalenga conceded the arguments raised by the Respondent but submitted that persons who have engaged themselves in

illegal or corrupt practices in order to find themselves in Parliament have no place in our democratic dispensation. In closing he pleaded that each party bear his own costs.

We are grateful to counsel for the extensive submissions. We have carefully scrutinised the entire record of appeal including the judgment of the trial court. The issue as we see it is whether the trial court misdirected itself by finding that the allegations of electoral malpractice and corruption arising from the Respondent's actions at the meetings held at Lwakela Basic School, Nyakaseya village and Nkemba, were not proved to the standard required by the EPA, 2016 in order to nullify the election of the Respondent. That the trial court erred when it upheld the election of the Respondent.

Since grounds three and four were abandoned, there are two substantive grounds of appeal upon which the Appellant is asking this Court to reverse the findings of fact and law by the court below. We will deal with the two grounds in the order in which they have been argued. Before we go into the merits of the two grounds we wish to clarify some points of law and procedure raised by the appeal.

Firstly, we note that the record of proceedings in the court below shows that the Respondent's witnesses are referred to as DW as opposed to RW. The trial Judge however referred to the Respondent's witnesses as RW in his Judgment. It follows that, we will in this judgment, refer to the Respondent's witnesses as RW, as they appeared in the Judgment of the trial court.

Secondly, the Appellant has questioned the use of previous court precedents generally and in relation to the EPA, 2016 in particular. We wish to state that this Court can choose to adopt the *ratio decidendi* in any particular case where the same is still good law and applicable to the facts in issue. We said this in the case of **Stephen Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 Others.**[9] Although the authorities cited are based on the repealed Electoral Act of 2006, and are not binding on this Court, they may nevertheless be good law. It follows that we will, where fitting, adopt the precedents established prior to the EPA, 2016.

Thirdly, the burden and standard of proof. 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, that is the Appellant in this

case, (Petitioner in the court below), 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. This principle was applied by the Supreme Court in many election petition appeals including that of **Mwalimu Simfukwe v Evaristo David Kasunga**[10] wherein it was stated 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:*

Further, the Appellant had to prove the allegations to a fairly high degree of convincing clarity. The standard remains higher and distinct from that required in an ordinary civil matter but lower than the standard of beyond a reasonable doubt required in criminal matters. As the Supreme Court opined in the case of **Lewanika and Others v Chiluba and Others**[6] Parliamentary election petitions are required to be proved to a standard higher than on a mere balance of probability and issues raised are required to be established to a fairly high degree of convincing clarity.

We now turn to the substance of the appeal. For convenience we begin by quoting the applicable law found in section 97(2) (a) of the EPA, 2016 which provides that:-

> **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—**
>
> **(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;**

Under section 97(2) (a), an election may be annulled where a petitioner shows that the alleged corrupt or illegal practice or misconduct was committed in connection with the election by the respondent or with the knowledge and consent or approval of the respondent or his election or polling agent and that, as a result, the majority of voters in that constituency were or may have been prevented from electing the candidate of their choice.

Having stated the applicable law, we now apply it to the evidence on record to determine whether the impugned acts are acts of bribery,

corruption and treating as opposed to developmental or political party meetings and if so whether they had or could have had an impact on the parliamentary choice exercised by the majority of the electorate in Ikeleng'i Constituency.

In ground one, Mr. Yalenga contended that the finding of the trial court that the meeting at Lwakela Basic School where the Respondent distributed soap, salt, pots, plates and donated K5,000.00 was not a campaign rally and therefore not an electoral malpractice or corruption, was an error both in law and fact. The Respondent on the other hand supported the lower court's finding and argued that the event in question took place outside the campaign period and was in fact responsible leadership.

We have considered the evidence on the record of appeal, through which counsel for the Appellant endeavored to demonstrate how the lower court's finding was a misdirection, by referring this Court to the statement made by the Respondent in his written answer that contradicted his subsequent testimony at the trial. Evidence that the inconsistency was confirmed by his witness RW2, Kapinga Christopher. And evidence of PW6, Stanford Dilema, who took video evidence of the meeting at Lwakela School showing that the Respondent addressed the meeting and asked

people to vote for him and as he was doing so gave out plates, pots, sugar and salt.

The record of appeal shows that the Appellant (PW1) in his testimony, said the Respondent campaigned at the School. The Appellant further testified that this was so because the video evidence showed that he had been using the hand symbol which is well known to be the symbol for the UPND despite the fact that he was the MMD Member of Parliament for Ikeleng'i Constituency. However, the Appellant admitted in his evidence that he was not present at the meeting held at Lwakela Basic School and merely "witnessed" the events in question through the video recording which he did not shoot himself.

Be that as it may, upon further perusal through the record we find that there was indeed a contradiction in the Respondent's evidence as his earlier denial in his answer turned into an admission in his evidence in chief that he had distributed the items as seen at pages 46 and 285 respectively of the record of appeal. The apparent contradiction in the Respondent's evidence is reason for us to seriously consider whether the Respondent's actions on the material day amounted to campaigning.

The EPA, 2016 does not define a campaign but provides a definition of a campaign message under section 29 (4) which provides that:-

> **29. (4) For the purposes of this section "campaign messages" means an activity, statement or any other form of expression aimed at promoting particular political ideas, policies and strategies for purposes of obtaining votes for a candidate or political party contesting an election.**

This definition is almost similar to that provided in the case of **Norris v United States**[11] at page 382 where a campaign was defined as:-

> *All the things and necessary legal and factual acts done by a candidate and his adherents to obtain a majority or plurality of the votes to be cast in any election for a public office.*

For the sake of clarity, we wish to draw a distinction between a campaign action and a philanthropic activity. Whilst both may be constituted by the same course of conduct the purpose and timing of undertaking the action distinguishes them. And whilst the former is confined to a specific time frame, the latter is not. In **Reuben Mtolo Phiri v Lameck Mangani**[12] it was stated that:

> *Philanthropic activities is the practice of helping the poor and those in need, especially by giving money and services....In Zambia, philanthropic activities include developmental projects.*

This is the definition we wish to adopt in order to determine whether the Respondent was campaigning or conducting some philanthropic activity as the incumbent Member of Parliament for the Constituency.

In as much as the Respondent has argued that the acts in question were part of his responsibility as Member of Parliament in that constituency, the evidence shows that he asked for votes during the said meetings. This is the evidence of his own witness RW3, which evidence also confirms that the Respondent had expressed a desire to stand under the UPND ticket. The Respondent, when asked in cross examination whether he had told people to vote for him stated at page 326 of the record of appeal as follows:-

> *Of course, it's natural at every meeting for a politician. Every time, you have to remind them, when you have got enemies, who are campaigning already.*

From the foregoing and other facts alluded to earlier, we find that the Respondent was soliciting for votes at the meeting at Lwakela School which act falls within the definition of a campaign aforementioned.

The decision of the court below at J28 was that-

> *At Lwakela Secondary School .....the Respondent stated that this was another get together for the members of the Parents and Teachers Association (PTA) of the school who had held the meeting to appraise the Respondent progress made on the school which was being extended. There was also an understanding that*

him as Member of Parliament will play the role of providing essential items they were lacking and them as a community to offer manpower. This was an ongoing arrangement with the community of Lwakela area. I find this to be true. And I find this arrangement to affect a small part of the community and therefore limited to that area only and did not have a bearing on the results of the whole Ikeleng'i Constituency.

.....this incidence happened in April, 2016 while the Respondent was still the incumbent Member of Parliament of the area under the Movement for Multi-party Democracy (MMD.)(sic)

Whilst we appreciate the fact that the Respondent was the Member of Parliament for Ikeleng'i Constituency and was expected to perform his duties at the time, the finding at page J28 that that was all he was doing, when there is overwhelming evidence to show that he was asking for votes is not tenable. The finding by the trial Judge that the Respondent was not campaigning was made on a misapprehension of the evidence on record which shows otherwise.

We are mindful that an appellate court, will not lightly interfere with the findings of fact of a lower court and not reverse those findings unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make. The case of **Attorney General v Marcus Kampumba Achiume**[1] is on point. However our

analysis of the evidence on record as well as the applicable law goes to show that we are justified to reverse this finding. In so holding, we draw on established precedents.

Having found that the Respondent's actions at Lwakela School went beyond philanthropic activity to campaigning, we must consider the fact that the activity took place in April, 2016 whilst the Respondent was still Member of Parliament for Ikelen'gi and before the official campaign period was announced by the Electoral Commission of Zambia (henceforth referred to as the ECZ). We see three distinct questions: First, whether the impugned actions are covered by the EPA, 2016. Second, whether the Respondent was a "candidate" at the time of the impugned actions. And third, whether it is possible to clearly discern the campaign period so as to exclude the impugned actions.

We begin with the applicability of the EPA, 2016. The meeting at Lwakela School was said by the Respondent's counsel, to have taken place in April, 2016 before the election campaign period had been announced which period began on 11th May, 2016 and that therefore it did not constitute a political campaign rally. It is not in dispute that the meeting was held before the official campaign period had been set by the ECZ. As per the Appellant's argument, the question is indeed whether the fact that

these acts were done outside the declared official campaign period means they are not caught up by the EPA, 2016 as an illegal or corrupt practice or electoral malpractice. The question that has therefore arisen is whether the facts in issue are governed by the EPA, 2016 and further whether they constitute electoral misconduct as envisaged by section 97 of the EPA, 2016. We see no difficulty.

The repealed Electoral Act of 2006 in section 79 (1) (c) provided that:-

> **(79) (1) Any person who corruptly either directly or indirectly, by oneself or any other person—**
>
> .....
>
> **(c) makes any gift, loan, offer, promise, procurement or agreement to or for 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;**

The equivalent of section 79 is section 81 of the EPA, 2016. Section 81 (1) (c) of the EPA, 2016 provides that:-

> **81 (1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly—**
>
> .....
>
> **(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;**

The said section 81 (1) (c) only shows minor variations in the phrasing. A close look at the subject matter of the two provisions shows

that the same actions proscribed under the EPA, 2016 were already proscribed by section 79 of the Electoral Act of 2006. Thus the wording of section 81 does not per se create any different or new offences from those under section 79 of the repealed Act.

To prove his case, the Appellant previously had to establish under the repealed section 79 and presently under the current section 81 that the Respondent directly or indirectly, by himself or through his election or polling agent or with any other person corruptly made gift(s), loan(s), offer(s), promise(s), procurement or agreement and that the said act(s) were made to or for the benefit of himself or any other person; that the said act(s)were intended to induce the person to procure or to endeavor to procure the return of any candidate (including the Respondent himself) at any election or the vote of any voter at any election. To the extent aforesaid the law has not changed.

Furthermore, we take cognizance that the Constitution provides in Article 267(3) that:

> **A provision of this Constitution shall be construed according to the doctrine that the law is continuously in force and accordingly-**
>
> **(d) a reference in a provision applying that provision to another provision shall be read with any modification necessary to make it applicable in the circumstances and any reference to the modified provision shall apply as modified;**

We are mindful of the position enunciated by section 14 (3) (e) of the Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia which provides that:-

> **(3) Where a written law repeals in whole or in part any other written law, the repeal shall not-**
>
> .....
>
> **(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.**

The impugned conduct was prohibited by the repealed law and when the new law came into force, it continued the prohibition thereafter without any break. We are alive to the Supreme Court decision in the case of **C & S Investments Limited, Ace Car Hire Limited, Sunday Maluba v The Attorney General**[13] where it was opined:-

> *That it is well settled that merely a wrong reference to the power under which certain actions are taken by government would not per se vitiate the actions done if it can be justified under some other power under which the government could lawfully do these acts..... If the effect of the repeal, is to resurrect the provisions in substantially the same form in another enactment, such new enactment would in our view, be a legitimate source of power. (emphasis ours)*

As the law proscribing election corruption, bribery and treating has been continuously in force during the period when the events at Lwakela, Nyakaseya and Nkemba took place, resort to section 81 of the EPA, 2016

is not fatal under the circumstances. Additionally the nature of the allegation put forward suggests that it was committed in connection with the elections that were subsequently held in August, 2016 when the EPA, 2016 had come into operation.

We now turn to the question of the Respondent's candidature. Article 52 (1) of the Constitution (Amendment) Act No. 2 of 2016 provides that:-

> **(1) A candidate shall file that candidate's nomination paper to a returning officer, supported by an affidavit stating that the candidate is qualified for nomination as President, Member of Parliament or councillor, in the manner, on the day, and at the time and place set by the Electoral Commission by regulation.**

The facts on record show only that the Respondent had applied to be adopted as an aspiring candidate under the UPND between March and April, 2016 which was before the official filing of nominations with ECZ. The Respondent cannot be considered to have been a candidate in the August, 2016 general elections at the time the meeting was held at Lwakela Basic School as he had not received the sponsorship of UPND nor had he filed in his nomination with ECZ. The mere fact that he had used the hand symbol to solicit for votes or even expressed intention of standing under the UPND ticket does not mean that he was officially a candidate. Therefore the case

of **Mazoka and others v Mwanawasa and others**[2] does not help the Appellant as it was stated in that case that:-

> *.....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....*

In addressing the final question whether the campaign period was clearly demarcated, we refer to section 28 (1) (a) (v) of the EPA, 2016 whose provisions are as follows:-

> *(1) Subject to the Constitution, the Commission shall, before the polling day—*
> .....
> *(a) compile an election timetable for each election to provide for the following:*
> .....
> *(v) the opening and closing dates of the campaign period;*

The mandate for setting the official commencement date of campaign activities is assigned to the ECZ. Section 2 of the EPA, 2016 goes further to elaborate that the campaign period is a period of three months before the holding of an election. Moreover article 56 of the Constitution of Zambia as amended by Act No. 2 of 2016 provides that the holding of a general election shall be on the second Thursday of August after every five years from the last general election. This entails that the day of the elections is now known well before hand and in addition, there is a clear-cut period that

has been set for political parties and/or independent candidates to conduct their campaigning in anticipation of any upcoming elections.

These provisions were enacted in the Constitution and the EPA, 2016 for good reason; particularly considering the fact that many potential candidates in the anticipated general elections will before such a time be performing their respective duties at different levels in their respective wards and/ or constituencies or even ministries. The law therefore draws a line between performing their government related duties and their vying to stand for elective office.

Even though we are of the considered view that the Respondent was campaigning at the Lwakela School meeting before the campaign period, the EPA, 2016 cannot be invoked in the circumstances. Whether a sitting Member of Parliament is allowed to campaign in the process of carrying out his official duties or whether he commits an illegal act by campaigning before the campaign period is not provided for under the invoked provisions of the EPA, 2016.

We are mindful that Mr. Yalenga has urged this Court to apply other canons of interpretation; however we are of the considered view that there is no ambiguity in the circumstances that would warrant this Court to divert

from the literal interpretation of section 97(2) (a) which is clear. We are fortified in this approach by the **Mazoka and others v Mwanawasa and others**[2] case wherein it was stated 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 canons of interpretation. We conclude that the impugned events at Lwakela did not constitute electoral malpractice that satisfies the threshold in section 97(2) (a). Ground one is therefore only partially successful in that the trial judge misdirected himself in his finding that the meeting at Lwakela School was not a campaign rally. However, the reversal of the trial Judge on that one element is insufficient to support nullification of the election under section 97(2) (a) of the EPA, 2016.

We are also alive to the fact that there is a further element to nullification under section 97(2) (a) of the EPA, 2016 as mere proof of a corrupt act does not suffice. The evidence has to show that the majority of voters were or may have been prevented from electing the candidate whom they preferred as a result of a proven proscribed act. In our considered view, having found that the campaigning took place outside of the official

campaign period envisaged by the EPA, 2016 there is no material upon which to consider the second element of the offence, which is its impact on the majority of the voters in Ikeleng'i Constituency. It follows that, the trial court's finding on the second element that the act was limited to the Lwakela School area and had no bearing on the results of the whole constituency was unnecessary once the court found the first element was not proved.

In ground two, the Appellant is also asking this Court to reverse findings of fact made by the trial Judge. Ground two relates to two meetings. The first at Nyakaseya and the second at Nkemba. The evidence in relation to both events was disputed by the parties and the court's findings appear at page J27 to J28 of the Judgment. We quote from the judgment verbatim:-

> *The Respondent has not denied that he held a meeting on the grounds of the Catholic Church in Nyakaseya. He stated that this meeting was organized by the two executives of the two political parties that is UPND and MMD who wanted to merge and float one candidate for the elections as a member of parliament. The local officials are the ones who arranged this consultative meeting to call all the office bears in all the 9 wards in the constituency. Each ward had to send 24 people from each party and that meant approximately 432 people from UPND and MMD. The organizing committee even on their own raised money through donations to come and host these delegates. There were the ones who were treated by two the parties together (sic). The unauthorized people who attended*

this consultative meetings they strayed into this gathering of the parties and to them it seemed as if the delegates were being treated by the Respondent. I believe the explanation put up by the witnesses of the Respondent who impressed me rather than the witnesses of the petitioner...

In relation to Nyakaseya, the Appellant alleges that at the time of the meeting the Respondent had already applied to stand on the UPND ticket a claim which is supported by his testimony at page 332 of the record of appeal which also shows that he had asked for votes. Counsel referred us specifically to the evidence of RW2 at page 373 of the record of appeal where he tells the trial court that the Respondent wanted a vote from the officials after the consultation. Further, PW4 testified that the meeting held at the Catholic Church was announced in church by the Church Secretary who stated that the Respondent was coming to the area and that he wanted to meet with the members of the Nyakaseya community. PW3 is also on record saying that she witnessed the Respondent distributing meat at a rally held at the Catholic Church in Nyakaseya and asking people to vote for him. Finally, the Appellant argued that the number of people in attendance at the Catholic Church in Nyakaseya was far too many for a consultative meeting which ranged from approximately 200 to 500 considering the evidence of the Respondent and his witness RW2.

However, other evidence on record shows that this meeting in Nyakaseya at the Catholic Church, was not open to the general public. That it was restricted to the UPND and MMD party officials for purposes of nominating someone from UPND or MMD to stand in the scheduled parliamentary elections. According to RW1, the gathering was a consultative meeting which he organized so that he could be guided on the strategy as to the way forward as MMD was "torn apart" by having members being "pulled" by the PF and UPND. There is also evidence at page 292 of the record from RW1 to show that various items like pots and plates as well as food were given out at the meeting as the party officials had to be fed by the party organizing committee.

The evidence of PW4 is in tandem with the evidence of PW3 when she alleges that the event at the Catholic Church took place and that the items in question had been distributed. It does not however support the allegation that it was a public meeting as PW4 identified himself to have belonged to the UPND at the time of the meeting which sits well with the Respondent's claim that the meeting was restricted to the UPND and the MMD officials.

The Appellant did not prove his allegation to the required standard of a fairly high degree of convincing clarity. We cannot fault the trial judge's

finding that the meeting at Nyakaseya was not a campaign rally but was restricted to UPND and MMD officials.

With regard to the meeting at Nkemba, the Respondent testified that, the meeting, did not take off as it rained heavily just when he was about to address the meeting. He averred that they all proceeded to a market shelter but even there they could not hold the meeting and they subsequently dispersed. RW2 also informed the trial court that the meeting at Nkemba was a consultative meeting for the general public. He confirmed that a few minutes after the meeting had started the rain began and there was no distribution of any items. PW5 on the other hand testified that the meeting at Nkemba did take place and the Respondent distributed various items from which she was given a pot. She also told the court that she held the position of chairlady in the PF whilst PW3 said that she was a member of the PF. We find that the claim that a meeting allegedly took place at Nkemba at which items were distributed to people is not supported by any independent evidence on record. We are fortified by our decision in the case of **Steven Masumba v Elliot Kamwendo**[14] wherein we indicated that witnesses from a litigant's own political party are partisan witnesses who should be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood.

We see no reason to interfere with the trial judge's finding beyond our own finding that the Respondent himself gave contradictory evidence and assigning his remaining testimony less weight. The said contradictions could not have formed the basis for the lower court to disbelieve or totally discard the testimony of the Respondent or his witnesses given the principle in **Ndongo v Moses Mulyango and Another**[15] wherein, the Supreme Court declined to do away with evidence of a Respondent even after finding contradictions in his evidence as it was able to find other evidence from the appellant's own evidence to support the fact in issue.

The trial court had the benefit of seeing the witnesses' demeanor and hearing their evidence first hand and therefore in exercising our appellate role, we will not, as we have said before, lightly interfere with its finding in relation to the credibility of witnesses; mindful as we are, that the trial court found the Respondent's witnesses more credible and believed their testimony rather than that of the Appellant's witnesses. And particularly, in the absence of cogent evidence to show a misapprehension of the facts on record, we find the case of **Samson Mbavu and Others v The People**[16] to be on point in this regard. It was stated in that case that:-

> *Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do*

so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence; The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

We cannot fault the trial Judge in finding as he did. This is because the Appellant's witnesses were suspect witnesses with a possible interest to serve who had to be treated with caution. It was incumbent upon the Appellant to corroborate his witnesses' evidence by presenting before the trial court independent evidence of the allegations put forward. Since the Nyakaseya meeting was essentially a private gathering for the benefit of the political parties in question, the Appellant has not shown how the activities of the Respondent therein could be an electoral malpractice.

We reiterate what we have already stated on numerous occasions, he who alleges must prove and in this case the burden lay on the Appellant to show how the Judge had misdirected himself in the findings in ground two. We thus find that ground two of this appeal has no merit and it is

dismissed in its entirety as the evidence on record falls short of meeting the required standard set in election petitions of a fairly high degree of convincing clarity. The appeal stands dismissed. We uphold the decision of the lower Court to declare the Respondent, the duly elected Member of Parliament for Ikeleng'i Constituency.

Since the appeal garnered partial, albeit insignificant success, in ground one, each party shall bear their own costs.

.....

A.M. Sitali

Constitutional Court Judge

.....	.....
M.S. Mulenga	**E. Mulembe**
Constitutional Court Judge	**Constitutional Court Judge**
.....	.....
P. Mulonda	**M M Munalula**
Constitutional Court Judge	**Constitutional Court Judge**

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

Appeal No. 7 of 2017
2016/CC/A28

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

AND

IN THE MATTER OF: SECTIONS 97(1); 97(2) (a) (i & ii) OF THE ELECTROAL PROCESS ACT, ACT NO. 35 OF 2016

AND

IN THE MATTER OF: A PETITION FOR THE KAPIRI MPOSHI PARLIAMENTARY ELECTION HELD ON 11TH AUGUST, 2016

B E T W E E N:

CHRISPIN SIINGWA APPLELLANT

AND

STANELY KAKUBO RESPONDENT

Coram: Chibomba, PC, Sitali, Mulenga, Mulembe and Mulonda, JJC
On 11th July, 2017 and 20th August, 2018.

For the Appellant: Mr. N. Yalenga of Messrs. Nganga Yalenga & Associates

For the Respondent: Mr. Paulman Chungu of Messrs. Ranchhod Chungu Advocates

---

JUDGMENT

Mulembe, JC, delivered the Judgment of the Court.

Cases referred to:

1. Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others (2005) Z.R. 138
2. Jere v Shamayuma and another (1978) Z.R. 47
3. Paul John Firmino Lusaka v John Cheelo (1979) Z.R. 284

4. Mlewa v Wightman (1995-97) Z.R. 17
5. Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79
6. The People v Muvuma Kambanja Situna (1982) Z.R. 115
7. Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1
8. Attorney General v Kakoma (1975) Z.R. 212
9. Mutale and Phiri v The People (1995-1997) Z.R. 227
10. Mushemi Mushemi v The People (1982) Z.R. 71
11. Misheck Mutelo v Eileen Mbuyana Imbwae SCZ Appeal No. 113/2012
12. Michael Mabenga v Sikota Wina and others (2003) Z.R. 110
13. Reuben Mtolo Phiri v Lameck Mangani, SCZ Appeal No 2 of 2013
14. Austin Liato v Sitwala Sitwala, Selected Judgment No. 23 of 2018
15. Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13 of 2017
16. Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 2007
17. Brelsford James Gondwe v Catherine Namugala, Appeal No. 175 of 2012
18. Christopher Kalenga v Annie Munshya and 2 others 2011/HK/EP/03
19. McGraddie v McGraddie [2013] UKSC 58
20. Changano Kakoma Charles v Kundoti Mulonda Appeal No. 5 of 2017

Legislation referred to:

Electoral Process Act No. 35 of 2016

Other works referred to:

Phipson on Evidence, 18th edition

When we sat to hear and consider this appeal, our sister, the Honourable Justice Chibomba, sat with us. However, at the time of this Judgment Justice Chibomba was outside the jurisdiction. This is, therefore, a judgment of the majority.

This is an appeal against the judgment of the High Court dated 25th November, 2016 in which it was adjudged the Respondent, Stanley Kakubo, was duly elected as Member of

Parliament for Kapiri Mposhi Constituency. The background to this appeal is that the Appellant, Chrispin Siingwa, and the Respondent were candidates for the position of Member of Parliament for Kapiri Mposhi Constituency in the 11thAugust, 2016 general elections. The Appellant contested the seat on a Patriotic Front (PF) party ticket. The Respondent was a candidate for the United Party for National Development (UPND). There were three other candidates representing the Movement for Multi-party Democracy (MMD), the Forum for Democracy and Development (FDD) and the United People's Party (UPP), respectively.

The Respondent emerged victorious with 22,388 votes cast in his favour, while the Appellant polled 20,798 votes. The other three candidates shared the rest of the 2, 397 valid votes cast. The Appellant challenged the result of the election in the High Court alleging that the Respondent was not validly elected as his campaign was characterized by widespread acts of undue influence, bribery, voter intimidation and violence contrary to the Electoral Process Act No.35 of 2016 (hereafter referred to as "the Act") and the attendant Electoral Code of Conduct.

It was alleged that the Respondent and other UPND officials engaged in systematic bribery and corruption right up to polling

day; that the Respondent and other UPND officials were seen giving out money to voters at some named polling stations and various other places in return for votes in favour of UPND candidates. Further allegations were that the local Red Cross Society Coordinator was a UPND sympathizer and used the auspices of the Red Cross as a cover to hand out money to voters. Also, that another non-governmental organization (NGO) called National Empowerment Fund was giving out money to some women and promised them K10,000 loans in the event that the Respondent emerged victorious. It was further alleged that the Respondent, during the campaign period, gave out footballs and bicycles labelled *"sponsored by Kakubo, vote UPND and HH"* at Katotola Village, Kakwesa ward and Kakwelesa.

It was also alleged that on the eve of the election, the Respondent and a Mr. Kabasa delivered beer to a tavern near to a polling station at Nansenga with instructions that it be given free to people during the night. Further allegations were that the Respondent ferried voters to Chisamba polling station in UPND branded vehicles and dropped them within the 100 metres restricted zone; that at Kampumba and Ilungu polling stations the

UPND gave out money and conducted open campaigns 50 metres within the precincts of the polling station.

Further allegations on bribery and corruption were to the effect that between 17th and 31st July, 2016 the Respondent gave out huge sums of money to women at a campaign rally at Kakwelesa in Kakolo area in Shipangula village. Another allegation was that the Respondent and Sameman Hakalumbwe gave out money to voters at Kapiri Mposhi Secondary School polling station in return for voting for UPND. At Imansa polling station, a UPND local government candidate allegedly gave out money in various sums and UPND campaign materials in the form of *chitenges*.

Allegations of undue influence and intimidation were that the campaign conducted by the Respondent and the UPND was characterized by widespread acts of violence and intimidation against persons known to be PF supporters, including the severe beating of the PF Central Province Youth Chairperson and the attack on PF supporters at Likumbi polling station in Mubofwe ward. In Mobe area, a village headwoman was allegedly given money by UPND officials and she became hostile and threatened her subjects with repercussions for not voting for UPND

candidates. More allegations were that the Respondent and the UPND engaged in character assassination, including that the PF would introduce gay rights via the referendum and that the Appellant was a serial adulterer and womanizer.

The Appellant alleged that, as a result of the aforesaid illegalities by the Respondent and his agents, the majority of the voters were prevented from electing the candidate of their choice.

At the trial, the Appellant testified as PW1 and called 13 other witnesses. The Respondent testified as RW1 and called two other witnesses.

In its judgment, the court below first dealt with the preliminary issue regarding the alibi raised by the Respondent in connection with the events of 10th August, 2016. The trial Judge noted that counsel for the petitioner (now the Appellant), Mr. Yalenga, asserted that the Respondent conveniently raised an alibi which had not been pleaded in his answer to the petition, citing **Mazoka v Mwanawasa**[1] and **Jere v Shamayuma and another**[2]. The two authorities confirm the well settled principle regarding the role pleadings play in litigation. The court below noted that the alibi

was raised in connection to paragraph (c) of the petition, which was in these terms:

> **"The local Red Cross Society Coordinator, one Mr. Chiyoye was and is a UPND sympathizer and used the auspices of the Red Cross as a cover to hand out money to voters. Another NGO called National Empowerment Fund was giving out money to voters in the sum of K200 and promising K10,000 in the event that the 1st Respondent emerged victorious."**

The court below stated that since the date of 10th August, 2016 in relation to the allegation in paragraph (c) was only alluded to in the course of the trial by PW6 and PW7, it was not practical that the Respondent could have raised the alibi in his Answer. The trial court thus found the objection misconceived. We wish to point out that issues arising under this allegation are addressed under ground three of this appeal.

Turning to the specific allegations relied on by the Appellant to impugn the election of the Respondent, the learned Judge noted that the election petition before her was predicated on section 97(1) and 97(2)(a)(i) and (ii) of the Act. She opined that section 97(2) sets out three clear grounds upon which an election of a candidate to the National Assembly can be nullified. Citing **Lusaka v Cheelo**[3], the trial Judge stated that nullification can be ordered even when it is an agent who is held personally blameworthy and not the candidate. The court below stated that section 97(2) of the Act

requires the petitioner to establish to the satisfaction of the court that corrupt practices or illegal practices were committed in the election by an agent of a candidate or with the knowledge or approval of the candidate. Citing **Mlewa v Wightman**[4] and **Lewanika v Chiluba**[5], the court below also noted that even one instance of a corrupt practice or illegal act is sufficient to nullify an election if proven to a standard higher than on a mere balance of probability.

Addressing the Appellant's main grievances, that is, corruption, bribery, undue influence and intimidation, the learned trial Judge noted that in view of the direct conflict of evidence between the Appellant and the Respondent and their respective witnesses in regard to the alleged electoral malpractices by the Respondent, the issue of credibility was crucial to the determination of the case; that the witnesses had to be subjected to strict scrutiny of their integrity.

Addressing the allegations of corruption and bribery, the trial Judge noted that evidence on this came from a fairly large number of witnesses and involved various wards and polling stations. The court below found that at Kashitu ward, evaluation of evidence of PW2, PW3, PW4 and PW5 left the impression that the alleged perpetrators of the corrupt practices were Mr. and Mrs. Lundale.

In particular, PW3 testified that he was given K500 in K20 notes on polling day by the Lundales to distribute to voters to entice them to vote for the UPND. According to the court below, the question was whether the Lundales were election or polling agents of the Respondent pursuant to regulation 55 of the Electoral Process (General) Regulations, 2016. The learned trial Judge observed that a close examination of regulation 55 aforesaid required a candidate's election agent to be specifically named in the nomination paper. She found no cogent evidence to show that the Lundales were appointed agents of the Respondent for purposes of the election. That in terms of section 97(2)(a)(ii) of the Act, the Respondent was only answerable for irregularities and malpractices committed by his election agent or with his knowledge or consent. The court below dismissed the allegation as the Appellant had not established that the Respondent was privy to the malpractice at Kashitu.

For Mpunde polling station, Kabwale, Munga and Mubofwe wards, the court below dismissed the Appellant's testimony which was based on information from one Tebulo Mumba, to the effect that Bernadette Chayi was seen giving out money to voters in return for their vote. As Tebulo Mumba was not called to testify,

the trial Judge adjudged the evidence of the Appellant on this aspect as pure hearsay, citing **The People v Muvuma Situna**[6] for authority. In regard to events of 10thAugust, 2016 at Matilyo Compound, where some women allegedly received K200 each from the Respondent after a meeting and were promised K10,000 empowerment loans if he won, the court below found that the testimonies of PW6 and PW7 were at variance. The trial Judge found it strange that PW7 was not able to give better particulars of the women she mobilized but recalled the names of the Respondent and Obby Kabasa whom she had met for the first time. She found that PW6 and PW7 were mostly motivated by a desire for monetary gain, lacked integrity and were highly likely to peddle falsehoods. The trial Judge also discounted the testimony of PW12, who allegedly found the women confronting PW7 over the promised K10,000 loans, for not being a wholly impartial and reliable witness. The court below found the Respondent's version of events, that he was elsewhere on 10th August, 2016, as more credible and held that the allegation had not been proved beyond a balance of probabilities.

On the allegation that Sameman Hakalumbwe, the local UPND District Youth Chairman, was seen distributing money to

voters and campaigning at Palamedes Basic School polling station, the court below found the testimony of the Appellant to be hearsay as no witness was called to testify to the allegation. In regard to events at Kakwelesa in July, 2016, the court below found the testimony of PW10 and PW11 credible and that it was not controverted by the Respondent and that although they indicated that the money they received was meant for campaigns, the promise to give them more money after the election was meant to induce them to vote for the Respondent, contrary to section 81(1)(c) of the Act. However, it was the trial court's position that although the actions of the Respondent came within the purview of section 81(1)(c), it did not provide a basis for nullification of the election as the act was not widespread.

The court below also dismissed the allegation of ferrying voters to Chisamba polling station as hearsay evidence. In regard to the allegation that the Respondent and others were seen at Kapiri Mposhi Secondary School polling station giving money to voters, the court below found the testimony of the Appellant and PW13 to be at great variance and held that the Appellant failed to establish that the alleged corrupt practice came within the purview of section 97(2) of the Act. The court below also found that there

was no evidence adduced connecting the Respondent to the alleged corrupt acts of Muka Patel at Imansa polling station.

On the allegations of undue influence and intimidation, the court below noted that the thrust of the Appellant's testimony was that there were severe acts of violence and intimidation perpetrated by the UPND in Mobe, Kabwale and Mubofwe wards. The learned trial Judge noted that the offence of undue influence is provided for under section 83 of the Act and added that a person is guilty of undue influence if it is proved, to a fairly high degree of convincing clarity, that the alleged acts impeded or prevented a voter from casting their vote freely. After examining the evidence, it was the lower court's position that the witnesses had failed to satisfy the court that some voters in the affected areas were indeed hindered in exercising their franchise within the meaning of section 83(1) of the Act.

On the allegation of character assassination, that the Appellant was an adulterer and womanizer, the court below noted that a close examination of section 84(1) of the Act revealed that the only publications that are proscribed as illegal practices are those statements relating to illness, death and withdrawal from the election of a candidate. She opined that section 84(1) did not make

reference to publication of a false statement in relation to sexual immorality and dismissed the allegation. And in regard to the allegation that the Appellant's party would introduce gay rights through the referendum, the court below found no connection between the referendum results and the outcome of the election results; that the allegation was misconceived and based on assumptions.

In conclusion, the court below found that the Appellant lost by a margin of 1,590 votes; that the alleged irregularities took place at one meeting in Kakolo area and that section 97(2)(a)(i) and (ii) of the Act were not satisfied. That the Appellant had not established that the majority of voters were prevented from electing a candidate of their choice and upheld the election of the Respondent, Stanely Kakubo, as Member of Parliament for Kapiri Mposhi Constituency.

Aggrieved with the decision of the court below, the Appellant filed this appeal outlining seven grounds of appeal as follows:

Ground 1

The Honourable Judge in the court below erred in fact and in law when she held that the Respondent was free to raise an unpleaded Defence of alibi because the Appellant did not specify the date of the alleged corrupt acts.

Ground 2

The Honourable Judge in the court below erred in law and in fact when she held that even though she had found that there had been electoral

malpractices in Kashitu Ward committed by Mr. and Mrs. Lundale, there was no cogent evidence to show that the said persons were the Respondent's agents yet the Respondent had admitted that by virtue of being UPND officials, they were authorised to campaign for him and all UPND candidates.

Ground 3

The Honourable Judge in the court below erred in law and in fact when she held that the evidence of PW6 and PW7 was unacceptable as they were motivated by the desire to gain monetary benefit and lacked integrity and as such they would deliberately resort to peddling falsehoods and that the versions of events of the Respondent and his two witnesses was true yet she failed to analyse the contradictions and instances when the Respondent and his witnesses were caught telling lies.

Ground 4

The Honourable Judge in the court below erred in law and in fact when having found as a fact that the Respondent had corruptly given money to the voters at Kakwelesa, the same had no significant bearing on the result of the whole Kapiri Mposhi Constituency as it was restricted to a small group of women.

Ground 5

That the learned Judge in the court below erred in law and in fact when she held that the Appellant had not proved that the corrupt practice committed by Sameman Hakalumbwe at Kapiri Secondary School Polling Station was committed with the knowledge or consent or approval of the Respondent yet the Respondent had expressly admitted that Sameman Hakalumbwe had been his election agent.

Ground 6

The learned Judge in the court below erred in law and in fact when she held that proof of undue influence and violence, the Appellant had not shown how the same impeded or prevented voters from the free exercise of the right to vote in the privacy of the voting booth.

Ground 7

The learned Judge in the court below erred in law and in fact when she held that:

i. The alleged character assassination as a sexually immoral person bore not a violence (sic) of section 84(1) of the Electoral Process Act No. 35 of 2016.

ii. The association of the Appellant with gay rights did not repulse voters because if it did all PF candidates would have lost, yet the record clearly shows that PW2, a PF Councilor candidate had won and was just an afterthought.

The Appellant filed lengthy submissions in which it was indicated that grounds one, six and seven of the appeal were abandoned. This Judgment, therefore, only addresses grounds two, three, four and five of the appeal.

In arguing ground two, the Appellant submitted that the learned Judge in the court below erred in fact and in law when she held that even though she had found that there had been electoral malpractice in Kashitu Ward by Mr. and Mrs. Lundale, there was no cogent evidence to show that the said persons were the Respondent's agent, yet, the Respondent had admitted that by virtue of being UPND officials, they were authorized to campaign for him and all UPND candidates. That the learned Judge in her judgment analysed the impact of the actions of the Lundales and dismissed the allegation on the ground that there was no cogent evidence that the Respondent was privy to the malpractice at Kashitu. It was submitted that the evidence regarding what went on at Kashitu was adduced through PW2, PW3, PW4 and PW5. It was the Appellant's further submission that the questions that fell to be answered in regard to this aspect were, and we quote:

(i) **Was there electoral malpractice committed by Mr. and Mrs. Lundale in the Kashitu Ward?**

(ii) **Were Mr. and Mrs. Lundale agents of the Respondent?**

(iii) **Did Mr. and Mrs. Lundale commit the said acts with the knowledge or consent of the Respondent?**

The Appellant submitted that with regard to the first question the trial Judge found as a fact that the electoral malpractices committed by Mr. and Mrs. Lundale at Kashitu did occur but that in terms of regulation 55(1) of the Electoral Process (General) Regulations, 2016 the Lundales were not the Respondent's election agents and the Respondent denied ever knowing them.

The Appellant further submitted that, in cross examination, the Respondent had testified that the position of the UPND was that party structures were mandated to campaign for the party and its candidates and that party members or candidates relied on the party policy directive. It was further submitted that according to his testimony the Respondent also campaigned for the party president, party council chairperson and all the councilors that fell under his constituency. That it would follow, therefore, that the Respondent had campaigned in Kashitu Ward and he would have met the party's officials in that Ward. The Appellant contended that the Respondent's denial that he knew Mr. and Mrs. Lundale was purely for self-serving reasons. Further, that the Respondent had acknowledged that he had heard that the Lundales were UPND

officials in Kashitu, as Branch secretary and chairperson respectively. The Appellant contended that notwithstanding the wording of regulation 55(1) of the Electoral Process (General) Regulations, the fact that the Lundales were acknowledged by the Respondent as having authority to campaign for him and the party generally made them, in the Appellant's view, the Respondent's agents.

The Appellant, citing the case of **Attorney General v Marcus Kampumba Achiume**[7] where it was held that an appellate court will not lightly interfere with the findings of fact made by a trial court, argued that, by focusing on the issue of an election or polling agent having to be named in a candidate's nomination paper, the court below was blinded to the facts as admitted by the Respondent on who was authorised to campaign for him. It was submitted that this Court has jurisdiction to interfere with the lower court's findings and find that Mr. and Mrs. Lundale were in fact the Respondent's agents and that the acts of electoral malpractice were committed with the consent and knowledge of the Respondent.

On ground three, it was the Appellant's submission that the court below erred in law and in fact when it held that the evidence

of PW6 and PW7 was unacceptable as they were motivated by the desire to gain monetary benefit, lacked integrity and would deliberately resort to peddling falsehoods; that the Respondent's version of events was true yet the court below failed to analyse the contradictions and instances when the Respondent and his witnesses were caught telling outright falsehoods.

The Appellant submitted that the portion of the Judgment forming the basis of ground three was to be found at page 50 of the record. The Appellant summarised the learned Judge's position as follows, and we quote:

(i) **Her amazement that PW7 who claimed to have mobilised the other women for the meeting was unable to give further and better particulars of the said women but was able to recall with ease the names of the Respondent and Obby Kabasa whom she was meeting for the first time.**

(ii) **Her amazement at PW7's inability to recall the candidates in the previous parliamentary elections but for the one that the Respondent stood.**

(iii) **Her amazement at the fact that notwithstanding their knowledge that what they were doing was illegal, PW6 and PW7 nonetheless decided to tag along because they were poverty stricken.**

It was the Appellant's submission that the learned trial Judge chose to believe the Respondent and his witnesses' evidence, in which they stated that they were not in Matilyo compound on 10th August, 2016. It was contended that other than discounting the evidence of PW6 and PW7, the trial Judge did not give any reasons

nor was there any evidence on which to base her conclusion that it was highly likely that PW6 and PW7 would deliberately resort to peddling falsehoods. The Appellant asserted that the aforesaid conclusion begged the question as to who the provider of the monetary gain was and contended that the monetary benefit was in fact provided by the Respondent. It was further submitted that the court below went on to state that the evidence of PW6 and PW7 could not be relied on in the absence of independent corroborative evidence. It was the Appellant's contention that the evidence of PW12 was independent evidence of the fact that the women had been arguing about the money that the Respondent had allegedly promised.

The Appellant asserted that it is established in jurisprudence that odd occurrences can amount to corroboration and a case in point was the question relating to the production of voters' cards at the alleged meeting of the 10th of August 2016. That the testimony of PW6 in cross-examination was that when she went for the meeting after being informed by PW7, she had carried her National Registration Card (NRC) and left her voter's card at home. It was submitted that PW7, in re-examination, informed the court below that PW6 was the only one who did not have her voter's card.

It was the Appellant's contention that this evidence was unscripted and spontaneous and it was highly probable that it was based on truth.

The Appellant contended that PW12 stated that he was the PF Councillor for Kapiri Central and RW2 and RW3 had stated that they were UPND members but the court below did not label RW2 and RW3 as "loyalists" but as truthful witnesses without giving reasons for that conclusion. According to the Appellant, there were several contradictions and inconsistencies in the testimony of the Respondent and his witnesses. That the first concerned the date of the death of the child of RW3. It was submitted that the loss of a child is a tragic and traumatic event and a parent would not easily forget the date of such a tragic event. That while the Respondent testified that on the 10th of August, 2016 he had gone to the house of RW3 whose child had died "the previous week", RW3 could not recall the exact date of the death of his son except that he died between 7th and 8th June, 2016. It was contended that it was not possible for the child to have died a week before 10thAugust 2016 and at the same time to have died between the 7th and 8th June, 2016. The Appellant argued that the failure to state accurately when the child died, even by the father, fortified

the Appellant's position that the said defence was an afterthought and a poor attempt at creating an alibi.

The Appellant submitted also that RW2 in his evidence in-chief referred to himself as the Campaign Programme Officer for the UPND in Kapiri Mposhi while in cross examination, he referred to himself as the UPND Programme Coordinator for elections. That when asked as to why he had changed his title, he confirmed that he was in fact the Programme Officer and not the Programme Coordinator, who was RW3. It was the Appellant's further submission that when asked whether drawing the campaign program fell under his portfolio, RW2's reply was that the task fell under that of RW3, which RW3 refuted and said it fell under RW2.

The Appellant went on to submit that there was also the question of the weight to be attached to the evidence of the Respondent who, in paragraph 7(h) of his Answer and paragraph 8(h) of his Affidavit in Opposition, had denied knowing Bernadette Chabakale Chayi, the UPND councillor candidate for Mpunde Ward. That in cross-examination, the Respondent maintained that there was no such candidate and insisted that he only knew a Bernadette Chabakale, but after being shown the elections register for Kapiri Mposhi, the Respondent admitted that he knew who she

was and that he had informed his lawyer that Bernadette Chayi was Bernadette Chabakale.

It was also submitted that despite the Respondent having denied holding a rally at Kakwelesa in Shipangula Village, the court below found as a fact that the Respondent had addressed the said rally and given out money and made promises as alleged by PW10 and PW11. We were referred to the following portion of the Judgment of the court below at page 52 of the record of appeal:

> **"After a close analysis of the evidence of the two witnesses I have come to the conclusion that they were witnesses of truth as they gave evidence in a straightforward and perfectly frank manner. Their evidence was not controverted by the respondent. Although the witness expressly indicated that the money they received from the respondent was meant to help in the campaigns, I am still of the opinion that the promise to give them more money after the election was meant to induce them to vote for the respondent. This I must say is contrary to the provisions of Section 81 (1)(c) of the Electoral Process Act."**

It was the Appellant's submission that the learned trial Judge should have made an adverse finding as to the credibility of the Respondent and his witnesses, more so that the Respondent did not qualify his evidence in chief or that the court below should have justified its conclusion notwithstanding its views in the said portion above, citing **Attorney General v Kakoma**[8] for authority.

The Appellant contended that having found that the Respondent had been untruthful on a material point, the court below ought to have reduced the weight to be attached to the

Respondent's evidence, citing **Mutale and Phiri v The People.**[9] And on the credibility of witnesses, the Appellant called in aid the case of **Mushemi Mushemi v The People,**[10] where the Supreme Court said the following:

> **"The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of a witness. The Judgment of the trial Court faced with such conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others."**

It was the Appellant's prayer that this Court interferes with and reverses the findings of fact made by the court below regarding the truth of the events of 10th August 2016 and hold that the Respondent's alibi was an afterthought and that he had in fact been in Matilyo compound.

On ground four, the Appellant submitted that the court below found as a fact that the Respondent had run afoul of section 81(1)(c) of the Act but went on to justify its decision not to nullify the election by holding that the promise to induce the voters was not widespread and had no significant bearing on the election in the constituency. Citing various authorities, including **Mlewa v Wightman,**[4] **Lewanika v Chiluba,**[5] and **Mutelo v Imbwae,**[11] the Appellant submitted that it was clear that the standard was no

longer how widespread the corrupt conduct complained of was, but the mere fact that it happened.

In respect of ground five, the Appellant attacked the trial court's finding that he had failed to prove that the Respondent had knowledge of, or consented to, or approved of the alleged electoral offence of Sameman Hakalumbwe at Kapiri Mposhi Secondary School polling station. The Appellant submitted that in his understanding, section 97(2)(a) of the Act envisages four instances when a corrupt practice may be committed, that is, by the candidate personally; or by a third party with the knowledge and consent or approval of the candidate; or by a third party with the knowledge and consent or approval of the candidate's election agent or polling agent; or by the candidate's election agent or polling agent even where the candidate was unaware or did not consent.

The Appellant asserted that though the court below observed in its judgment that the Appellant's testimony was inadmissible on account of being hearsay, there could not be any variance in his testimony and that of PW13 who was present at the scene. It was, therefore, the Appellant's contention that the learned trial Judge erred in law and fact when she held that the allegation must fail

as it was not shown to have been done with the consent or approval of the Respondent. It was contended that from a complete reading of the section 97(2)(a) of the Act, it is clear that a candidate's election can be nullified on the basis that the election agent by himself committed an electoral malpractice even if it was not consented to by the candidate.

It was the Appellant's further submission that section 97(3) of the Act shifts the burden of proof from the Appellant to the Respondent to show that the corrupt practices as found were committed by the candidate personally or by the candidate's election agent or with the consent or approval of the candidate's election agent. The Appellant contended that despite the lack of clarity in the Judgment, the learned Judge in the court below did in fact find that Sameman Hakalumbwe had committed the corrupt practice. It was submitted that the acts of the Respondent's agent were not refuted save for the Respondent claiming that Sameman Hakalumbwe could not have committed the acts complained of.

In augmenting the heads of argument filed, learned counsel Mr. Yalenga made brief oral submissions on grounds two, three and four.

On ground two, Mr. Yalenga urged this Court to set aside the finding of the court below that Mr. and Mrs. Lundale had not been proven to be agents of the Respondent. Mr. Yalenga contended that the record showed that the Respondent had admitted that the policy of the UPND in the last election was that all party members, particularly office bearers, were to campaign for UPND candidates. He argued that they, by that very fact, became agents of UPND candidates in the constituency.

When asked to clarify that position, Mr. Yalenga's response was that this Court was empowered to straighten the law and remove ambiguities and lacunas that might result from a strict literal interpretation of the law. Counsel argued that the law in its current status of requiring the naming of agents left open the proliferation of illegal and corrupt acts by political party members on the sole basis that the law would not recognise them as agents of the candidates because they had not been named in the nomination paper. Mr. Yalenga further stated that he was not inviting this Court to ignore the provisions of the law on who an election agent is, but that this Court should take into account the peculiar circumstances whereby the Respondent admitted in

evidence that party officials were required to campaign for candidates even though there were no letters to that effect.

Asked to state in what circumstances a candidate could be liable for electoral malpractices committed by other persons, Mr. Yalenga stated that the Appellant agreed that there was a specific description of an agent and added that the question of agency was covered by the common law. Learned counsel argued that a person authorised to campaign on behalf of a candidate made that person an agent. But when proded further on whether all members of the UPND were agents of the candidate, Mr. Yalenga submitted that those who followed the directive and campaigned on behalf of the Respondent were agents by implication though a strict interpretation of the law excluded them as they were not listed in the nomination papers. Mr. Yalenga pressed the point that the Court must move away from a strict adherence to the literal interpretation of election agent so that the electoral process is clean and free of any illegal or other corrupt acts of persons not named on a nomination paper as agents. It was Mr. Yalenga's position that political parties must not be given a safe haven by the literal interpretation of the law.

Augmenting on ground three, learned counsel submitted that this ground hinged on overturning a finding of fact made by the lower court. Mr. Yalenga recalled that the learned Judge in the court below had described the Respondent and his three witnesses as truthful and their version of events of 10th August, 2016 more likely to be believed than that of PW6, PW7 and PW12. Counsel invited the Court to have in mind that RW2 and RW3 stated that they were members of the UPND and members of the campaign team, bemoaning the fact that the court below had no problem believing the evidence of RW2 and RW3 but discounted the evidence of PW6, PW7 and PW12. That with particular reference to PW12, the court below disbelieved him because he was loyal to the Appellant and could not be an impartial and independent witness. It was Mr. Yalenga's submission that so were RW2 and RW3 loyal to the Respondent. Counsel contended that if loyalty to either litigant was the basis for believing or disbelieving the evidence, then, he submitted, the court below ought to have applied a uniform standard to both the Appellant's and Respondent's witnesses and then gone on to state what other reasons existed to prefer the evidence of one witness over the other.

Mr. Yalenga proceeded to submit that the evidence of PW12 corroborated the testimony of PW6 and PW7 as regards the allegations that the Respondent had given the women K200 each with a further promise of K10,000 should he win. Counsel maintained that the evidence of PW12 was not that he was present when the Respondent gave out the money or when he made the promise of K10,000, but that he found a group of women quarrelling about the whereabouts of the promised K10,000 loans. Mr. Yalenga urged this Court to overturn the finding of the court below as, he submitted, it was one which, on a proper view of the evidence, could not reasonably have been made as the reason given by the court below was that PW6 and PW7 were motivated by monetary gain.

On ground four, learned counsel submitted that the question to be determined was whether, having found that there was a corrupt or illegal act by a candidate, the court could not proceed to nullify the election if it was not shown that the majority of the voters were prevented from electing a candidate of their choice. Counsel submitted that the point of an election in a democratic state was to elect persons of integrity into office. Referring to Supreme Court authorities which held that a single act of

corruption or illegality was sufficient to nullify an election, Mr. Yalenga contended that though of mere persuasive value to this Court, the cited authorities were still good law and necessary in Zambia's fledgling democracy. It was his further contention that the question of the majority though, in his view, more elaborately couched in the current section 97, has always been the same in intent and effect. Learned counsel proceeded to submit that in the repealed law the issue of the majority was still there but that the Supreme Court interpreted the law in such a manner as to remove the mischief of corruption or other illegalities in the conduct of elections. That this was done not by reference to how many people were shown to the court to have been prevented from electing a preferred candidate, but by the mere fact that a candidate engaged in corrupt practices. Mr. Yalenga urged this Court to continue the practice and hold that the proven act of corruption by the Respondent at Kakwelesa was sufficient to nullify his election.

In opposing this appeal, learned counsel for the Respondent also filed detailed heads of argument, which he augmented with oral submissions. In regard to ground two, the Respondent submitted that in its Judgment the court below stated that the issue that fell for consideration was whether Mr. and Mrs. Lundale

were election or polling agents of the Respondent. The Respondent recalled the trial court's reference to regulation 55 of the Electoral Process (General) Regulations in the following excerpt at page J41 of the Judgment:

> **"A close examination of Regulation 55 reveals that not everyone in one's political party can be considered as a candidate's election agent, since an election agent has to be specifically appointed. Accordingly, I find no cogent evidence to show that the Lundale's were appointed agents of the Respondent for the purpose of the previous election. I am also satisfied that in line with section 97(2) (a) (ii) the Respondent is only answerable for those irregularities and malpractices which are done by his election agent or with his consent."**

Rebutting the Appellant's argument that the court below made a finding of fact to the effect that there were malpractices committed by the Lundales, the Respondent submitted that no such finding was made. That the learned Judge in the court below merely stated that she got the impression that the alleged perpetrators of the corrupt practices were Mr. and Mrs. Lundale and did not go further to state that she actually found for a fact that the acts of corruption were in fact committed. The Respondent contended that the fact was not found as proven and that on that account alone the allegation must fail. According to the Respondent, the court below went on to deal with the allegation on the basis of the supporting legal provisions and found that any wrong doing, if at all, could not be attributed to the Respondent.

The Respondent further contended that the argument, and supposition, by the Appellant, that this Court should stretch the meaning of election agent beyond the provisions of regulation 55 of the Electoral Process (General) Regulations, on account of the fact that the Respondent conceded to the fact that UPND had mandated all the party structures to campaign for all candidates, was untenable. It was submitted that the legal provision could not be circumvented by an extended interpretation by this Court, adding that the instances when the courts are permitted to shed further light on legal provisions are limited to cases of ambiguity. That the Appellant had not shown any lack of clarity in the statutory provision to warrant the invitation to this Court to render any clarifying interpretation on the meaning of "agent".

The Respondent concluded on this ground by submitting that the learned Judge in the court below was on firm ground when she determined that Mr. and Mrs. Lundale were not the Respondent's agents and he could not be accountable for their actions.

On ground three, the Respondent submitted that the legal position relating to the extent to which an appellate court can interfere with the findings of fact of a trial court are well stated in **Attorney General v Marcus Kampumba Achiume**[7] being the

principle that a finding of fact can only be interfered with in the event that the trial court's findings were perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make. It was the Respondent's contention that the Appellant's argument, that the court below ought to have believed the testimony of PW6 and PW7, and that the trial court did not give reasons nor was there any evidence on which to base its conclusion that the two witnesses deliberately resorted to telling lies, was not correct. We were referred to the following excerpt of the Judgement of the court below at page 50 of the record of appeal:

> **"It is equally amazing that PW6 and PW7 conceded that notwithstanding the illegal nature of the activities they had engaged in they decided to tag along because they were poverty stricken."**

According to the Respondent, the finding by the court below was based on evidence that was called by the Appellant. That the Appellant had not shown nor argued that the findings by the court below were perverse nor that they were based on a misapprehension of the facts. Further, that the Appellant had not shown nor argued that the conclusion was not one that could be reasonably made on the correct apprehension of the facts. The Respondent submitted that the finding that PW6 and PW7 could

not be believed should not be interfered with because the trial court's conclusion was not one that could be challenged on any of the **Marcus Achiume**[7] grounds.

The Respondent further submitted that the Appellant's argument that the testimony of PW12 was corroborative of the testimony of PW6 and PW7 side stepped the trial court's findings that PW12 was not an independent witness and his evidence could, as such, not be relied upon. That it was on the basis of that determination that the court below made the decision not to rely on the evidence of a witness with apparent loyalties to the Appellant, which fact, the Respondent argued, the Appellant had not addressed and the appeal to reverse the findings ought to fail.

In this regard, the Respondent found it unnecessary to respond to the Appellant's contention that PW12's testimony was in fact independent, arguing that the Appellant would have to show that the Court's finding was flawed based on one of the **Marcus Achiume**[7] grounds. The Respondent contended that the trial court's determination that PW12 was not independent was sufficiently backed by the fact that he was in fact loyal to the Appellant. Further, that the fact that RW2 and RW3 were

members of the UPND should be distinguished from PW12's status.

It was submitted that the learned trial Judge was clear in stating that the reason for her decision was that she sensed a loyalty in respect of PW12 and could not, in that event, give much weight to his testimony. It was the Respondent's view that that reason was sufficient backing for the finding that the court below made. The Respondent's assertion was that the finding of the court below should not be interfered with merely because there was another instance or another possible version.

In response to the Appellant's submission that there were contradictions in the Respondent's evidence regarding the dates of the death of RW3's child, the position of RW2 in the UPND, the identity of Bernadette Chayi, the events at Kakwelesa and the allegation of the distribution of money at the rally, and that the court below should have been on guard and treated the Respondent's evidence with caution and circumspection, it was the Respondent's contention that the matter of the date of the death of RW3's child did not raise any inconsistency. That the record did not, as alleged, state that the child died a week earlier than 10th August, 2016 and that the Appellant's assertion that it was not

possible for RW3's child to have died a week before 10th August, 2016 and at the same time to have died between 7th and 8th June, 2016 was not a fact that was elicited in the testimony of RW3 at all.

The Respondent admitted that RW2 at one point referred to his position as Campaign Project Officer and at another as a Campaign Programme Coordinator. However, it was his view that the substitution of one title for another was not so material as to invite the conclusion that his testimony could not be relied on or that he was giving false testimony. The difference, it was submitted, was innocent and the court below did not find fault in what was an obvious innocent misstatement of the title.

The Respondent also submitted that there was no inconsistency in the identity of Bernadette Chabakale, and that the Respondent was referring to this person as she was identified in the Appellant's petition and affidavit, where she was referred to erroneously as Bernadette Chayi. That when the testimony came through which correctly referred to her as Bernadette Chayi Chabakale, the Respondent then recognised the name and argued that the "confusion", if at all, was caused by the Appellant's fault

who wrongly referred to the person by her first and middle name and not by the full names by which she was known.

In regard to the incident at Kakwelesa, it was the Respondent's position that the findings made by the court below did not apply to this ground but to ground four.

The Respondent agreed with the Appellant's submission on the authorities in **Attorney General v Kakoma**[8] and **Mutale and Phiri v The People**[9] that a court must make findings on the conflicting statements in evidence and that where a witness lied on an important issue, that lie should affect the weight to be attached to that witness' other testimony. It was the Respondent's contention, however, that the authorities did not apply to the instances that the Appellant was referring to. The Respondent reiterated that, no instance could be discerned, in respect of this ground, that suggested any lies by either RW2, RW3 or the Respondent, and that the authorities could not be interpreted as the Appellant had attempted to make them apply.

It was submitted that the citation in **Mushemi Mushemi v The People**[10] was misplaced. That the wholesome assessment of evidence that the court referred to in that matter referred to the evidence of witnesses on the same matter. It was asserted that it

was not intended that the assessment of evidence should be a global exercise even on unrelated testimony of witnesses on different matters. The Respondent contended that the relationship on the assessment of the Respondent's evidence in relation to this ground of appeal should be restricted to the testimony of RW2, RW3 and the Respondent. It was the Respondent's view that there was no substantial conflict, in the testimony of these witnesses.

The Respondent maintained that there was no basis for overturning the findings of fact made by the court below and that ground three should fail.

On ground four, the Respondent began by making reference to the Appellant's argument that a single illegal act pertaining to an election is sufficient ground for that election to be nullified, citing several authorities for support namely, **Mlewa v Wightman,**[4] **Lewanika v Chiluba,**[5] **Mabenga v Wina and others,**[13] **Mutelo v Imbwae,**[11] and **Phiri v Mangani.**[14] It was submitted that the cases that the Appellant had relied on to support this ground were based on section 18(3) of the Electoral Act 2006. The Respondent agreed that the position of the law prior to 2016 was that a single act was sufficient reason for avoiding an election but that that position changed after the enactment of the Electoral Process Act. The

Respondent submitted that there is a specific mandatory requirement under section 97(1) and (2)(a) of the Electoral Process Act that a Petitioner must show, in addition to proof of the corrupt practice or illegal act, that the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency whom they preferred. The Respondent asserted that this was a new introduction that was not in the Electoral Act, 2006 and it distinguished the legal position prior to 2016.

It was the Respondent's submission that the trial Judge was on firm ground in her decision that the isolated act of inducement was not sufficient reason to avoid the election and that this ground must fail on that basis.

In opposing ground five, the Respondent began by discounting the Appellant's assertion that the election of a candidate can be nullified even in the event that the corrupt practice or illegal act was not authorised by the candidate or indeed if the corrupt practice or illegal act was unknown to the candidate. It was submitted that the correct interpretation of section 97(2)(a)(i) and (ii) of the Act is that the corrupt practice or illegal act must be committed by the candidate personally. That

the following part of the provision then introduces a responsibility on the candidate if the corrupt practice or illegal act is committed by a third person and the candidate knew about it or consented to the acts. Further, that this responsibility is extended and the candidate would be held accountable, if an agent similarly knew about the acts or consented to them.

Thus, the Respondent disagreed with the Appellant's submission that he should be held to account for the actions of Sameman Hakalumbwe even if he did not consent to the acts or know about the same, as the provisions of the law did not support the Appellant's argument. The Respondent argued instead that a candidate is only held to account for his own acts or for those that he permits or knew about. Further, that the unknown and unauthorised activities of a truant agent are not a basis for nullifying an election and that the Judge in the court below was within the law when she determined that the allegation should fail because the Appellant had not proved that the alleged corrupt act was committed with the knowledge or consent of the Respondent.

The Respondent went on to submit that the court below did not make any findings as to the commission of the corrupt act but that the learned Judge noted that there was a variance in the

versions of the incident given by the Appellant and PW13 respectively. That the court below also indicated that the allegation was couched in broad strokes without specific details and for these reasons, it did not determine that the acts were proven.

Recounting the Appellant's argument that the learned Judge should have believed the testimony of PW13 and disregarded that of the Appellant which she had earlier found to be hearsay, and that if that testimony was disregarded then no inconsistency would have been discerned and PW13's evidence would have stood, it was the Respondent's position that the Appellant had ignored the fact that the Judge based her reasoning on two factors, the fact of the inconsistency and the scanty detail in the evidence. It was contended that even if the argument was sustained that the Appellant's testimony should be ignored, the Appellant had made no comment or advanced any arguments on the second reason. The Respondent argued that on account of the failure to address the two reasons, he took the view that the Appellant had not succeeded in showing any reason for which this Court should then substitute its reasoning for that of the trial Judge and make a

finding that there was in fact a corrupt act committed. He submitted that ground five should fail.

It was the Respondent's prayer that the entire appeal should fail and that the Appellant be ordered to pay the costs of this appeal and of the proceedings in the court below.

Augmenting on ground two, Mr. Chungu argued that regulation 55 of the Electoral Process (General) Regulations, 2016 defines who an agent is; that it was clear and unambiguous and that this Court could not step out of the provision and give it a meaning beyond what the law provided. It was counsel's contention that the Appellant's suggestion that any official of the UPND would be an agent would open the door to numerous possibilities to ascribe fault to candidates and that it was untenable. Mr. Chungu added that, there was no finding of wrong doing by the lower court on this ground. That the lower court only recognised that there were acts ascribed to Mr. and Mrs. Lundale and not that the acts were in fact committed. He contended that the learned Judge in the court below went past that post and stated that since Mr. and Mrs. Lundale were not agents of the Respondent, whether or not the acts were true would have been inconsequential.

Responding to the Appellant's suggestion for this Court to take into account the common law definition of agency, Mr. Chungu disagreed and contended that this Court could not refer to the common law in the face of a clear statutory prescription of who an agent was. He submitted that the Court should be restricted to regulation 55 aforesaid. It was his prayer that the ground must fail and that the court below was correct in its determination that an agent must be appointed in a candidate's nomination papers.

On ground three, Mr. Chungu submitted that a petitioner must prove his case by calling supporting evidence to prove the allegations. He contended that it did not aid the Appellant for him to argue that the court found shortcomings in his witnesses and should have found similar shortcomings in the Respondent's witnesses on the same account. That even if the Respondent conceded, which he did not do, that the evidence of PW6, PW7, PW12, RW2 and RW3 should fail, the net effect would be that the Appellant had not proved the allegations on the ground. Mr. Chungu argued that the court below did specify that it had difficulty believing PW6 and PW7 as they appeared to be motivated

by financial gain. And that PW12, who was supposed to corroborate their testimony, had loyalty to the Appellant.

In reference to the **Marcus Achiume**[7] case, Mr. Chungu submitted that the Court should exercise circumspection before interfering with findings of fact. He argued that the Appellant must show that the findings by the court below were perverse and made in the absence of relevant evidence. According to counsel, the court below referred to that evidence, the fact that the two witnesses, PW6 and PW7, said that poverty is what led them to get involved and the fact that PW12 had indicated his loyalty. That, according to Mr. Chungu, was the relevant evidence. He argued that on a proper view of the evidence, the determination the court below reached was a proper one. He urged this Court not to interfere with the lower court's findings because the leeway for such interference was a narrow one and, Mr. Chungu submitted, the Appellant had not widened the leeway to the extent that this Court should interfere. The Respondent's prayer was that this ground should fail.

And turning to ground four, learned counsel asserted that section 97 of the Act is different in a material way to section 93 of the repealed Electoral Act, 2006. Mr. Chungu submitted that

instances itemized in section 93 of the repealed Act were listed disjunctively by use of the word "or" and a petitioner needed only prove one of the items listed. He argued that section 97 of the Act is crafted conjunctively, with the items separated by the word "and", meaning that a petitioner must prove everything that is in section 97. It was learned counsel's position that the distinction set the two provisions apart and that this Court should not rely on pre-June 2016 decisions as they referred to a completely different provision. It was his further contention that for current purposes, this Court must find that there was an illegal act or a prohibited act and that it had the effect of affecting the poll. Counsel argued that it was the Respondent's position that the learned Judge in the court below was on firm ground when she determined that even though she found an illegal act, it was not sufficient to nullify the election. It was the Respondent's prayer that ground four should fail.

In reply and in reference to Mr. Chungu's argument on ground four that there was a material change in the current section 97 from section 93 of the Electoral Act of 2006, Mr. Yalenga submitted that there was no change on the question of the effect on the majority of voters. He contended that this Court must look

at the integrity of an election and those that come to power via the ballot box. Mr. Yalenga argued that persons who admit to corrupt activities as the Respondent did should not be allowed to stand on the podium as winners simply because there was no evidence of how the majority were prevented from electing a candidate of their choice.

We have given due consideration to the Judgment of the court below, the grounds of appeal, the evidence on record and the oral and written submissions in support of, and in opposition to, this appeal. From the outset, we note that this appeal challenges the lower court's findings on aspects of both law and fact. Noteworthy is the fact that the court below noted that the petition was predicated on section 97(1) and (2) of the Electoral Process Act and found that the Appellant failed to satisfy the threshold for the nullification of an election as required by section 97(2)(a). In this regard, and to put things in context, we find it imperative to reiterate what we have stated in numerous cases regarding the position of the current law on the nullification of elections.

Section 97(2)(a) is in these 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 of a candidate's 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; "

Section 97(2)(a) is in clear terms and it provides for clear elements which the petitioner must prove in order to successfully have an election, in this instance that of a Member of Parliament, nullified. The first requirement is that the petitioner must prove, to the satisfaction of the court, that the candidate whose election is being challenged personally committed a corrupt practice or illegal practice or other misconduct in connection with the election or that such corrupt or illegal practice or misconduct was committed with the knowledge, consent or approval of that candidate or his or her election or polling agent.

Then, there is the further requirement that where it is proved that a corrupt or illegal practice or other misconduct was committed by the candidate or with the candidate's knowledge, consent or approval or that of his or her election or polling agent, the person challenging the election must further prove that as a result of the electoral malpractice or misconduct, the majority of

the voters in the constituency, district or ward were or may have been prevented from electing their preferred candidate. Recently in **Austin Liato v Sitwala Sitwala,**[14] we were clear that it is not sufficient for a petitioner to prove only that an illegal or corrupt practice or other misconduct was committed. The petitioner must adduce evidence that the electoral malpractice or misconduct was so widespread as to have prevented the majority of the electorate from electing the candidate of their choice. In doing so, we were not only affirming a mandatory requirement of the law but restating our approval of Zambian jurisprudence on this aspect of the electoral laws. In **Austin Liato**[14] aforesaid and in **Jonathan Kapaipi v Newton Samakayi,**[15] we cited with approval the case of **Mubika Mubika v Poniso Njeulu,**[16] in which the Supreme Court said:

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

The threshold in section 97(2)(a) of the Act is clear and it must be satisfied on the basis of credible and cogent evidence. The

petitioner must prove, at a fairly high degree of convincing clarity, all the allegations and that the majority of the voters were influenced in their choice of preferred candidate. We have in recent decisions cited with approval the case of **Lewanika v Chiluba**[5] wherein it was stated:

> **"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..., 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 affirmed in a number of our decisions the well settled principle that the burden of proof lies on the person making the allegations. In **Brelsford James Gondwe v Catherine Namugala**[17] the Supreme Court stressed that the burden of establishing the grounds lies on the person making the allegation. The learned authors of **Phipson on Evidence, 18th edition**, in paragraph 6-06 at page 162 state that the burden of proof lies upon the party who asserts the affirmative of the issue.

We now proceed to determine this appeal based on the principles aforementioned and the provisions of the law.

In ground two, the thrust of the Appellant's argument is that the court below erred when it did not find that Mr. and Mrs.

Lundale were election agents of the Respondent and, thus, making the Respondent liable for their alleged electoral malpractices in Kashitu ward. The Lundales allegedly gave out money to voters in exchange for votes in favour of the UPND. In particular, PW3, Thomas Katandala, testified that he was approached by Mr. and Mrs. Lundale and given K100 and asked to vote for UPND candidates and that he was given K500 in K20 notes to distribute to voters in return for payment of K500. Growfold Katandala, PW4, testified that after polling day, he found his elder brother, PW3, arguing with Mr. Lundale at Kennedy bar to be paid the balance of K440 by Mr. Lundale who had paid him K60 only from the promised K500. PW5, Brian Masapi, also testified that he witnessed the argument between PW3 and Mr. Lundale.

Central to the Appellant's argument was that the UPND's policy in the last election was that the party structures were directed to campaign for the party and its candidates. The Appellant contended that the Respondent had acknowledged that he had heard that the Lundales were UPND officials in Kashitu and that, notwithstanding the provision in regulation 55(1) of the Electoral Process (General) Regulations, the fact that the Lundales campaigned for the UPND generally made them the Respondent's

agents. Learned counsel for the Appellant, Mr. Yalenga, though conceding that the law provides a specific description of an agent in the context of elections, urged this Court to remove what he called "ambiguities and lacunas" that might result from a strict literal interpretation of the law. Mr. Yalenga went as far as proposing that this Court should consider the common law definition of an agent.

On the other hand, the Respondent submitted that this Court cannot circumvent the law by an extended interpretation of the term agent. Learned counsel Mr. Chungu argued that the court below rightly relied on the meaning of agent as provided in regulation 55(1) of the Electoral Process (General) Regulations. He disagreed with the Appellant's assertion that the meaning of agent should be stretched and pointed out that the Appellant had not shown any lack of clarity or any ambiguity in the law to warrant giving the word agent a meaning beyond what the law provides. It was Mr. Chungu's contention that the Appellant's suggestion would open the door to numerous possibilities to ascribe fault to candidates.

We have considered the submissions of the parties on this ground. From our perspective, it is clear that the key question

that falls for our consideration is whether, in the peculiar circumstances of this case, Mr. and Mrs. Lundale could, within the dictates of the law, be held to be election agents of the Respondent in the 11th August, 2016 election for Member of Parliament for Kapiri Mposhi constituency. Before we proceed to consider the main question, we find it imperative to recall the findings of the court below on this aspect.

The record shows that the learned Judge in the court below was of the view that an evaluation of the evidence of PW2, PW3, PW4 and PW5 left the impression that the alleged perpetrators of corrupt practices in Kashitu were Mr. and Mrs. Lundale. The question, however, was whether the Lundales were election agents of the Respondent within the meaning of regulation 55(1) of the Electoral Process (General) Regulations. Regulation 55(1) 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."**

Regulation 55(1) is succinct. An election agent must be specifically named in the candidate's nomination paper. The record shows that the learned Judge in the court below found no cogent evidence

to show that Mr. and Mrs. Lundale were appointed agents of the Respondent for the purposes of the previous election.

We have carefully perused the record of appeal on this aspect. We have found nothing upon which we can fault the lower court's finding. There is no evidence on the record that the Respondent appointed the Lundales as his election agents. Learned counsel Mr. Yalenga pressed the argument that the fact that the UNPD policy was for all members and party officials to campaign for UPND candidates made the Lundales agents of the Respondent. That those who followed the party directive and campaigned on behalf of the Respondent were agents by implication though a strict interpretation of the law excluded them as they were not listed on the nomination papers.

We find the Appellant's position on this point rather odd and it is simply not tenable. We do not agree as the law is very clear. We further wish to state that the Electoral Process (General) Regulations, 2016 are promulgated pursuant to the Electoral Process Act. Section 2 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;"**

Regulation 55(1) is in line with the definition in section 2 above. The Appellant suggests that there are "ambiguities and lacunas" requiring our attention to straighten out. We disagree. In that regard, we agree with the Respondent that the Appellant has shown no basis upon which the term election agent requires clarification. We also agree with Mr. Chungu that not only is it untenable for us to stretch the meaning of agent beyond what the law clearly provides, but for us to do so would also entail ascribing fault to candidates for electoral malpractices committed by persons who are not appointed by the candidate as election agents. The fact that the Legislature was specific on the definition of election agent was meant, in our considered view, to avoid endless permutations of who an agent is in particular circumstances. We are also reminded of the case of **Lewanika and others v Chiluba**[5] wherein the Supreme Court said:

> **"We are also mindful of the provisos in the Electoral Act so that a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since, under regulation 67 (now regulation 50)) of the Electoral (General) Regulations, an election agent has to be specifically so appointed."**

Regulation 55(1) *supra* requires that an election agent be specifically appointed and named in the candidate's nomination paper. As we find no ambiguity in that provision, there is no room

for the Court to clarify what it means or entails. We further agree with the court below that in terms of section 97(2)(a)(ii) of the Act, the Respondent is only answerable for electoral irregularities and malpractices which are committed by his election agent or done by another person with his knowledge and consent or approval. In this case it was not sufficiently shown that the corrupt practices by Mr. and Mrs. Lundale were committed with the knowledge and consent or approval of the Respondent.

Ground two is devoid of merit and we dismiss it accordingly.

Under ground three, the Appellant contends that the court below erred in law and in fact when it discounted the testimony of PW6 and PW7 on the basis that the two witnesses were motivated by financial gain. That the court below chose instead to believe the Respondent's witnesses despite contradictions in their testimony.

PW6, Justina Bwalya Nondo, testified that PW7, Edina Mutale, informed her that some people wanted to empower women and had asked her to mobilise some women for a meeting at PW7's house on 10th August, 2016 at 14:00 hours. It was PW6's evidence that she attended the meeting addressed by a Mr. Chiyoye, who

was later joined by the Respondent and Mr. Kabasa. PW6 stated that the Respondent and Mr. Kabasa asked the women to vote for them and the UPND and that, if they won, the women would get K10,000 empowerment loans. PW6 admitted that even after the men proposed bribes and she knew it was illegal, she stayed on because of being poverty stricken. That after the meeting, the women were each given K200 by the Respondent. On 15th August, 2016, PW7 was confronted about the promised empowerment loans of K10,000, an incident which she said was witnessed by PW12, Simon Musonda.

PW7's testimony was largely in line with that of PW6. She confirmed that the meeting at her house was addressed by Mr. Chiyoye, the Respondent and Mr. Kabasa. She also confirmed receiving K200 from the Respondent and being accused by the other women of having squandered the promised K10,000 empowerment loans and that PW12 found the women arguing about the same. As shown at page 215 of the record of appeal, PW7 conceded that she thought it was alright to sell her vote for money. PW12, who described himself as a PF member and a councillor in Kapiri Central, confirmed witnessing the scuffle at PW7's house.

In his testimony, the Respondent stated that on 10th August, 2016 he was at RW3's house who had lost a child "the previous week" and that his alibi was not an afterthought. RW2, Chriscential Phiri, testified that he was a UPND member and was campaign programme officer for candidates that stood in Kapiri Mposhi. It was his testimony that he and the Respondent went to RW3's home to pay their respects as he had lost a son. Later they proceeded to the Respondent's farm and that he was with the Respondent the whole day on 10th August, 2016. In his testimony, RW3, who at page 256 of the record of appeal described himself as a UPND member and District Co-ordinator for Kapiri Mposhi, confirmed that the Respondent and RW2 visited him on 10th August, 2016 to console him over the loss of his son, who he said passed away "between 7th and 8th June, 2016".

We have considered the evidence on record and the submissions made on this ground. We note that the learned Judge in the court below discredited the testimonies of PW6, PW7 and PW12 regarding the events of 10th August, 2016 in Matilyo compound. At pages 50 to 51 of the record of appeal, the trial Judge made the following observation:

> **"It is clear to me that the two witnesses were mostly motivated by the desire to gain monetary benefit and lacked integrity, as such it is highly likely that they would deliberately resort to peddling falsehoods. With these observations I have come to the conclusion that PW6 and PW7 are not witnesses of truth upon whose evidence any reliance can be placed, in the absence of independent corroboration. I have also considered the evidence of PW12 whose loyalty to the petitioner was so obvious to such an extent that I cannot accept him as a wholly impartial and reliable witness."**

In contrast, the learned Judge's view on the Respondent's evidence was in these terms:

> **"The counter evidence of the respondent and his witnesses was that on 10th August, 2016 they had visited RW3 to console him following the death of his son. The respondent denied being at Matilyo compound on the date in question. I find the version of the events as narrated by the Respondent and his witnesses to be probably true compared to that of the Petitioner's witnesses."**

It is evident to us that, under this ground of appeal, the Appellant seeks to attack the findings of fact made by the learned trial Judge in respect of the evidence put before her and also the conclusions she drew from those findings. It is an invitation for this Court to interfere with the findings of fact made in the court below.

The instances in which an appellate court will interfere with findings of fact of a lower court have been well settled. Both parties in the instant case have made reference to the **Marcus Achiume**[7] case which clearly articulated the principle that an appellate court can only interfere with a finding of fact where it establishes that

the trial court's decision was perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts, which, on a proper view of the evidence, no trial court acting correctly could reasonably make. The question is does this ground of appeal in the instant case satisfy any or more of the conditions as indicated in **Marcus Achiume?**[7] The Appellant's contention was that the trial Judge chose to believe the Respondent's version of events even when there were inconsistencies in his testimony and that of his witnesses. It seems to us that the Appellant's main grievance is that the trial Judge discredited his witnesses and placed more weight on the Respondent's testimony.

We have closely examined the record of appeal in an effort to see whether the findings of the court below offend any of the established principles based on which an appellate court can interfere with, or overturn, the findings of fact of a lower court. From our perspective, the learned Judge's consideration of this aspect of the case hinged on the credibility and reliability of the witnesses brought by the Appellant and the Respondent. She listened to and observed the demeanor of PW6, PW7 and PW12. She also did the same for the Respondent and his witnesses. The learned Judge rendered her verdict, on this aspect, when all the

evidence was fresh in her mind. In her view the Appellant's witnesses were not credible and reliable. And as earlier noted, the learned trial Judge had categorically stated that due to conflicting evidence between the Appellant and the Respondent and their witnesses in regard to allegations of corruption, undue influence and intimidation, the witnesses had to be subjected to strict scrutiny of their respective integrity. She, in particular, called in aid the following reasoning in **Christopher Kalenga v Annie Munshya**[18] where Kaoma J (as she then was) said:

> **"In an election petition, just like in an election itself, each party is set out to win. Therefore, the Court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection .... It would be difficult indeed for a Court to believe that supporters of one candidate behave in a saintly manner. While those of other candidates were all servants of the devil.... In an election contest of this nature, witnesses most of them motivated by the desire to score victory against their opponents will deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain"**

Other than claiming that the trial Judge should not also have believed the Respondent's version of events on 10th August, 2016 in Matilyo compound, the Appellant has not given this Court any basis on which to fault the learned trial Judge in her findings. In the English case of **McGraddie v McGraddie**[19] the United Kingdom Supreme Court confirmed that matters of credibility and reliability of witnesses were pre-eminently a matter for the judge at first

instance and that an appellate court should not generally interfere with that judge's findings of fact. In the view of the court below, PW6 and PW7 were likely to peddle falsehoods motivated by financial gain. There is nothing on the record that would compel us to fault the trial Judge's findings in regard to PW6 and PW7.

The foregoing notwithstanding, it is our considered view that the learned trial Judge should have also subjected the testimonies of the Respondent and his witnesses to closer scrutiny on this aspect. We say so because, as shown at pages 252 and 256 of the record of appeal, RW2 and RW3 described themselves as UPND members and functionaries. RW2 said that the role he played in the August 2016 election was that of "campaign programme officer". RW3 gave his title as "District Coordinator". And according to RW3, RW2 was responsible for drawing up the campaign programme. It is clear from the record that RW2 and RW3 were partisan witnesses. The trial Judge should have approached their testimonies with greater care and caution as it was highly probable they had an interest to serve and their evidence should have been corroborated.

Secondly, in regard to the death of RW3's son, the Respondent testified, as shown at page 246 of the record, that

RW3's son passed away "the previous week". Since, according to the record, the visit to console RW3 was undertaken on 10th August, 2016, this would place the occurrence of the death of RW3's child in early August, 2016. On the other hand, RW3, at page 256 of the record, gave the date of his son's death as "between 7th and 8th June, 2016". This was a glaring inconsistency in the evidence which the learned trial Judge should have addressed as it touches on the credibility of the testimonies of the Respondent and his witnesses. Recently in **Changano Kakoma Charles v Kundoti Mulonda**,[20] we stated that "the issue of credibility is broad and includes the demeanour and the perception on truthfulness of the witness and consistency of one's testimony." We affirm that position in this case.

In view of the foregoing, we cannot support the finding of the trial Judge that the Respondent's version of events on 10th August, 2016 was, to use her words, "probably true". A closer scrutiny of the evidence on record reveals otherwise. We hold that had the learned trial Judge appropriately dealt with the evidence on this aspect, she would not have come to the conclusion that she did in regard to the truthfulness of the Respondent and RW3. We accordingly reverse the trial court's finding on this aspect.

The question then is, where does ground three of this appeal stand? It was the task of the Appellant to prove, with convincing clarity, that his version of events in Matilyo compound on 10th August, 2016 was the correct one as opposed to that of the Respondent. Merely discounting the Respondent's evidence on this ground was not sufficient. In **Changano Charles**[20] we said the following:

> **"In election petitions, the burden of proof lies on a petitioner and where the trial court finds evidence unconvincing or where his evidence does not prove the allegation to the required high standard, it matters not the evidence proffered by the other party, the case will fail."**

Based on the evidence on record and the submissions, we find that the Appellant has not discharged his burden under section 97(2)(a) of the Act. We accordingly find ground three of this appeal devoid of merit and it fails.

We now turn to ground four. In this ground, the Appellant alleges that the trial Judge erred in law and in fact when, having found that the Respondent had committed a corrupt act, she held that the same had no significant impact on the result of the election in Kapiri Mposhi constituency.

PW10, Beauty Mukonchi, testified that in July, 2016 she attended a meeting addressed by the Respondent in Shipangula

village in Kakolo area. That after the meeting, the Respondent gave her K1,000 on behalf of other women and promised more money if they voted for him. The Respondent also left campaign posters and some footballs for the youth and women. PW11, Peter Munkuli, also testified that he attended the meeting in July, 2016 and that after the meeting, the Respondent gave him K100 so that he could campaign for him. PW11 also confirmed that PW10 received K1,000 from the Respondent.

After reviewing the evidence of PW10 and PW11, the learned trial Judge found the two witnesses to be truthful and that their evidence was not controverted by the Respondent. The trial Judge held that although the witnesses expressly indicated that the money they received from the Respondent was for campaigns, she was of the view that the promise to pay them more money after the election was meant to induce them, contrary to section 81(1)(c) of the Act.

The Appellant particularly took issue with the portion of the Judgement of the court below at page 53 of the record of appeal where the learned trial Judge said:

> **"I must however stress that although the promise which was made may have subjected the Respondent to penalties under the Act, it does not in my opinion provide a basis upon which this election can be nullified. It**

is apparent that the said promise to induce the voters was not wide spread as it was only restricted to a small group of women in Kakolo area. In my considered view, it had no significant bearing on the result of the whole Kapiri Mposhi constituency."

Citing various authorities, the Appellant argued that the standard was no longer how widespread the corrupt or illegal act was, but the mere fact that it happened. Learned counsel Mr. Yalenga questioned whether, having found that there was a corrupt or illegal act by a candidate, the court could not proceed to nullify the election even if it was not shown that the majority of voters were prevented from voting for their preferred candidate. Counsel's view was that the purpose of elections in a democracy was to elect persons of integrity into office.

Mr. Chungu, for the Respondent, disagreed and argued that unlike the repealed section 93 of the Electoral Act, 2006, section 97(2) of the Act was couched conjunctively and not disjunctively. He contended that the items in section 97(2) of the Act were joined by the word "and", meaning the petitioner had to prove all elements in the provision. Mr. Chungu submitted that the trial Judge was on firm ground when she determined that the illegal act was not sufficient to void the election.

We have reviewed the evidence on record and carefully considered the submissions on this ground. It is not in dispute

that the Respondent held a campaign meeting in July, 2016 a Kakolo area in Kakwelesa. It is also not in dispute that after th meeting, and as testified to by PW10 and PW11, the Responder gave out money to some people that attended the meeting ar promised more money after being elected. The learned trial Jud found that the promise for more money amounted to an infracti of section 81(1)(c) of the Act. Section 81(1)(c) reads:

> **"81(1) A person shall not, either directly or indirectly, by oneself or any other person corruptly-**
> ...
> **(c)make any gift, loan, offer, promise, procurement or agreement for the benefit of any person in order to induce the person to procu to endeavour to procure the return of any candidate at any electi the vote of any voter at any election;"**

Section 81 creates the electoral offence of bribery and paragraph 1(c) clearly proscribes the making of a gift, loan, offer, promise, procurement or agreement for purposes of inducing a person in order to gain a benefit in the electoral process. The learned trial Judge found the Respondent wanting in respect of this provision in relation to what transpired after his meeting with the electorate in July, 2016 in Kakwelesa. He had made a promise to voters to pay them more money after he won the election. However, the trial court held that that act of inducement on the part of the Respondent, though offensive to section 81(1)(c), did not

attain the majority threshold required in section 97(2)(a), stating in the Judgment at page 53 of the record of appeal that:

> **"It is apparent that the said promise to induce the voters was not widespread as it was only restricted to a small group of women in Kakolo area. In my considered view it had no significant bearing on the result of the whole Kapiri Mposhi constituency."**

The Appellant questioned the trial Judge's reasoning and urged us to reverse the finding of the lower court.

We disagree. Earlier in this Judgment, we stated, as we have done in many of our earlier decisions, that the requirement that the majority of voters were or may must have been influenced by the malpractice of a candidate is an integral requirement to be proved for an election to be nullified under section 97(2)(a) of the Act. Earlier in this Judgment we referred to our recent decision in **Austin Liato v Sitwala Sitwala.**[14] At page J22 of that Judgment we affirmed the majority requirement in these terms:

> **"...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."**

The Appellant did not adduce any evidence to prove to a fairly high degree of convincing clarity that the incident at Kakolo in Kakwelesa affected the majority of the electors in Kapiri Mposhi

Constituency. Instead, we note that Mr. Yalenga argued that the point of an election is to put persons of integrity into office and that since it had been proved that the Respondent violated section 81(1)(c) of the Act, he should not, in counsel's words "stand on the podium" as a winner. We agree with the Appellant that there should be integrity on the part of election candidates. That is in fact the essence of the proscriptions that candidates and other players in the electoral process are warned about in our electoral laws and regulations. However, the law as it stands now in section 97(2)(a) of the Act includes the requirement that the illegality or misconduct that is proved should have influenced the majority of the voters into making a choice they would not otherwise have made had the catalyst of the malpractice not existed. Further, we note that at page 173 of the record of appeal, the Appellant under cross-examination indicated that there were 93 polling stations in Kapiri Mposhi Constituency and that he had grievances in eight where malpractices allegedly occurred. This leaves 85 polling stations where no allegations of malpractice were proffered as far as this matter is concerned.

We see no basis upon which to fault the finding of the trial Judge. We hold that she correctly interpreted and applied the law

when she found that the electoral transgression on the part of t Respondent was not proved to the required standard. Ground fo of the appeal is unmeritorious and we dismiss it.

Turning to ground five, the Appellant alleges that the cou below erred in law and in fact when it found that the Appellant h not proved that the Respondent had knowledge or consented approved of the corrupt act committed by Sameman Hakalumb at Kapiri Mposhi Secondary School polling station. The Appella testified that he was informed that Sameman Hakalumbwe w found bribing voters in the company of the Respondent and o Obby Kabasa. The record of appeal at page 181 shows that unc cross-examination, the Appellant conceded that his informant w also just informed about the bribing incident at Kapiri Mpo Secondary School polling station. The other witness on t aspect, PW13, Patrick Mulenga Chola, testified that he was serv as a polling agent for the PF at Kapiri Mposhi Primary Sch polling station when he overheard a group of women saying t there was a person distributing money at the gate. PW proceeded to the gate and found an individual, who he identif as Sameman, the UPND District Chairperson, giving out K50 no and urging people to vote on the UPND symbol. PW13 testif

that he apprehended the person and handed him over to the police but he was later released. PW13 denied apprehending Obby Kabasa, Mrs. Kabasa and Mr. Lundale because he did not see them. He also did not see the Respondent at the scene.

In his submissions, the Appellant took issue with the following portion of the Judgment of the court below at page 54 of the record of appeal:

> **"But most importantly the crucial feature of this complaint is that, the petitioner has not established in keeping with Section 97(2) of the Electoral Act (sic), that the alleged corrupt practice by Sameman Hakalumbwe was committed with the knowledge or consent or approval of the respondent. This allegation cannot therefore succeed."**

The Appellant maintained that the Respondent consented to or approved of the conduct of Sameman Hakalumbwe by virtue of being his agent.

In rebuttal, the Respondent argued that he was only accountable for acts which he knew about or consented to or approved of. That the unknown and unauthorized activities of a truant agent cannot be the basis for nullifying an election.

At page 249 of the record of appeal, the Respondent conceded to knowing Sameman Hakalumbwe; that he was an agent for the UPND and the Respondent also described Sameman Hakalumbwe as his "accredited agent." The Respondent testified that he was not

with Sameman Hakalumbwe on election day until polling ended. The Respondent stated that Sameman Hakalumbwe was under "specific instructions" to be the team leader at the results totaling centre in Kapiri Mposhi. It was the Respondent's further evidence that he was in constant touch with Sameman Hakalumbwe "coordinating the results he was receiving with the PVT"; that he was communicating with Sameman Hakalumbwe by way of cellphone and had reason to believe that he (Sameman Hakalumbwe) was at the totaling centre.

We have considered the Judgment of the court below, the evidence and the parties' submissions on this aspect. The question that falls for our consideration is whether, as alleged by the Appellant, the Respondent could be held accountable for the actions of Sameman Hakalumbwe at Kapiri Mposhi Secondary School polling station on polling day.

We have already outlined the provisions of the law as provided in section 97(2) of the Act on the basis of which an election of a candidate may be nullified. Electoral transgression will lie at the feet of the candidate either by his own doing or by malpractice perpetrated by his election or polling agent or by a third person with the knowledge of the candidate or his election or

polling agent. Provided all the ingredients in section 97(2)(a) of the Act are proved to the required standard, the election can be nullified. In this case, the Appellant seeks to ascribe the alleged corrupt acts of Sameman Hakalumbwe to the Respondent. As already noted, the Respondent admitted to knowing Sameman Hakalumbwe and described him as "an agent for UPND" and as his "accredited agent". An examination of the Act and the attendant Electoral Process (General) Regulations reveals that there is no provision for, or definition of, the term "accredited agent". The law provides for an "election agent" or a "polling agent". The Appellant argued that section 97(2)(a) of the Act covers the actions of an election agent even if the illegal or corrupt conduct was not consented to by the candidate. In our consideration of ground two, we dealt at length how, according to the electoral laws, a person becomes an election agent of a candidate. The Appellant has not adduced clear and cogent evidence on record that Sameman Hakalumbwe was the Respondent's duly appointed election agent. The trial court also did not categorically state whether or not it was proved that Sameman Hakalumbwe was the Respondent's election or polling agent.

There is also nothing on the record to compel us to conclude that Sameman Hakalumbwe was a polling agent for the Respondent. Section 2 of the Electoral Process Act defines "polling agent" as "an agent appointed by a candidate in respect of a polling station." Further, regulation 56(1) of the Electoral Process (General) Regulations states that a polling agent is appointed by the candidate or by the candidate's election agent by, according to regulation 56(2), giving written notice of the names of the appointed polling agents at least four days before polling day. We have seen nothing on the record to show clearly that Sameman Hakalumbwe was a polling agent of the Respondent. According to the Respondent, as shown at page 249 of the record of appeal, Sameman Hakalumbwe was under specific instructions to be a team leader at the totaling centre in Kapiri Mposhi.

The question then that confronts us is whether there is evidence on the record that links the Respondent to the alleged corrupt acts of Sameman Hakalumbwe at Kapiri Mposhi Secondary School polling station. More specifically, did the Respondent, as alleged by the Appellant, know of or consent to or approve of, the alleged electoral malpractice committed by Sameman Hakalumbwe? The learned Judge in the court below

found that the Appellant had not established, in accordance with section 97(2)(a) of the Act that the alleged corrupt practice by Sameman Hakalumbwe was committed with the knowledge or consent or approval of the Respondent.

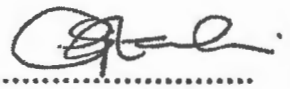
We affirm the finding of the court below. We reiterate that Zambian jurisprudence has long required that the issues raised in an election petition must be established to a fairly high degree of convincing clarity. It is a standard that is higher than a mere balance of probability, as aptly stated in **Lewanika and others v Chiluba**[5] which we referred to earlier. The Appellant's evidence in the instant case failed that test on this particular aspect in the court below and, in this Court, we see no basis upon which we can reverse the decision of the lower court. As aptly put by the Supreme Court in **Brelsford James Gondwe v Catherine Namugala:**[17]

> **"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 fairly high degree of convincing clarity."**

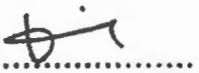
In view of the foregoing, we find ground five of this appeal devoid of merit and it is dismissed.

All the grounds of this appeal are unmeritorious and have failed. The appeal is dismissed.

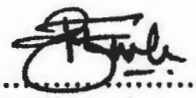
We order that each party shall bear their own costs.



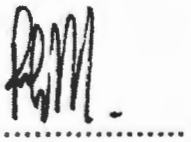
A.M. Sitali
CONSTITUTIONAL COURT JUDGE



M.S. Mulenga
CONSTITUTIONAL COURT JUDGE



E. Mulembe
CONSTITUTIONAL COURT JUDGE



P. Mulonda
CONSTITUTIONAL COURT JUDGE

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

APPEAL NO. 19 OF 2017
2016/CC/A008

IN THE MATTER OF: THE PETITION RELATING TO THE SHANG'OMBO DISTRICT COUNCIL CHAIRPERSON ELECTION HELD ON 11TH AUGUST, 2016

AND

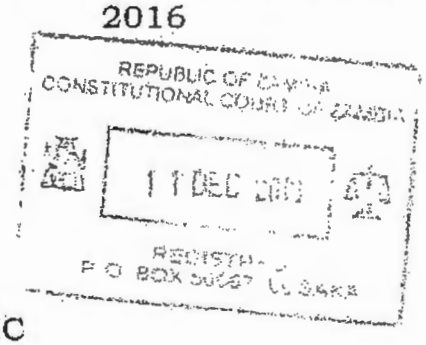
IN THE MATTER OF: ARTICLE 159 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SECTIONS 81, 82, 83, 84, 85, 86, 87, 89, 92, 94, 97, 98, 99, 100 AND 110 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016



BETWEEN:

MWIYA MUTAPWE — APPELLANT

AND

SHOMENO DOMINIC — RESPONDENT

CORAM: Sitali, Mulenga, Mulembe, Mulonda and Munalula, JJC on 22nd March, 2018 and on 11th December, 2018

For the Appellant: Miss M. Mushipe of Mushipe and Associates

For the Respondent: Mr. L. Eyaa of KBF and Partners

J U D G M E N T

Sitali JC delivered the judgment of the Court.

Cases cited:

1. Michael Mabenga v Sikota Wina and Others (2003) Z.R. 110
2. Kamanga v Attorney-General and Another (2008) 2 Z.R. 7
3. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138
4. Subramanian v The Public Prosecutor (1956) 1WLR 965
5. Kufuka Kufuka v Mundia Ndalamei SCZ Appeal No. 80 of 2012
6. Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114 of 2007
7. Green Nikutisha and Another v The People (1979) Z.R. 261
8. Lewanika and Others v Chiluba (1998) Z.R. 79
9. Mubita Mwangala v Inonge Mutukwa Wina Appeal No. 80 of 2007
10. Josephat Mlewa v Eric Wightman (1995/1997) Z.R. 171
11. Inonge Mubika v Mukelabai Pelekelo Selected Judgment No. 32 of 2017
12. Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014
13. Zambia Electricity Supply Corporation v Redlines Haulage Limited SCZ Judgment No. 10 of 1992
14. Machipisha Kombe v The People SCZ Judgment No. 27 of 2009
15. Buchman v Attorney-General (1993/94) Z.R. 131
16. Chimbini v The People (1973) Z.R. 191
17. Evaristo Bwalya v The People (1975) Z.R. 227
18. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172
19. Matilda Mutale v Emmanuel Munaile SCZ Judgment No. 14 of 2007
20. NFC Africa Mining Plc v Techpro Zambia Limited SCZ Judgment No.22 of 2009
21. Brelsford James Gondwe v Catherine Namugala SCZ Appeal No. 129 of 2012
22. British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 45 Con. L.R. 1
23. Khalid Mohamed v Attorney-General (1982) Z.R. 49
24. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172
25. Margaret Mwanakatwe v Charlotte Scott and Attorney-General Selected Judgment No. 50 of 2018
26. Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney-General Selected Judgment No. 51 of 2018

27. **Steven Masumba v Elliot Kamondo Selected Judgment No. 53 of 2017**

Legislation cited:

1. **The Electoral Process Act No. 35 of 2016 section 97 (2) (a)**
2. **The Local Government Election Tribunals Rules, Statutory Instrument No. 60 of 2016, rule 23 (1)**

The Appellant Mwiya Mutapwe who was the Respondent before the Local Government Election Tribunal for the Shang'ombo District appeals against the judgment of the Tribunal which nullified his election as Shang'ombo District Council Chairperson. The Appellant and the Respondent were candidates for the Shang'ombo District Council Chairperson election held on 11th August, 2016. The Appellant was the United Party for National Development (UPND) candidate while the Respondent was the Patriotic Front Party (PF) candidate.

The Appellant emerged victorious with ten thousand, one hundred and seventy-two (10,172) votes and was declared as the duly elected Council Chairperson for Shang'ombo District Council. The Respondent got five thousand four hundred and four (5,404) of the votes cast.

The Respondent filed a petition seeking a declaration that the election be nullified on the ground that the election was invalid due to non-compliance with the provisions of the Constitution as amended and the Electoral Process Act No. 35 of 2016 (which we shall refer to as the Act).

In his petition, the Respondent (as petitioner) alleged that during the campaign period the Appellant and his agents engaged in acts of violence against PF supporters citing an incident where a PF cadre on 24th July, 2016 was stabbed with a knife, the assault of a PF cadre at Beshe polling station on 26th July, 2016, the assault of another PF cadre by named UPND members on 4th August, 2016 and an attack on PF officials in Mutanda area on 9th August, 2016. He further alleged that during the campaign period, the Appellant and his agents brewed eight (8) drums of local beer for voters in Shang'ombo Constituency to drink. That on two separate occasions, the Appellant and his agents broke into the Food Reserve Agency (FRA) shed and stole 104 bags of maize which they distributed to voters. That during the campaign period the Appellant and his agents called the Respondent a drunkard and a thief and extended the aspersions to his Party President.

He also alleged that the Appellant's agents distributed pens to voters on queues at all polling stations promising K50 cash payment upon return of the pen after voting for the UPND candidates; that UPND candidates ferried voters to polling stations in a coach and a 4 x 4 truck belonging to a UPND businessman; that the Appellant and his agents constantly pulled down and destroyed PF campaign posters during the campaign period and that on polling day, UPND supporters beat up and threatened violence against PF supporters and prevented them from voting.

The Tribunal analysed the Respondent's evidence and held that he had proved his case beyond a balance of probabilities. The Tribunal nullified the election of the Appellant as Council Chairperson for Shang'ombo District Council and further held that the Appellant was not eligible to stand for re-election as Council Chairperson or as a Councilor within Shang'ombo District for a period of five years in accordance with Article 157 (2) and (3) of the Constitution as amended.

Aggrieved by the decision of the Tribunal, the Appellant appealed to this Court advancing the following grounds which we have quoted verbatim:

1. That the Learned Members of the Tribunals erred in both law and fact when it nullified the election of the Respondent on the grounds of corruption and bribery when it held that the Respondent had committed corrupt practices or illegal practices or misconduct when the same was not supported by evidence to the required standard.

2. The Learned Members of the Tribunal erred in fact and in law when they attached due weight to the testimony of the Petitioner without any evidence in corroboration.

3. The Learned Members of the Tribunal erred in fact and in law when it attached due weight to the testimony of PW1 who was the District Commissioner of Shang'ombo when his evidence was hearsay and utter speculation which was not supported by any evidence in corroboration.

4. The Learned Members of the Tribunal erred in fact and in law when they attached due weight to the testimony of PW2 who was a witness with an interest to serve and when analysing his testimony did not consider the provisions of section 100 (2) of the Electoral Process Act No. 35 of 2016.

5. The Learned Members of the Tribunal erred in fact and in law when they attached due weight to the testimony of PW3 of identifying the Respondent as the one who stole the maize in the dark in the absence of conducting an identification parade, let alone an arrest from the police being made.

6. The Learned Members of the Tribunal erred in fact and in law when they attached due weight and reliance on the testimony of PW4 when he is a Patriotic Front (PF) member therefore a witness with an interest to serve.

7. The Learned Members of the Tribunal erred in fact and in law when they attached due weight to the testimony of PW5 who was a Patriotic Front (PF) member therefore a witness with an interest to serve.

8. The Learned Members of the Tribunal erred in fact and in law when they did not consider the provisions of section 100 (2) of the Electoral Process Act No. 35 of 2016 in passing their judgment and in analysing the evidence given by the Petitioner and his witnesses.

9. **The Learned Members of the Tribunal erred in fact and in law when they did not allow the Respondent to present his case.**

10. **The Learned Members of the Tribunal erred in fact and in law when they held that the evidence of witnesses with an interest to serve was enough to reach the standard of proof required in election Petitions in order to nullify an election in the absence of corroborative evidence.**

The Appellant filed written heads of argument upon which Ms. Mushipe, counsel for the Appellant relied at the hearing of the appeal. The Appellant submitted that it is settled law regarding the burden of proof in election petitions that the party who alleges must prove the allegations made to a standard higher than a balance of probabilities in ordinary civil cases but not beyond reasonable doubt as required in criminal matters. The Appellant cited the case of **Michael Mabenga v Sikota Wina and Others**[1], **Kamanga v Attorney-General and Another**[2] and **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others**[3] in support.

It was submitted that section 97 (2) of the Act clearly states that an election will not be declared void on mere allegation of electoral malpractice unless the allegation is proved with cogent evidence to the required standard that the candidate committed the electoral malpractice complained of or that it was committed with his knowledge and consent or approval or that of his election agent.

The Appellant further submitted that it must be demonstrated that the majority of the voters in the district were prevented from voting for a candidate whom they preferred.

It was submitted that notwithstanding that the Appellant did not file an Answer and therefore did not call witnesses to defend the petition, the Tribunal could only nullify the election of the Appellant as Council Chairperson on evidence establishing to a fairly high degree of convincing clarity that he actually committed the electoral malpractices complained of and that as a result of the proven malpractices, the majority of voters were prevented from voting for their preferred candidate. The Appellant stated that it was on the premise of the foregoing that the judgment of the Tribunal was challenged.

Grounds one and two of the appeal were argued together. The Appellant submitted that the Respondent failed to conclusively prove the allegation of corruption and bribery, in terms of section 81 (1) (a), (b), (c) and (f) of the Act, as there was no clear and unequivocal evidence that he committed the alleged corrupt practices. The Appellant quoted the learned authors of Halsbury's Laws of England, 4th edition, volume 15 at page 780 who state that

clear and unequivocal proof is required before a case of bribery will be held to have been established. That suspicion is not sufficient and the confession of the person alleged to have been bribed is not conclusive.

The Appellant submitted that in this case, the Respondent's evidence (as Petitioner) did not clearly and unequivocally establish that the Appellant brewed local beer at Sebumbu polling station and gave it to the voters as an inducement for them to vote for him, and that no eye witness was called to confirm the allegation that the Appellant gave beer to voters as an inducement at a rally.

The Appellant further submitted that there was similarly no clear and unequivocal evidence that the Appellant gave money and pens to voters or that the people who allegedly distributed pens and money to voters were the Appellant's appointed agents. The Appellant challenged the evidence of PW4 and PW5 who sought to substantiate the allegation of corruption and bribery by the Appellant on the ground that their evidence required corroboration. That PW4 alleged that he received meat, beer and chitenge from the Appellant and his agents and therefore voted for UPND candidates. That PW5 said he was bribed by Kalomo Kalomo and Kalomo

Ndumba whom he alleged were UPND agents and therefore confessed to taking a bribe from the alleged UPND agents. The Appellant further impugned the evidence of PW5 that people voted for the Appellant and other UPND candidates because of the bribes they allegedly gave to the electorate and argued that there was no independent evidence to that effect.

Regarding the allegation of violence, the Appellant submitted that the Respondent's evidence that at a meeting held in Liyuwayuwa village, John Kakomwisa was stabbed with a knife by Pumulo Munyumbwe, an agent of the Appellant; that another PF cadre was assaulted at Villa polling station in Bushe ward by a person who was standing as a Councilor on the UPND ticket; and that a PF member was badly assaulted by Nawa Mubika, Inonge Mubika and Sililo Mwakamui at Ngandwe polling station with the Appellant's knowledge, was inadmissible hearsay evidence. He cited the case of **Subramanian v Public Prosecutor**[4] in support of that submission.

The Appellant contended that there was no evidence before the Tribunal that Pumulo Munyumbwe or the other people who were allegedly involved in violence were appointed agents of the

Appellant, that they acted on the Appellant's instructions or that he had any knowledge of the alleged attacks and assaults.

The Appellant submitted that the evidence of PW2 that John Kabonwisa was stabbed with a knife by a person wearing UPND regalia did not mean the person was the Appellant's agent or that he acted on his (Appellant's) instructions. In support of his submission, the Appellant cited the case of **Kufuka Kufuka v Mundia Ndalamei**[5] wherein the Supreme Court stated that just because the attackers came from the direction where the Respondent was having a meeting could not lead to an inference that he was responsible for the attack.

Regarding the alleged disparaging statements, the Appellant submitted that there was no evidence that he called the Respondent a thief and a drunkard at his meetings. That no independent witness testified that he attended a meeting at which the Appellant made the disparaging remarks. He argued that PW4 in his testimony did not say in which areas the Appellant allegedly discouraged the people from supporting the Respondent because he suffered from diarrhea.

Regarding the effect of the alleged acts of bribery, violence and disparaging statements on the electorate, the Appellant submitted that the Respondent's evidence did not show how the alleged acts and statements affected the majority of voters so as to prevent them from voting for their preferred candidate. The Appellant further submitted that the Respondent's assertion, that people were afraid to vote due to threats of violence, was not supported by evidence of the number of people who did not vote due to the threats. The Appellant again cited the learned authors of Halsbury's Laws of England, 4th edition, volume 15, paragraph 784 at page 429 who state that in order to constitute undue influence, a threat must be serious and intended to influence the voter but also that the threat should be judged by its effect on the person threatened and not by the intention of the person using the threat.

It was submitted that in this case, there was no evidence of how many people attended the rallies, and heard the disparaging remarks, or the number of people who participated in the beer drinking or who benefitted from the bribery by the Appellant to induce them to vote for him. The Appellant contended that there was no evidence of widespread vilification of the Respondent, which

evidence was required to be proved as held in the case of **Mubika Mubika v Poniso Njeulu.**[6] That in **Kufuka Kufuka v Mundia Kabimbi,**[7] it was stated that it was not enough for the petitioner to say "people were saying" and that what was required was for him to provide proof of his allegations and the extent of influence the allegations had on the electorate.

That in this case, the Respondent's evidence was inconclusive and speculative.

Grounds three, four, five, six, seven, eight and ten were argued together. In arguing these grounds, the Appellant contended that the Tribunal should not have nullified the election of the Appellant on the evidence of the Respondent and his five witnesses, PW1 to PW5, without considering the fact that they were witnesses with interest to serve and that their evidence was speculative and therefore needed to be corroborated.

The Appellant submitted that there was a disparity in the evidence of PW1 and PW3. That on one PW1 had said the maize was removed from the FRA shed by the Appellant and his agents on 10th August, 2016 and given to the voters with instructions to vote for the UPND. That PW3, on the other hand, said the Appellant and

two other men broke into the FRA shed on 9th August, 2016 around 20:00 hours and stole six bags of maize. It was contended that a police report regarding the incident should have been produced to conclusively show the date when the alleged break-in happened and to authenticate PW3's assertions. It was submitted that PW3's evidence identifying the Appellant as one of the people who broke into the FRA shed was doubtful as no identification parade was held for the identification of the Appellant.

The Appellant cited the learned author Edward J. Imkwinkelried, Evidentiary Foundations, 4th edition, 1998 at page 41 wherein they state that the common law generally requires that the proponent of evidence prove the authenticity of the evidence as a condition to the admission of the evidence. That to authenticate an item of evidence, the proponent must present proof that the article is what the proponent claims that it is.

It was contended further that since the Appellant was not arrested and no police report was produced regarding the alleged theft of the maize by the Appellant, doubt was raised as to the authenticity of the evidence of PW3, which doubt could have been cleared by corroborative evidence. The Appellant cited the case of

Kikutisha and Another v The People[7] wherein it was held that the need for calling of other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt.

Regarding the evidence of PW4 and PW5 who sought to substantiate the Respondent's allegations of corruption and bribery, the Appellant contended that their evidence without corroboration cannot be considered as conclusive because they both confessed to accepting a bribe. The Appellant reiterated the observation of the learned authors of Halsbury's Laws of England, 4th edition, volume 15 at page 780 who state that clear and unequivocal evidence of a case of bribery is required before it will be held to have been established. Further, that the confession of the person alleged to have been bribed is not conclusive.

The Appellant further submitted that the provisions of the Act clearly show that a candidate for an election is only responsible for corrupt or illegal acts or misconduct which are done by the candidate or with his knowledge and consent or approval or that of his appointed agent. That the evidence of the Respondent, as

petitioner, and that of PW2, PW4 and PW5 did not show that the people whom they alleged were UPND or to have committed acts of violence or made disparaging remarks were the Appellant's appointed agents or that they acted on the Appellant's instructions. The case of **Lewanika and Others v Chiluba**[8] was cited in support. The Appellant contended that the Tribunal erred by nullifying the election of the Appellant on the evidence of PW1, PW2, PW4 and PW5 without corroboration.

The Appellant went on to submit that in terms of section 97 (2) of the Act, an election is void only if on the trial of the election petition, it is proved to the satisfaction of the Court or Tribunal that the electoral offence committed in connection with the election prevented the majority of voters from electing their preferred candidate. In this regard, the Appellant relied on the cases of **Mubika Mubika v Poniso Njeulu**[6], **Mubita Mwangala v Inonge Mutukwa Wina**[9] and **Josephat Mlewa v Eric Wightman**[10], all of which emphasise that an election will only be void where it is demonstrated that the prohibited activity complained of was widespread and thus prevented the majority of voters from electing their preferred candidate.

It was contended that in the present case, the evidence adduced fell far below the required standard of a fairly high degree of convincing clarity. That the Tribunal, therefore, misdirected itself when it nullified the election of the Appellant on inconclusive evidence.

Underground nine which was argued alone, the Appellant argued that the pillars of the Constitution and system of adjudication are that a person has the right to be heard and that matters should be heard on the merits. That in this case, the Tribunal denied the Appellant the right to be heard when it refused to grant his application to file his answer out of time on the ground that election petitions are time bound. That the Tribunal misdirected itself in refusing the Appellant's application because the Constitution does not give a time frame for the disposal of appeals relating to local government elections as held in **Inonge Mubika v Mukelabai Pelekelo**[11] wherein this Court held that there is no time frame given in the Constitution, the Act or the Rules for the disposal of appeals relating to local government election petitions. It was submitted that the Tribunal should have taken into account the provisions of Article 118 (2) (e) of the Constitution which enjoins

courts to administer justice without undue regard to procedural technicalities. That based on a procedural technicality, the Tribunal denied the Appellant his constitutional right to be heard when it refused him to file his answer. It was submitted that the Tribunal therefore contravened the provisions of Article 18 (2) (e) of the Constitution.

In conclusion, the Appellant submitted that the Respondent failed to prove the allegations of electoral malpractice to a fairly high degree of convincing clarity as the evidence he adduced was not clear and unequivocal and did not satisfy the requirements of section 97 (2) of the Act. It was contended that the Tribunal misdirected itself in law and fact to have declared the election of the Appellant void on the Respondent's evidence. The Appellant submitted that the decision of the Tribunal be set aside and that his election as Council Chairperson for Shang'ombo District Council be upheld with costs.

The Respondent filed written heads of argument in opposition to the appeal on which Mr. Eyaa, counsel for the Respondent relied. Ground one of the appeal was argued alone. Grounds two and three were argued together, grounds four and eight were argued

together, ground five was argued on its own, grounds six, seven and eight were argued together while ground nine was argued last and on its own.

In opposing ground one, the Respondent submitted that the Tribunal was right to nullify the election of the Appellant as Council Chairperson as there was overwhelming evidence to support the allegations in the petition. The Respondent contended that the Appellant had no defence having failed to file an answer to the petition and relied on the holding in the cases of **Michael Mabenga v Sikota Wina and Others**[1], **Saul Zulu v Victoria Kalima**[12] and **Anderson Kambela Mazoka and others v Patrick Levy Mwanawasa and others**[3] and **Zambia Electricity Supply Corporation v Redlines Haulage Limited**[13] to the effect that an election petition depends on the pleadings, that is, the petition and the answer and that the parties are bound by them. That the burden of proof is on the challenger to prove the allegations to a higher standard than a balance of probabilities.

The Respondent submitted that in paragraphs (v) to (xiii) of his petition, he alleged a number of electoral malpractices involving corruption by the Appellant and that at trial he testified to the effect

that on 10th August, 2016, the Appellant and his agents stole 104 bags of maize from the FRA shed which he distributed to the electorate so that they should vote for him. That the matter was reported to the police but no action was taken. It was submitted that the Respondent's further testimony was that on 11th August, 2016 the Appellant's agents gave pens and money to voters on queues and told them to vote for UPND candidates while PF supporters were chased away.

The Respondent contended that the Appellant did not dispute the alleged acts in cross examination and did not file an answer to dispute the alleged corruption and bribery allegations. That the corruption and bribery allegations were corroborated by two independent witnesses, PW1, the District Commissioner for Shang'ombo district and PW3, a security guard at the FRA who testified to seeing the Appellant and other people at the FRA shed on 9th August, 2016 around 20.00 hours where they stole the maize which the Appellant distributed to the people on 10th August, 2016, a day before the elections.

It was further submitted that the evidence of PW5 demonstrated that the bribery and corruption which characterized

the election of the Appellant as Council Chairperson was unchallenged. It was contended that the Tribunal was therefore on firm ground in nullifying the election as the corruption and bribery allegations were proved to the required standard based on the authority of the **Mabenga**[1] case wherein it was held that satisfactory proof of any one corrupt or illegal act or misconduct in an election petition is sufficient to nullify an election.

In opposing grounds two and three, the Respondent contended that the Respondent's evidence in support of the allegations in the petition was sufficiently corroborated by the five witnesses who testified on his behalf. That the allegation regarding the distribution of maize to the electorate was corroborated by PW3 who witnessed the Appellant break into the FRA shed and steal the maize. That the evidence was not shaken in cross examination and stood unchallenged. It was contended that the evidence of PW1 was not hearsay because PW3 who informed him of the break in at the FRA was present when the Appellant allegedly distributed the maize to the electorate. That in any case, the Appellant did not object to the evidence on the basis that it was hearsay when PW1 testified in chief. It was submitted that based on the principle laid down in the

Subramaniam[4] case, the testimony of PW1 was not hearsay because the maker of the statement PW3 was before the Tribunal and confirmed that he personally witnessed the incident which PW1 testified about.

It was further submitted that the allegation that the Appellant vilified the Respondent's character by calling him a drunkard was corroborated by PW4 who said the Appellant in Sebumbu area of Shang'ombo told the electorate not to support the Respondent because he suffered from diarrhea. That PW4 further said the Appellant bribed the electorate with chitenge material, meat and beer whilst lobbying them to vote for him and other UPND candidates and that he (PW4) voted for the UPND. The Respondent submitted that his evidence was sufficiently corroborated in terms of the case of **Machipisha Kombe v the People**[14] wherein it was held that corroboration must not be equated with independent proof and that it is not evidence which needs to be conclusive in itself. That corroboration is independent evidence which tends to confirm that the witness is telling the truth when he or she says the offence was committed and that it was the accused who committed it.

The Respondent submitted that grounds two and three lacked merit and should fail.

In opposing grounds four and eight which were also argued together it was submitted that although in ground four the Appellant contended that the Tribunal was wrong when it attached low weight to the testimony of PW2 who was a witness with an interest to serve and in so doing did not consider the provisions of section 100 (2) of the Act; and in ground eight that the Tribunal erred when it ignored the provisions of section 100 (2) in analyzing the evidence of the Respondent and his witnesses, there was no connection between the provisions of section 100 (2) and the testimony of PW2 and the other four witnesses who testified on behalf of the Respondent. That in any case, there was nothing on record to show that PW2 was a witness with an interest to serve. That section 100 (2) only provides for the lodging of an election petition and with whom it should be lodged.

The Respondent submitted that the Appellant did not raise any issue with section 100 (2) of the Act before the Tribunal and cannot raise any issue on appeal. The Respondent cited the case of **Buchman v Attorney-General**[15] wherein the Supreme Court laid

down the principle that a matter which is not raised at trial cannot be raised before an appellate court as a ground of appeal. It was contended that grounds four and eight must fail.

In opposing ground five, the Respondent submitted that although the Appellant contended that the Tribunal was wrong to have relied on the evidence of PW3 identifying the Appellant as the person who stole the maize in the dark when an identification parade was not held and the Appellant was not arrested by the police, PW3 testified that he knew the people who had raided the FRA shed because they lived in Shang'ombo Boma and he had known them for a long time. It was submitted that although the standard of proof in an election petition is higher than the balance of probabilities, an election petition is still a civil case while issues of identification parades are matters which relate to criminal trials. He cited the cases of **Chimbini v The People**[16] and **Evaristo Mulenga v The People**[17] both of which are authorities in criminal cases to press the point that an identification by a single witness is acceptable as long as the possibility of an honest mistake is ruled out. He stated that in the present case the possibility of an honest mistake was ruled out because PW3 knew the Appellant before the

[redacted] and he saw the Appellant again when he went back to the [redacted] and started distributing the maize to the electorate. The [redacted] submitted that there was a connecting link between the [redacted] and the offence in question which rendered a mistaken [redacted] too much of a coincidence.

In opposing grounds six, seven and ten, the Respondent [redacted] that the Appellant's assertion that PW4 and PW5 were [redacted] with an interest to serve due to the fact that they were PF [redacted] was unfounded and not supported by the evidence on [redacted]. That PW4 testified that he was a peasant farmer who had [redacted] the Appellant defame the Respondent and the PF leadership [redacted], and who said he voted for the Appellant due to the bribe [redacted] received from him. That in cross examination, he said he was a [redacted] who did not belong to any political party. That PW5 was [redacted] a beneficiary of the Appellant's bribery and corrupt practices [redacted] was not a PF member. It was submitted that the Tribunal [redacted] the Respondent and his witnesses credible having observed [redacted] demeanor and further, that the Tribunal made findings of fact which we, as an appellate Court, cannot interfere with. In support, he cited the case of **Wilson Masauso Zulu v Avondale Housing**

Project Limited[18] wherein the Supreme Court said an appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of relevant evidence or upon a misapprehension of the facts. The Respondent urged us to dismiss the three grounds for lack of merit.

Finally, in opposing ground nine, the Respondent submitted that although the Appellant argued that the Tribunal was wrong in not allowing him to present his case, the Appellant was not deprived of the opportunity to present his case as the record of appeal shows at page 75 that he was served with the petition on 1st September, 2016 and according to rule 11 of the Local Government Elections Tribunals Rules, Statutory Instrument No. 60 of 2016, he should have filed his answer within seven days of receiving the election petition. He argued that the section is clear and unambiguous and that the Tribunal was bound to give effect to it in according with the principle stated in **Matilda Mutale v Emmanuel Munaile**[19] to the effect that an Act of Parliament must be construed according to the words expressed in the Act itself and that if the words are clear and unambiguous, then no more is

necessary than to expound those words in the ordinary and natural sense.

The Respondent further submitted that the Appellant who was duly represented by counsel made no effort to seek leave of the Tribunal to file the answer out of time even when the Respondent raised a preliminary issue regarding whether or not the Appellant should open his defence when he had not filed an answer. The Respondent argued that even in opposing the preliminary issue, the Appellant did not apply for leave to file the answer out of time. The Respondent adopted the reasoning of the Tribunal in its ruling at pages 126 to 134 of the record of appeal and cited the case of **NFC Africa Mining Plc v Techpro Zambia Limited**[20] wherein it was held that rules of the court are intended to assist in the proper and orderly administration of justice and as such they must be strictly followed. The Respondent submitted in conclusion that ground nine has no merit and should be dismissed. He contended that the entire appeal has failed and should be dismissed.

The Appellant filed heads of argument in reply in which he more or less reiterated his heads of argument in support of the

appeal. We will not restate them here save to state that we have given due consideration to them.

We have considered the grounds of appeal, the respective parties' heads of argument and the judgment of the Tribunal.

The grounds on which an election can be nullified are set out in section 97 (2) (a) of the Electoral Process Act No. 35 of 2016 (the Act) which provides as follows:

> **"(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**
>
> **the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred."**

A consideration of section 97 (2) (a) of the Act, which is relevant to this case, reveals that the election of a candidate will only be nullified if the petitioner proves to the satisfaction of the High Court or a tribunal, as the case may be, that the candidate committed a corrupt or illegal practice or other misconduct in

to the election or that the corrupt or illegal practice or misconduct was committed by the candidate's election or polling agent or by another person with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent.

In addition to this, the petitioner must further prove that as a result of the corrupt or illegal practice or misconduct complained of, the majority of the voters in the constituency, district or ward were or may have been prevented from electing their preferred candidate.

This position of the law has been reiterated in a plethora of cases. In the persuasive case of **Mubita Mwangala v Inonge Mutukwa Wina** [9] which we have cited in a number of our recent judgments, the Supreme Court said:

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

In the earlier case of **Josephat Mlewa v Eric Wightman,** [23] which is equally persuasive, the Supreme Court held that:

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

The cases cited above aptly demonstrate the import of the majority provision under section 97 (2) (a) of the Act.

In this case, the Respondent's election petition was premised on section 97 (2) (a) of the Act. Thus, the Respondent (as Petitioner) was required to prove the commission of the alleged corrupt or illegal practices or misconduct by the Appellant or his election or polling agents or by another person with the candidate's knowledge and consent or approval or that of his election or polling agent, and further, that the majority of voters in the district were or may have been prevented from electing their preferred candidate by the electoral offence complained of.

The petitioner in an election petition, just as in any other civil matter, bears the burden to prove the electoral offence complained of. However, the standard of proof in an election petition is higher than that required in an ordinary civil action. The evidence adduced in support of allegations made in an election petition must prove the issues raised to a fairly high degree of convincing clarity. In the persuasive authority of **Lewanika and Others v Chiluba**[8] the Supreme Court said this regarding the standard of proof:

election petitions have generally long required to ... standard higher than on a mere balance of ... It follows also that the issues raised are required to be ... to a fairly high degree of convincing clarity."

... Brelsford James Gondwe v Catherine

... the Supreme Court said:

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

In the present case, the evidence adduced by the Respondent, as Petitioner, before the Tribunal needed to have proved the allegations raised in the petition to a fairly high degree of convincing clarity and to have demonstrated that the proven electoral offences committed by the Appellant or his election or polling agents were so widespread that the majority of voters in the district were or may have been prevented from electing the candidate whom they preferred.

We have borne in mind these principles and the provisions of the Act in determining this appeal.

In determining this appeal we shall first consider ground 9 of the appeal as it raises a procedural issue. Thereafter, we shall consider grounds 1 and 2 together, ground 3 on its own, and

grounds 4, 5, 6, 7, 8 and 10 together as the issues they raise are inter-related.

In ground nine, the Appellant challenges the Tribunal's refusal to allow him to adduce evidence in his defence at the trial of the petition because he did not file an answer to the petition. In determining this ground, we have examined the law that regulates the filing of a local government election petition and of an answer to such petition. Article 159 (3) of the Constitution as amended by Act No. 2 of 2016 provides that:

> **"(3) A person may file an election petition with a local government elections tribunal to challenge the election of a councillor."**

Further, Article 159 (4) provides that:

> **"(4) An election petition shall be heard within thirty days of the filing of the petition."**

Article 164 (e) of the Constitution provides for legislation on local authorities as follows:

> **"164 The following shall be prescribed:**
> **(e) election of councillors.**

Pursuant to Article 164 (e), the Electoral Process Act provides in section 102 (1) that the Electoral Commission shall have conduct of local government elections. Section 102 (1) of the Act provides that:

"(1) Subject to the other provisions of this Act, the Chief Justice may make rules regulating generally the practice and procedure of the High Court and tribunals with respect to the presentation and trial of election petitions, including rules as to the time within which any requirement of the rules is to be complied with and as to the costs of and incidental to the presentation and trial of the election petitions and as to the fees to be charged in respect of proceedings therein, and generally as regard to any other matter relating thereto as the Chief Justice may consider necessary or desirable." (Emphasis added).

The Local Government Elections Tribunals Rules, Statutory Instrument No. 60 of 2016 which were made pursuant to section 93 of the Act provides in rule 8 (2) that:

"(2) A person may file an election petition within seven days of the date on which the result of an election is declared."

Rule 11 of the said Rules provides for the filing of an answer to the petition filed under rule 8 (2) in the following terms:

"11 The Respondent shall file an answer within seven days of receipt of an election petition."

Further, rule 17 (2) provides that:

"(2) The Respondent shall be afforded an opportunity to be heard in answer to the election petition." (Emphasis added).

The provisions of rule 8 (2) of the Rules are couched in mandatory terms and require a respondent who is served with a local government election petition to file an answer within seven days of receipt of the petition. It is on the basis of the answer filed

under rule 8 (2) that a respondent will be given an opportunity to be heard by the tribunal in answer to the petition under rule 17 (2).

It follows that a respondent who fails to file an answer to a petition as required by rule 11 of the Rules forfeits his right to be heard in answer. The rationale for the requirement of the law that a respondent who wishes to be heard in answer to a petition must file an answer to the petition prior to the hearing of the petition is clear. It is in order for the petitioner to know the case that he will be expected to meet at the trial so that he can prepare for it adequately. It would be unjust to permit a respondent who has not filed an answer to a petition to mount a defence to a petition at the trial as this would be tantamount to ambushing the petitioner. It would also mean that the respondent would be at large to raise any issue without the limitation that filing an answer to the petition places upon such a respondent.

The function of pleadings was well articulated in **Mazoka and others v Mwanawasa and others**[3], wherein 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."

It is in the interest of justice that the petitioner should be given fair notice of the case which he will be required to meet. Pleadings define the issues which the Court will have to adjudicate upon. They are intended to give each party a fair hearing as was held in **British Airways Pension Trustees Limited v Sir Robert McAlpine and Sons Limited**[22], an English case of persuasive value. We endorse the sound principle of law espoused therein as well as in the **Mazoka v Mwanawasa**[3] case.

In the present case, the Appellant did not file an answer to the Respondent's petition although the record of appeal reveals that he was served with the petition in time. He also did not apply for leave to file his answer out of time and attempted to open his defence without having an answer. The Appellant's argument that he was denied the opportunity to be heard based on a technicality contrary to Article 118 (2) (e) of the Constitution is untenable and does not aid his case. His failure to file an answer in time or at all was fatal to his case.

The Tribunal was on firm ground when it refused to allow the Appellant to mount a defence in the absence of an answer. Ground nine therefore lacks merit and we dismiss it.

Before we proceed to consider the remaining grounds, we wish to clearly state that although the Appellant did not file an answer to the petition and, therefore, did not adduce any evidence in his defence before the Tribunal, the Respondent, nonetheless, still bore the burden to prove his allegations against the Appellant to the required high standard of convincing clarity, if judgment was to be entered in his favour. This is because a petitioner cannot obtain a default judgment in relation to an election petition as there is no procedure in the rules to that effect.

Further, as we stated earlier in this judgment, it is a well settled legal principle of law that the burden of proof in civil matters, including election petitions, lies on the party who asserts the affirmative of the issues. The learned authors of Phipson on Evidence, 17th edition, in paragraph 6-06, at page 151 state the following regarding the burden of proof in civil cases:

> **"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all the parties, the**

party who has this burden has not discharged it, the decision must be against him."

In the celebrated case of **Khalid Mohamed v Attorney-General**,[23] the Supreme Court refused to accept an unqualified proposition that a plaintiff should succeed automatically whenever a defence failed. The Supreme Court held that 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.

Further, in **Wilson Masauso Zulu v Avondale Housing Project Limited** [24] the Supreme Court reiterated that:

> **"(a) plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."**

We endorse the holding in these two cases.

We turn to the remaining grounds. In grounds one and two, the Appellant contends that the Tribunal erred when it nullified the election based on allegations of corruption and bribery in the absence of evidence that the Appellant committed the alleged corrupt acts. Further, that undue weight was attached to the uncorroborated evidence of the Respondent before the Tribunal. The issue we have to determine under these two grounds is essentially whether the Tribunal rightly nullified the Appellant's

election as Council Chairperson in light of the evidence adduced by the Respondent in support of the allegations in the petition. In other words, the question is, did the Respondent as petitioner adduce cogent evidence to prove the allegations of bribery, violence, character assassination and inducement which he made against the Appellant to the requisite high standard of convincing clarity in terms of section 97 (2) (a) of the Act? To answer this question, we have examined the evidence adduced by the Respondent and his witnesses, in turn.

The Respondent testified that during the campaign period the Appellant was brewing beer and freely distributing it to the electorate in Shang'ombo district, particularly at Sebumbu polling station in order to induce the voters to vote for him. He also alleged that the Appellant stole maize from the Food Reserve Agency shed and distributed it to the voters as an inducement for them to vote for him; that the matter was reported to the police but no action was taken.

The Respondent cited various incidents of violence, including at Liyuwayuwa village where he said John Kakomwisa a PF supporter was stabbed by the Appellant's agent Pumulo

Munyumbwe for attending the Respondent's rally. The Respondent said he reported the incident to the police as a result of which Paulusi Munyumbwe was arrested and prosecuted for the crime. He testified that at Beshe Ward, a councillor who stood on the UPND ticket assaulted Paulusi Namate for attending a meeting which he (the Respondent) held. That at Ngandwe polling station a PF supporter was assaulted by Nawa Mubika, Inonge Mubika and Mwakamui. He stated that the effect of the assaults was that people were afraid to vote for the PF party candidates for fear that if they did so, they would be assaulted or killed.

He further testified that the Appellant engaged in character assassination and called him a thief and a drunkard. That the Appellant's agents were canvassing for votes by giving out pens and money to voters at polling stations; that the Appellant's agents stood on the roads to the polling stations and chased away voters whom they thought belonged to the PF so that they should not vote for him.

He alleged that he lost the election as a result of all these malpractices by the Appellant and his agents.

In cross examination, the Respondent conceded that he did not witness the incidents of violence and that the Appellant was not present when the named PF supporters were assaulted.

PW1 testified that he was the District Commissioner for Shang'ombo District and the chairperson for the DMMU District Committee for Shang'ombo District. He told the Tribunal that Abel Muyendekela, a member of a non-governmental organisation (NGO) called Shang'ombo Food Production, which NGO was tasked by the DMMU Committee to distribute relief maize, informed him that on 9th August, 2016 in the night, the Appellant and three other people had broken into a FRA shed and had stolen 6 x 50 kg bags of maize. Further, that the following day on 10th August, 2016, the Appellant and others in the company of Mubika Mubika returned to the FRA shed. They were followed by a large crowd of men and women whom they instructed to collect the bags of maize which were stacked outside the shed. As the crowd collected the maize, they were told by the Appellant and the others to vote for the UPND presidential candidate and all other UPND candidates.

PW1 told the Tribunal that he instructed the NGO official to go and report the matter to the police. PW1 said he gave a statement to the police and reported the matter to the Provincial Coordinator for the DMMU who is based in Mongu.

PW1 also testified that he was the chairman of the District Security Committee in Shang'ombo and that in that capacity, he received reports of violence involving mainly PF members and that complaints were made to the Police against the perpetrators of the violence. The Police, however, took no action. He stated that the violence in Shang'ombo District was widespread and may have contributed to some voters not voting at all or voting for the UPND candidates.

PW2 Munalula Mulonda testified that on 25th July, 2016 he and John Kakomwisa went to Liyuwayuwa village where they found a rally held by the UPND. They were approached by a person in UPND regalia who asked them where they were going. They told him. they were going to the market whereupon the person started fighting with them. Other UPND cadres joined in the fight, during which fight Pumulo Munyumbwe a UPND cadre stabbed John Kakomwisa with a knife on the left shoulder. PW2 said the

Appellant was not present when he and John Kakomwisa were attacked by UPND cadres. The next day the Appellant took John to the Police and reported the matter. In cross examination, PW2 conceded that the Appellant was not present when John Kakomwisa was stabbed.

PW3 a security guard at the FRA shed in Shang'ombo testified that on 9th August, 2016, the Appellant and three other men got 6 x 50 kg bags of maize from the FRA shed. On 10th August, 2016 the Appellant in the company of Sondo Mutapwe, Kennedy Munyumbwe, Mubika Mubika and Petulu went back to the FRA shed with about 200 party cadres and took away bags of maize which were stocked within the FRA premises. PW3 alleged that the UPND leaders intended to bribe the voters with the maize which they collected.

PW4 Mukapitule Muneta of Sebumbu village testified that the Appellant and his agents went to Sebumbu village with Mubika Mubika and Mr. Nangana in July, 2016 and removed PF posters which they replaced with UPND posters. They returned every week to remove the posters and replace them. He further alleged that the Appellant and his agents also urged the electorate not to vote for