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

IN HIGH COURT FOR ZAMBIA **2026/HP/EP/031**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Election Jurisdiction)

IN THE MATTER OF: **ARTICLES 73(1) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF: **SECTIONS 72,92,96.97.98.99 AND 100(1)(a) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF: **PART III OF THE HIGH COURT (ELECTION PETITION) RULES 2026 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF: **AN ELECTION PETITION RELATING TO MSANZALA CONSTITUENCY PARLIAMENTARY ELECTIONS HELD ON THURSDAY,13th AUGUST 2026**

BETWEEN:

ELIAS DAKA (MALE) **PETITIONER**

AND

AMON MUMBA (MALE) **1st RESPONDENT**

ELECTORAL COMMISSION OF ZAMBIA **2nd RESPONDENT**

ANSWER TO PETITION

Pursuant to Rule 10(1) of the High Court (Election Petition) Rules, 2026 Statutory Instrument 31 of 2026

THE 1st RESPONDENT'S RESPONDS TO THE PETITION AS FOLLOWS;

[1.] In answer to paragraph 1 of the Petitioner's Petition, the 1st Respondent states that the averments

therein are matters within the peculiar knowledge of the Petitioner and therefore neither admits nor denies the same, but puts the Petitioner to strict proof thereof.

[2.] In answer to paragraph 2, the 1st Respondent admits that the election for Member of Parliament for Msanzala Constituency was held on 13th August 2026, at which the Petitioner and the 1st Respondent were candidates, and further admits that the Returning Officer duly declared the 1st Respondent elected as Member of Parliament for Msanzala Constituency.

[3.] In answer to paragraph 3 of the Petition, the 1st Respondent admits that the results reflect the will of the People of Msanzala Constituency and the 1st Respondent was declared the winner of the Parliamentary Election.

[4.] Contrary to paragraph 4 of the Petition, the 1st Respondent was duly elected as Member of

Parliament for Msanzala Constituency and was declared the winner by the Electoral Commission of Zambia. The Petitioner emerged 3rd and got no more than 20% of the Votes the 1st Respondent obtained.

[5.] Contrary to paragraph 4(a) of the Petition, the 1st Respondent maintains that the recording of the votes on the Gen 20 Forms by the Electoral Commission of Zambia was not characterized by rampant and widespread irregularities and clear mathematical discrepancies. The Petitioner did not raise any such concerns during the counting and recording of the votes on the Gen 20 Forms.

[6.] Paragraph 4(i) of the Petition is incomplete hence difficult to respond to. The Petitioner will at the hearing of the Petition be put to strict proof.

[7.] Paragraph 4(ii) of the Petition is denied and the Petitioner shall at the hearing of this Petition be put to strict documentary proof. The Petitioner has not

produced an exhibit supporting the allegation contained in the said paragraph.

[8.] Paragraph 4(iii) of the Petition is denied. The Petitioner shall at the hearing of this Petition be put to strict documentary proof.

[9.] Paragraph 4(iv) of the Petition is denied. The Petitioner shall at the hearing of this Petition be put to strict documentary proof.

[10.] Paragraph 4(v) of the Petition is denied. The Petitioner shall at the hearing of this Petition be put to strict documentary proof.

[11.] Paragraph 4(b) of the Petition is denied. The Petitioner shall at the hearing of this Petition be put to strict documentary proof.

[12.] Paragraph 4(b)(i) of the Petition is denied. The Petitioner shall at the hearing of this Petition be put to strict documentary proof.

[13.] Paragraph 4(b)(ii) of the Petition is denied. The Petitioner shall at the hearing of this Petition be put to strict documentary proof.

[14.] Paragraph 4(b)(iii) of the Petition is denied. The Petitioner shall at the hearing of this Petition be put to strict documentary proof.

[15.] The 1st Respondent will aver at the hearing that the allegations relating to illegality and the purported failure to follow procedure should have been challenged by way of Judicial Review in accordance with the law.

[16.] In answer to paragraphs 4(C) and 4(C)(ii), the 1st Respondent states that the purported an unsubstantiated allegations concerning the unlawful movement of ballot papers and the purported breach of established chain of custody of the ballot papers are an untrue and are matters within the peculiar knowledge of the Returning Officer and the Electoral Commission of Zambia (hereinafter called the 2nd

Respondent) and are therefore not within the 1st Respondent's knowledge; the 1st Respondent, however, states that, so far as he is concerned, the election was conducted properly and without any illegality, irregularity or breach of procedure.

[17.] Further to the preceding paragraph, the 1st Respondent shall show at the hearing that the said video evidence has not been produced in the affidavit, has not be authenticated and its originality has not been ascertained. The 1st Respondent will object to the production of the purported video recording.

[18.] The 1st Respondent denies the allegations contained in paragraph 4(d) of the Petition. The 1st Respondent will aver at the hearing that the Petitioner failed to report the alleged corrupt or illegal practices to any Law Enforcement Agency, and has failed to produce any official report or documentation confirming that such reports were made.

[19.] The 1st Respondent denies the allegations contained in paragraph 4(d)(i) of the Petition. The Petitioner has failed to provide any documentary or probative evidence to support the allegations of bribery and corruption. The 1st Respondent avers that neither he nor his agents distributed money or resources to voters, and further notes that the Petitioner has failed to specify the manner in which the alleged funds were distributed.

[20.] The 1st Respondent denies the allegations contained in paragraph 4 (d)(ii) of the Petition. The 1st Respondent avers that party agents do not possess the mandate or capacity to assign or alter votes; their role is strictly limited to witnessing and verifying the tabulation of votes. The votes accrued by the 1st Respondent reflects the lawful will of the electorate of Msanzala Constituency, as officially verified and declared by the Electoral Commission of Zambia.

[21.] The 1st Respondent denies the allegations contained in paragraph 5 of the Petition. The 1st Respondent will aver at the hearing that the Petitioner did not report the purported allegations to any Law Enforcement Agency and has failed to produce any of the un-marked campaign materials alleged to have been distributed.

[22.] The 1st Respondent denies the allegations contained in paragraph 6 of the Petition and puts the Petitioner to the strictest proof thereof.

[23.] The 1st Respondent denies the allegations contained in the repeated paragraph 5 of the Petition. The Msanzala Constituency election was conducted by the Electoral Commission of Zambia in a lawful, transparent, and professional manner. Prior to the declaration of results, the Petitioner explicitly affirmed his satisfaction with the handling of the election and the tabulation process.

[24.] Contrary to the allegations contained in paragraph 6 of the Petition, the 1st Respondent avers that he was validly elected as Member of Parliament for Msanzala Constituency in full compliance with the law, reflecting the true democratic will of the electorate.

[25.] The 1st Respondent will aver that the Petitioner is not entitled to any of the reliefs sought, as the results across all polling stations demonstrate a decisive lack of electoral support for the Petitioner. The 1st Respondent avers that the Petitioner is not entitled to any of the reliefs sought, as this Petition constitutes an abuse of the court process aimed at undermining the lawful will of the electorate. Consequently, the 1st Respondent prays that this Petition be dismissed with costs awarded against the Petitioner.

[26.] The 1st Respondent denies that his election was conducted in contravention of sections 72, 73(1), 92, 96 97(1)(b) and 100 all of the Electoral Process Act No. 35 of 2016, or any other provision of the Laws of Zambia and states that the allegations contained therein relate principally to the conduct of the Returning Officer and/or the Electoral Commission of Zambia, neither of whom was under the control or direction of the 1st Respondent; the 1st Respondent maintains that the election was properly conducted and that he was duly declared elected.

[27.] In answer to relief 1, the 1st Respondent opposes the prayer that his election be declared null and void and states that the Petitioner has failed to identify any act, omission, malpractice or misconduct personally committed, authorised, procured or participated in by the 1st Respondent capable of invalidating his election.

[28.] The 1st Respondent will aver and show at the hearing of this Petition that the people of Msanzala Constituency have given their collective and individual consent to served and be led by him.

[29.] In answer to relief 1, the 1st Respondent opposes the said relief as the election of the 1st Respondent was not characterized by illegal practices. The Petitioner has even failed to establish that the 1st Respondent approved any of the alleged illegal practices purportedly committed by his agents.

[30.] In answer to relief 3, the 1st Respondent opposes the said relief. There is no need to either set aside the will of the people of Msanzala or direct that fresh elections be held. The people of Msanzala have chosen their servant and leader.

[31.] In answer to relief 3, the 1st Respondent opposes the same. The costs of this application must be borne by the Petitioner for launching a Petition which is unmeritorious, frivolous and vexatious.

[32.] The 1st Respondent states that he was merely a candidate in the election and had neither the statutory authority nor practical control over the conduct of the tallying process, the Returning Officer, the Electoral Commission of Zambia or the security arrangements at the Tallying Centre.

[33.] The 1st Respondent further states that he did not count the votes, verify the GEN20 Forms, prepare the electoral returns, direct the Returning Officer, or declare himself the winner. He was declared duly elected by the Returning Officer after the completion of the electoral process.

[34.] The 1st Respondent accordingly maintains that he was validly elected as Member of Parliament for Msanzala Constituency, having obtained over 7, 000 votes against the Petitioner's 1, 416 votes, a majority

of over 5,000 votes, and that the Petitioner's allegations, insofar as they are unsupported by cogent evidence connecting the 1st Respondent to any unlawful act or material electoral irregularity, cannot avail the Petitioner.

[35.] Save as expressly admitted herein, the 1st Respondent denies each and every allegation contained in the Petition and puts the Petitioner to strict proof thereof.

[36.] WHEREFORE, the 1st Respondent prays that this Honourable Court be pleased to dismiss the Petition in its entirety, uphold the election and declaration of the 1st Respondent as the duly elected Member of Parliament for Msanzala Constituency, dismiss the reliefs sought by the Petitioner, and award the costs of

and incidental to the Petition to the 1st Respondent, together with such further or other relief as this Honourable Court may deem just.

DATED at Lusaka this _____day of _____2026.

AMON MUMBA
(1ST RESPONDENT)

Drawn By:

Messrs. Kang'ombe & Associates, Plot No. 1176, House No. 2, Nyati Close, Addis Ababa Road, Rhodes Park, P.O Box 39428, Email:kangom6@gmail.com, Lusaka Zambia

Advocates for the 1st Respondent

To:

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Lusaka, Zambia

The Electoral commission of Zambia

The Commission Chairperson

Elections House, Haile Selassie Avenue

Longacres

P.O Box 50274

Lusaka, Zambia

IN HIGH COURT FOR ZAMBIA **2026/HP/EP/031**
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ELIAS DAKA (MALE) **PETITIONER**
AND
AMON MUMBA (MALE) **1st RESPONDENT**
ELECTORAL COMMISSION OF ZAMBIA **2nd RESPONDENT**

LIST OF AUTHORITIES AND COPIES OF THOSE AUTHORITIES

Pursuant to Rule 10(2)(c) of the High Court (Election Petition) Rules, 2026 Statutory Instrument 31 of 2026

IF IT MAY PLEASE THIS HONOURABLE COURT The 1ST RESPONDENT shall rely upon the following authorities, copies of

unreported decisions and excerpts from other works in support of their Petition and arguments:

[1.] LIST OF AUTHORITIES;

1.1. LEGISLATION

1. Constitution of Zambia (Amendment) Act No. 2 of 2016 as Amended by Act No. 13 of 2025.
2. The Electoral Process Act No. 35 of 2016 as Amended by Act No.12 of 2026
3. The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia

1.2. CASES

1. Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others, Presidential Election Petition Nos. SCZ/01/02/03/2002;
2. Bowman Lusambo Vs Bernard Kanengo & The Electoral Commission of Zambia 2021-CCZ-A0019 – Jul 2022
3. Luo v Mwamba and Another Selected Judgment No. 51 of 2018
4. Masumba v Kamondo (2017) 3 Z.R. 130
5. Mutapwe v Shomeno Appeal No. 19 of 2017

Dated at Lusaka this ..... Day of ..... 2026.

Drawn by:

Messrs. Kang'ombe & Associates, Plot No. 1176, House No. 2, Nyati Close, Addis Ababa Road, Rhodes Park, P.O Box 39428, Email:kangom6@gmail.com, Lusaka Zambia

Advocates for the 1st Respondent

IN THE CONSTITUTIONAL COURT OF ZAMBIA 2023/CCZ/A002
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
25 JAN 2024
REGISTRY
BOX 50067 LUSAKA

IN THE MATTER OF:	ARTICLE 1 (2), (3), 8 (c) (d) (e) AND 9 (1) (b) OF THE CONSTITUTION OF ZAMBIA, CHAPTER ONE OF THE LAWS OF ZAMBIA
IN THE MATTER OF:	ARTICLE 73(1) AND 70(1) OF THE CONSTITUTION OF ZAMBIA, CHAPTER ONE OF THE LAWS OF ZAMBIA AS READ TOGETHER WITH SECTION 96 (1) (a) (c) (i) AND (2) OF THE ELECTORAL PROCESS ACT No. 35 of 2016
IN THE MATTER OF	ARTICLE 45 (1), (a), 2 (a) (c) (e) AS READ TOGETHER WITH ARTICLE 52 (4) OF THE CONSTITUTION OF ZAMBIA, CHAPTER ONE OF THE LAWS OF ZAMBIA
IN THE MATTER OF	SECTION 97 (1), 2 (b) AND (4) AS READ TOGETHER WITH SECTION 83 (2) AND 99 (a) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF	SECTION 98 (a) (b) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF	SECTION 4 (1) AND (2) (a), (b) AND (c) OF THE ELECTORAL COMMISSION ACT NO. 25 OF 2016
IN THE MATTER OF	THE NATIONAL ASSEMBLY BY - ELECTIONS (KABUSHI CONSTITUENCY No. 36 AND KWACHA CONSTITUENCY No. 22) (ELECTION DATE AND TIME OF POLL) (NO. 3) ORDER, 2022.

IN THE CONSTITUTIONAL COURT OF ZAMBIA 2023/CCZ/A002

HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
25 JAN 2024
REGISTRY
BOX 50067 LUSAKA

IN THE MATTER OF:	ARTICLE 1 (2), (3), 8 (c) (d) (e) AND 9 (1) (b) OF THE CONSTITUTION OF ZAMBIA, CHAPTER ONE OF THE LAWS OF ZAMBIA
IN THE MATTER OF:	ARTICLE 73(1) AND 70(1) OF THE CONSTITUTION OF ZAMBIA, CHAPTER ONE OF THE LAWS OF ZAMBIA AS READ TOGETHER WITH SECTION 96 (1) (a) (c) (i) AND (2) OF THE ELECTORAL PROCESS ACT No. 35 of 2016
IN THE MATTER OF	ARTICLE 45 (1), (a), 2 (a) (c) (e) AS READ TOGETHER WITH ARTICLE 52 (4) OF THE CONSTITUTION OF ZAMBIA, CHAPTER ONE OF THE LAWS OF ZAMBIA
IN THE MATTER OF	SECTION 97 (1), 2 (b) AND (4) AS READ TOGETHER WITH SECTION 83 (2) AND 99 (a) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF	SECTION 98 (a) (b) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF	SECTION 4 (1) AND (2) (a), (b) AND (c) OF THE ELECTORAL COMMISSION ACT NO. 25 OF 2016
IN THE MATTER OF	THE NATIONAL ASSEMBLY BY - ELECTIONS (KABUSHI CONSTITUENCY No. 36 AND KWACHA CONSTITUENCY No. 22) (ELECTION DATE AND TIME OF POLL) (NO. 3) ORDER, 2022.

IN THE MATTER OF	THE ELECTORAL (CODE OF CONDUCT) REGULATIONS 2011 STATUTORY INSTRUMENT NO. 52 OF 2011
IN THE MATTER OF	THE SCHEDULE TO THE ELECTORAL PROCESS ACT NO. 35 OF 2016.
IN THE MATTER OF	THE KABUSHI CONSTITUENCY BY ELECTION HELD ON THE 21ST DAY OF OCTOBER 2022.

BETWEEN:

BOWMAN CHILOSHA LUSAMBO	APPELLANT
AND	
BERNARD KANENGO	1st RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA	2nd RESPONDENT
THE ATTORNEY GENERAL	3rd RESPONDENT

Coram: **Shilimi, DPC, Chisunka, Mwandenga, Kawimbe and Mulife, JJC on 11th October 2023 and 25th January 2024**

For the Appellant:	Mr. M. Zulu, Mr. J. Zimba and Mr. E. Phiri of Messrs Makebi Zulu Associates
For the 1st Respondent:	Mr. C. Maggubwi and Mr. Chilekwa Maggubwi of Messrs Maggubwi & Associates
For the 2nd Respondent:	Ms. T. Phiri and Mr. M. Bwalya – In House Counsel
For the 3rd Respondent:	Mr. M. Muchende SC-Solicitor General; Mr. C. Mulonda – Principal State Advocate and Mr. N. Mwiya Principal State Advocate

JUDGMENT

Kawimbe JC., delivered the Judgment of the Court.

Cases Referred To:

1. Gilbert Hamalambo v Zambia National Building Society, SCZ, Appeal No. 64/2013
2. George Muhali Imbwae v Attorney General and Electoral Commission of Zambia, CCZ Selected Judgment No. 12 of 2018
3. Isaac Mwanza v Electoral Commission of Zambia and Attorney General 2020/CCZ/008
4. Mlewa v Wightman (1995-1997) ZR 11
5. Institute of Law, Policy Research and Human Rights and Two others v Electoral Commission of Zambia, Attorney General and Three Interested Parties, 2022/CCZ/0029
6. Benard Kanengo v Electoral Commission of Zambia and Attorney General 2022/CCZ/0024
7. Giles Chomba Yamba Yamba v Kapembwa Simbao, Electoral Commission of Zambia and Others, CCZ, Selected Judgment No. 6 of 2018
8. Governance Elections Advocacy Research Services Initiative Zambia Limited v The Attorney General and the Electoral Commission of Zambia 2022/CCZ/0020
9. Peter Chazya Sinkamba, Issac Mwanza v Electoral Commission of Zambia 2022/CCZ/0023
10. Munir Zulu v Gertrude Pilila Mwanza 2021/CCZ/009
11. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba, The Attorney General and others SCZ Judgment No. 14 of 1998
12. Indira Nehru Gandhi (Smt.) v Raj Narain & Anr on 24 June 1975
13. Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba & Attorney General, CCZ Selected Judgment No. 51 of 2018
14. Patrick Banda v Attorney General, CCZ, 2022/CCZ/A005
15. Bizwayo Nkunika v Newton Nyirenda & Electoral Commission of Zambia 2019/CCZ/005
16. Margaret Mwanakatwe v Charlotte Scott, CCZ, Appeal No. 14 of 2016
17. Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu, Inonge Wina and Electoral Commission of Zambia 2016/CCZ/003

18. Sibongile Mwamba v Kelvin M. Sampa and the Electoral Commission of Zambia CCZ, Selected Judgment No. 57 of 2017
19. Allen Banda v Bornwell Matanda & Electoral Commission of Zambia 2021/CCZ/A0025
20. Governance Elections Advocacy Research Services Initiative Zambia Limited v The Attorney General & The Electoral Commission of Zambia 2022/CCZ/0020
21. Zacharia Okoth Obada v Edward Akong'o Oyugi and 2 Others eKLR (2014)

Legislation Referred To:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by The Constitution of Zambia (Amendment) Act No. 2 of 2016.
2. The Electoral Process Act, No. 35 of 2016
3. Regulation 18(7) of the Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016
4. The Rules of the Supreme Court 1999 Edition

Other Works Referred To:

1. African Charter on Human People's Rights adopted by the Organisation of African Unity (now African Union) 1st June,1981
2. United Nations General Assembly International Covenant on Civil and Political Rights 16th December, 1966
3. General Comment No. 25 of the United Nations Human Rights Committee on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (1) (2) adopted at the 1510th Meeting of the Committee at its 57th Session, 12th July, 1996

[1] INTRODUCTION AND FACTUAL BACKGROUND

[1.1] This case raises an important question on the legal principles of vitiating an election, which is alleged to have been conducted in

contravention of constitutional principles and the electoral laws. It arises from the Appellant's grievance which is traceable to the August 2021 General Election, when he was elected and declared as the Member of Parliament for Kabushi Constituency in Copperbelt Province. The outcome aggrieved the 1st Respondent who petitioned the results of the election before the Ndola High Court, and it subsequently nullified the Appellant's election. The Appellant was dissatisfied with the outcome and appealed the decision before this Court under cause no. 2021/CCZ/A0019. The nullification decision of the High Court was upheld by this Court. The Court did not make any pronouncement on whether the Appellant was disqualified from contesting future elections in Kabushi Constituency.

[1.2] After our judgment, the 2nd Respondent set new dates for the Kabushi Constituency by-election. The date for filing nominations was announced as 25th August, 2022 while 15th September, 2022 was declared as the election date. On 21st August, 2022 the Patriotic Front Party adopted the Appellant as its parliamentary candidate for the Kabushi Constituency by-election. On 24th August, 2022, the 2nd Respondent issued a statement that it would not accept nominations from candidates whose seats had been nullified by the courts and thereby causing vacancies in the National Assembly. On 25th August, 2022, the Appellant and other candidates filed their nomination

papers before the 2nd Respondent's agents. The Appellant's nomination papers were rejected on the ground that he was ineligible to participate in the by-election because the court had nullified his earlier election victory.

[1.3] Disgruntled by the 2nd Respondent's action, the Appellant challenged the decision through a petition that was before the High Court in cause No. 2022/HP/1327. He alleged that the 2nd Respondent's action contravened section 98(b) of the Electoral Process Act (EPA) and asserted that neither the High Court nor Constitutional Court judgments disqualified him from participating in the by-election. The Appellant also applied for a stay of the election of 15th September 2022, before the High Court and the prayer was granted.

[1.4] While the stay order was still in operation, one of the candidates, an independent contestant, Mr. Alfred Joseph Yombwe resigned from the election. He later rescinded his decision on 13th September, 2022. According to the Appellant, the 2nd Respondent should have cancelled the nominations of the by-election and called for a fresh process. Before the High Court rendered its decision in the nomination petition, the 3rd Respondent applied for a stay of delivery of judgment before the Court of Appeal. The action was motivated by

the fact that this Court had not determined whether the High Court had jurisdiction to hear the Appellant's nomination petition.

[1.5] On 22nd September 2022, the Court of Appeal granted the 3rd Respondent a stay of the High Court proceedings. Later, on 20th October 2022, we delivered judgment in which we determined that the High Court ran out of jurisdiction to hear the Appellant's nomination petition. In the end, the High Court never delivered a judgment in the Appellant's nomination petition. Subsequently, the 2nd Respondent on 11th October, 2022 announced 21st October, 2022 as the new date for the by-election in Kabushi Constituency. The election was held on that day.

[1.6] The 1st Respondent emerged as winner in the by-election and was declared as the duly elected Member of Parliament for Kabushi Constituency. Dissatisfied with the outcome, the Appellant petitioned the High Court challenging the conduct of the by-election. He claimed that the election was not held in conformity with the law and that he was prevented from participating in the election. In the Appellant's view, the by-election was illegally conducted because there was a stay order that had been granted by the High Court on 13th September, 2023, which was still in force. Further, that the 2nd

Respondent had no authority to call for fresh nominations after the resignation from the election by the independent candidate.

[1.7] The Appellant's petition was heard by Lady Justice Ruth Chibbabbuka of the High Court. She dismissed the petition and aggrieved by the outcome, the Appellant filed this appeal before us.

[2] GROUNDS OF APPEAL

[2.1] These are stated here below: -

i) **The lower court erred in both law and fact when it held that the Petitioner's petition failed to adduce any evidence of non-compliance by the 2nd Respondent with the provisions of the Electoral Process Act No. 35 of 2016;**

ii) **The lower court erred in both law and fact when it held that the election petition was an abuse of court process as the same was used as an appeal mechanism of cause no. 2022/HP/1327;**

iii) **The lower court erred in both law and fact when it held that the grievances arising out of the rejection of the nomination have already been litigated under cause no. 2022/HP/1327;**

iv) **The lower court erred in both law and fact when it held that following the decision of Bernard Kanengo v Attorney**

General, the stay or suspension of elections by the High Court was automatically discharged;

v) The lower court erred both in law and fact when it failed to render the said election null and void following the prevention of the Appellant from contesting the 21st October 2022 by-election by the 2nd respondent.

[3] APPELLANT'S CASE

[3.1] On behalf of the Appellant, learned counsel filed heads of argument into Court on 10th May, 2023.

Ground 1

[3.2] Counsel begun his submissions by averring that the people of Kabushi Constituency shunned the by-election of 21st October 2022. This is because their preferred candidate, namely the Appellant, was prevented by the 2nd Respondent from participating in the election. According to counsel the results confirmed his assertion as shown here below: -

Kanengo Bernard	UPND	6, 553
Kalasa Richard	Independent	4, 607
Telela Osias	LM	226
Yombwe Alfred	Independent	81

[3.3] In counsel's view, the representation of voters was way below the number of registered voters in the constituency and the lower Court should have paid attention to this fact including the cogent evidence of the Appellant's witnesses which demonstrated the voter apathy. Hence, the election conducted by the 2nd Respondent was not in conformity with the EPA and particularly section 4 of the Act requiring elections to be free and fair.

Ground 2

[3.4] Under this head, counsel submitted that the lower court erred when it found that the Appellant's case amounted to a multiplicity of actions and an abuse of court process. To support the assertion, our attention was drawn to the case of **Gilbert H. Hamalambo v Zambia National Building Society**[1] where the Supreme Court stated that:

> **Multiplicity of actions refers to commencement of more than one action on the same facts or transaction. Piece meal litigation is the same as multiplicity of actions; it is litigation that is split and instituted in chapters**

[3.5] Counsel next argued that, there were no pending proceedings involving the parties herein before any court. Further, that what was sought under cause no. 2022/HP/1327 was different from this

case. In addition, there was no evidence that the same subject matter involving the same parties had been brought under this appeal seeking the same reliefs as in the Appellant's nomination petition. Thus, the lower court made perverse findings on the contention..

Ground 3

[3.6] Counsel further submitted that no court had dealt with the Appellant's grievances on being prevented from participating in the Kabushi Constituency by-election. This issue lay at the heart of the appeal and before this Court, therefore, no relief was being sought over the Appellant's failed nomination case because this Court had no jurisdiction.

[3.7] For this position, counsel cited the case of **George Muhali Imbwae v Attorney General and Electoral Commission of Zambia**[2], where we struck out *Order IX Rule 4 of the Constitutional Court Rules* for being unconstitutional. We also held in that case that no appeals in nomination cases can lie from the decision of the High Court as this is contrary to the provisions of the Constitution.

[3.8] Counsel went on to submit that a challenge of an election by way of petition could only be initiated post-election. Thus, the issue whether fresh nominations ought to have been called for or not,

only arose post-election. As such, the Appellant's cause of action only arose after the by-election held on 21st October, 2022.

Ground 4

[3.9] On the stay of elections, counsel submitted that the order granted by the High Court in cause no. 2022/HP/1327 was still in force because it had not been reversed, vacated or terminated. It was predicated by the determination of the nomination petition as what was stayed was the holding of any by-election in Kabushi Constituency and not nominations. Going against the stay order would prejudice the Appellant's position. However, in total defiance of the order the 2nd Respondent purportedly conducted an illegal by-election in the constituency. Based on the submission, the Court was urged to vitiate the election result.

Ground 5

[3.10] Under this head, counsel submitted that the 2nd Respondent's agents did not follow the mandatory provisions of Article 52(6) of the Constitution by preventing the Appellant from recontesting the Kabushi Constituency seat. In addition, the 2nd Respondent's failed to cancel the by-election and call for fresh nominations after the independent candidate resigned from the election. Regarding our decision in the **Isaac Mwanza v Electoral Commission of**

Zambia and Attorney General[3] case, on the resignation of candidates from the elections; counsel argued that it did not affect the Appellant's case. This is because it was made post the event herein and after the Appellant's cause of action accrued.

[3.11] Counsel, however, conceded that this Court categorically addressed the issues of resignation and rescission of candidatures in elections. Further, that the Court settled the law in Article 52(6) of the Constitution that it does not provide for rescission of resignation by a candidate in an election.

[3.12] Accordingly, the 2nd Respondent's failure in calling for fresh nominations despite being aware of this Court's decision, amounted to breach of the EPA. Additionally, by deliberately preventing the Appellant from participating in the by-election, the results obtained therein were invalid because of the illegalities committed by the 2nd Respondent.

[3.13] To reinforce the submission, counsel referred us to case of **Mlewa v Wightman**[4] where the Supreme Court citing with approval the cases of ***Jere v Ngoma (1969) and Limbo v Mutuwa (1974)*** held that it was illegal to prevent a candidate from contesting in an election. In this regard, the Supreme Court stated that:

> **Where evidence shows that a candidate for election to Parliament was prevented by the misconduct of other persons, from lodging his nomination papers with the returning officer, such misconduct essentially makes the election in the particular constituency void. The election was nullified under paragraph (a) because the petitioner had been prevented by a crowd of people, nothing to do with the respondent, from lodging his nomination paper.**

[3.14] We were urged by counsel to uphold the Supreme Court's decision on prevention of candidates and to consequently vitiate the by-election of 21st October, 2022 for being illegal and failing to comply with the law. Further that, the laxity exhibited by the 2nd and 3rd Respondents in failing to comply with the High Court orders and 1st Respondent's willingness to participate in a questionable election, affirmed the position that the by-election was illegal. In concluding, counsel prayed to Court to void the elections with costs to the Appellant.

[4] 1st RESPONDENT'S CASE

[4.1] On behalf of the 1st Respondent, learned counsel filed opposing heads of argument into Court on 3rd October, 2023.

[4.2] He began by attacking ground 5 of appeal contending that Article 52 of the Constitution was self-prescriptive of the remedy that was available to a candidate or indeed any person who was aggrieved

by the results of a nomination process. Counsel then singled out Article 52 (4) of the Constitution, as the remedy, which the Appellant ought to have pursued over his nomination challenge before the High Court.

[4.3] Counsel added that the law did not provide for rejection of a nomination as a basis for challenging an election under sections 97(2) b and (4) of the EPA as submitted by counsel for the Appellant. To his credit, the Appellant invoked the remedy under Article 52(4) of the Constitution but was unsuccessful because his challenge became statute barred. Hence, he had no right to extend his grievances on nomination to section 97 (2) b and (4) of the EPA, through his failed election petition.

[4.4] In support of the argument, counsel cited the case of **Institute of Law, Policy Research and Human Rights and Two Others v Electoral Commission of Zambia, Attorney General and Three Interested Parties,**[5] where we stated that:

> **In the petition, the Petitioners alleged that Article 52(6) of the Constitution of Zambia had been violated by the Electoral Commission of Zambia (hereinafter the 1st Respondent) by not cancelling the scheduled by-elections and holding fresh nominations following the resignation of two independent candidates from the scheduled by-election. We cannot fault the 2nd**

Respondent for failing to cancel the by-election in Kabushi and Kwacha Constituencies.

[4.5] By our holding, counsel argued that there was nothing illegal about the by-elections and in essence, the Appellant had no case. Counsel next adverted to the case of **Benard Kanengo v Electoral Commission of Zambia and Attorney General**[6] where we stated that:

> **... the High Court has jurisdiction which jurisdiction must be exercised within 21 days' time frame given by the Constitution under Article 52(4). In sum to answer the two questions, the 21 days in Article 52 (4) cannot be stopped or enlarged by any Court or authority.**

[4.6] On the Appellant's submission that the resignation of the independent candidate should have caused fresh nominations to be called for the by-election; counsel argued that the matter had been overtaken by events. This was for the reason that this Court had given guidance in the cases of **Institute of Law, Policy Research and Human Rights**[5] and **Benard Kanengo**[6] on the issues of resignation or recission by candidates in an election. In any event, the Appellant's arguments on his exclusion from the election was baseless because it was grounded on his resuscitated

issue about his nomination in a matter that had become *res judicata*.

[4.7] Referring to the case of **Mlewa v Wightman**[4], counsel argued that the facts and circumstances therein were distinguishable from the current one. Additionally, that the authorities were pre the 2016 electoral law regime where the grounds for annulling or avoiding an election had changed. With the new law, section 97 (2) of the EPA had introduced new standards on the threshold for voiding elections and the **Mlewa case** was inconsequential.

[4.8] That position notwithstanding, the 1st Respondent had nothing to do with the Appellant's alleged prevention in filing his nomination papers. This is because it was not done with his knowledge and consent, or approval or through his agents. The fact that the 2nd Respondent did not call for fresh nominations did not fall as a ground for voiding the by-election under section 97(2) of the EPA.

Ground 1

[4.9] Under this ground, counsel averred that the Appellant's allegations concerning the breach of the EPA were disclosed in the record of appeal. The allegations were however, debunked by the cases of **Benard Kanengo**[6], **Institute of Law, Policy Research and Human Rights** and Two **Others**[5]. Thus, it could not be said that

the Appellant's alleged exclusion from the election affected the majority of voters in Kabushi Constituency by failing to select their preferred candidate.

[4.10] According to counsel, the lone evidence of PW3 on his vote, which would have gone to the Appellant in the by-election was of little value compared to the majority voters in the constituency. Counsel further argued that on a balance of probabilities, it would be illogical and fallible to conclude that the mood and decision of the members in Kabushi Constituency, who did not vote, depended on the evidence of the single witness.

[4.11] It was also his argument, considered with the pleadings and evidence, before the lower court, that the Appellant miserably failed to prove his claims against the 2nd Respondent.

[4.12] Counsel argued that it was not demonstrated at all that the 2nd Respondent flouted any provisions of law or procedures in the EPA, that it ought to have followed or adhered to. Instead, the Appellant tried to cross pollinate the 2nd Respondent's rejection of his nomination papers under Article 72(4) of the Constitution as constituting breach envisaged under section 97(2) and (4) of the EPA. This, in counsel's view, turned out to be a futile attempt.

Ground 2

[4.13] Under this ground, counsel averred that the Appellant's appeal oscillated around what he termed as prevention of an eligible candidate from participating in the by-election. He principally stated two factors to support his case namely; that is, the rejection of his nomination by the 2nd Respondent alleged and the latter's refusal to call for fresh nominations after an independent candidate resigned from the contest. In counsel's view, the allegations were baseless because the Appellant failed to prove them before the lower court. The ground, therefore, should not have graced the appeal.

[4.14] In any case, the Appellant had been pursuing cause no. 2022/HP/1327, where he asked the High Court to call for fresh elections. Consequently, the reliefs sought herein and before the High Court were not different and related to the same subject matter or facts involving the same parties before the different courts. In short, the Appellant's appeal was misconceived and he was guilty of abusing the process of court.

Ground 3

[4.15] Under this head, counsel argued that the Appellant deliberately failed to recognise that for one to participate in an election, the

nomination had to be successfully filed in. However, the Appellant's nomination was rejected but this did not amount to preventing him in participating in the election. His remedy was available in Article 52 (4) of the Constitution and he had full recourse under cause no. 2022/HP/1327, despite the fact that the High Court never delivered judgment because it ran out of time.

[4.16] Counsel contended that the Appellant failed to prove the alleged prevention committed by the 2nd Respondent. Fresh nominations were not called for after the independent candidate resigned and according to counsel, the argument was secondary because this Court decided the issue. In any case, Appellant's cause of action arose immediately after the 2nd Respondent announced the election date. Thus, it was up to him to challenge the issue of his nomination. Instead, the **Institute of Law, Policy Research and Human Rights and Two Others**[5] rose to the challenge and this court settled the matter. It was averred that the Appellant who was privy to this case as an interested party therefore, had no right to resurrect spent arguments through the failed election petition and consequent appeal.

Ground 4

[4.17] Counsel submitted that there was no issue under this ground because our decision in the case of **Bernard Kanengo**[6] was sound both in fact and law. The Appellant was therefore, precluded from arguing that after the proceedings under cause no. 2022/HP/1327 collapsed, the stay order granted by the High Court remained in force. According to counsel, the argument defied both factual and legal reasoning because it was utterly flawed to insinuate that orders granted for instance in a dismissed action could survive the aftermath. In short, after cause no. 2022/HP/1327 collapsed by effluxion of time, the stay order granted therein lapsed.

[4.18] Counsel concluded with a prayer to Court to dismiss the appeal.

[5] 2nd RESPONDENT'S CASE

[5.1] Learned counsel for the 2nd Respondent filed opposing heads of argument into Court on 3rd October, 2023.

Ground 1

[5.2] Counsel argued that the lower court was on firm ground when it held that the Appellant failed to adduce any evidence of non-compliance by the 2nd Respondent. Instead, the election was held in conformity with the law and on the basis of the record of appeal, the Appellant had failed to demonstrate the 2nd Respondent alleged

wrongdoing. It was further argued that in terms of section 97(2) (b) of the EPA the Appellant failed to meet the burden of proof threshold for voiding an election on **convincing clarity.** This was a requirement of the law and anything short could not be entertained by the court.

[5.3] Counsel averred that the ingredient of non-compliance of the law more importantly, hinged on the results of the election. For the proposition of the law, he cited the case of **Giles Chomba Yamba Yamba v Kapembwa Simbao, Electoral Commission of Zambia and Others**[7], where we stated that:

> **It is unequivocal that section 97(2) (b) relates to non-compliance with the provisions of the law in the conduct of elections. It calls for the annulment of the elections in the event that there has been non-compliance with the principles laid down in the Electoral Process Act in as far as the conduct of elections is concerned.**

[5.4] Counsel argued that the Appellant failed to demonstrate the non-compliance. In any case, the allegation that the Statutory Instrument issued by the 2nd Respondent for the by-election held on 21st October 2023 was illegal, had not been challenged before any court. Thus, it could not be raised in the present appeal. In addition, counsel dismissed the argument that the 2nd Respondent's failed to comply with the law for not calling fresh

elections after the resignation of Mr. Alfred Yombwe. According to counsel, the High Court had no jurisdiction to interpret the Constitution and was on firm ground when it dismissed the issue.

[5.5] Subsequently, our judgment in the case of **Governance Elections Advocacy Research Services Initiative Zambia Limited v The Attorney General and the Electoral Commission of Zambia**[8] settled the issue when we held that:

> **Article 52 (6) does not apply to an independent candidate who files nomination papers for election as a Member of Parliament in accordance with Article 52(1) of the Constitution. We further determine that the framers of Article 52(6) had a political party in mind when they provided that where a candidate resigns after the close of nomination but before the election date, the ECZ must cancel the election and require the filing of fresh nominations by eligible candidates and thereafter hold elections within thirty days of the filing of the fresh nominations.**

[5.6] According to counsel, there was no need for the Appellant to insist on the issue of resignation because it was decided by this Court, that a candidate resigning from an election did not apply to an independent candidate. Hence, the candidate who resigned in the Kabushi Constituency by-election being an independent candidate did not invite the provision of Article 52(6) of the Constitution.

Ground 2

[5.7] Counsel argued that the lower court was on firm ground when it held that the Appellant's petition amounted to an abuse of court process. Since counsel adopted similar argument as his learned friends on behalf of the 1st Respondent, his submission shall not be repeated (for the sake of brevity).

Ground 3

[5.8] It was contended that the lower court was on firm ground when it held that the grievances arising out of the Appellant's nomination had already been litigated under cause no. 2022/HP/1327. To support his position, counsel drew our attention to the case of **Peter Chazya Sinkamba, and Issac Mwanza v Electoral Commission of Zambia**[9] where we declined to grant the declaration that the nominations held by the 2nd Respondent on 25th August 2022, in Kabushi and Kwacha constituencies were invalid as follows:

> **We further decline to grant the declaration that nominations held by the Respondent on 25th August, 2022 in the Kabushi and Kwacha constituencies are invalid and that any election held based on those nominations contravene the Constitution and are illegal and null and void as the High Court, which has jurisdiction to hear matters relating to a challenge of the nomination of candidates for**

parliamentary elections has not made a pronouncement to that effect.

[5.9] Counsel next cited our decision in the cases of **George Muhali Imbuwa[2], Munir Zulu v Gertrude Pilila Mwanza[10]** where we stated that the High Court was the only court that has jurisdiction to hear challenges regarding nominations under Article 52(4) of the Constitution. Hence, the Appellant could not be permitted to further challenge his failed nomination post the by-election in defiance of the constitutional provision.

Ground 4

[5.10] Counsel's short argument was that the lower court was on firm ground when it held that after the decision in the **Bernard Kanengo[6]** case, the stay or suspension of election granted by the High Court had been effectively discharged.

Ground 5

[5.11] It was averred that the allegation that the 2nd Respondent prevented the Appellant from exercising his right to contest the Kabushi Constituency was highly misconceived. This is because the Appellant's nomination was merely rejected. In support of the argument, counsel cited **Regulation 18(7) of the Electoral Process (General) Regulations, Statutory Instrument No. 63 of**

2016, which prescribes the mode of challenging the Returning Officer's decision as follows:

> **The determination of the returning officer that a nomination is valid or invalid is final unless challenged through an election petition in accordance with Article 52 (4) of the Constitution.**

[5.12] Counsel went on to assert that rejecting nomination papers was not the same as preventing the Appellant from participating in the by-election. For this reason, the Appellant challenged his rejected nomination in the High Court under cause no. 2022/HP/1327 but was unsuccessful. Counsel also argued that the case of **Mlewa v Wightman**[4], was distinguishable because it concerned a candidate who was prevented from participating in an election by another candidate's supporters and not the 2nd Respondent.

[5.13] Furthermore, the **Mlewa**[4] case was determined before Article 52(4) of the Constitution, section 97(2) of the EPA and Regulation 18 (7) of the Electoral Process (General) Regulations, were enacted. Thus, in this case, where the Appellant's nomination papers were processed but rejected in accordance with the electoral law, he could not allege prevention. In short, the Appellant's case against the 2nd Respondent was very weak.

[5.14] In concluding, counsel prayed to Court to dismiss the Appellant's appeal.

[6] 3rd RESPONDENT'S CASE

[6.1] Learned counsel for the 3rd Respondent filed opposing heads of argument into Court on 3rd October, 2023.

Ground 1

[6.2] Counsel begun by submitting that the issue for determination before us was whether we had jurisdiction to hear challenges relating to nomination petitions. A perusal of all the grounds of appeal revealed a common thread that the Appellant was in essence, challenging his nomination for the Kabushi Constituency by-election. This was dealt with in the **Peter Chazya Sinkamba**[9] case.

[6.3] Counsel next cited Article 52(4) of the Constitution on the procedure and forum for challenging nominations. He thereafter argued that the Appellant had run out of time to challenge his failed nomination post the by-election. Additionally, there was evidence on the record of appeal showing that the Appellant had already challenged his failed nomination in the case of ***Joseph Malanji and Bowman Lusambo v Electoral Commission of Zambia and***

Attorney General 2022/HP/1327. In this regard, the Court was invited to take judicial notice of the record.

[6.4] In supporting the decision of the lower court, counsel argued that the Appellant failed to prove that 2nd Respondent failed to comply with the EPA in the attacked by-election. The Returning Officer's rejection of the Appellant's nomination papers was done in accordance with Article 72(4) of the Constitution. As such, the key element of non-compliance, in relation to the EPA was not proved. Counsel added that only the EPA could be relied on in voiding elections. Therefore, the Appellants extrapolation of the rejected nomination under Article 72(4) of the Constitution could not be used as ground for breach of the law under the EPA.

[6.5] Counsel referred us to the record of appeal, where the High Court held on the strength of **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba and Others**[11], that the Appellant had failed to prove his case to a fairly high degree of convincing clarity over the 2nd Respondent's disregard of the law.

Ground 2

[6.6] It was further argued that the Appellant's case amounted to an abuse of court process under **Order 19 Rule 19** of the **Rules of the Supreme Court, 1999 Edition (White Book)**. The lower court

properly found that the Appellant had abused court process by instituting an election petition on grounds of nomination. The abuse was compounded by the fact that post-election, the court had no jurisdiction to hear nomination challenges and any proceedings would be asking it to go beyond its scope.

Ground 3

[6.7] Under this head, counsel argued that the Appellant was in essence challenging his failed nomination for the by-election. This is why the lower court stated at page 76 of its judgment that:

> **This court is bound by the holding of the Superior Court in the above cited case and cannot add to or take away from what the Constitutional Court found in its interpretation of Article 52(6) of the Constitution. To that extent, I agree with counsel for the 2nd and 3rd Respondent's arguments that the grievances arising from the rejection have already been challenged and litigated under cause no. 2022/HP/1327 and cannot be determined under this petition.**

[6.8] According to counsel, what the Appellant classified as prevention stemmed out of the rejection of his nomination papers. Thus, he could not erroneously seek to relitigate a matter that was *res judicta*.

Ground 4

[6.9] It was counsel's argument that the High Court order of stay or suspension of elections in the Kwacha and Kabushi Constituencies, respectively under cause no. 2022/HP/1327 ceased when the 2nd Respondent announced the 11th October, 2022 for the by-election. The High Court's jurisdiction ran out on 20th September, 2022, and this position was confirmed by this Court in the **Bernard Kanengo**[6] case. As at 17th October, 2022, we pronounced that the nominations for the Kabushi Constituency seat held on 25th August, 2022 were valid and, in the circumstances, the Appellant could not rely on cause no. 2022/HP/1327.

[6.10] The action of the 2nd Respondent in issuing Statutory Instrument No. 64 of 2022, was therefore lawful and constitutional because there was no stay order in force. The Appellant's argument was thereby flawed in terms of Article 52(4) of the Constitution.

[6.11] In the alternative, counsel argued that the moment the Court of Appeal stayed the proceedings of the High Court, the stay or suspension of elections was nullified. Counsel cited the Indian Supreme Court case of **Indira Nehru Gandhi (Smt.) v Raj Narain & Anr**[12] where it was stated that:

> **By sheer force of the first limb of this court's stay order, the judgment and order of the High Court is nullified for the nonce i.e., till the appeal is disposed of.**

[6.12] According to counsel, on 16th September, 2022, when a single Judge of the Court of Appeal stayed proceedings in the High Court under cause no. 2022/HP/1327, the order of the lower court was nullified.

Ground 5

[6.13] Counsel went on to argue that Article 52(6) of the Constitution provides for procedure to be adopted by the 2nd Respondent in the event that a candidate contesting in an election dies, resigns or indeed becomes disqualified. According to counsel, it was lucid from the wording of sub-Article (6) that the 2nd Respondent was mandated to cancel the elections and require the filing of fresh nominations by eligible candidates and elections within thirty days of the filing of fresh nominations.

[6.14] Hence, when the 2nd Respondent's agents rejected the Appellant's nomination, the action was not illegal because they had power to either accept or reject the nomination of a candidate according to **Article 52(2) of the Constitution** that:

> 52 (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.
>
> (2) A returning officer shall, immediately on the filing of a nomination paper, in accordance with clause (1), duly reject the nomination paper if the candidate does not meet the qualifications or procedural requirements specified for election to that office.

[6.15] In consequence, the 2nd Respondent acted within its constitutional mandate, by rejecting the nomination of the Appellant. In any case, there was no court pronunciation on the effect of nullifying a Parliamentary seat vis a vis the qualification of a candidate in a subsequent election. Hence, the press statement barring candidates whose seats had been nullified could not be termed to be illegal or a prevention of the Appellant from participating in the election. Instead, the 2nd Respondent merely performed its constitutional mandate in accordance with Article 72(4) of the Constitution.

[6.16] In concluding, counsel prayed to Court to dismiss the appeal.

[7] APPELLANT'S REPLY TO THE RESPONDENT'S ARGUMENTS

[7.1] In reply to the Respondents' arguments, counsel for the Appellant affirmed his reliance on the submissions in the record of appeal. He maintained that the 2nd Respondent's action of preventing the Appellant, an eligible candidate from participating in the by-election was illegal. He urged the Court to deal with the 2nd Respondent's conduct decisively because it undermined the electoral system and process of the country. Counsel then dismissed the 1st Respondent's argument that the lone evidence of PW3 was insufficient to demonstrate that the majority voters were dissatisfied with the 2nd Respondent's actions against the Appellant. He asserted that the results of the by-election were self-evident and therefore, the court had a duty to void the illegal election.

[7.2] We were also implored to uphold the decisions in the **Mlewa** and **Ngoma** cases on prevention, not only because the law was flouted but because court orders were disregarded by the 2nd and 3rd Respondents. On the other hand, the 1st Respondent participated in an election that was illegal. In concluding, counsel reiterated that the elections held on 21st October, 2022 in Kabushi Constituency be voided for the reasons given above.

[8] HEARING

[8.1] The parties were all represented by their learned counsel at the hearing of the appeal on 11th October, 2023. Counsel relied on their rival arguments filed herein and reinforced their respective positions with oral submissions.

[8.2] Leading the Appellant's case, Mr. Zulu submitted that the lower court erred when it held that evidence of the 2nd Respondent's non-compliance of the law was not provided. In stating his case, counsel referred us to page 721 of the record of appeal showing the testimony of Mr. Bob Musenga (PW5), and later section 97(4) of the EPA, that the 2nd Respondent breached its duty to act in conformity with the law. According to counsel, the Appellant had a right to be nominated and to participate in the by-election. Additionally, that section 98(2) of EPA clothed him with *locus standi* as admitted by PW5 the 2nd Respondent's officer.

[8.3] Counsel further submitted that while the by-election may have been free, it was certainly not fair. He dismissed the 1st Respondent's assertion that the Appellant's election petition after the event was targeted at relitigating issues of nomination when section 98 of the EPA entitled him to an opportunity to present an election petition. Mr. Zulu averred that the **George Muhali**

Imbuwa[2] case was instructive on nominations and this was not the issue before court. Rather, the Court as one of substantial justice, was being called on to nullify the Kabushi Constituency by-election not for convenience but because it was illegal. Anything short would amount to a diversion of what the Court had stated in a plethora of authorities.

[8.4] In the continuing submissions, Mr. Zimba averred that the lower Court's finding that the Appellant failed to provide evidence of the 2nd Respondent's non-compliance with the law was perverse. Counsel stated that the substance of the breach and non-compliance with the law had been demonstrated in the record of appeal. Hence, it was not the duty of the Court to substitute the evidence with that which was non-existent in arriving at its decision. We were urged to nullify the Kabushi Constituency by-election.

[8.5] Further, on behalf of the Appellant, Mr. Phiri referred us to the judgment of the lower court in the record of appeal. He averred that the court, among others, stated that the by-election in Kabushi Constituency was held in substantial conformity with the law. The statement in his view raised both eye brows because Statutory Instrument No. 64 of 2022 was not legal. A stay order had been in place when the 2nd Respondent issued the instrument. Hence, the

2nd Respondent misconducted itself by defying the court order and the result opened the by-election to nullification.

[8.6] On behalf of the 1st Respondent, Mr. C. Maggubwi strongly opposed the appeal because the Appellant's relief lay in the nomination dispute resolution mechanism under Article 52 of the Constitution and not the EPA. Thus, the Appellant's grievances had no basis because they all pertained to the filing of his nomination papers up to their rejection. On the other hand, Article 52 of the Constitution was self-prescriptive on how a discontented party could seek protection from the law in order to appear on the ballot. The Appellant in this case sought the protection but did not succeed. Accordingly, the by-election was held, was not illegal and the Appellant had no proper basis for clothing himself with the provisions of section 97(2) (b) and (4) of the EPA purporting to have a case before court.

[8.7] Counsel next argued that the by-election in casu was conducted in accordance with the EPA and not any other law. Thus, the Appellant could not cite prevention as a ground for voiding the by-election because his nomination papers were merely rejected. In short, his case did not meet the threshold set out in section 97(2)(b) of the EPA and the appeal was liable to be dismissed.

[8.8] On behalf of the 2nd Respondent, Ms Phiri reiterated that the lower court was on firm ground when it dismissed the Appellant's case. The Appellant failed to prove that the 2nd Respondent failed to comply with the law. Instead, the evidence on record showed that the by-election of 21st October, 2022 was held in conformity with the law.

[8.9] As far as the 2nd Respondent was concerned, for the election of 21st October, 2022, to be nullified, the Appellant ought to have proved the non-compliance on a threshold of a fairly high degree of clarity. Further, that the results of the election were affected according to the cases of **Giles Yambayamba**[7] and **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba & Attorney General**[13]. Counsel also referred to our recent decision in the case of **Patrick Banda v Attorney General**[14], where we reiterated the threshold to be met before an election can be nullified. We also stated in that case that an election could not be voided except by the way of a petitioner moving the Court and satisfying the threshold prescribed in section 97 of the EPA.

[8.10] On behalf of the 2nd Respondent, Mr. Bwalya further submitted that under **Regulation 18 Sub Regulation 17 of the Electoral**

Process General Regulations, the determination of an electoral officer on nomination was final unless it was challenged under Article 52 of the Constitution. He cited the case of **Bizwayo Nkunika v Newton Nyirenda & Electoral Commission of Zambia**[15] where this Court said on the 2nd Respondent's mandate in relation to Article 52 of the Constitution, that it can accept or reject nominations based on qualification. According to Mr. Bwalya, the Appellant's submission that the 2nd Respondent did not conduct the election in conformity with the law was incorrect. In any case, he submitted that the Appellant failed to show the Court the law that the 2nd Respondent had breached. In concluding, counsel reiterated the 2nd Respondent's prayer that the appeal be dismissed.

[8.11] On behalf of the **3rd Respondent,** Mr. Muchende, SC, the Solicitor-General submitted that the EPA governed the vitiation of elections. Section 97(2) of the EPA was very clear on the factors a court was required to consider in sanctioning such declaration. He cited the case of **Margaret Mwanakatwe v Charlotte Scott**[16] where the provision was addressed.

[8.12] Mr. Muchende, SC, then averred that courts were reluctant to interfere with election results because it was not enough to allege

misconduct. The actual ingredients or elements of misconduct had to be proved, such as in this case, section 97(2)(b) of the EPA. Hence, the Appellant who was deliberately oblivious of the nonchalant requirement proving non-compliance as far as the election results were affected could not rely on the provision.

[8.13] It was further argued that the framers of the EPA slotted in section 97(4) deliberately to show that an election could not be declared void by reason of any act or omission. In this case, what was being challenged was not only in substantial compliance with the Act, but more importantly, there was no evidence presented by the Appellant showing that the results of the by-election were affected. According to counsel, the gravamen of section 98(b) of the EPA spoke to who could file a petition and once filed, the provision of section 97 of the EPA became operational through an election petition. In the Solicitor General's view, a nomination challenge could only be brought under Article 52(4) of the Constitution and not under section 97 of the EPA. Thus, the Appellant's case had been misconceived.

[8.14] On the doctrine of constitutional supremacy provided in Article 1 of the Constitution and on nomination petitions under Article 52(4) of the Constitution, the Solicitor General, contended that an

interpretation of section 98(2)(b) of the EPA to mean that there is another window outside Article 52(4) of the Constitution for nomination challenge would render section 98(2)(b) of the EPA null and void. As such, there being no absurdity in Article 52 of the Constitution, it was clear that the Appellant could only invoke that provision. Hence, once the challenge period lapsed no window was open to the Appellant for a remedy. To fortify his argument on time limits, the Solicitor General cited the case of **Hakainde Hichilema and Another v Edgar Chagwa Lungu and Electoral Commission of Zambia**[17].

[8.15] In further supporting the 3rd Respondent's case, Mr. Mulonda reiterated that section 97(2) of the EPA had been complied with. Mr. Mwiya added that the Appellant's failure in adducing evidence of non-compliance rendered his appeal unmeritorious.

[8.16] In reply to the Respondents' arguments, Mr. Zulu averred that from the record of appeal, and through the evidence of PW5, the 2nd Respondent admitted that the Appellant was treated unfairly in an election that was not conducted in substantial conformity with the law. The breach of the law was as espoused in Article 70 of the Constitution and thereby not only limited to the EPA. Counsel cited Article 45 of the Constitution on the rights of citizens and adult

suffrage. Further, he cited section 3 of the EPA as repeating what is contained in Article 70 of the Constitution. He then contended that an election, which was in breach of the electoral process could not be said to be credible because a qualified person was stopped from participating.

[8.17] Counsel also argued that a breach of the Constitution did not require evidence backed by results. There was evidence through PW3 in the lower court that he clearly wanted the Appellant to continue as his Member of Parliament in Kabushi Constituency. According to counsel, it was inconceivable that the Appellant would be required to bring all the witnesses who preferred his election in the constituency to prove his case. In any case, the 2nd Respondent's Acting Chief Electoral Officer, Mr. Musenga (PW5) independently provided further evidence that the 2nd Respondent failed to comply with the law in the assailed by-election. On lapse of time, counsel contended that the **Hakainde Hichilema**[17] case was distinguishable from the one in casu because the law allowed an aggrieved person to file a petition under Section 98 of the EPA. In any event, the issues raised by the Appellant about the conduct of the by-election only arose post election. Therefore, being a person aggrieved by the election, section 98 of the EPA entitled the Appellant to pursue remedy.

[8.18] Counsel urged the Court not to turn a blind eye to the 2nd Respondent's actions because it failed to abide with section 3 of the EPA. The only recourse was for the election to be nullified not for convenience but for purposes of protecting the Constitution, ensuring credible and transparent elections, in which the rights of citizens were protected and not threatened by the State and its agents.

[8.19] Finally, on behalf of the Appellant, Mr. Zimba submitted that the **Bizwayo Nkunika**[15] case was distinguishable from the present appeal. Further, that in the **Hakainde Hichilema**[17] case, the Court exercised original and final jurisdiction unlike the matter before us, which came by way of appeal. Counsel argued that the breach of the Constitution and sacrosanct rights did not fall under section 97(4) of the EPA. Therefore, the argument that election agents are insulated from unfairness was not covered by any law.

[9] ANALYSIS AND DETERMINATION

[9.1] We have given due consideration to the appeal and rival submissions of learned counsel for the parties, made in support and rebuttal of the issues raised therein. From the outset, we state that our jurisdiction is set out in Article 128 of the Constitution and relevant to this appeal, sub-Article (1) (d) provides that:

> (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear: -
>
> (d) appeals relating to the election of Members of Parliament and councillors;

[9.2] In our view, there are two major issues that fall for determination, in the disposal of this appeal namely: -

i) **Whether the 2nd Respondent's rejection of the Appellant's nomination papers for the Kabushi Constituency by-election, breached the Constitution and electoral laws on holding fair elections?**

ii) **Whether in the circumstances of this case, this Court should vitiate the by-election, which was held on 21st October, 2022?**

[9.3] Before we delve into the substantive issues in this appeal, we wish to state that an electoral process is multilayered and comprises different stages. There are broadly broken down into three, namely the pre-voting stage, election and post voting stages. The pre-voting stage includes but is not limited to the delimitation exercise, voter registration, keeping of voters registers, prescribing the procedures for nominations for elections and challenges, campaign activities, the role of presiding officers.

[9.4] The election stage involves the actual conduct and management/supervision of an election. This includes the opening of polling stations, procedures and management of polling stations, the process of voting, etc.

[9.5] The post voting election stage breathes life into the role of an election court after the fact of an election. This is one of the means through which, the 2nd Respondent's adherence to electoral laws and the integrity of an election may be assessed. The Court essentially asks if the manner in which, elections were conducted conformed with the electoral laws to ensure that the outcome represents the will of the majority of voters. The election court upon assessment may vitiate election outcomes, which result from maladministration of election laws and procedures.

[9.6] In our electoral laws, it is not envisaged that the procedures available to parties for ventilating their grievances during the election cycle (stages) are meant to fall under one process. In other words, the manner in which nomination, election or post-election challenges may be assessed by the Courts depends on the stage of the election cycle. Hence, the remedies available to the parties in the different stages will materially be different.

[10] *Constitutional and Statutory framework on Elections.*

[10.1] The law on the electoral systems and process of our country is set out in **Part V of the Constitution** and the **Electoral Process Act**. The Articles in Part V, of the Constitution guarantee various political rights, beginning with Article 45, which provides:

> **45 (1) The electoral systems provided for in Article 47 of the election of President, Member of Parliament or councillor shall ensure-**
>
> **(a) that citizens are free to exercise their political rights;**
>
> **(b) universal adult suffrage based on the equality of a vote;**
>
> **(c) fair representation of the various interest groups in society; and**
>
> **(d) gender equity in the National Assembly or council.**
>
> **(2) The electoral process and system of administering elections shall ensure-**
>
> **(a) that elections are free and fair;**
>
> **(b) that elections are free from violence, intimidation and corruption;**
>
> **(c) independence, accountability, efficiency and transparency of the electoral process;**
>
> **(d) a simple and practical system of voting and tabulating votes; and**

(e) **timely resolution of electoral disputes.**

[10.2] The principles of free and fair elections are further elaborated in section 3 of the EPA, which provides inter alia that:

> 3. **Subject to the Constitution, the principles applied in the electoral system and process shall ensure the following:**
>
> **(a) equal and universal suffrage;**
>
> **(b) no discrimination based on gender or disability when providing electoral services;**
>
> **(c) transparent and credible electoral process.**

[10.3] Stated differently, Article 45 of the Constitution and section 3 of the EPA place citizens at the heart of polity by expressly providing that they hold the power to select their leaders. They may also participate in elections either as candidates or through the selection of their preferred leaders. Elections for the National Assembly are based on the principle of first-past-the-post, elaborated in **Article 47 (2) of the Constitution** quoting the relevant Sub–Article as follows:

> ...**(2) Elections to the National Assembly shall be conducted under a first-past-the-post electoral system in accordance with Article 68...**

[11.] *International Standards on Political Participation*

[11.1] It must be recognised that the foundational principles of Articles 45 and 47 of the Constitution on the right to participate in the governance of one's country are equally recognized in various international instruments. For instance, **Article 13** of the **African Charter on Human and Peoples Rights (ACHPR)** adopted by the Organisation of African Unity (now African Union) on 1st June, 1981 provides that:

> **Every citizen has a right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.**

[11.2] Article 25 of the **International Covenant on Civil and Political Rights1966 (ICCPR)** provides that:

> **Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:**
>
> **(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;**
>
> **(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;**

(c) To have access, on general terms of equality, to public service in his country

[11.3] In elaborating what is entailed in Article 25 of the ICCPR, the Human Rights Committee (HRC) which is the treaty monitoring body of the ICCPR in its **General Comment No. 25 on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service**, adopted at its 1510th meeting on 12th July 1996, 57th Session, (1996) (1) (2), explains *inter alia* that:

> **Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service... Whatever form of Constitution or Government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects... Article 25 lies at the core of democratic Government based on the consent of the people and in conformity with the principles of the Covenant... The conduct of public affairs, referred to is a broad concept, which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. Participation through freely chosen representatives is exercised through voting processes which must be established by laws... The effective implementation of the right and the opportunity to stand for elective**

office ensures that persons entitled to vote have a free choice of candidates.

[12] *Application of International Standards to Zambian context*

[12.1] The State of Zambia being a party to the ICCPR and ACHPR is enjoined to promote democratic principles. So far as has been established, it does this through Part V of the Constitution, the Electoral Process Act and other electoral Regulations. Bearing in mind that the Constitution is the supreme law of the land, this Court has a duty under the national values and principles contained in Article 8 of the Constitution; including but not limited to democracy and constitutionalism under Article 8 (c), to interpret and apply the principles stated in the Constitution, on all persons. This should be done in a manner that promotes its purposes, values and principles in advancing the rule of law and good governance. Additionally, under Article 267 of the Constitution, this Court has a duty to interpret the Constitution in accordance with the Bill of Rights and in a manner that permits the development of the law.

[13] *The Conduct and Supervision of Elections in Zambia.*

[13.1] The responsibility to conduct and supervise general elections in Zambia reposes in the 2nd Respondent, the body established under Article 229 of the Constitution. In the exercise of its powers and

performance of its functions, the 2nd Respondent is not under the direction or control of any person or authority. The conduct and supervision of elections is done under the law, that is the Constitution, EPA and other electoral Regulations such as the Electoral Code of Conduct and attendant Regulations. Suffice to state that the EPA deals comprehensively with the conduct of elections and responsibilities of electoral officers.

[14] *Consideration of Grounds of Appeal*

[14.1] Having set out the law on elections, we shall now proceed to determine the grounds of appeal raised herein. Grounds 1 and 5 which are interlinked will be dealt with at the same time. Thereafter, we shall deal with grounds 4, 3 and lastly ground 2.

[14.2] ***Grounds 1 and 5***

[14.2.1] In our view, there is no internationally accepted definition of the term "free and fair elections". What may be assessed in those terms is based on a value judgment. When an election is not free and fair, the political rights of citizens are likely to be materially infringed. The consideration therefore, is what lies at the heart of the Appellant's case, and it is *whether the Kabushi Constituency by-election suffered from defects that would render it not to be fair so as to be vitiated?*

[14.2.2] In analysing this appeal, we will fall back on the position that the Appellant is aggrieved by the manner in which, the 2nd Respondent treated his nomination papers for the by-election. In essence the 2nd Respondent's impugned infraction occurred at the pre-election stage when his nomination papers were rejected by the Returning Officer. The Appellant invoked the provision of Article 52 (4) of the Constitution, and to his credit, instituted proceedings before the High Court in Cause no. 2022/HP/1327. He diligently followed the process, however, the matter was not heard and determined on the merits because the High Court ran out of time.

[14.2.3] In our decision in the **Bernard Kanengo** case[6], we indeed confirmed the position that the High Court is the only Court empowered to hear nomination challenges. However, as far as the Appellant's nomination petition was concerned, it ran out of time. As such, it had no discretion to enlarge time outside the prescribed case hearing period of 21 days.

[14.2.4] Notwithstanding, the matters referred to in paragraphs 14.2.2 and 14.2.3, the Appellant argues in this appeal that the challenges he faced in his nomination case are not in issue. What we should focus on is how he was prevented by the 2nd

Respondent from participating in the assailed by-election. The consequences were dire because the impugned action interfered with his political rights and thereby deprived him an opportunity to hold a public office. More importantly, the Appellant contended that his exclusion rendered the election illegal and is asking us to vitiate the Kabushi by-election.

[14.2.5] We find it necessary to refer to **Part IX of the EPA** which is specifically dedicated to the dispute resolution mechanism of election disputes for Parliamentary elections. It specifically provides that these may be pursued through election petitions. In particular, **Section 97 of the EPA** states the grounds upon, which an election can be vitiated or annulled and the threshold which a petitioner is required to meet in proving a case against a respondent. In our recent decision in **Patrick Banda**[14], we reiterated the proposition of the law that an election petition is not tenable without recourse to section 97 of the EPA. Accordingly, a petitioner who comes to court in the appearance of an election petition must do so under the provisions of **Part IX of the EPA.** In addition, a petitioner bears the burden of proving his/her case against a respondent on the provided threshold contained in section 97 of the Act.

[14.2.6] On vitiating an election, section 97 of the EPA states that:

> 97 (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.
>
> (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or tribunal, as the case may be, that –
>
> (a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –
>
> (i) by a candidate; or
>
> (ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and
>
> the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;
>
> (b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid

not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or

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

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

[14.2.7] Simply put, section 97 (2) (a) of the EPA expresses the position that an election result cannot be vitiated, unless a petitioner proves that the victorious candidate or their agent engaged in proscribed conduct, thereby preventing the majority of voters from electing their preferred candidate. On the other hand, section 97(2)(b) of the EPA, the ground upon which, the Appellant in *casu* has relied on, requires a Court to determine whether during the conduct of an election, the 2nd Respondent and its agents engaged in practices that affected, or disadvantaged a losing party from contesting in an election in conformity with the law. In other words, the loss of a candidate

would be attributed to the 2nd Respondent's failure to adhere to the law.

[14.2.8] We affirmed the position of the law in the cases of **Sibongile Mwamba v. Kelvin M. Sampa and the Electoral Commission of Zambia**[18] and **Allen Banda v Bornwell Matanda & Electoral Commission of Zambia**[19]. We said of section 97 (2)(b) of the EPA in the latter case that:

> **This provision is clear that section 97 (2) (b) is subject to subsection (4) which provides that an election shall not be declared void due to an act or omission by an election officer in breach of his official duties in relation to an election where an election is substantially in accordance with the EPA and where the election result is not affected. The fact that section 97(2)(b) is made subject to subsection (4) means that once the trial court is satisfied on the evidence that the non-compliance with the electoral laws has been proved, the court must further determine whether the act or omission complained of affected the results in line with subsection (4).**

[14.2.9] We further guided in the **Sibongile Mwamba**[18] case on what amounts to substantial non-compliance with electoral laws that the threshold is high and the effect of the irregularities should result in the election being so flawed that the defects actually affected the result and it could not reasonably be said to

represent the true free choice and will of the majority of the voters.

[14.2.10] To put it more clearly, the election stage is only concerned with the process of elections, that is how the 2nd Respondent and its agents conduct an election and the outcome. This is critical in establishing whether an election has been held in substantial conformity with the law or not.

[14.2.11] After analysing the facts before us, measured against the electoral laws and standards; and upon proper construction of section 97 (2)(b) of the EPA, we find that the Appellant has failed to prove that the 2nd Respondent failed to comply with the law.

[14.2.12] As can be seen in section 97(2)(b) of the EPA, an allegation of non-compliance with the law on elections requires proof of two elements. Firstly, that there has been a breach or violation of the provisions of the EPA that regulates the conduct of elections. That is to say, the act of non-compliance with the EPA entails a deviation by the 2nd Respondent from the legal framework that governs elections. However, bearing in mind that not every act of non-compliance is sufficient to invalidate an election.

[14.2.13] Secondly, that the non-compliance with the EPA was substantial and affected the result of the election thereby altering the will of the majority of the voters. In both instances, the burden of proof rested on the Appellant to have provided credible evidence of the non-compliance and its impact on the outcome of the election.

[14.2.14] We are called upon as a Court in determining whether the non-compliance with the provisions of the EPA is substantial to examine the evidence presented by the Appellant and the Respondent. Thereafter, to apply relevant legal principles and standards in determining whether the election was conducted in accordance with the EPA or whether the non-compliance affected the result of the election in a substantial way. In so doing, we are supposed to use the fundamentals stated above in a claim of non-compliance with the law.

[14.2.15] Pertinent to this fact, is that the non-compliance with the law (section 97(2)(b) of the EPA) in an attacked election, must have been suffered by the person who participated in the election conducted by the 2nd Respondent and no other person. In casu, it is clear that the Appellant's complaint is based on the outcome of the by-election of 21st October, 2022 and the

evidence clearly shows that he did not participate in the election. Rather, he haboured a lingering belief that if the by-election had been conducted without the deficiencies stemming from his failed nomination, then the result would have been different. As we see it, there is no way of knowing whether the Appellant on the evidence of PW2 and PW3 would have won or lost the by-election.

[14.2.16] Further, there is nothing in the evidence which suggests that the Appellant's non-participation seriously hampered or interfered with the results of the election or the eventual outcome. Therefore, in our assessment of this case against the identifiable standards set out in section 97(2)(b) of the EPA, we are led to find that the Appellant failed to demonstrate the aspects of the election which, established the 2nd Respondent's breach of the law.

[14.2.17] In other words, for a claim of non-compliance to succeed, it must show the nature of irregularities committed by the 2nd Respondent and their impact on the conduct, as well as the result of the election, as far as it can be assessed or measured against electoral laws and standards. In any case, there is a distinction between rejection of nomination papers and

prevention from participating in an election. Hence, the Appellant who was not a participant in the election is not entitled to rely on the provisions of section 97(2)(b) of the EPA.

[14.2.18] In any event, the evidence before us also does not suggest that that the Appellant is challenging the constitutionality of the EPA, which contains the law on the conduct and supervision of elections in this country. Accordingly, we do not accept his contention that his case can be addressed outside the provisions of the EPA. This is on the premise that we have been unable to see the cause and effect on the type of non-compliance his counsel argued and the final result for the attacked by-election. If anything, from our reading of the EPA, the view we take is that the Legislature in enacting the law aimed at ensuring that the Act would be comprehensive enough, to deal with all matters relating to the conduct and supervision of elections in our country, including providing the dispute resolution for all election grievances at the National Assembly and Council level. Additionally, the Legislature in our view, deliberately set the standard and threshold upon which, an election can be vitiated under section 97(2) of the EPA. Anything short would amount to an illegality.

[14.2.19] Consequently, we find no substance in Appellant's arguments that the assessment of his election petition should have been conducted outside the EPA. The cases of **Mwelwa v Wightman**[14] and **Jere v Ngoma** earlier cited in the judgment are inconsequential and have no bearing whatsoever on founding a case of prevention against the 2nd Respondent.

[14.2.20] As we conclude our determination of grounds 1 and 5 of the appeal, we wish to indicate that the issue of withdrawal of a candidate in elections provided in Article 52(6) of the Constitution and section 31 of the EPA was settled in the case of **Governance Elections Advocacy Research Services Initiative Zambia Limited v The Attorney General and The Electoral Commission of Zambia**[20]. We need not say more.

[14.2.21] Our conclusion on grounds 1 and 5 is that they have no merit and are dismissed.

[14.3] *Ground 4*

[14.3.1] The Appellant contended that at the time that 2nd Respondent held the by-election, the High Court stay of elections was still subsisting and had not been discharged. As such, the 2nd Respondent had no authority to hold the by-election in Kabushi Constituency. He also argued that, our decision in the **Bernard**

Kanengo[6] case did not affect the stay order granted by the High Court because it was pronounced after the by-election had been conducted in Kabushi Constituency. Thus, at the material time the stay order was still in place and could not be ignored.

[14.3.2] We begin from our assertion that jurisdiction is the lifeline of a Court. In other words, it is the distinctively legal power of a Court to make decisions or orders that will govern the rights and obligations of the parties. Where it runs out, the Court has no other option but to down its tools. We settled this position in the **Bernard Kanengo**[6] case, when we said that the High Court ran out of jurisdiction. Thus, the fact that our decision was rendered after the by-election does not alter the proposition of the law.

[14.3.3] In our view, a period prescribed by the Constitution cannot be suspended by anything including a statute or court order. In the case of **Zacharia Okoth Obado v Edward Akong'o Oyugi and 2 Others**[21] which we align ourselves with, the Kenyan Supreme Court on Constitutional Supremacy stated that:

> **All statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally guided process. What this Court would not do is to extend**

time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorised.

[14.3.4] In our jurisdiction, **Article 1 of the Constitution** binds us to constitutional authority by providing that:

> (1) This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.
>
> (2) An act or omission that contravenes this Constitution is illegal.
>
> (3) This Constitution shall bind all persons in Zambia, State organs and State institutions.
>
> (4) The validity or legality of this Constitution is not subject to challenge by or before a State organ or other forum.
>
> (5) A matter relating to this Constitution shall be heard by the Constitutional Court.

[14.3.5] It flows from the above that, all State organs including all Courts and the laws are subservient to the Constitution. They cannot arrogate themselves power, which would otherwise be in conflict with the Constitution. Hence, we are unable to lend legitimacy to any order that was given by a Court that had no jurisdiction.

[14.3.6] The effect being that any order that is predicated upon a Court that has run out of jurisdiction amounts to a nullity. In more simpler terms, the stay of proceedings in the High Court was contingent on the pending proceedings in that Court. Since the proceedings extinguished by effluxion of time, the stay which was dependent of those proceedings could not survive the main action. Consequently, ground 4 lacks merit and it is dismissed.

[14.4] *Ground 3*

[14.4.1] Under this ground, the issue is whether the lower court erred in holding that the Appellant's grievances arising out of the rejection of his nomination were litigated under cause no. 2022/HP/1327. In responding, we have no doubt whatsoever in our minds that Article 52 (4) of the Constitution as read with Section 31 of the EPA provides the dispute resolution mechanism for contesting nomination challenges, that is within seven (7) days of the close of nomination. Further that a Court or Tribunal must hear and determine such challenges within twenty-one (21) days of lodgment. We stated in the case of **George Muhali Imbuwa**[2], that the process of hearing election nomination petitions for Parliamentary elections, starts and ends in the High Court.

[14.4.2] Accordingly, we find that it is no longer open to this Court to nurture the Appellant's complaints about the events in cause no. 2022/HP/1327 or indeed the rejection of his nomination papers. While we are mindful that there was no judgment delivered in cause no. 2022/HP/1327, it cannot be said that the issues that were involved in that cause can find life through this appeal. More so that the nomination case grievances manifested in the Appellant's purported subsequent election petition, which in any event failed the threshold test set out in section 97(2)(b) of the EPA. We therefore agree with the lower Court's holding that the issues about the Appellant's case on nomination, which were in issue in cause no. 2022/HP/1327, even though not determined on the merits, are *res judicata*. Accordingly, we find no merit in ground 3 and it is dismissed.

[14.5] ***Ground 2***

[14.5.1] Under this ground, the Appellant complained that the trial court's decision that his election petition was an abuse of court process and was being used as an appeal mechanism for cause no. 2022/HP/1327 was perverse. To place the issue in context, portions of the record of appeal are reproduced here below where the learned trial Judge stated at page 83, lines 1 – 10 thus:

> Concluding on this argument counsel for the Respondent argued that this petition was an abuse of court process as the issues raised by the Petitioner have either been determined or are yet to be determined by the Constitutional Court. By way of response, counsel for the Petitioner argued that appearing before numerous tribunals in itself is not necessarily multiplicity of actions. Additionally, counsel for the 3rd Respondent argued that the Petitioner has used this petition as an appeal to challenge the nomination process. The Petitioner in reply to the 3rd Respondent's submissions argued that he was not using this petition as an appeal to challenge the nomination process.

[14.5.2] At page 84 of the record of appeal lines 3-7, where the learned trial Judge said: -

> Subsequently, I agree with counsel for the 3rd Respondent's arguments that this petition is indeed an abuse of the court's process as the reliefs claimed cannot be employed in a petition of this nature post elections. Thus, this allegation cannot be the basis upon which the election can be nullified or voided.

[14.5.3] While we find that the learned trial Judge agreed with the 3rd Respondent's submission that the Appellant's election petition amounted to an abuse of court process; we have not found any evidence indicating that the learned Trial Judge made any finding to the effect that the Appellant's petition was used as an

appeal mechanism for cause no. 2022/HP/1327. Instead, the allegation was made by the 3rd Respondent. Notwithstanding, what the Appellant is inviting us to react to, is whether his election petition amounted to an abuse of court process. In the context of our findings thus far in this appeal, we take the view that this assertion is not far from the truth. This is because the Appellant decided to move the Court under section 97(2)(b) of the EPA when he clearly had no entitlement to do so.

[14.5.4] He was represented by counsel throughout the proceedings, and ought to have advised him of the requirements of the EPA. Instead, he continued to pursue his grievances arising out of his rejected nomination papers as ground for alleging non-compliance of the law by the 2nd Respondent in a futile effort. As if that were not enough, his counsel also attempted to formulate grounds for vitiating the Kabushi Constituency by-election outside the EPA.

[14.5.5] Clearly, these actions amount to an abuse of court process because the Appellant has been trying to obtain a result beyond the Court's jurisdiction using all his arsenal. This conduct is undesirable. For this reason, ground 2 fails and it is dismissed.

[15] FINAL ORDERS

[15.1] Our conclusion is that all grounds of appeal fail and are hereby dismissed.

[15.2] Since this matter raises issues of public interest, notwithstanding the Appellant's transgressions cited in paragraphs 14.5.3 – 14.5.5 of this judgment, we order the parties to bear their own costs.

A.M Shilimi
Deputy President, Constitutional Court

M.K Chisunka
Judge, Constitutional Court

M.Z Mwandenga
Judge, Constitutional Court

Mapani

M.M Kawimbe
Judge, Constitutional Court

K. Mulife
Judge, Constitutional Court

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

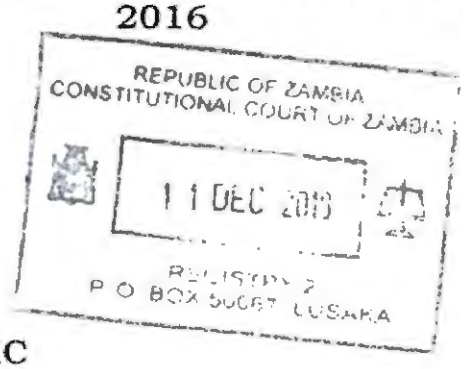
IN THE MATTER OF: ARTICLE 159 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA

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

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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

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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 Kakomwisa 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 Ndalamei**,[5] 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

Green Nikutisha 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 ten 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 therefore lack 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 due 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

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

In opposing grounds six, seven and ten, the Respondent submitted that the Appellant's assertion that PW4 and PW5 were witnesses with an interest to serve due to the fact that they were PF members was unfounded and not supported by the evidence on record. That PW4 testified that he was a peasant farmer who had heard the Appellant defame the Respondent and the PF leadership at a rally, and who said he voted for the Appellant due to the bribe he received from him. That in cross examination, he said he was a headman who did not belong to any political party. That PW5 was merely a beneficiary of the Appellant's bribery and corrupt practices and was not a PF member. It was submitted that the Tribunal found the Respondent and his witnesses credible having observed their 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 ably 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 could 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

relation 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:

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

Further, in **Brelsford James Gondwe v Catherine Namugala**[21] 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 102 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 Pumulo 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 Sililo 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

the Respondent and other PF candidates because they suffered from diarrhea. He also said the Appellant and his agents gave the electorate beer, meat and chitenge materials and that he voted for the UPND candidates because of the meat he received from them.

PW4 said the effect of what the Appellant and his agents did was that all UPND candidates were elected at presidential, parliamentary and local government level.

PW5 testified regarding the ferrying of voters to the polling stations on 11th August, 2016. He said he personally ferried 32 people to polling stations upon being paid K300 by Kalomo Kalomo and Kalomo Ndumba who were UPND agents. On their way to the polling station, they found unnamed people who gave him K300 and gave others 32 pens so that they could vote for the UPND with a promise to give them K50 each upon returning the pens. After voting he was paid K500 for ferrying 32 people and the 32 people were given K50 each for voting for UPND candidates.

The Tribunal considered the evidence on record and stated at page J34 of its judgment set out on page 59 of the record of appeal that they had taken into account the demeanour of the Respondent and his witnesses and observed that they testified in a forthright

manner and were unperturbed in cross-examination. The Tribunal therefore accepted their version of what transpired during the campaigns and on the polling day. The Tribunal found as a fact that the Appellant and some UPND members took part in acts of violence and that the Appellant did not disassociate himself from the incident in which a PF cadre John Kakomwisa was stabbed by a UPND cadre.

The Tribunal also found as a fact that the Appellant distributed beer to the voters with a message that they should vote for him and not the Respondent. The Tribunal stated that the Appellant failed to discredit this evidence in cross-examination. According to the Tribunal, the Appellant in his submissions admitted to committing some of acts testified to by the Respondent and his witnesses.

The Tribunal further found as a fact that the Appellant and his agents de-campaigned the Respondent by assassinating his character and that of the other PF candidates by calling them drunkards and thieves and alleging that they suffered from diarrhea. The Tribunal observed that this evidence was not

controverted by the Appellant in cross examination or in his submissions. At page J39 of its judgment, the Tribunal held that:

> **"It was proved that disparaging remarks were used during the campaigns by the Respondent and his agents against the Petitioner and other candidates contesting on the PF ticket. In most cases, these remarks were uttered during public meetings."**

The Tribunal stated that the disparaging remarks about the Respondent and other PF candidates being thieves and drunkards were against the holding of free and fair elections enshrined in Article 45 of the Constitution as amended. Further, that the making of such remarks is proscribed by regulation 15 of the Electoral Code of Conduct of 2016.

We have considered the evidence on record adduced by the respondent and his witnesses in respect of each of the allegations. Regarding the bribery allegation relating to the distribution of maize, we have considered the evidence of PW1 and PW3. PW1 did not witness the alleged looting of the maize. His evidence was based on what he was allegedly told by an NGO official who was not called as a witness. His evidence was therefore hearsay and it did not assist the respondent's case as it required corroboration. The Tribunal ought not to have relied upon it heavily as it did.

As for PW3's evidence, although he said he was present on both occasions when the Appellant allegedly stole the maize from the FRA shed and that he reported the matter to the Police, no police report was produced before the Tribunal to support the allegation. Further, the FRA is a statutory Agency with the important responsibility of ensuring food security in Zambia. If indeed 110 50kg bags of maize were looted from its shed as alleged by PW3, a witness from the FRA should have been called to support the allegation that 110 bags of maize were lost through looting. The Respondent did not call such a witness. In addition to that, evidence was required to sufficiently prove the allegation and to show that the looting of maize from the FRA shed was at the instigation of the Appellant.

Further, no evidence was led by the Respondent to prove the effect of the alleged distribution of maize on the majority of the electorate on the eve of the election. If indeed a crowd of voters participated in the looting and distribution of the maize as alleged by PW3, evidence should have been led to show how that impacted the outcome of the election by preventing the majority of the electorate from voting for their preferred candidate.

A careful scrutiny of the evidence on this aspect reveals that the Respondent's evidence did not sufficiently establish or connect the Appellant or his agents to the alleged looting of the maize or its effect on the majority of the electorate, which are requirements under section 97 (2) (a) of the Act.

Regarding the evidence on violence, the Respondent and PW2 testified regarding three incidents of violence. In all these incidences, the evidence was that the Appellant was not present and none of his agents was connected to the violence. Thus the commission of violence by the Appellant and his agents was not proven in terms of section 97 (2) (a) of the Act.

Regarding the character assassination, the Respondent and PW4 testified that the Appellant called the Respondent a thief and a drunkard at all the campaign meetings he held and alleged that he suffered from diarrhoea. A careful consideration of the evidence on record reveals that the Respondent and PW4 did not specify in which places the alleged character assassination was done and how many people were at the meetings in order to establish widespread vilification of the Respondent by the Appellant which is a requirement of the law.

Regarding the allegation that the Appellant and his agents gave pens and money to voters on polling day and that they ferried voters to the polling stations, we note that PW5 clearly said at page 96 of the record of appeal that the two men who allegedly approached him on 8th August, 2016 with a promise to pay him K500.00 for ferrying voters to polling stations on polling day were UPND agents. The two men were therefore not shown to have been the Appellant's election or polling agents or to have done so with the knowledge and consent or approval of the Appellant.

It is settled law that not everyone in a candidate's political party is his election agent as an election agent has to be specifically appointed in terms of the law. Section 2 of the Act defines an election agent as:

> **"a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper."**

A candidate is responsible only for illegal or corrupt acts or other misconduct which the candidate commits or which are committed with the candidate's knowledge and consent or approval

or that of his election agent. In **Lewanika and Others v Chiluba**,[8] the Supreme Court observed thus:

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

We agree with these observations.

The Tribunal found as a fact at page 61 of the record of appeal that the Appellant and his agents gave K50.00 notes to the voters who collected pens from them and returned the pens after voting. The tribunal further observed that the people who gave out pens to the voters were standing on the way to the polling stations and that there was no way of telling the exact number of voters they reached. According to the Tribunal, this evidence was uncontroverted in cross-examination.

The Tribunal's finding that it was the Appellant and his agents who handed out pens to voters on polling day and gave them K50.00 upon returning the pens to them is glaringly at variance with the evidence of PW5 who was the only witness who testified with regard to this allegation. It is a finding which is

clearly perverse as it says the opposite of what PW5 said on oath. It therefore cannot stand and we reverse it.

A careful review of the evidence adduced by the Respondent and his witnesses in support of the allegations of corruption and bribery contrary to section 81 of the Act reveals that none of the said allegations was proved to the requisite standard of proof of a fairly high degree of convincing clarity. The findings of the Tribunal that each of the Respondent's bribery allegations against the Appellant were proven in terms of section 97 (2) (a) of the Act were made against the weight of evidence adduced by the Respondent. They therefore cannot stand for reasons we have already given.

Based on the evidence on record, our firm view is that the Respondent did not adduce cogent evidence to prove to a fairly high degree of convincing clarity that the Appellant committed the alleged electoral offences of bribery, corruption and character assassination of the Respondent.

We further have not found any evidence on record that the alleged offences were widespread and that they affected or

may have affected the majority of the voters in the district by preventing them from electing their preferred candidate.

These two elements were both required to be sufficiently proved for the provisions of section 97 (2) (a) of the Act to be satisfied. This shows that even if it had been proved that the Appellant or his agents committed these offences or that they were committed with his knowledge and consent or that of his election or polling agents, without the additional proof that the majority of the electorate were affected, the allegation cannot be held to have been proved.

We are alive to the well-settled principle of law which we recently applied in the cases of **Margaret Mwanakatwe v Charlotte Scott and Attorney-General**[24] and **Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney-General**[25] that an appellate Court will not lightly interfere with the findings of fact of a trial Court unless it is satisfied that the findings in question were either perverse or were made in the absence of any relevant evidence or upon a misapprehension of facts or were findings which a trial Court acting correctly could not have made, on a proper view of the evidence before it.

Given the high standard of proof required for a petitioner to prove allegations in an election petition, we find that the evidence adduced by the Respondent in support of his allegations in the petition fell far short of that standard. We are of the firm view that if the Tribunal had properly evaluated the evidence before it, it would not have come to the conclusion that the allegations in the petition had been proved to the required standard. In view of this, we do not agree with the Tribunal's findings on each of the allegations for the reasons we have given. The findings were not supported by the evidence on record and were perverse. We according reverse each one of the findings as they were made against the weight of the evidence.

Grounds 1 and 2 have merit and we uphold them.

In grounds 3, 4, 5, 6, 7, 8 and 10 the Appellant essentially challenges the Tribunal's reliance on the evidence of the Respondent's witnesses whom he stated were either partisan or had an interest to serve without any evidence in corroboration. As we have found that the Respondent's evidence before the Tribunal did not satisfy the requirements of section

97 (2) (a) of the Act, it is not necessary for us to address these grounds in great detail as they are otiose.

As we have found merit in grounds 1 and 2 which in our view were the backbone of the appeal, we set aside the decision of the Tribunal to nullify the election of the Appellant. We declare that the Appellant Mwiya Mutapwe was duly elected as Council Chairman for Shangombo District.

Each party will bear their own costs of this appeal.

.....
A.M. Sitali
CONSTITUTIONAL COURT JUDGE

.....
M.S. Mulenga
CONSTITUTIONAL COURT JUDGE

.....
E. Mulembe
CONSTITUTIONAL COURT JUDGE

.....
P. Mulonda
CONSTITUTIONAL COURT JUDGE

.....
M.M. Munalula
CONSTITUTIONAL COURT JUDGE

SELECTED JUDGMENT NO. 51 OF 2018

IN THE CONSTITUTIONAL COURT OF ZAMBIA — Appeal No. 10/2016
AT THE CONSTITUTIONAL REGISTRY — 2016/CC/A016
HOLDEN AT LUSAKA — 2016/CC/A042
(Constitutional Jurisdiction)

IN THE MATTER OF: ARTICLE 47(2), 51, 54, 72(2)(c) AND 73(1) OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SECTION 81, 89, 97(1), 98(c), 99 AND 100(2) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF: CODE OF CONDUCT RULES 12, 15(a)(h)(k)

AND

IN THE MATTER OF: MUNALI CONSTITUENCY ELECTIONS HELD IN ZAMBIA ON THE 11TH AUGUST 2016

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

BETWEEN:

NKANDU LUO (PROF) — 1ST APPELLANT
THE ELECTORAL COMMISSION OF ZAMBIA — 2ND APPELLANT

AND

DOREEN SEFUKE MWAMBA — 1ST RESPONDENT
ATTORNEY GENERAL — 2ND RESPONDENT

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

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

For the 1st Appellant: Mr. B. Mutale, SC, and Ms. M. Mukuka of Messrs. Ellis & Company

Mr. E. Silwamba, SC, of Messrs. Eric Silwamba, Jalasi and Linyama Legal Practitioners

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

JUDGMENT

Mulembe, JC, delivered the Judgment of the Court.

Cases referred to:

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

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

Legislation referred to:

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

Other works referred to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ground Two

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

Ground Three

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

Ground Four

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

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

Ground One

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

Ground Two

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

Ground Three

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

Ground Four

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

Ground Five

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> **"97. (2). An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or tribunal as the case may be, that-**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**
>
> **the majority of the voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;"**

As earlier stated, we have, in unequivocal terms, stated our position on the above provisions. In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a), there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his

duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election; or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent. Sections 81 to 95 in Part VIII of the Act and also relevant provisions of the Electoral Code of Conduct outline the corrupt or illegal practices or misconduct in the electoral process.

In addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice. Recently in **Austin Liato v Sitwala Sitwala**[19] we said:

> **"...it is not sufficient for a petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice."**

We reaffirm the above position.

> "...we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore, that in this case where the petition has been brought under Constitutional provisions and would impact upon the governance of the nation..., no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "15(1) A person shall not –
> ...
> (k) use Governmental or parastatal transportation or facilities for campaign purposes, except that this paragraph shall not apply to the President and the Vice President in connection with their respective offices;"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"A person shall not -

(a) cause violence or use any language or engage in any conduct which leads or is likely to lead to violence or intimidation during an election campaign or election;"

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

"A person shall not directly or indirectly, by oneself or through any other person –

...

(g) unlawfully prevent the holding of any political meeting, march, demonstration or other political event."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "...a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since...an election agent has to be specifically so appointed." (emphasis added)

Section 2 of the Act defines "election agent" as:

> "a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper."

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

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

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

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

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

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

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

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

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

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

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

We reaffirm that position.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: Yes I agree, my Lord.

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

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

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

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

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

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

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

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

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

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

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

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

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

entire constituency also, that the failure to sign or countersign GEN 12 forms could not form the basis for nullification if each candidate was affected, citing section 49 of the Electoral Process (General) Regulations.

The gist of the 2nd Appellant's detailed submissions on this aspect of the appeal was that the issue for determination was the alleged refusal by the 2nd Appellant to provide GEN12 forms to the 1st Respondent's polling agent and whether, as a result, the 1st Respondent was not able to have the correct total of results. It was the 2nd Appellant's position that PW5 was not a credible witness as her testimony contained various untruths on collateral matters and the court below ought not to have believed and accepted the evidence of PW5. Citing regulation 49(2) of the Electoral Process (General) Regulations, it was submitted that the court below misdirected itself in finding that the failure to countersign a Form GEN12 amounted to a failure to provide the document to polling stations. That non-availability of polling agents at completion of the election process could not be regarded as refusal by the 2nd Appellant to provide copies of Form GEN 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "The flaws of all types which we have said were established, of course, did not reflect well on those managing the electoral process. Many of them can and should be addressed in order to enhance our democratic profile and in order to engender greater confidence in the electoral process."

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

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

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

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

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

We remain persuaded by that position.

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

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

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

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

.....
A. M. Sitali
Constitutional Court Judge

.....
M. S. Mulenga
Constitutional Court Judge

.....
E. Mulembe
Constitutional Court Judge

.....
M. M. Munalula
Constitutional Court Judge

.....
M. Musaluke
Constitutional Court Judge

P.(1798)

SELECTED JUDGMENT NO.53 of 2017

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

APPEAL NO. 17/ 2016

IN THE MATTER OF A PARLIAMENTARY ELECTION PETITION FOR MUFUMBWE CONSTITUENCY NUMBER 113 SITUATE IN THE MUFUMBWE DISTRICT NUMBER 006 OF THE NORTH WESTERN PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THE 11TH AUGUST, 2016

AND

IN THE MATTER OF:	SECTION 83 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF:	SECTION 15 (1) (a) (b) (c) OF THE CODE OF CONDUCT OF THE ELECTORAL ACT NO. 35 OF 2016

AND

IN THE MATTER OF:	THE ELECTORAL PETITION RULES STATUTORY INSTRUMENT NO. 426 OF 1968 (As amended)

BETWEEN:

STEVEN MASUMBA (MALE) — APPELLANT

AND

ELLIOT KAMONDO — RESPONDENT

Chibomba, PC, Mulenga, Mulembe, Mulonda and Munalula, JJC
on 29th May, 2017 and on 17th November, 2017

For the Appellant:	Mr. K. F. Bwalya, Mr. L. E. Eya, Mr. J. Tembo, Mr. L. Mayemba and Ms. D. Mwewa, all of Messrs. K.B.F. & Partners.
For the Respondent:	Mr. M. Katolo of Messrs Milner & Paul Legal Practitioners.

JUDGMENT

P.(1799)

Chibomba, PC, delivered the Judgment of the Court.

Cases referred to:

1. S v Chanda (CA9/05) [2005] NAHC 17 (23 June, 2005).
2. Mutambo v The People (1965) Z.R. 15.
3. Shamwana and 7 Others v The People (1985) Z.R. 41.
4. Subramaniam v Public Prosecutor (1956) 1 W. L. R. 965.
5. Leonard Banda v Dora Siliya, SCZ Judgment No. 127 of 2012.
6. Alex Cadman Luhila v Batuke Imenda, 2002/HP/EP/0017.
7. Saul Zulu v Victoria Kalima (2014) ZR. (Vol. 1) 14.
8. Eileen Mbuyuwana Imbwae v Misheck Mutelo, Electoral Commission of Zambia and the Attorney General 2011/HP/EP/0004
9. Josephat Mlewa v Eric Wightman SCZ Judgment No. 1 of 1996.
10. Limbo v Mututwa 1974 HP/EP/2.
11. Simasiku Kalumyana v Geoffrey Lungwangwa and Electoral Commission of Zambia 2006/HP/EP/11.
12. Attorney General v Marcus Achiume (1983) Z.R. 1.
13. Lee v The Queen (1998) 72 ALJR 1485.
14. Lewanika and Others v Chiluba (1998) Z.R. 79.
15. Khalid Mohammed v Attorney General (1982) Z.R. 49.
16. Jyoti Basu v Debi Ghosal 1982 AIR 983.
17. Sikota Wina and others v Michael Mabenga (2003) Z.R.110.
18. Nkhata and Others v The Attorney General (1966) Z.R. 147.
19. Attorney General v Kakoma (1975) Z.R. 212.
20. Kamba Saleh Moses v Hon. Namuyangu Jennifer- Election Petition Appeal No. 0027of 2011.
21. Wadada Rogers v Sasaga Isaiah Jonny & EC- Election Petition No.31 of 2011.
22. Mubika Mubika v Poniso Njeulu- Appeal No. 114/2007.
23. Peter Lifunga Machilika v The People (1978) Z.R. 44.

Legislation referred to:

1. The Electoral Process Act No. 35 of 2016.
2. The Electoral Act No.12 of 2006.
3. The Code of Conduct of the Electoral Process Act No. 35 of 2016.

Other authorities referred to

1. Black's Law Dictionary, 10th Edition by Bryan A Garner.
2. Longman's Dictionary of Contemporary English, New Edition.

The Appellant who was the Petitioner in the court below, appeals against the Judgment of the High Court which declined to nullify the election of the Respondent as Member of Parliament for Mufumbwe Parliamentary Constituency in the North-Western Province of the Republic of Zambia.

The brief facts leading to this appeal are that both the Appellant and the Respondent together with three others stood as parliamentary candidates for Mufumbwe Constituency at the elections that were held on 11th August, 2016. The Respondent who stood on the United Party for National Development (UPND) ticket, was declared as the duly elected Member of Parliament for Mufumbwe Constituency after polling 8,012 votes. The Appellant who stood on the Patriotic Front (PF) ticket polled 2,687 votes while the rest of the votes went to the two independent candidates who polled 5,438 and 3,084 respectively and the Forum for Democracy and Development (FDD) candidate who got 202 votes.

Dissatisfied with the declaration of the Respondent as the duly elected Member of Parliament for Mufumbwe Parliamentary Constituency, the Appellant, on 26th August, 2016 filed a petition in the High Court in which he sought the nullification of the election of the Respondent on the following grounds:-

"1. That the campaigns in the said Constituency were characterised by defamation or inflammatory allegations and that this was contrary to Regulation 15 (1) (c) of the Code of conduct.

2. That there was intimidation and violence contrary to Regulation 15 (1) (a) of the Code of Conduct.

3. That there was undue influence contrary to the provisions of Section 83 of the Electoral Process Act No. 35 of 2016."

He alleged that the above resulted in voters voting for the Respondent's party. The Appellant also sought any other declaratory orders the Court may deem fit and costs.

In opposing the claims in the petition, the Respondent filed an Answer in which he disputed all the allegations made against him stating that neither he nor his agents defamed the Appellant or brought his name into ridicule. He also denied the allegations that his party members instigated violence at every place where the two political parties met.

The matter proceeded to trial and the learned trial Judge heard evidence from the respective parties which he considered and analysed. He then came to the conclusion that six issues had been raised for the Court's determination which he put as follows:-

"1. Whether the Respondent and his polling agents told the electorates that gay rights would be introduced into the Constitution through the Referendum if it received a yes vote from them.

2. Whether the Respondent and his agents published false statements and assassinated the character of the Petitioner by spreading a message that he was a criminal, thief and convict.

3. Whether there was widespread violence, intimidation and threats in the constituency of Mufumbwe that the majority of voters failed to elect the candidate they preferred.

4. Whether there was undue influence from the Indunas during the campaign period to sway the electorate from voting for the Petitioner.

5. Whether the election officers who worked for the ECZ were barred from performing their duties in the elections.

6. Whether there were any corrupt or illegal practices which would be sufficient ground to nullify the election".

Based on the totality of the evidence before him, the learned trial Judge dismissed the Appellant's petition with costs on the ground that the Appellant had not proved to the required standard, any of the allegations in the petition.

The Appellant has appealed to this Court advancing and arguing three grounds of appeal which we have had to correct as they contained typographical and grammatical errors. These now read as follows:-

1. The learned Judge erred in law and fact when he held at page 108 that; "in my Judgment there was no evidence to substantiate particulars 1 (i) and (ii) of page 3 of the Petition that during the campaign period the Respondent and two (2) other candidates namely Davies Mbalau and Watson Kyakilika used lies against the referendum in the entire constituency and that the Respondent and the said independent candidates told the electorate that the rights which were to be included in the bill of rights via the referendum contained gay rights and as such the PF was not to be voted for. The

2 Petitioner has not proved these allegations to a fairly higher degree of convincing clarity." In the face of unshaken evidence of PW1 at page 5, 9, and 11, the evidence of PW11 at pages 42 and 43, evidence

of PW12 at page 44 and evidence of PW13 at pages 47, 48 and 50 of the Judgment.

3 The learned Judge erred in law and fact when he held at page 113 that; "I find that there was no evidence to substantiate the allegation in particular 1 (iii) of page 3 of the Petition that during the campaign period the Respondent's campaign message was that the Petitioner was a thief despite the Presidential pardon against his conviction and that the Petitioner stole money meant to roof Munyambala Primary School and rehabilitate Bulobe Primary School. The Petitioner has not established the allegation to a fairly high degree of clarity." In the face of evidence by PW1 at pages 5 and 6, evidence of PW11 at pages 42 and 43, evidence of PW12 at pages 44 and evidence of PW13 at page 48, 49 and 51 of the Judgment which was not discredited during cross-examination.

4 The Learned Judge erred in law and fact when held at page 130 that; "the conclusion that the Court has reached is that the claim of intimidation and violence which would adversely affect voters to vote for a person not of their choice, has not been supported by the evidence on record. Further, if indeed there occurred acts of intimidation and violence there is no sufficient evidence to link them to the Respondent. I find that the petitioner failed to show that political violence affected the final election result." In the face of evidence by PW8 at page 120, evidence of PW13 at page 13 and evidence of PW2 at pages 12 and 13 which was not shaken during cross-examination.

In support of this appeal, the Counsel for the Appellant, Mr. Bwalya, relied on the Applicant's Heads of Argument filed which he augmented with oral submissions.

In arguing ground one of this appeal, Counsel began by referring to the alleged contravention of Regulation 15 (a) (b) (c) of the **Electoral Code of Conduct** which is cast as paragraph 1 (i) and (ii) of the particulars of contravention highlighted in the petition. This states as follows:-

"(i) During the campaign period, the UPND candidate Eliot Kamondo and the other two (2) independent candidates alluded to above used lies against the referendum as part of their campaign message throughout the campaign period in all the constituencies for example Chizela ward, Kalambo ward, Kashima East and Kamabuta.

(ii) In reference to the referendum, the candidates told the electorates that the rights which were to be included in the bill of rights via the referendum included gay rights. So the candidates implored the electorates not to vote for the PF because according to the UPND, the PF was going to introduce the purported gay rights. The two independent candidates, Webby Iputu, Ben Mufuka, Malachi Tedious, Kalundu Peter and Justine Kaponge will testify that they heard the UPND candidate Eliot Kamondo speak on gay rights in the whole of Mufumbwe constituency and that the two were influenced to say the same against the Petitioner."

Counsel then went on to refer to and quote extensively some portions of the Appellant's evidence and that of his witnesses, PW11, PW12 and PW13. He submitted that this was the evidence that the Appellant relied upon in the court below to support the above allegations. Details of this evidence are given later.

As regards the programme by the Ministry of Justice for all stakeholders which was held two weeks before the elections over the Referendum, Counsel referred us to the evidence of PW13 which he again quoted extensively. It was Counsel's submission that the evidence of these witnesses is clear, corroborated and was unshaken under cross-examination.

Counsel submitted that although he concedes that no documentary or recorded evidence was adduced by the Appellant to

show that the Respondent made the false statements attributed to him over the Referendum, the Appellant's position was that his evidence was nonetheless, corroborated by the evidence of PW11, PW12 and PW13 who all said they heard the Respondent speak ill of the Referendum as the Appellant perceived and heard him at Chizela market; while PW11 perceived and heard him at Miluji on 14th July, 2016; PW12 perceived and heard the Respondent at Miluji four days before the elections while PW13 heard the questions of participants at the programme on the Referendum organised by the Ministry of Justice two weeks before the elections. Hence, the Appellant's position was that the evidence on record shows that the Respondent and his agents spoke ill about the Referendum in Mufumbwe.

As regards the finding by the court below that the evidence of PW13 was hearsay, Counsel argued that since the issue of the Referendum was reported to this witness by traditional leaders and since PW13 later heard it in church and at the Ministry of Justice programme on the Referendum, her evidence could not be hearsay because she was there and she heard it herself. In support of this argument, the case of **S. v Chanda**[1] was cited in which the High Court of Namibia held that:-

> **"The only further issue which I wish to deal with is the issue of hearsay evidence... It would suffice to state the definition of hearsay to the following effect: And that is that, "oral and written statements by persons who are not a**

party to the proceedings or who are not witnesses in the proceedings, and who are not called, cannot be tendered as evidence for the truth of what those oral or written statements say."

It was contended that arising from the above case, since PW13 was called as a witness in the proceedings in this case, the trial court should not have treated her evidence as hearsay. We wish to state here, however, that a copy of the above cited case was not filed and as such, we are not able to verify it.

Counsel also contended that if the evidence of PW10 and PW13 was hearsay, the rule on hearsay evidence is that, 'if what was brought' before court was to show that the statements in relation to the Referendum were made and not to show the truthfulness of the statements, then the said evidence is not hearsay and it is admissible. Counsel's position was therefore, that the evidence of PW10 and PW13 was admissible as it was not hearsay. In support of this proposition, Counsel cited and quoted from the cases of **Mutambo v The People[2], Shamwana and 7 Others v The People[3] and Subramaniam v Public Prosecutor[4].**

As regards the finding by the Court below that PW13 appeared to be a candid and truthful witness, Counsel urged us to find that the

evidence of PW13 was true in relation to the Referendum and that we should accordingly, find that the Appellant had proved this allegation to the required standard.

It was also submitted that the trial court erred when it found that PW11 was not truthful on the ground that he was testifying as if he was with someone else when he was listening to the Respondent and the Headman. However, that PW11 clarified this position under cross-examination when he stated that at the time that he had gone to Miluji, he was not alone, but that at the time he was seeing what was happening, he was alone. Thus, Counsel urged, we should find PW11 a credible witness on the alleged ill speaking of the Referendum by the Respondent. In support of this argument, Counsel cited Regulation 15 (1) (c) of the **Electoral Code of Conduct** of the **Electoral Process Act** which prohibits making of false, defamatory or inflammatory allegations concerning any person or political party in connection with an election. He also cited the decisions by the Supreme Court in **Leonard Banda v Dora Siliya**[5] and **Alex Cadman Luhila v Batuke Imenda**[6].

In support of ground two, Counsel again referred to paragraph 1 (iii) of the particulars of contravention of Regulation 15 (a), (b) and (c) of the **Electoral Code of Conduct** in the petition which alleges that:-

"(iii) During the campaign period again, the UPND candidate Eliot Kamondo's campaign message was to the effect that the Petitioner was a thief despite the Presidential Pardon against the Petitioner's conviction. That the Petitioner stole money that was meant for the purchase of iron sheets for roofing Muyambala Primary School. That the total money stolen was K77,000 for Muyambala Primary School and K55,000 for Bulobe Primary School."

Counsel again quoted the Appellant's evidence and that of his witnesses, PW11, PW12 and PW13. A detailed analysis of this evidence is given later in this Judgment.

It was submitted that it is clear from the evidence of these witnesses that the Appellant was defamed as their evidence was not discredited under cross-examination and that the Respondent had no proper defence to it. Further, that the trial court's findings on this allegation were more inclined to the fact that the Appellant did not report the matter to the police or the District Conflict Management Committee (DCMC) but that this was wrong as the Appellant in fact reported the matter to the DCMC as shown by his evidence on record.

As regards the findings by the learned trial Judge that the Appellant did not bring evidence to support the alleged defamation and that the Appellant did not show the number of people who did not vote for him as a result of being defamed, Counsel contended that the testimonies of the Appellant, PW11, PW12 and PW13 as well as the

final results constituted enough evidence that showed that a lot of people did not vote for the Appellant. According to Counsel, this is so because out of 48 polling stations in the Constituency, the Appellant only won in 10 polling stations. Hence, the finding that the Appellant did not bring evidence to support the claim of defamation was wrong as the evidence in question proved that the Respondent and his agents defamed him.

As regards the trial court's finding that PW13's evidence was hearsay, Counsel argued that since PW13 investigated the matter of the Appellant and former Chief Muyambala being called thieves, her evidence was not hearsay as she got her own information through investigations apart from what she was told by the former Chief. Counsel repeated his submission under ground one as regards hearsay evidence that if what was brought before the court was to show that the statement attributed to the Respondent was made against the Appellant and the Chief and not whether the statement was true, then such evidence is not hearsay and was thus, admissible. To press this point further, Counsel again cited the **Mutambo**[2] and the **Subramanian**[4] cases. He, accordingly, urged us to find that the evidence of PW13 was true as regards the defamation allegation as the court below too in fact stated that PW13 appeared to be a candid and truthful witness.

As regards the evidence of PW11, it was argued that since the trial court did not give any reason for finding his evidence doubtful, this Court should consider the evidence on ground that PW11 heard and perceived the defamatory statement at Miluji and that PW11's evidence was not discredited during cross-examination.

In concluding his arguments in support of ground two, Counsel urged us to find that the Respondent and his agents did not comply with the law as they defamed the Appellant. To this effect, Counsel quoted extensively from the decisions of the Supreme Court in the cases of **Saul Zulu v Victoria Kalima**[7] and **Eileen Mbuywana Imbwae v Misheck Mutelo, Electoral Commission of Zambia and The Attorney General**[8]

In arguing ground three of this appeal, Counsel quoted paragraph 1 (iv) and (v) of the particulars of the alleged contravention of Regulation 15 (a), (b) and (c) of the **Code of Conduct** of the **Electoral Process Act** as cast in the petition which alleges that:-

> "(iv) During the campaign period, the UPND members led by the Respondent developed a tendency to threaten violence against the PF members around every place they found them in; for instance on the 4th of August about 19.00 hours along M8 road, Kalambo area, Mr. Roy Ifwa who was driving a Hillux motor vehicle registration number AAV 1211 belonging to Machai Clement who was campaign manager for UPND deliberately hit

into the PF motor vehicle and injured Lastorn Kandela aged 21 years of Kakilufya, injuring his right leg and he is still admitted in Mukinge Mission Hospital. The driver was charged with dangerous driving. The investigating officer was Shambala Rodgers. Evidence will be led to this effect.

(v) On 27th July, 2017 at about 17.00 hours a rally was held at Kamazovu by the Petitioner and his campaign team. The UPND cadres violently disrupted the meeting and started throwing stones at the people who were gathered in the meeting. This matter was reported to the police and a docket was opened for further investigations. The investigations officer in relation to this matter was Mpasela Felix."

Counsel then referred to the evidence of PW2, PW13 and the police officers who testified and investigated the different reports of alleged violence. The evidence of PW2 and PW13 is outlined later.

It was argued that PW2 and PW13's evidence shows that various incidents of violence were reported and that although the learned Judge found that the police officers were lying, he, nevertheless, found that there was violence which he attributed to the PF. And that this was inspite of PW2's evidence that the violence was by all political parties. Therefore, Counsel contended, the learned Judge contradicted himself as in one breath, he found that the police officers were lying while in the other, he found that there was violence. However, Counsel argued that the Appellant's position is nevertheless that since the police officers are the witnesses who mainly testified about the violence and since the trial court found that there was political violence, it follows that the police

officers told the court the truth. Further, that although there could have been contradictions as to the times and dates when the incidences of violence occurred, that did not take away the fact that there was violence. Hence, his position was that political violence is violence regardless of who starts or perpetrates it and that there is no doubt that violence intimidates voters and pollutes the political atmosphere. Thus, although he concedes that the reports on record were against the PF and independent candidates, nevertheless, the Appellant's position was that PW2's evidence shows that some of the reports were made to the DCMC and to the Political Liaison Committee and that some of those were against members of other political parties though these reports were not for public consumption. Therefore, Counsel submitted, based on what PW2 told the court, the court below was wrong when it attributed the political violence to the PF as the law is very clear that it does not matter who the wrong doer is provided that the court is satisfied that there was violence just as the court below was satisfied in the current case. To support this argument, Counsel referred to the decisions of the Supreme Court in Dora Siliya[5], **Josephat Mlewa v Eric Wightman**[9] and **Limbo v Mututwa**[10].

In augmenting the Appellant's written Heads of Argument, Mr. Bwalya combined his arguments in support of all the three grounds of

Appeal. He, more or less repeated the arguments in the filed Heads of Argument. He, however, emphasized that the main thrust of this appeal is that the parliamentary election in Mufumbwe was not free and fair as it was characterised by violence, intimidation and threats of intimidation and character assassination. Further, that the learned trial Judge overlooked serious evidence before him which he at times glossed over and in some instances, dismissed as hearsay.

To counter the holding by the trial Judge that political violence in Mufumbwe was not so widespread as to have negatively affected the election results, Mr. Bwalya stressed PW2's evidence and that of the other police officers who testified on this aspect and the exhibits produced. He also referred to the evidence of PW13.

In emphasizing the point that political violence and intimidation of elections officers did occur contrary to the finding of the trial Judge, Mr. Bwalya referred to the evidence of PW14 and to the letter written by Clement Machayi and to the pronouncements by the Respondent's presidential candidate Mr. Hakainde Hichilema and the threat which, according to Counsel, was made at a rally on 27th July, 2016. He submitted that this action was contrary to Section 97 (2) (a) of the

Electoral Process Act.

As regards the contention that the learned trial Judge did not properly analyse the evidence as he glossed over some of the evidence, Mr. Bwalya submitted that inspite of the disparities which Counsel conceded as regards the timings of the reports of the violence and the names of the people involved, the learned Judge should have nevertheless accepted the evidence as it showed that the violence was widespread. He cited the case of **Simasiku Kalumyana v Geoffrey Lungwangwa and the Electoral Commission of Zambia**[11] in which the High Court stated that in election petition cases, the testimony of witnesses such as police officers and monitors during an election is more credible than that of party officials and election officers.

In concluding his oral submissions, Mr. Bwalya urged us to find that there was widespread violence and that the Appellant was defamed and that this affected his candidature and that the ill speaking of the Referendum also affected his candidature in the minds of the voters because of the political party on whose ticket he was standing on which was also the party in government and which was also responsible for conducting the Referendum programme. Counsel's prayer was therefore that the Appellant's Appeal should be upheld and that this Court should

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the PF's candidate for Council Chairman, Counsel submitted that PW10 was giving evidence on an out of court statement which was made by a person who was not called as a witness. Counsel submitted that PW10's evidence was clearly hearsay which is inadmissible. Hence, the court below was on firm ground when it declined to admit this evidence. And that PW10 conceded that he did not investigate the alleged intimidation. To press this point further, Counsel cited the case of **Lee v The Queen**[13] where Lord Gleeson, CJ, guided on why the court sets its face against hearsay evidence. Counsel also referred to the definition of the term *'hearsay'* by the learned authors of **Black's Law Dictionary.**

It was argued that in the current case, the evidence on the alleged intimidation of the electorate of Miluji to vote against the PF depended on the credibility of Herold Jerome and not that of PW10 who did not personally witness any of the alleged act(s) of intimidation. However, that PW10 was called to establish that there was intimidation of voters in Miluji by the UPND. Counsel also cited the **Subramanian**[4] case where it was held that evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement.

In response to Counsel for the Appellant's submission that PW11's evidence showed that at a meeting addressed by the Respondent, he heard someone telling people not to vote for the Referendum as that would allow people of the same sex to marry each other, Counsel argued that the learned trial Judge correctly evaluated the evidence of this witness.

In response to the three grounds of appeal argued in this matter, Counsel for the Respondent submitted that the overriding consideration by this Court should be whether the Appellant met the threshold set out in Section 97 (2) (a) of the **Electoral Process Act** in terms of what must be proved before an election of a member of parliament can be nullified. He pointed out that the Appellant needed to prove, at trial, that the majority of the voters were prevented from electing a candidate of their choice. In further pursuance of this point, Counsel referred to the observations of the learned Judge in the Judgment appealed against that: -

> **"No single witness testified before Court that she or he was prevented from voting for the candidate she or he preferred. Each witness stated that she or he voted freely at the polling station to which they registered. Even PW14, Dorcas Mwambanabantu Shipilo who testified that she was living in fear testified in court that she voted on 11th August, 2016 without any hindrance or at all."**

Counsel also drew our attention to the evidence of PW1, the Appellant himself where, under cross-examination, he conceded that the

result of the poll for Mufumbwe Constituency was based on the independent thinking of the voters of Mufumbwe who are quite independent people. It was argued that the above evidence from the Appellant himself shows clearly that the election results for Member of Parliament for Mufumbwe were based on the independent will and choice of the people of that constituency.

In response to the submissions by Counsel for the Appellant that there was evidence from the Appellant's witnesses that the Respondent and his agents had told the people that if they voted 'yes' in the Referendum, gay rights would be introduced in the Constitution and the contention that this negatively affected the Appellant's candidature as people in Mufumbwe abhor homosexual relationships, Mr. Katolo referred us to the Appellant's own evidence, where he stated that the Referendum was a Government programme and that the Government had circulated countrywide, through newspapers, what was to be contained in the proposed Bill of Rights through the Referendum. Counsel, therefore, invited us to take Judicial Notice of the fact that the Referendum was a separate and distinct programme from the parliamentary elections and the voters were not the same because individuals that were not registered as voters were eligible to vote in the Referendum. While in the presidential, parliamentary and local

government elections, only registered voters were eligible to vote. On this premise, Counsel argued, issues relating to the Referendum, if any, were totally unconnected to the election petition in this matter. And that there was also no evidence to show that anything allegedly said about the Referendum had any bearing on the results of the parliamentary polls.

As regards the decisions in the cases of **Alex Cadman Luhila v Batuke Imenda**[6] and **S. v Chanda**[1], which the Appellant relied upon to support the contention that the law prohibits making of false, defamatory or inflammatory allegations concerning any person or political party in connection with an election and the argument that PW13's evidence was not hearsay, respectively, Counsel submitted that these cases are decisions of the High Court which do not bind this Court and which should also be distinguished from the current case as they related to the electoral law as it then existed prior to the enactment of the **Electoral Process Act No. 35** 2016. And that the **Act,** has introduced a different and higher threshold for nullification of an election of a member of parliament. Therefore, ground one must fail and be dismissed with costs.

In response to ground two, Counsel submitted that the Appellant did not bring any evidence to show that any voter in Mufumbwe was

prevented from voting for him on ground of the alleged defamation. To counter the Appellant's contention that the people of Mufumbwe were influenced not to vote for him as he was defamed and called a thief by the Respondent, Counsel referred us to the Appellant's own evidence where he told the court below that the people of Mufumbwe decided based on their independent decision. He further argued that the results for Nyansonso, Kikonge, Kawama East, Shukwe, Bulobe, Kawama West and Chizela polling stations show that the Appellant in fact scored more votes in those polling stations than the Respondent inspite of what he alleged was said about him. Counsel, thus argued, since the Appellant managed to beat the Respondent in some polling stations, this shows that if at all the alleged defamation existed, it did not have any bearing on the election results.

It was further contended that the Appellant conceded in his evidence that he is the one who told the people of Mufumbwe that he had been incarcerated and released from prison upon a presidential pardon. As such, Counsel submitted, if anyone talked about his incarceration, they would only be repeating the information that the Appellant himself had already told the whole Constituency. Further, that no evidence was tendered in court to prove that the Respondent or any

of his agents, with his knowledge or consent, called the Appellant a 'thief' who had stolen money meant for the rehabilitation of Munyambala School.

In response to the contention that PW13's evidence was proof that the Respondent defamed the Appellant and called him a thief who had misappropriated funds, Mr. Katolo submitted that the learned Judge was on firm ground as he properly evaluated this evidence and came to the conclusion that PW13's evidence was hearsay which was unreliable. Counsel pointed out that former Chief Munyambala was not called as a witness so that his evidence could be tested through cross-examination to establish its veracity. Hence, the Appellant failed to prove the allegations of defamation to a higher degree of clarity. In support of the above submission, Counsel cited the case of **Lewanika and Others v Chiluba**[14] in which the Supreme Court stated that: -

> **"Parliamentary election petitions are required to be proved to a standard higher than that on a mere balance of probabilities and therefore in this case, where the Petition has been brought under Constitutional provisions and would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Furthermore, the issues raised were to be established to a fairly high degree of convincing clarity."**

Counsel pointed out that the Appellant did not also demonstrate how the alleged defamation affected the result of the poll as no single witness testified to not having voted for the Appellant on ground of his

being called a thief. To press this point, Counsel cited the case of **Khalid Mohammed v Attorney General**[15] where it was held that a plaintiff cannot automatically succeed whenever a defence has failed. He must prove his case. Mr. Katolo submitted that in the current case, the Respondent and his witnesses strongly denied the allegation that the acts attributed to him did take place as alleged.

To further buttress this point, Mr. Katolo cited the case of **Jyoti Basu v Debi Ghosal**[16] in which the Supreme Court of India put it thus:-

> **"An election Petition is not an action at common law nor in equity. It is a Statutory Proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concept familiar to common law and equity must remain strangers to election law unless statutorily embodied...In the trial of election dispute the court is put in a straight jacket."**

It was Mr. Katolo's further submission that in the current case, the **Electoral Process Act** has put a court trying an election petition in a similar or same position as regards what must be proved before the election of a member of parliament can be nullified. Counsel, thus, cited Section 97 (2) (a) of **the Act** which provides for avoidance of elections.

Counsel argued that the evidence on record shows that Mufumbwe had a total of 31,964 registered voters out of which 20,199 voters cast their votes. However, that the Appellant did not bring any

evidence to show that the majority of the voters were prevented from electing a candidate they preferred. And that no other person other than the individual voters themselves would know or knew which candidate each had resolved to vote for and as such, the Appellant failed to show how many out of that number of voters were prevented from voting for him.

In concluding his arguments in opposing ground two, Counsel prayed that this ground must be dismissed with costs on ground of failure to meet the threshold set out in Section 97 (2) (a) of **the Act**.

In response to ground three, Mr. Katolo began by drawing our attention to the finding by the learned trial Judge that the alleged disruption of the Appellant's meeting at Kamazovu was not proved as it was premised on fabricated evidence.

As regards the alleged assault on Sydney Wotela, Counsel submitted that the court below properly analysed the evidence of PW6 and made a finding of fact that PW6 was lying. And that the court below also clearly and carefully analysed Exhibits "P1" and "P5", which were the Police Occurrence Books produced in the court below by the Appellant to support the alleged violence. Counsel submitted that the learned Judge found as a fact that although during the period in

question, 68 incidents of assault occasioning actual bodily harm were reported to the police, only 8 reports were identified by the police as being politically motivated. Therefore, Mr. Katolo submitted, it is not correct to assert that political violence was on the increase in Mufumbwe during the campaign period. He further contended that none of the witnesses called testified to being prevented from voting for a candidate of their choice on account of the alleged violence. And that the converse applies as the evidence on record shows that the percentage turn out of voters in Mufumbwe was 63.19 percent. As such, Counsel argued, if political violence was prevalent in Mufumbwe as alleged by the Appellant, this could have negatively impacted on the voter turnout. In conclusion, Counsel urged us to dismiss this appeal with costs to the Respondent.

In augmenting the Respondent's written Heads of Argument, Mr. Katolo too more or less repeated the arguments in the Respondent's Heads of Argument in Opposition. We will not repeat these except to the extent hereunder reflected. Mr. Katolo submitted that this appeal turns on the interpretation of Section 97 (2) of the **Electoral Process Act** which contains thresholds that a petitioner must meet through evidence at trial to warrant the nullification of an election of a member of Parliament. He put these as a corrupt practice, an illegal practice or

misconduct committed by a candidate or that candidate's election agent with the candidate's knowledge, consent or approval. Further, that the petitioner must also demonstrate through evidence that by reason of the alleged corrupt practice, illegal practice or other misconduct, the majority of the voters in the constituency were or may have been prevented from electing a candidate whom they preferred. Counsel's position was that although the Appellant called sixteen witnesses including himself, none of these witnesses testified to having been prevented in any way from voting for a preferred candidate.

In response to the Appellant's submissions concerning the attack on Sydney Wotela, Mr. Katolo referred to the evidence of PW6 who recorded the statement from the victim and to PW5's evidence which according to Counsel, shows that the Appellant himself was a perpetrator of the violence. He argued that the Appellant should not be allowed to profit from his own wrong doing by asking this Court to nullify an election on the basis of his own conduct.

In response to the Appellant's submissions concerning the accident involving PF and UPND motor vehicles, Mr. Katolo argued that PW3's evidence was that his investigation showed that the incident was an ordinary road traffic accident. And that this is supported by the

evidence of RW2 who was an eye witness to the road traffic accident in question and that this witness gave a clear description of how the accident occurred. Counsel also referred to the sketch plan prepared by PW3 which according to him, shows how the accident occurred. His submission was that the Court below cannot, therefore, be faulted for finding that if indeed there was any violence that occurred, sufficient evidence was not adduced to link the Respondent to that violence. Hence, the Appellant failed to show that political violence affected the final election result.

Mr. Katolo further submitted that the Appellant did not adduce evidence to show that the Respondent was personally involved in any act of violence or that any of his election agents were involved in such acts or indeed, that the Respondent personally involved himself in any wrong doing to warrant nullification of his election.

As regards the alleged defamation of the Appellant, Mr. Katolo repeated the submission concerning the Appellant's evidence where he stated that after he was pardoned by the Republican President, he went round Mufumbwe Constituency and informed the people of the pardon.

In concluding this oral submissions, Mr. Katolo urged us to dismiss this appeal with costs. He added that in the event that this Court holds

the view that this is a constitutional matter where costs should not be ordered, his prayer was that the Court should not interfere with the award of costs made by the court below as the said order was not appealed against or challenged by the Appellant on appeal.

In reply, Mr. Bwalya, submitted as regards the statement by Sydney Wotela that there was no premise upon which the learned Judge accepted this evidence so as to kick in the principle that one should not benefit from his own wrongful conduct and that Sydney Wotela was not called as a witness as all that the court below had was a statement recorded by the police. Mr. Bwalya submitted that the veracity of his evidence was never tested in the court below and as such, the court was wrong to have accepted this evidence without any other proof that the Appellant was involved in violence as alleged in the statement which was also hearsay. Mr. Bwalya also referred to PW7's evidence as regards the time the Appellant was alleged to have been in Mufumbwe beating and threatening to kill Sydney Wotela. He submitted that this evidence shows that the Appellant was 82 kilometres away and that his alibi was never refuted.

As regards the argument by Counsel for the Respondent that there was no evidence to connect the alleged violence to the Respondent or

his agents, Mr. Bwalya referred to the letter written by Clement Machayi. He submitted that the letter contains threats of violence and that Clement Machayi who wrote the letter was the Respondent's campaign manager. Hence, it was not correct to argue that there was no relationship between the Respondent or his agents and the violence.

In reply to the arguments relating to the Appellant's presidential pardon, Mr. Bwalya submitted that although the Appellant did in fact visit the Constituency after he was pardoned, what is material is the timing as this happened before or outside the election period while the Respondent was defaming the Appellant during the campaign period.

Counsel urged us to look at the Respondent's intention, which, according to Counsel, the Respondent intended to benefit from and that he in fact did benefit from the damaging statements that he made against the Appellant. In response to Mr. Katolo's argument on costs, Mr. Bwalya submitted that costs are in the discretion of the court. And that since the Appellant appealed against the entire Judgment of the court below, this Court should look at this appeal in that light. Hence, costs must follow the event.

We have seriously considered this appeal together with the Grounds of Appeal filed, the arguments in the respective Heads of

Argument, the authorities cited and the oral submissions by the learned Counsel for the parties. We have also considered the Judgment by the learned Judge in the court below. The major question raised in this appeal is whether the Respondent was not properly elected as Member of Parliament for Mufumbwe constituency on account of the alleged illegal acts or misconduct during the campaign period.

In the judgment appealed against, the learned Judge dismissed all the grounds that the Appellant had relied upon in his quest to have the election of the Respondent nullified. In this appeal, the Appellant alleges that the election was not free and fair as it was marred by defamation/character assassination, violence and intimidation of elections officers and that the character assassination resulted in his candidature being negatively affected.

We wish to state from the outset that in terms of the law as to when an election of a member of parliament may be nullified, the governing provision is Section 97 (2) of the **Electoral Process Act No. 35 of 2016** which provides in part as follows:-

> **"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."

As can be seen from the above, the requirement in the current law for nullifying an election of a member of parliament is that a petitioner must not only prove that the respondent has committed a corrupt or illegal act or other misconduct or that the illegal act or misconduct complained of was committed by the respondent's election agent or polling agent or with the respondent's knowledge, consent or approval, but that he/she must also prove that as a consequence of the corrupt or illegal act or misconduct committed, the majority of the voters in the constituency were or may have been prevented from electing a candidate whom they preferred. In this respect, we agree entirely with the submission by Mr. Katolo that in order to meet the thresholds set by Section 97 (2) (a) of the **Electoral Process Act** for nullification of an election of a member of parliament, a petitioner must prove through evidence at trial, that a corrupt practice, an illegal practice or misconduct was committed by a candidate or that candidate's election agent or with the candidate's knowledge, consent or approval. And that the petitioner must also demonstrate that by reason of the alleged corrupt practice, illegal practice or other misconduct, the majority of the voters in the

constituency were or may have been prevented from electing a candidate whom they preferred.

In determining the issues raised in this appeal, therefore, we will be guided by the position of the law as illustrated above.

It is also settled that in election petitions, the applicable standard of proof is higher than a mere balance of probability applicable in ordinary civil cases. The Supreme Court aptly explained this in the **Lewanika**[14] case. It also echoed the above position in **Sikota Wina and others v Michael Mabenga**[17] when it stated that the standard of proof in election petitions is higher than the balance of probabilities but less than beyond all reasonable doubt.

The question in this appeal, therefore, is, was the learned Judge on firm ground when he found that the Appellant did not prove the allegations made against the Respondent to the required standard? Was he also on firm ground when he held that the alleged illegal acts or misconduct complained of did not prevent the majority of the voters from voting for a candidate whom they preferred?

For convenience and to avoid repetitions, we shall consider grounds one and two together as they are inter-related. Ground three will be considered separately.

The thrust of the Appellant's argument under grounds one and two of this appeal was that the learned trial Judge was wrong to have overlooked or glossed over serious evidence adduced by the Appellant and his witnesses and in some instances, for dismissing it as hearsay. According to Counsel, this evidence came from the Appellant himself and from his witnesses, PW11 and PW12 who heard the Respondent and his agents speak ill about the Referendum. And that PW13 also heard what the Respondent said about the Referendum from traditional leaders, in church and at the Ministry of Justice programme on the Referendum. It is also alleged that the learned Judge came to the wrong conclusion when he found that the Appellant did not prove that the Respondent defamed him and for also holding that the Appellant had not shown the number of people who did not vote for him as a result of being defamed when there was clear evidence from the Appellant, PW11, PW12 and PW13 that the Respondent was calling the Appellant a thief in his campaign messages. Further, that there was also evidence of the final results on record which showed that out of a total of 48 polling stations, the Appellant only won in 10. And that the learned Judge was also wrong to dismiss the Appellant's evidence in support of the alleged defamation on the ground that he did not report the matter to the Police or the **DCMC** as this was contrary to the evidence on record

which showed that in fact, the Appellant reported this matter to that Committee.

The crux of the Respondent's argument in response was to agree with the trial Judge that the Appellant's evidence did not meet the required threshold. And that the Appellant's contention in this appeal does not meet the applicable standard for this Court as the appellate court to interfere with the findings of fact made by the trial court as the learned Judge did carefully consider and evaluate the evidence of all the witnesses in arriving at his findings of fact which the Appellant now seeks to impugn in this appeal. Further, that the Appellant has also failed to prove that whatever was allegedly said about the Referendum had a bearing on the results of the election or that any voter in Mufumbwe was prevented from voting for him on ground of the alleged defamation or indeed, that the majority of the voters were prevented from electing a candidate of their choice. And that the cases of **Alex Cadman Luhila v Batuke Imenda**[6] and **S. v Chanda**[1] cited and relied upon by the Appellant relate to the electoral law as it existed prior to the enactment of the **Electoral Process Act, 2016.** Hence, the two cases should therefore be distinguished from the current position of the law which now provides for a different and higher threshold for nullification of an election of a Member of Parliament.

We have considered the above submissions and the authorities cited. The question is whether the learned trial Judge erred when he discounted the Appellant's evidence and that of his witnesses PW11, PW12 and PW13 on ground that it was hearsay and whether he glossed over the evidence of the witnesses in question. To ably determine the issues raised, it is necessary to first define or state what constitutes hearsay evidence. **In Black's Law Dictionary, 10th edition, by Brant Garner**, cited to us by Mr. Katolo, the term *"hearsay"* is defined as follows:-

> "Hearsay-Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence."

We totally agree with the above definition of hearsay as this is the correct position of the law as regards hearsay evidence and the rationale for its inadmissibility.

The issues raised by Counsel for the Appellant require us to review the evidence of each witness called to support the alleged ill speaking of the Referendum by the Respondent starting with PW11. The sum total of PW11's evidence was that he saw the Respondent's vehicle at Miluji and that someone was telling people that if they voted

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for the referendum, people of the same sex will be marrying each other. And that this message was all over the whole district as some of his friends who went to campaign in different areas told him so. Our response is that clearly, the above evidence cannot be said to have connected the Respondent to whatever PW11 said he heard someone telling people over the Referendum simply because he had seen the Respondent's motor vehicle pass by. Further, none of PW11's so called friends, who told him of hearing this message wherever they went to campaign was called to testify to confirm what they heard.

PW12's testimony was that at a meeting he attended which was chaired by the Respondent four days before the elections, the Respondent told people to vote wisely and not to forget what he had told them over the referendum. Clearly, this witness did not at all say what he heard the Respondent tell the people about the Referendum as what he said he heard was the Respondent reminding the people not to forget whatever he had told them. Certainly, the learned Judge and indeed this Court, cannot be expected to speculate on what the Respondent could have been reminding the people who attended his meeting over the Referendum.

PW13's evidence was that she received complaints from different stakeholders who feared that if the PF candidates were voted for and if the Referendum received a 'yes' vote, the Government would introduce homosexuality in the country. And that at the Ministry of Justice programme for all stakeholders which she attended, the overwhelming question by the participants was whether the Referendum was a means by which the Government wanted to introduce gay rights and homosexuality in the country. Surely, the above evidence cannot be said to have linked the Respondent to the alleged ill speaking of the Referendum and the alleged introduction of gay rights in the country.

As regards the alleged defamation, Mr. Bwalya referred us to the Appellant's evidence which was that the Respondent had been going around calling him a criminal on account of his incarceration. PW11's evidence was that the Respondent told the people that the person who was coming was a thief and a criminal and that people would waste their votes if they voted for him. While PW12's evidence was that his friend (PW11) told him that at a meeting he attended, the Respondent told the electorate that if they voted in favour of the Referendum, it would allow people of the same sex to marry each other. And that the Respondent also said that the Appellant was a thief and a criminal. And that he also attended a meeting at which he heard the Respondent tell the people to

vote wisely and not to forget what he had told them about the Referendum. PW13's evidence was that as the Chairperson of the District Disaster Management Committee, former Chief Munyambala summoned her so that she could clarify the allegations which the UPND had been making at public meetings that they held in his area that he, and the Appellant had stolen funds meant for the rehabilitation of Muyambala School whose roof was blown off. And further that the Appellant had also stolen money meant for other schools in the constituency that had experienced disasters.

We have carefully perused the record and considered the evidence of the above witnesses together with the submissions by the learned Counsel for the respective parties on this aspect of this appeal. As regards the evidence of PW11 which Mr. Bwalya argued supports both the alleged ill speaking of the Referendum and defamation of the Appellant by the Respondent, the learned trial Judge rejected PW11's evidence on ground that his demeanour was not impressive. He therefore, found his evidence doubtful as he was not a truthful witness.

It is settled that the question of demeanour of a witness relates to the credibility of that witness and the weight that the court puts to his evidence. In **Nkhata and Others v the Attorney General,**[18] the Court

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Therefore, the learned trial Judge cannot be faulted for finding and concluding that PW11's evidence was not credible as his demeanour was not impressive. There is therefore no basis at law upon which we can reverse the trial Judge's finding as regards PW11's demeanour.

As for PW12, the learned Judge rejected his evidence on the alleged ill speaking of the Referendum by the Respondent on ground that he could not possibly have attended the UPND rally at which he claimed to have heard the Respondent speak ill about the Referendum as PW12's evidence in examination in chief was that both he and PW11 were not able to do any field work as they feared the UPND team. The court below had the opportunity of seeing the witness testify which we do not have. PW12's evidence was also that PW11 told him that the Respondent had said the Appellant was a thief and a criminal who would be taken back to jail. Clearly, this aspect of PW12's evidence was hearsay as the record shows that PW11 did not tell the court below that he had told PW12 about the statement attributed to the Respondent. So PW12 was clearly testifying from what he claimed to have been told by PW11 and not what he personally heard the Respondent speak or say about the Appellant's character. Further, PW12's evidence that he personally attended a meeting at which he heard the Respondent

remind people to vote wisely and not to forget what he had told them about the Referendum is a mere statement which was not at all helpful to the Appellant's case as it did not particularise the alleged misconduct of ill speaking of the referendum.

As regards Mr. Bwalya's contention that the evidence of PW13 supported the Appellant's evidence and that of his witnesses that the Respondent was speaking ill of the Referendum and had defamed him by calling him a thief and a criminal and Counsel's contention that the finding by the learned Judge that PW13's evidence was hearsay is wrong, our firm view is that the trial Judge cannot be faulted for so holding as clearly, PW13 was testifying on what was reported to her by other people and not what she personally perceived or heard the Respondent utter. Her evidence was that she was receiving reports from different stakeholders who were concerned about the 'intended introduction' of gay rights and gay relationships by the Government through the proposed amendments to the Bill of Rights. And that she was also told by the former Chief Munyambala about the allegation by UPND that the former Chief and the Appellant had stolen funds that were meant for the rehabilitation of Munyambala School and other schools in the area. Her evidence was also that at the programme by the Ministry of Justice on the Referendum, most of the questions raised by

the attendants was whether the proposed amendment to the Bill of Rights was intended to introduce gay rights in the Constitution by the PF Government.

Clearly, the above evidence from PW13 was caught up in the rule against hearsay evidence as it was based on statements that were attributed to the Respondent by other persons who were not themselves called as witnesses. Her evidence flies directly in the teeth of the definition of what hearsay evidence is and the rationale for its inadmissibility given in **Black's Law Dictionary** which we have recast above. Therefore, the learned trial Judge cannot be faulted for finding PW13's evidence inadmissible as it was hearsay.

As regards Mr. Bwalya's contention that the trial Judge contradicted himself when he stated that he had found PW13 to be a candid and credible witness but in the same breath, he found her evidence inadmissible, our brief response is that the question here is not whether or not PW13 was a candid/ truthful and credible witness but rather, whether she was an eye witness who personally saw and heard the Respondent speak ill of both the Referendum and the Appellant's character to the electorate which, as stated above, she did not.

In what appears to be an alternative and astonishing, if we may say so, argument, Mr. Bwalya contended as regards the finding by the learned Judge that the testimony of PW13 was hearsay, that if PW13's evidence was indeed, hearsay, her evidence was still admissible under the hearsay rule as her evidence was brought to show that the negative statements about the Referendum and character assassination of the Appellant were made and not as proof of the truthfulness of the said statements; our short response is that again, the question here is not whether the alleged negative statements about the Referendum and the Appellant's character were true or not but rather, whether PW13 was an eye witness who saw and heard the Respondent make those allegations. Since she did not, clearly her evidence is still caught up in the realm of hearsay evidence which is inadmissible as she merely repeated what she heard from third parties and the investigations that she did. Therefore, although we agree that PW13 was a candid and truthful witness and we believe her evidence in so far as it relates to what she did upon receipt of the complaints from former Chief Munyambala and other stakeholders and the investigations she conducted which showed that the Disaster Management Unit had not released any money for rehabilitation of the schools in question, her evidence nevertheless cannot be said to have connected the

Respondent to the alleged defamation or ill speaking of the Referendum. As such, PW13's evidence on its own cannot be proof that the Respondent made the statements attributed to him. Therefore, Mr. Bwalya's argument in this respect is legally flawed.

As regards Mr. Bwalya's further argument that the evidence of the Appellant as regards the alleged defamation and ill speaking of the Referendum by the Respondent was corroborated by the evidence of PW11, PW12 and PW13, our considered view is that to ably determine this issue, it is necessary to first clarify what corroborative evidence is. **Black's Law Dictionary** defines ***'corroborating evidence'*** as follows:-

> **"Evidence that differs from but strengthens or confirms what other evidence shows."**

In the case of **Kamba Saleh Moses v Hon. Namuyangu Jennifer,**[20] the Court in Uganda had the occasion of considering the need in election petitions for corroboration of the evidence of witnesses who belong to the same political party. The Court put it thus:-

> **"Kataike's evidence is evidence of a confessed supporter of the respondent. It is also evidence of an accomplice under S68 (2) of the PEA. Such evidence is suspect. Partisan witnesses, as Kataike is in the instant case, are likely to exaggerate their evidence in an effort to tilt the balance of proof in favour of the candidate they support. What was needed in this case was for the learned trial judge to look for independent evidence from a non partisan and independent witness to corroborate the evidence of Kataike. I find no such evidence on record."**

In **Wadada Rogers v Sasaga Isaiah Jonny & EC**[21] the court in Uganda re echoed the above requirement and observed that:-

> **"No number of witnesses is required to prove a fact. In election matters partisan witnesses have a tendency to exaggerate claims about what might have happened during elections. In such situations it is necessary to look for 'other' evidence from an independent source to confirm the truthfulness or falsity of the allegation."**

We hasten to mention here that although the decisions in the above cases are not binding on us, they are of persuasive value and they aptly apply in the current case as they provide useful guidelines in similar cases.

Applying the above principles to the current case and to Mr. Bwalya's argument that the above mentioned witnesses corroborated the Appellant's evidence, our firm view is that this proposition is not sound at law. First and foremost, both PW11 and PW12, belonged to the Appellant's own political party and were members of his campaign team and hence their evidence was evidence of partisan witnesses which should be treated with caution and required corroboration in order to eliminate the danger of exaggeration and falsehood. Therefore, their evidence cannot be said to have corroborated the Appellant's evidence. Further, the onus was on the Appellant to adduce some independent

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how many people did not vote for him as a result of being defamed together with Mr. Katolo's submission in response that whatever was alleged to have been said about the Referendum did not affect the parliamentary elections as the Referendum was a separate Government programme from the parliamentary elections. The reason given for this proposition by Mr. Katolo is that the voters in the Referendum were different from those in the parliamentary election. He thus invited us to take judicial notice of this difference.

We have considered the above submissions. As much as we agree that the Referendum was a separate government programme from the general election in the sense that there was a difference as regards the eligibility of voters as only registered voters were eligible to vote in the general election whilst in the Referendum, persons who had attained the age of 18 years and had a green National Registration Card could vote, nevertheless, we have not lost sight of the fact that the government in power at the time of both the general elections and Referendum was the PF and on whose ticket the Appellant stood and that it was the government that initiated the Referendum and that the decision to hold the Referendum at the same time as the general elections was by the government. We are also alive to the fact that Regulation 15 (1) (c) of the **Code of Conduct** which is a Schedule to the

2016 **Electoral Process Act** prohibits the making of false or defamatory allegations against a person or his political party as it states that:-

> **" A person shall not make false, defamatory allegations concerning any person or political party in connection with an election."**

However, the question here is, whether on the evidence that was adduced in the court below, it can be said that the Appellant proved to the required standard that the Respondent or his party did speak ill of the Referendum and character assassinated him and that as a result of the alleged illegal acts or misconduct, the majority of the voters in Mufumbwe constituency were or may have been prevented from voting for a preferred candidate. We say so because as alluded to above, it is a legal requirement under Section 97 (2) of the **Electoral Process Act** that the petitioner must not only prove the commission of a corrupt or illegal act or misconduct by the respondent or his/her election or polling agent, he/she must also prove that as a result of that illegal act or misconduct, the majority of the voters in that constituency were or may have been prevented from electing their preferred candidate.

In **Mubika Mubika v Poniso Njeulu**[22] the Supreme Court aptly guided and stated that:-

> **"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 or 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."

Applying the above guidelines to the evidence on record, we find that it cannot be safely concluded that this evidence met the threshold set for nullifying an election of a member of parliament under Section 97 (2) (a) of the **Act.** The learned trial Judge cannot thus be faulted for dismissing the alleged character assassination and ill speaking of the Referendum as the requisite threshold was not met.

Although we agree with Mr. Bwalya's submission that the Appellant was not expected to bring all the electorate to testify as that would amount into requiring a higher standard of proof beyond what is stipulated or envisaged by the law in election matters, we nonetheless find that the totality of the evidence adduced by the Appellant did not at all meet the applicable standard. We also do not agree with Mr. Bwalya's argument that the learned Judge dismissed the alleged defamation on ground of the 'inclination' of not reporting the alleged defamation to the **DCMC** as the correct reason was insufficient evidence. Further, the contention that the Appellant did report the

alleged defamation to the **DCMC** cannot be proof of the commission of the alleged act or misconduct or that it was widespread so as to have negatively impacted on the election result. In any event, the Appellant is on record and Mr. Bwalya conceded in his submission that the minutes of the Committee were not produced to support the claim that the Appellant reported this complaint. As it is, it was the Appellant's word only which the learned trial Judge rejected and he was perfectly entitled to do so. We thus do not also agree with Mr. Bwalya's submission that the Appellant did prove that the majority of the voters did not vote for him because of the character assassination and ill speaking of the Referendum by the Respondent and his party and the suggestion that this is evidenced by the fact that he only won in 10 out of the 48 polling stations. The question here is not where or the number of polling stations each candidate won in but whether the Appellant led sufficient evidence to show that the majority of the voters in the Mufumbwe Constituency were influenced in their choice of a candidate to vote for on account of what was alleged to have been said about him and his party. The Appellant's evidence which we have illustrated above did not at all establish a link between the alleged character assassination and ill speaking of the Referendum and why he polled more votes than the Respondent in only 10 out of 48 polling stations. The only inference that

can reasonably be drawn is that he was more popular among the people who voted in those polling stations than the other candidates. As such, we are not persuaded that the trial Judge glossed over any of the Appellant's evidence.

As regards the argument by Mr. Katolo that speaking about the Appellant's incarceration and release from prison through the Presidential pardon did not amount to assassination of his character as it was the Appellant himself who first informed the people of Mufumbwe about this, Mr. Bwalya's response was to concede that indeed, the Appellant informed the people of Mufumbwe about this. He, nonetheless, urged this Court to draw a distinction in the timing and contended that whilst the Appellant spoke about his incarceration and pardon before or outside the election period, the Respondent did so during the campaign period with the intention of benefitting from the damaging statements about the Appellant and which, according to Counsel, the Respondent did benefit. We have considered the above arguments. Our brief response is that the distinction in the timing as to when the Appellant and the Respondent spoke about the Appellant's incarceration and release from prison is immaterial. What is of import and which point Mr. Bwalya conceded is that the Appellant himself

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We therefore, find no merit in grounds one and two of this appeal. We dismiss them.

Ground three of this appeal attacks the learned Judge for dismissing the Appellant's claim that there was widespread violence and intimidation of elections officers and for also attributing the political violence to the PF. The major argument in support of this ground was that in the light of the evidence of PW13 and all the police officers who testified which clearly showed that there was widespread violence in the constituency involving all political parties, the learned Judge should have nullified the Respondent's election. Further, that the learned Judge contradicted himself as on one hand, he found that the police officers who testified on the violence were telling lies while on the other, he agreed that there was violence in the constituency which he must have based on the evidence of the same police officers as they are the only witnesses who testified on violence. Counsel argued that violence pollutes the political atmosphere regardless of who the wrong doer or perpetrator is.

Counsel also criticised the learned Judge for not finding that there was intimidation of elections officers by the Respondent and his party. He argued that this is against the spirit of Section 97 (2) of the **Act** and

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We have considered the above submissions by the learned Counsel for the parties. The main question raised in ground three is whether on the evidence adduced by the Appellant, it can be said that there was widespread political violence and intimidation of the elections officers in Mufumbwe Constituency during the campaign period and if so, whether the said political violence, affected the parliamentary election results such that it can be held that the majority of voters were or may have been prevented from electing a candidate of their choice?

To ably determine the issues raised under this ground of appeal, it is crucial and imperative that we first identify the incidents of the alleged violence and the intimidation complained of. In this regard, we have identified six incidents. These are: the alleged disruption of the Appellant's meeting at Kamazovu by UPND cadres; the road accident involving the UPND and PF motor vehicles; the alleged attack on Marshal Mungochi, a presiding officer at Kangombe polling station; the alleged assault of Sydney Wotela; the alleged intimidation of elections officers; and the alleged widespread political violence in Mufumbwe Constituency in general.

As regards the alleged disruption of the Appellant's meeting at Kamazovu by UPND cadres, the record shows that although this was

referred to in the introduction in the Appellant's Heads of Argument under ground three of this appeal, it was not argued in both the Appellant's written Heads of Argument and in Counsel's oral submissions. We, therefore, take it that it has been abandoned. Hence, we shall not consider it.

As regards the alleged road traffic accident involving the UPND and PF motor vehicles, the learned Judge relied on the evidence of PW3, a police officer who investigated the incident in arriving at the finding of fact that the incident was a pure road traffic accident which was caused by the negligence of Roy Ifwa (RW9) who was driving the UPND motor vehicle. The trial Judge did not believe the testimony of PW4 who was the victim of the said road traffic accident that the two motor vehicles did not collide but that he was hit by the UPND motor vehicle whilst standing by the PF motor vehicle which was stationary. However, this evidence was in total contrast to that of RW2 who too was a passenger in the same PF motor vehicle. RW2's evidence tallied with the evidence of PW3 who investigated the incident and with the sketch plan that PW3 made and produced in court as to how the accident occurred and where the impact was. RW2's evidence also tallied and supports the evidence of both PW3 and RW9 that there was a collision between the two motor vehicles whilst both were in motion. Therefore,

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We have considered the above evidence. The record shows that Marshal Mungochi who was the alleged victim of the attack was not called to testify by the Appellant. The failure by the police to issue a medical report to Marshal Mungochi was also a dereliction of duty which cast doubt as to whether the alleged attack by suspected UPND cadres did at all occur as all that is on record is the evidence of PW5 who was not at the scene of the alleged attack. Further, this evidence did not at all link the Respondent or his agents to the attack. Therefore, even though the learned Judge did not make any specific finding on this incident, it cannot be said that this allegation was proved to the required standard of convincing clarity as no eye witness(es) were called to testify. Hence, the alleged assault remains a mere assertion.

With regard to the alleged assault on Sydney Wotela, the learned trial Judge identified and referred to the evidence of PW5, PW6, PW7 and PW8, who were all police officers. He, however, rejected their evidence on ground that their evidence was not reliable as they had lied to the court and that their evidence contradicted the Police's own entries in the Occurrence Books and the statement which the police recorded from Sydney Wotela as the entry in the Occurrence Book showed that Sydney Wotela was attended to by PW6 at the Police Station at 19.54 hours over the attack by alleged PF cadres at Mufumbwe Bus Station at

19.00 hours. While PW6 and PW8 said he reported the attack at 17.00 hours. PW8 also confirmed, under cross- examination, that the time of reporting the alleged assault entered in the Occurrence Book tallied with the time that was recorded in Sydney Wotela's statement to the police which PW5 recorded as regards the time when the attack was reported.

In view of the contradiction illustrated above, the learned trial Judge cannot be faulted for resorting to and relying on the entries in the Occurrence Books which were part of the Appellant's own evidence produced to support his case that the violence was widespread. This is more so because the Occurrence Books constituted formal records of the reports that were being received and recorded by the police on the various incidents of violence reported during the period in question.

In **Peter Lifunga Machilika v The People,**[23] the Supreme Court guided as regards the question of credibility of witnesses that once a witness or a complainant has been shown to be untruthful in material respects such as the use of violence, his or her evidence can carry very little weight. Although the above case related to the offence of rape to which a higher standard of proof applies than the one in the current case, a cardinal principle of law was discussed as regards assessment and findings on credibility of witnesses. This is that once a witness is

found to untruthful in material respects, his or her evidence carries very little weight as this goes to the credibility of such a witness. Therefore, the learned Judge was on firm ground when he declined to rely on the evidence of PW6 and PW8 on ground that they were not credible witnesses as they had lied to the court as regards the time of the alleged assault on Sydney Wotela. The least we can say is that for three police officers to contradict their own entries in the documents that they had in their possession leaves much to be desired. Further, PW7 who testified about the whereabouts of the Appellant at the time of the alleged assault on Sydney Wotela, contradicted himself as in examination- in- chief, his evidence was that on the date in question at about 19.00 hours, whilst monitoring the situation at the market in Kalengwa, he saw the Appellant's vehicle passing going back to Mufumbwe but under cross-examination, he changed his statement and stated that he saw the Appellant driving his vehicle and that he stopped at the market and then he saw him greeting people freely. This was a serious contradiction which goes to the credibility of the witness as the Appellant could not have been in Kalengwa greeting people at the market while at the same time, his motor vehicle was seen by the same witness going back to Mufumbwe. Therefore, the court below cannot be faulted for finding that PW7 had contradicted himself on the whereabouts of the Appellant on

the 13th June, 2016 when Sydney Wotela was alleged to have been assaulted at Mufumbwe bus stop.

As regards an issue that emanated from Mr. Katolo's submission which we think requires clarification, whereunder Counsel submitted that since the Appellant was involved in political violence as he was implicated in the assault of Sydney Wotela, he should not be allowed to benefit from his own wrong actions by asking this Court to nullify the Respondent's election on the basis of his own conduct and the argument in response by Mr. Bwalya that since Sydney Wotela was not called as a witness, the learned Judge was wrong when he accepted the statement by Sydney Wotela as proof of the Appellant's involvement in political violence because the statement was hearsay evidence which is inadmissible; our response is that the statement by Sydney Wotela was produced by the Appellant himself as part of his own evidence to show that there was widespread violence. It is rather shocking that the Appellant is now seeking in this appeal to disparage his own evidence. In fact, this contention by Mr. Bwalya flies directly in the teeth of the maxim: ***allegans contraria non est audiendus*** which means that a person should not be allowed to blow hot and cold at the same time. When it suited him, the Appellant sought to rely on the statement recorded from Sydney Wotela to support his claim that the violence in

Mufumbwe was widespread. He has now turned around and attacks it and wishes us to disregard it as hearsay evidence which is inadmissible. If not ingenuity it is a case of the Appellant wanting to have his cake and eat it too.

As regards the alleged intimidation of elections officers by the Respondent and his party, we note that PW14, a Stenographer at Mufumbwe District Council, who was the Assistant Returning Officer, IT, testified on the pronouncements made by Mr. Hakainde Hichilema at a public rally at which he is alleged to have accused the named elections officers of planning to rig the elections. Mr. Bwalya also relied on the letter written by Clement Machayi to the Council Secretary demanding the removal of those officers from participating in the conduct of the elections.

For convenience, the relevant portions of the letter read as follows:-

"...

28th July 2016

The District Electoral Officer
Electoral Commission of Zambia
P.O. Box 13001
Mufumbwe

Dear Sir

REF: REMOVAL OF SUSPECTED ELECTION OFFICERS FROM HANDLING THE 11 AUGUST 2016 GENERAL ELECTION

Please refer to the above caption.

The United Party for National Development (UPND) has received intelligence information concerning the following officers: Hector (Returning Officer). Samuel Mwanza (Planner) Tracy Bwalya (Chief Administrator). Dorcas Shipilo (Secretary to the CS) and Oliver Usheya (human resource officer – DEBS office) that the Officers are working with the Patriotic Front (PF) to manipulate election results in favour of the Patriotic Front (PF).

The United Party for National Development being a major stakeholder in this election demands the express removal of the above mentioned names from handling the 11 August 2016 general election. We further demand that the above mentioned Officers be replaced with non-partisan individuals who will deliver a credible election which will reflect the will of the people of Mufumbwe.

Please note that the above mentioned names are already in public domain and any attempt to mismanage this election by the same Officers will not only plunge Mufumbwe District into chaos but also endanger the lives of the Officers from the general public.

Your prompt action will be highly appreciated.

Yours faithfully,

(Signed)
Clement Machayi
CAMPAIGN MANAGER
UNITED PARTY FOR NATIONAL DEVELOPMENT (UPND)
..."

PW14's evidence was that because of the pronouncement and the above letter, she and the other elections officers mentioned lived in fear and that her colleagues requested and were transferred from Mufumbwe. The learned Judge considered this evidence and the letter in question. He found that PW14 was a very evasive witness who refused to voluntarily answer questions relating to matters that she had dealt with as Assistant Returning Officer, IT. And that the above letter reflected the pronouncements made by Mr. Hakainde Hichilema at the rally but that the said letter did not say that the named elections officers

were to be removed from Mufumbwe as it only demanded their removal from handling the 11th August, 2016 general election. And that the letter did not put the lives of the named elections officers in danger as it clearly stated that any attempt to mismanage the election by the officers would not only plunge Mufumbwe District into chaos but also endanger the lives of the officers from the general public and that it was however, common cause that Mufumbwe District was not plunged into chaos nor were any of the elections officers named in the letter harmed as the election was not mismanaged. He also found that other than PW14's claim in her evidence that as a result of the said pronouncements she and her colleagues could not move freely in Mufumbwe. no other evidence was adduced as none of the three officers were called to testify to show that they requested for transfers and that they were transferred immediately because of that reason. He also found that although PW14 had claimed that she lived in fear but that at the same time, she stated that she was able to walk to and from church during and after the campaign period and that she was not assaulted or harmed by anyone and that she freely voted on 11th August, 2016.

We have considered the above submissions. We totally agree with the learned Judge that PW14's evidence did not at all show how her

life was adversely affected as a result of the alleged pronouncements and the letter in question. Although she claimed that she was living in fear, her own evidence as found by the learned Judge contradicted this as her testimony was also that she was able to freely walk to and from church during and after the campaign period and that on 11th August, 2016 she voted freely at the polling station where she had registered without any incident and that after voting, she went to the totalling centre to perform her job as Assistant Returning Officer, IT. We also note from the record that this witness was indeed, very evasive as found by the learned Judge. Apart from her, none of the other named elections officers were called to confirm the basis of their transfers.

Further, as regards the contents of the letter, this witness, under cross-examination, confirmed that as stakeholders, the UPND had the responsibility to bring any suspicion of possible mismanagement of elections to the attention of the authorities and she too conceded that there was no violence as the elections were not mismanaged Therefore, the inescapable conclusion is that apart from the above assertion by PW14, there is nothing else on record that shows that the elections in Mufumbwe were mismanaged as the only purported attack on an elections officer highlighted was that on Marshal Mungochi which as stated above, was not proved.

We are, therefore, not persuaded that the Appellant proved that the alleged pronouncements against the elections officers and the letter in question negatively impacted on the parliamentary election results as required by Section 97 (2) of the **Electoral Process Act** and Regulation 15 of the **Code of Conduct**. We, thus find no basis upon which to reverse the findings of fact by the learned Judge as he based these on the evidence before him which he properly evaluated.

As regards the last allegation that generally, violence was widespread in Mufumbwe Constituency, the thrust of Mr. Bwalya's contention was that the learned Judge should have nullified the Respondent's election on ground that the Appellant's evidence showed that there was generally widespread political violence in the constituency as attested by PW2 who was the Officer-In- Charge and a member of the **DCMC**. And that PW2's evidence was that the political violence in the constituency was too much such that the officers under his command could not cope with the reports. Mr. Bwalya also argued that PW2's evidence was that most of the cases or complaints that were reported to the **DCMC** involved violence and that PW13's evidence also supports the Appellant's position and the evidence of PW2 that the violence was widespread. Counsel's position was therefore that

sufficient evidence was adduced upon which the learned Judge should have nullified the Respondent's election as area Member of Parliament.

We have considered the above submissions and the Appellant's evidence and that of PW2 and PW13. In arriving at his findings of fact as regards the claim that the violence was widespread, the learned Judge again referred to the entries in the Occurrence Books which the Appellant produced. He came to the conclusion that although there was political violence in Mufumbwe during the period in question, the violence in question was not as widespread as claimed by the Appellant and his witnesses. We totally agree with the learned Judge that the Appellant did not prove this allegation to the requisite standard of convincing clarity. The learned Judge properly evaluated the evidence before him including the entries in the Occurrence Books which showed that only 8 out of 68 cases of violence recorded during the period in question were identified by the police themselves as having been politically motivated. So the learned Judge cannot be faulted for so finding.

Mr. Bwalya's further contention was that the learned Judge contradicted himself as on one hand he found that there was political violence in Mufumbwe during the period in question which he must have

based on the evidence of police officers who testified in support of the Appellant's claim and yet on the other hand, he found that the same police officers were lying. We have considered the above argument. The question is: did the Appellant's evidence prove to the requisite threshold that there was widespread violence during the period in question contrary to the trial Judge's findings of fact that the violence was not so widespread to justify nullification of the Respondent's election?

We have combed through the evidence on record. We totally agree that the Appellant's evidence did not meet the applicable threshold which could have persuaded the court below and indeed this Court to find in his favour that the political violence was widespread as claimed. Simply put, the Appellant's evidence did not meet the threshold required under Section 97 (2) of the **Electoral Process Act** for nullification of an election of a Member of Parliament. PW2's evidence that the Appellant relied on as proof that political violence in the constituency was widespread is not supported by the Police's own official statistics recorded in the Occurrence Books which the Appellant produced. Admittedly, the question here is not the number of the alleged acts of violence but the magnitude and how widespread the violence was. The analysis of each one of the alleged incidences of violence

highlighted in this appeal, fortifies our position that the trial Judge was on *terra firma* when he held that the alleged political violence was not so widespread as to justify the nullification of the Respondent's election on that basis. In fact, the learned Judge went further and stated that out of those reports that he isolated from the Occurrence Books, they showed that it was the PF cadres who were the perpetrators of the violence. These documents were in the Appellant's own bundle of documents.

Further, PW13's evidence which the Appellant has also sought to rely upon as proof that the violence was widespread, should be considered in its own right as already observed above as the basis of her opinion were the reports that she was receiving from other persons including the parliamentary candidates themselves. However, none of the persons who reported to her were called to testify. PW13 did not personally witness the violence. We thus agree with the trial Judge that this aspect of PW13's evidence was too caught in the realm of hearsay evidence which is inadmissible. Consequently, we are not persuaded that there was sufficient evidence that showed that the violence in Mufumbwe was as widespread as claimed by the Appellant or that the purported violence negatively impacted on the parliamentary election results.

Therefore, although Mr. Bwalya argued with vigour that since the trial Judge found PW13 to be a candid and truthful witness, he should have found that her evidence corroborated the evidence of the police officers who investigated the cases of the alleged political violence, for the reasons given above, this assertion is not at all well founded at law and is thus not tenable. Further, the issue here as alluded to above, is not the credibility of the witness but rather, whether the allegations were supported by the evidence on record which we have found it was not. Therefore, the learned trial Judge cannot be faulted for rejecting PW13's evidence as hearsay which is inadmissible.

Although Mr. Bwalya also forcefully argued that the learned Judge was wrong to attribute all the political violence to the PF cadres when PW2's evidence was that some of the cases of alleged violence against members of other political parties were referred to the DCMC to which PW2 as the officer in charge was a member; our brief response is that PW2's own evidence under cross-examination was that the entries in the Occurrence Books showed that all the reports of the alleged political violence recorded were against suspected PF cadres. PW13's evidence also shows that she was only told by the Council Secretary that some of the cases of political violence were reported to the DCMC. Mere stating that cases or complaints were made to the DCMC cannot be proof that

the violence was widespread. None of the reports or minutes of the **DCMC** were produced in the court below. In fact, Mr. Bwalya conceded this in his submission. Therefore, the only tangible evidence produced in support of the alleged violence were the Occurrence Books upon which the trial Judge based his finding that these showed that most of the reports of alleged political violence were against the PF cadres. We thus, find, no basis upon which we can reverse the findings of fact made by the learned Judge and find that the violence was widespread as claimed.

There was a further and rather strange and shocking contention by Mr. Bwalya that when asked in cross-examination, the Appellant did not give an unequivocal response to the question whether the people of Mufumbwe were capable of making independent decisions on who to vote for because his response was that they were 'quite' capable of doing so. We first wish to refer to the definition of the word 'quite' before we make any comment. **Longman's Dictionary of Contemporary English, New edition** defines ***'quite'*** as follows:-

"Quite – 1. fairly or very, but not extremely,

2. quite a lot/bit/few- in a fairly large number or amount."

In his earlier response under cross-examination, the Appellant categorically stated that in the parliamentary election, the people of

Mufumbwe decided based on their independent decision and that they were quite capable of making independent decisions on who to vote for. Our understanding of the responses by the Appellant if applied to the definition of the word 'quite' is that he confirmed that a fairly large number of the electorate in Mufumbwe were capable and did make their own independent decisions as to who to vote for. In view of the Appellant's own evidence referred to above, there is nothing more to add suffice to repeat that in coming to the conclusion that the Appellant did not prove the allegations against the Respondent to the required standard, the learned Judge looked at the totality of the evidence before him including the Appellant's own evidence in cross-examination. We thus decline to respond to the Appellant's invitation as regards whether by using the word 'quite' the Appellant qualified his statement as doing so would amount to the court engaging in semantics and that this would be an exercise in futility. So going by the Appellant's own responses; it can be deduced that although the voters in Mufumbwe may not have been 100% independent, the majority of them were, nonetheless, capable of making an independent choice as to which candidate to vote for based on their own free will without being influenced as has been argued in this appeal.

For the reasons stated above, we find no merit in ground three. We dismiss it.

All the three grounds of Appeal having failed on account of want of merit, the sum total is that the Appellant's appeal has failed. The same is dismissed.

As regards the issue of costs and the arguments by the learned Counsel for the respective parties, we wish to reiterate that the award of costs is in the discretion of the court. We however, agree with Mr. Katolo's submission that since the Appellant did not in this appeal challenge the award of costs to the Respondent by the court below, there is no basis for us to interfere with the order of the court below.

As regards the costs of this appeal, we order that each party shall bear own costs.

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H. Chibomba
President
CONSTITUTIONAL COURT

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M. S. Mulenga
Judge
CONSTITUTIONAL COURT

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E. Mulembe
Judge
CONSTITUTIONAL COURT

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P. Mulonda
Judge
CONSTITUTIONAL COURT

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M. M. Munalula
Judge
CONSTITUTIONAL COURT