

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

(2025)
 APPEAL NO. 15 of 2017
 2016/CC/A035

SELECTED JUDGMENT NO. 58 of 2017

IN THE MATTER OF: THE PARLIAMENTARY PETITION RELATING TO
 SINAZONGWE PARLIAMENTARY CONSTITUENCY
 ELECTIONS HELD IN ZAMBIA ON THE 11TH OF
 AUGUST 2016.

AND

IN THE MATTER OF: ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA,
 CHAPTER 1 OF THE LAWS OF ZAMBIA.

AND

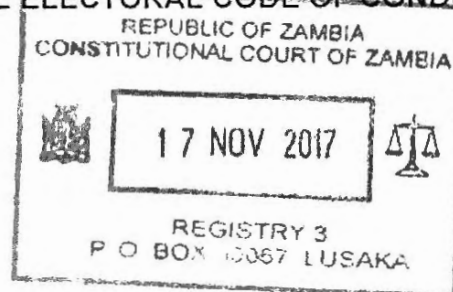
IN THE MATTER OF: SECTION 81, 83, 84, 89, 91, 97 AND 98, OF THE
 ELECTORAL PROCESS ACT NO. 35 OF 2016.

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016.

BETWEEN:

RICHWELL SIAMUNENE
 AND
 SIALUBALO GIFT



APPELLANT

RESPONDENT

CORAM: Chibomba PC, Sitali, Mulembe, Mulonda and Munalula JJC on 30th
 August, 2017 and 17th November, 2017.

For the Appellant: Mr. F Besa of Messrs Besa Legal Practitioners

For the Respondent: Mr. M Cheelo of Messrs MAK Partners

JUDGMENT

Munalula JC, delivered the judgment of the Court.

Cases referred to:

1. Lanyero Sara Ochieng and Electoral Commission v Lanyero Molly Election Petition Appeal No. 032 of 2011 (Uganda Court of Appeal)
2. Ndongu v Moses Mulyango and Roostico Banda (2011) Z.R. 187
3. Examinations Council of Zambia v Reliance Technology Limited (2014) 3 Z.R. 171
4. Zulu v Avondale Housing Project Limited (1982) Z.R. 172

(2026)

5. Attorney General v Achume (1983) Z.R.1
6. Nkhata and Others v Attorney General (1966) Z.R.124
7. Khalid Mohamed v The Attorney-General (1982) Z.R. 49
8. Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v Frederick Jacob Titus Chiluba (1998) Z.R. 79
9. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138
10. Wadada Rogers v Sasaga Isaiah Jonny and Electoral Commission Election Petition No. 031 of 2011 (Uganda Court of Appeal)
11. Geoffrey Kwijuka v Electoral Commission and Another Election Petition No. 007 of 2011 (Uganda Court of Appeal)
12. Masiko Winnie Komuhangi v Babihuga Winnie Election Petition Appeal No. 9 of 2002 (Uganda Court of Appeal)
13. Mwalimu Simfukwe v Evaristo David Kasunga Appeal No. 50 of 2013 (unreported)
14. Reuben Mtolo Phiri v Lameck Mangani S.C.Z. No. 2 of 2013 (Unreported)

Legislation referred to:

The Electoral Process Act, No. 35 of 2016, section 83(1), 89(1) 97(2) (a)

Richwell Siamunene, the Appellant herein, and Petitioner in the Court below, appeals against the entire decision of the said Court. The facts leading to this appeal are that the Appellant had contested the election in Sinazongwe Constituency as Member of Parliament on the Patriotic Front (PF) ticket whilst the Respondent contested on the United Party for National Development (UPND) ticket. The Respondent was declared winner with 34,397 votes as against the Appellant's 6,171.

The Appellant being dissatisfied with the election results, petitioned the High Court for the nullification of the election of the Respondent as Member of Parliament for the said constituency on grounds that the Respondent's election campaign was characterized by widespread

(2027)

electoral malpractices, corrupt and illegal practices such as intimidation, undue influence and illegal publication of false statements by the Respondent, his agents and supporters contrary to the Electoral Process Act of 2016 (henceforth referred to as the EPA, 2016) and the Electoral Code of Conduct, 2016.

The Appellant contended that the said practices prevented the majority of voters in Sinazongwe from electing the candidate whom they preferred. The allegations of undue influence were based on a number of grounds one of which was that the Respondent personally and through his agents had engaged in various and widespread acts of violence and intimidation in all the wards. The other grounds alleged that the Respondent and his agents had threatened to beat up anyone who would vote for the Appellant to an extent that the Respondent and his supporters were deployed outside the windows next to polling booths intimidating the voters and denying them their entitlement to a secret ballot.

The Appellant also alleged illegal road blocks being mounted by the Respondent, acts of corruption and bribery at all the polling stations on polling day such as buying of food and drinks for the presiding officer and the Electoral Commission of Zambia (henceforth referred to as the ECZ)

(2028)

officers in the constituency and generally creating an environment of fear and intimidation for the Appellant's supporters.

The Court below found that there was violence on nomination day perpetrated by the Respondent's supporters with his knowledge and consent or approval and that of his agent against the Appellant and his supporters. The Court however found that on the question as to whether the acts of violence had prevented the majority of voters from electing the candidate that they preferred, the few reports made could not be said to be representative of the majority of voters. The Court further found as a fact that the UPND supporters were telling voters to fold their ballot papers outwards at certain named polling stations but held that these incidents were isolated to three out of the 58 polling stations in the Constituency and that there was no evidence that the malpractice had a negative impact on the majority of the voters.

The Court equally dismissed all the other allegations stating that the Appellant had failed to prove all the allegations set out in the Petition and held that the Respondent had been duly elected.

The Appellant appeals against the entire decision on the grounds set out in the memorandum of appeal which we quote verbatim:-

(2029)

1. *That the learned trial Judge in the Court below grossly erred in fact and in law when he held that the violence perpetrated on the nomination day with the consent and knowledge of the Respondent in his presence did not affect the majority of voters in the face of indisputable evidence that the more than 16 people who were assaulted, a fact which the Court established were part of the Appellant's supporters mobilized from all the 14 wards.*
2. *That the learned trial Judge erred in both law and fact when he held that the five people who it was expressly stated failed to vote as a result of violence of the Respondent and his agents did not represent the all (sic) constituency when it cannot realistically be expected of the Appellant to bring all the 59, 544 voters to testify and confirm how they voted.*
3. *That the learned trial Judge erred in law and in fact when he held that the Appellant did not prove that the Respondent or his election or polling agents knew or consented to the violence after nomination day despite the learned trial Judge earlier pronouncing that **"I find that there were cases of political violence by both UPND and PF cases but mostly perpetrated by UPND cadres".(sic)***
4. *That the learned trial Judge erred in both law and fact when he held that the forcing of voters not to treat their votes as secret was only happening in 3 polling stations when the evidence, including video evidence showed that this was widespread.*
5. *That the learned trial Judge erred in law and fact when he held that the Respondent was not aware of the setting up of the illegal road block when evidence shows that this was done by a Mr. Zachariah Chikete a member of*

(2029)

1. *That the learned trial Judge in the Court below grossly erred in fact and in law when he held that the violence perpetrated on the nomination day with the consent and knowledge of the Respondent in his presence did not affect the majority of voters in the face of indisputable evidence that the more than 16 people who were assaulted, a fact which the Court established were part of the Appellant's supporters mobilized from all the 14 wards.*
2. *That the learned trial Judge erred in both law and fact when he held that the five people who it was expressly stated failed to vote as a result of violence of the Respondent and his agents did not represent the all (sic) constituency when it cannot realistically be expected of the Appellant to bring all the 59, 544 voters to testify and confirm how they voted.*
3. *That the learned trial Judge erred in law and in fact when he held that the Appellant did not prove that the Respondent or his election or polling agents knew or consented to the violence after nomination day despite the learned trial Judge earlier pronouncing that **"I find that there were cases of political violence by both UPND and PF cases but mostly perpetrated by UPND cadres".(sic)***
4. *That the learned trial Judge erred in both law and fact when he held that the forcing of voters not to treat their votes as secret was only happening in 3 polling stations when the evidence, including video evidence showed that this was widespread.*
5. *That the learned trial Judge erred in law and fact when he held that the Respondent was not aware of the setting up of the illegal road block when evidence shows that this was done by a Mr. Zachariah Chikete a member of*

generally fear instilled in the Appellant's supporters and campaign agents who were all scared of being beaten up by the Respondent's supporters. He insisted that this evidence went unchallenged on record but the learned trial Judge erroneously opted to create a justification on behalf of the Respondent that there was no evidence to show which areas other supporters (for the Appellant) came from. Counsel submitted that it was not in dispute that there were a lot of people at the nomination and which villages they came from was not an issue. It was submitted that the learned trial Judge had failed to apply Section 83 appropriately.

Counsel emphasized that through the wording of the said section, a person need not personally perpetrate the violence but this can be done through any other person not limited to his election agent or polling agent. It was argued that the learned trial Judge erroneously excused the Respondent by finding that the said acts of violence could not be attributed to the Respondent as none of the witnesses had seen or heard the Respondent instructing the assailants to attack. Counsel submitted that this was a clear misapplication of the said section as there was ample evidence that the Respondent had waged a campaign of extreme violence.

(2032)

In ground four, Counsel contended that it was erroneous for the trial Judge to have in one breath agreed that voters were being asked to reveal who they were voting for and yet in another breath to have minimized the effect on the outcome by simply stating that it only happened in three polling stations. Counsel argued that the totality of the evidence as presented showed that the effect of the widespread intimidation was to influence the outcome of the poll in favour of the Respondent.

As for ground five, Counsel submitted that the said Zachariah Chikete was clearly a UPND member and part of the Respondent's campaign team. He argued that the setting up of the illegal road block by Chikete was for the Respondent's benefit and for the Court to have found that the Respondent was not responsible was erroneous.

In arguing ground six, it was contended that the trial Court had arrived at its 'decision to excuse' the Respondent by taking into account the fact that he was in Choma on the day of elections. Counsel submitted that the mere fact that the Respondent was not physically there did not absolve him of responsibility as there was evidence to the effect that the Respondent was heard telling his supporters that they should continue campaigning and camp at the polling stations. He ended by urging this

(2032)

In ground four, Counsel contended that it was erroneous for the trial Judge to have in one breath agreed that voters were being asked to reveal who they were voting for and yet in another breath to have minimized the effect on the outcome by simply stating that it only happened in three polling stations. Counsel argued that the totality of the evidence as presented showed that the effect of the widespread intimidation was to influence the outcome of the poll in favour of the Respondent.

As for ground five, Counsel submitted that the said Zachariah Chikete was clearly a UPND member and part of the Respondent's campaign team. He argued that the setting up of the illegal road block by Chikete was for the Respondent's benefit and for the Court to have found that the Respondent was not responsible was erroneous.

In arguing ground six, it was contended that the trial Court had arrived at its 'decision to excuse' the Respondent by taking into account the fact that he was in Choma on the day of elections. Counsel submitted that the mere fact that the Respondent was not physically there did not absolve him of responsibility as there was evidence to the effect that the Respondent was heard telling his supporters that they should continue campaigning and camp at the polling stations. He ended by urging this

In responding to ground four, it was argued that indeed, the violence was only from three polling stations and could not be said to have been widespread. He contended that some of the witnesses such as PW4, Nicholas Lungu's evidence was not corroborated and that he had failed lamentably to adduce proper evidence.

As for ground five, it was submitted that even though the alleged road blocks were made by Zachariah Chikete who was a member of the UPND, that person is not the Respondent hence the trial Judge was in order to have found the Respondent not to have been responsible for the alleged act.

He submitted that it would be asking too much to assume that a person who after casting his vote, was not present during the rest of the voting was the one who had instructed the UPND members to campaign during voting. He contended that in the absence of any report from the Returning Officer in that constituency to prove the Appellant's allegations against the Respondent, the claims amounted to mere speculation because the Returning Officer receives reports from all polling stations before announcing the winner. He ended by urging this Court to dismiss the grounds of appeal and find in the Respondent's favour.

(2035)

We are grateful to learned counsel for the submissions. Although both learned counsel did not cite any case authorities, we have nevertheless given all due consideration to the arguments raised. We have also considered in detail, the judgment of the learned trial Court. The issues as we see them are as follows. The Appellant asks this Court to revisit the trial Court's findings of fact and law. In Ground One, the question is whether because of the violence perpetrated on nomination day by the Respondent's supporters with his knowledge and consent or approval and that of his agent, against the petitioner and his supporters, the majority of voters were or may have been prevented from electing a candidate whom they preferred. The second and third grounds attack the trial Court's findings in relation to ongoing violence. The Appellant claims in ground two that the five individuals who did not vote as a result of violence were representative of the whole constituency as it was not possible to bring the entire constituency to testify. And in ground three, that the post nomination day violence which was found to have been mostly perpetrated by the UPND, the Respondent's party, was proved to have been consented to by the Respondent and his agents.

In the fourth ground, the Appellant wants this Court to find that there was evidence, including video evidence, showing that forcing of voters to

(2036)

vote in a particular way by revealing their vote, was widespread and not confined to the three polling stations. The fifth ground attacks the finding that the Respondent was not aware of the setting up of an illegal road block by a member of the UPND District structures when there is evidence showing otherwise. The sixth ground opposes the trial Court's finding that the Respondent was unaware of campaigning by the UPND on polling day when in fact at a rally the previous day, he had instructed his supporters to so campaign.

Before we consider the grounds of appeal, we wish to state the law on an appeal against a finding of fact by the trial court. The process of review requires what the Ugandan Court of Appeal, in the case of *Lanyera Sara Ochieng and Electoral Commission v Lanyero Molly*¹ described as, subjecting the evidence on record as a whole, to a fresh and exhaustive scrutiny while allowing for the fact that the Court has not seen or heard the witnesses. Be that as it may, overturning a trial Court's finding of fact should not be undertaken lightly. More so for election petitions. We are mindful that it is not in the public interest for interference which leads to nullification of an election to be undertaken without good cause. There is a plethora of authorities spelling out this position. In *Ndongo v Moses Mulyango and Roostico Banda*² the Supreme Court

(2036)

vote in a particular way by revealing their vote, was widespread and not confined to the three polling stations. The fifth ground attacks the finding that the Respondent was not aware of the setting up of an illegal road block by a member of the UPND District structures when there is evidence showing otherwise. The sixth ground opposes the trial Court's finding that the Respondent was unaware of campaigning by the UPND on polling day when in fact at a rally the previous day, he had instructed his supporters to so campaign.

Before we consider the grounds of appeal, we wish to state the law on an appeal against a finding of fact by the trial court. The process of review requires what the Ugandan Court of Appeal, in the case of *Lanyera Sara Ochieng and Electoral Commission v Lanyero Molly*¹ described as, subjecting the evidence on record as a whole, to a fresh and exhaustive scrutiny while allowing for the fact that the Court has not seen or heard the witnesses. Be that as it may, overturning a trial Court's finding of fact should not be undertaken lightly. More so for election petitions. We are mindful that it is not in the public interest for interference which leads to nullification of an election to be undertaken without good cause. There is a plethora of authorities spelling out this position. In *Ndongo v Moses Mulyango and Roostico Banda*² the Supreme Court

(2038)

should have ignored instead of what he should have considered; further that the judge did not take proper advantage of seeing and hearing the witnesses or erred in assessing their manner and demeanour. In addition, we take cognisance of *Khalid Mohamed v The Attorney-General*⁷ wherein it was stated that:-

“The appellate court may draw its own inferences in opposition to those drawn by the trial court although it may not lightly reverse the findings of primary facts.”

On the basis of these authorities, this Court will not lightly interfere with the findings of fact of the trial Court, which principle is good law and we intend to apply it in this appeal as if the decisions in the authorities cited were ours. In considering the appeal we shall reverse the findings of fact of the trial Court only if we consider that they are perverse, unsubstantiated by the evidence, or a misapprehension or improper view of the evidence.

We are further guided by the principle that he who alleges must prove any allegations to the standard of proof required by law; in election petitions this standard is higher. On the basis of a plethora of authorities established by the Supreme Court the standard of proof applicable is higher than the standard in civil matters of a “balance of probabilities” but lower than the standard in criminal matters of “beyond all reasonable

(2039)

doubt". In the case of *Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v Frederick Jacob Titus Chiluba*⁸ it was pronounced that:-

"...parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also the issues raised are required to be established to a fairly high degree of convincing clarity."

Further, in the case of *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and others*,⁹ it was opined that:-

"...the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of the voters."

Thus the Appellant in this case must prove his allegations to a fairly high degree of convincing clarity.

We also want to point out that as this is an election petition and the majority of witnesses are partisan, it is incumbent on the Appellant as

(2040)

petitioner to place before the Court independent evidence to corroborate and strengthen the testimony of the partisan witnesses. This is not only because of the reduced weight attached to their evidence but also because of the higher standard of proof required. We are not bound but are nevertheless guided by the case of *Wada Rogers v Sasaga Isaiah Jonny and the Electoral Commission*¹⁰ in which the Ugandan Court of Appeal held 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.

Similarly, in another Ugandan case, *Geoffrey Kwijuka v Electoral Commission and Another*,¹¹ the court referred to the decision in the case of *Masiko Winnie Komuhangi v Babihuga Winnie*¹² wherein it was stated that a Petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof. The evidence must be of a kind that is free from contradictions and truthful so as to convince a reasonable tribunal to give Judgment in a party's favour.

(2041)

We now turn to the substance of the appeal. The Appellant's six grounds are confined to section 97(2) (a) of the EPA, 2016. Under the provision, the following must be proved: First that a corrupt or illegal practice or other act of misconduct was committed by the Respondent in connection with the impugned election. Second, that the prohibited practice or illegal act was committed with the knowledge as well as the consent or approval of the Respondent; or alternatively, with the knowledge and consent or approval of the Respondent's election or polling agent. Thirdly, that as a result of the misconduct, the majority of voters in the Constituency were or may have been prevented from electing the candidate in the Constituency whom they preferred. Section 97 (1) and (2) (a) of the EPA, 2016, reads:

97. (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.

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

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

(i) by a candidate; or

(2042)

(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;

Although all the grounds point to the exercise of undue influence and intimidation, the Appellant chose to present each ground separately. We shall therefore consider the grounds in the order in which they were argued. Grounds one, two and three relating to violence will be dealt with before grounds four, five and six relating to other misconduct.

Part VIII of the EPA, 2016 sets out the specific election offence of violence under the umbrella of undue influence. Section 83(1)(a) and (b) prohibits a person either directly or indirectly by themselves or through any other person from exerting undue influence through the use of violence or threats to make use of violence upon any other person. Section 83 reads in part:

83. (1) A person shall not directly or indirectly, by oneself or through any other person –

(a) make use of or threaten to make use of any force, violence or restraint upon any other person;

(b) inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means, or pretended supernatural or non-

(2043)

natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person;

(c) do or threaten to do anything to the disadvantage of any person in order to induce or compel any person-

(i) to register or not to register as a voter;

(ii) to vote or not to vote;

(iii) to vote or not to vote for any registered political party or candidate;

(iv) to support or not to support any political registered party or candidate; or

(v) to attend and participate in, or not to attend and participate in, any political meeting, march, demonstration or other political event;

(d) interfere with the independence or impartiality of the Commission, any member, employee or officer of the Commission;

(e) prejudice any person because of any past, present or anticipated performance of a function under this Act;

(g) advantage, or promise to advantage, a person in exchange for that person not performing a function under this Act; or

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

(2) Subject to the other provisions of this Act, a person shall not prevent another from exercising a right conferred by this Act.

.....

(5) A person who contravenes any of the provisions of subsections (1) to (4) commits an offence.

(6) A person who, by abduction, duress or any fraudulent device or contrivance, impedes or prevents the free exercise of the vote of any voter or thereby compels, induces or prevails upon any voter either to give or to refrain from giving the person's vote at any election, commits an offence.

Ground one relates to the trial Court's finding that there was an incident of violence on nomination day which occurred when the UPND supporters returning from filing nomination papers encountered PF supporters who were on their way to file their own nomination papers. Further that the said violence was perpetrated by the Respondent's supporters with his knowledge and consent or approval as well as the knowledge and consent or approval of his election or polling agent. However, that there was inadequate evidence to support a finding that as a result of the act of violence the majority were prevented from voting for a candidate of their choice.

The Appellant takes issue with the finding that there was insufficient evidence that the violence that occurred on nomination day did affect or could have affected the majority of the electorate by preventing them from voting for a candidate of their choice. Counsel argued that the violence which was proven under sections 83 and 97 and was witnessed by several people from the whole constituency instilled fear in the Appellant's support base across the Constituency. He averred that the Court failed to apply the finding appropriately to come to the right decision. That the Court's decision is a misapprehension or improper view of the evidence before it. Counsel finally averred that *"this violence which was witnessed by*

(2045)

thousands of people and which was perpetrated in the presence and with the knowledge and consent or approval of the Respondent affected the outcome of the election to the Appellant's detriment."

We have already alluded to the standard of proof in an election petition. A minimum threshold must be met in order to prove the actual or probable impact on the majority of voters in a constituency. That the burden of proof lies on the Appellant to provide cogent evidence to a fairly high degree of convincing clarity that there was misconduct on the part of the winning candidate as a result of which the majority of voters in the Constituency were prevented or were likely prevented from voting for a candidate of their choice. The mere existence of proven misconduct on its own without proof of its effect on the majority of voters in a particular constituency is not enough to achieve nullification of the election under the EPA, 2016. We have carefully considered the evidence to see whether the trial Court did as averred by the Appellant, misapprehend the evidence and whether this is a suitable case in which to interfere with the findings of fact.

The trial Court found that the probability of the majority being influenced by the violence perpetrated on nomination day was not established for three reasons. First, the Court looked at the statistics. It

(2045)

thousands of people and which was perpetrated in the presence and with the knowledge and consent or approval of the Respondent affected the outcome of the election to the Appellant's detriment."

We have already alluded to the standard of proof in an election petition. A minimum threshold must be met in order to prove the actual or probable impact on the majority of voters in a constituency. That the burden of proof lies on the Appellant to provide cogent evidence to a fairly high degree of convincing clarity that there was misconduct on the part of the winning candidate as a result of which the majority of voters in the Constituency were prevented or were likely prevented from voting for a candidate of their choice. The mere existence of proven misconduct on its own without proof of its effect on the majority of voters in a particular constituency is not enough to achieve nullification of the election under the EPA, 2016. We have carefully considered the evidence to see whether the trial Court did as averred by the Appellant, misapprehend the evidence and whether this is a suitable case in which to interfere with the findings of fact.

The trial Court found that the probability of the majority being influenced by the violence perpetrated on nomination day was not established for three reasons. First, the Court looked at the statistics. It

(2047)

We have perused the record. We agree with the trial Court. There is evidence of violence but no cogent evidence of its widespread impact. It was incumbent upon the Appellant to prove his case to the required standard by providing cogent evidence not just of the incident of violence but also of its effect or likely effect on the majority. Just because an offence has been found to be proved against the Respondent whether directly or indirectly does not mean a nullification is warranted because evidence of an offence does not necessarily constitute evidence of a negative and widespread impact. The impact on the electorate must be proved in its own right by the party alleging it to the same standard of a fairly high degree of convincing clarity. In this case the Appellant's own witnesses testified that they voted freely in spite of the violence they witnessed. We cannot fault the trial Court on its findings and see no reason to interfere. Ground one has no merit and it is dismissed.

Grounds two and three relate to ongoing violence throughout the campaign period and on the polling day itself and will be dealt with together. The Appellant testified to several reports of violence, as did his witnesses. Independent testimony from PW13 and PW14, both of whom are senior police officers, attested to and produced documentary evidence of the incidents of violence which the Court found were mostly attributable

(2048)

to the UPND, the Respondent's party. The trial Court found that there was no evidence that the Respondent or his agents were aware of or consented to the violence.

The Court also found that the reported incidents of violence were too few to be representative of Sinazongwe Constituency which is vast. It found that even the few witnesses who encountered the violence voted freely. That over 50% of the registered voters in the constituency voted. There was no evidence of the negative impact on the majority of the voters. The Court therefore agreed with the Respondent's counsel that none of the Appellant's witnesses either failed to vote or where they voted, were prevented from electing the candidate of their choice. The Court concluded that the election results were not affected by violence.

We have given all due consideration to the Appellant's argument. We have looked carefully at the claim that section 83(1) of the EPA, 2016 refers to the perpetrator as "any person". That it means a candidate's responsibility for a violent or threatening act goes beyond his own actions or those of his election or polling agents. That it in fact extends to any violence or threats done by any member of his political party. That the only inference that can be drawn from any party related violence is that it was for the benefit of the candidate, in this case the Respondent. As he

stood to benefit, then he was aware of and had approved or consented to the violence. This is not what the law provides.

While we accept that in construing section 83 (1) of the EPA, 2016 we ought to follow the principle in *Mwalimu Simfukwe v Evaristo David Kasunga*¹³ which considered the provisions of section 82 of the repealed **Electoral Act No. 12 of 2006** which is similar to the current section 83 of the EPA, 2016 wherein it was stated that a person can directly and indirectly commit the corrupt or illegal practice. In our considered view, section 83 is similar to other provisions under Part VIII setting out the election offences. Therefore, the meaning of "indirect" is found in section 97(2) (a) of the EPA, 2016. A corrupt practice, an illegal practice or other misconduct is imputed to a candidate, and is therefore indirectly committed by the candidate, only where the candidate is proved to have had knowledge of and approved or consented to the alleged corrupt or illegal practice or misconduct. It will also be imputed to a candidate where the corrupt or illegal practice or misconduct is committed with the knowledge and consent or approval of the candidate's election or polling agent.

(2050)

The phrase "any other person" in Part VIII of the EPA, 2016 is defined and delimited by section 97 which is the only provision under which an election may be nullified. It identifies a group of persons

(20

connected to the person who is accountable, either through agency and / or through knowledge of the activity combined with consent or approval. 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.

It must be noted that on 11th August, 2016 there was a general election taking place, which included multiple candidates for presidential, local government and parliamentary elective positions and that the candidates came from several different political parties. In the circumstances clear and cogent evidence must be adduced to assign fault to a candidate or to his election or polling agent. Without such clear evidence it is difficult to apportion blame to the Respondent.

We have carefully reviewed the evidence in the Court below as well as the reasoning that formed the Court's decision. We note that there is insufficient evidence to support a finding that the documented acts of violence that occurred after the nomination day are linked to the Respondent. 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.

Counsel for the Appellant also argued that the violence which took place on nomination day, in the presence of the Respondent and his agents, and which he was found to be liable for, is evidence of his continuing knowledge and consent to or approval of subsequent violence and therefore his liability for ongoing violence. This argument is not tenable because the chain of causation is not unlimited. The evidence on record which established that the Respondent was aware of and had consented to the violence on nomination day does not show that he waged a campaign of violence throughout the election period.

(2052)

The evidence on record shows that the violence which was recorded, post nomination day was perpetrated by different individuals in different places over a period of several months. Therefore it cannot be said to be part of the same course of action or some form of extended conspiracy without clear and cogent evidence linking the violence on nomination day to post nomination violence. In the circumstances, cogent evidence with probative value should have been led by the Appellant to connect the Respondent to the various incidents of violence.

We are alive to the holding in the case of *Reuben Mtolo Phiri v Lameck Mangani*¹⁴ that any misconduct in connection with an election done by someone else and which has nothing to do with the Respondent and his agent can nullify an election. The Court in that case was looking at provisions of the repealed **2006 Electoral Act**, framed differently. This petition was brought under Section 97(2) (a) of the EPA, 2016 only. We are therefore of the firm view that the trial Court was on firm ground when it came to its decision that it is not enough to prove an illegality without proceeding further to prove that the illegality affected or could have affected the majority of the electorate, and we see no reason to disturb the lower court's findings of fact. Grounds two and three cannot be sustained and are dismissed for lack of merit.

(2053)

We now turn to the remaining grounds four, five and six. Ground four contends that voters were forced to reveal their votes when the Constitution and the election process guarantee them secrecy. The details are that some voters were assisted to vote whilst others were instructed to fold their ballot papers outwards so that persons who had positioned themselves at the windows of the polling stations could see whom they had voted for. That this practice was widespread throughout the constituency. The Court in considering this ground looked at the provisions of section 89 which states that a voter shall not be induced to vote for a particular candidate and that no one may communicate with a voter whilst in the precinct of the polling station for purposes of voting.

Section 89 reads in part:

89. (1) A person shall not-

.....

(e) on any polling day, at the entrance to or within a polling station, or in any public place or in any private place within four hundred metres from the entrance to such polling station

(i) canvas for votes;

(ii) solicit the vote of any person;

(iii) induce any person not to vote; or

(iv) induce any person not to vote for a particular candidate;

(f) on any polling day loiter in any public place within four hundred metres from the entrance to any polling station;

(2054)

(g) on any polling day exhibit in any public or private place within one hundred metres from the entrance to any polling station any notice or sign, other than an official notice or sign authorised by an election officer under this Act, relating to the election;

(h) not being a presiding officer, an election officer, candidate, an election agent or a polling agent in the course of their functions within a polling station, make any record showing that any particular person has voted in an election;

.....

(j) willfully obstruct or interfere with a returning officer, presiding officer, or election officer in the execution of their duties;

.....

(l) have any communication with a voter while such voter is in the precincts of a polling station for the purpose of voting;

(m) fail to comply with any requirement or direction to leave a polling station or the precincts thereof; or

.....

(2) A person who contravenes any of the provisions of subsection (1) commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both.

The trial Court found that the evidence relating to the lack of secret ballot was inconsistent and some of it was hearsay. One independent witness, PW4, testified that voters at Nangombe polling station were folding the ballot papers outwards and told him it was for the benefit of persons stationed at the windows of the polling station who had instructed them to vote for the UPND. Apart from PW4, all the witnesses to the

(2055)

alleged malpractices were partisan. Not all the Appellant's partisan witnesses testified to seeing the practice unfold. PW 9, who was a field monitor for the PF, and whilst in the company of the vice chairman and the chairlady for the PF visited a number of polling stations and reported seeing people campaigning on the queues made no mention of the outward folding of ballot papers. Therefore the Court found that there was no cogent evidence showing that the Respondent was aware of and had consented to or approved of the practice and held that the allegation was not proved.

The trial Court could not find that the majority of the voters were prevented from or were likely to have been prevented from electing a candidate of their choice based on the allegation. The Court also dismissed the claim that voters were swayed in their voting by a threat that there was a machine which would be used to detect voting patterns of those who voted against the Respondent.

We have considered the evidence on record. We note that these allegations of folding ballot papers outwards and other malpractices at the polling stations originated from the testimony of PW1. In cross-examination, it was revealed that his evidence was hearsay. The allegations however were a recurring theme in the testimony of several of

(2056)

the Appellant's witnesses. PW7 repeated the allegation of folding ballot papers outwards. PW10, a PF official and polling agent at Siameja polling station in Mweenda Ward, testified that he observed the malpractices and alleged that the presiding officer was biased against PF voters. He further testified that on 10th August, the day before the election, UPND organised a big rally at Siameja playground at which the Respondent was present and at which UPND supporters were told to loiter at the polling stations after voting. Under cross-examination, he admitted that he was not present at the rally and his testimony was hearsay. The malpractices were also testified to by PW12, the Appellant's election agent. Similar testimony came from FW3 who however testified that despite being instructed to do otherwise, he folded his ballot paper normally. PW 6 stated that he was a UPND sympathiser who chose to support and vote for the Appellant. He testified that the Respondent was telling UPND supporters to fold ballot papers outwards but he did not testify to seeing the practice unfold on polling day. In cross-examination, he admitted that he had never actually met or heard the Respondent issue such instructions and said he was merely told that the Respondent had issued the instructions. PW8 testified that there were people who felt threatened

(2057)

and did not vote because of the fear that a machine would be able to detect who they voted for but was unable to name any of them.

Counsel for the Appellant referred us to the evidence of PW4, PW13, PW14, and PW15. For reasons that will become apparent shortly, we wish to quote his submission verbatim:

My Lords and my ladies, it is not in dispute that voters were being told who to vote for and indeed they were being told not to treat their votes as secret. This undisputed evidence was confirmed and collaborated by independent witnesses, who had no partisan interests to save (sic) either during or after the elections. These are PW 4 NICHOLAS LUNGU, who was a Polling Assistant from the Electoral Commission of Zambia, PW 13, Chief Inspector Derrick Bwalya, the Officer in Charge based at Maamba Police Station and PW 14, Chief Inspector Nalumino Kuyewana; the officer – in – charge in Sinazongwe. The testimony and reports of these officers (P1 and P2) established that there was widespread intimidation of voters at the polling station as they were being ordered to fold the ballot papers outwards in all the Polling stations in Sinazongwe Constituency and this was perpetrated by the Respondent's supporters on a scale never seen in Sinazongwe ever before. And all the allegations were put beyond doubt by video evidence presented by PW15, Mike Munkombwe, yet another independent witness, an Editor from Zambia News and Information Services, ZANIS.

We have scrutinised the evidence of PW4, PW13, PW14 and PW15. It is as follows: PW4 was a polling assistant at Nangombe Ward and he testified that he observed voter assistance by UPND party agents and folding of ballot papers outwards by voters involving many people. That

(2058)

voters came with their own pens to ensure their vote does not change after voting. That after voting, voters did not leave the premises and began observing proceedings through the windows. His testimony is different from that of PW13, PW14 and PW15.

PW13 testified that he was at Maamba East polling station but made no reference to any of the malpractices observed by PW4. PW14 who went round various polling stations under his control also made no mention of the malpractices. PW15, a reporter with ZANIS produced video evidence of the happenings on 11th August but made no reference to the malpractices. No official from ECZ was called to corroborate PW4's evidence.

We have considered the substance of the allegation. The evidence on record is not convincing. The ECZ staff and Zambia Police as well as local and international observers were present at the polling station throughout the voting process. Such open and widespread violation of the electoral law would have been observed by those present and efforts made to stop the practice. Surely some independent witnesses from any of these groups could have been called to testify.

In any event, the petition having been brought under section 97(2) (a) of the EPA, 2016, the requirement for cogent evidence tying the

(2059)

Respondent to the malpractice still had to be met even if the allegation had been found to have been proved. No evidence was adduced to show that the Respondent was aware of and approved or consented to the malpractice. In fact it was the evidence of PW14 that when he contacted the Respondent, he was in Choma and no one testified to seeing him at any polling station during the course of polling day. Finally, evidence showing the impact or potential impact of the alleged malpractice on the majority of voters had to be led.

Given the public nature of the alleged misconduct, the Appellant had enough potential independent witnesses to draw from to prove the allegation and how widespread it was. We are loath to find that one such witness was sufficient for three reasons. First, PW4 was confined to one polling station. Secondly, other independent witnesses called made no mention of the practice. Thirdly, the impugned effect was not evident. The Appellant's witnesses testified that they ignored the instruction to fold their ballot papers outwards. That they voted freely and the secrecy of their vote was not endangered.

In our considered view, the Appellant's evidence in this respect is weak. Although the Appellant's counsel submitted that the allegations of the malpractice were testified to by PW13, PW14 and PW15, it was not

(2060)

so. Counsel's argument in ground four is thus an attempt to mislead this Court. We condemn the attempt. We find the allegation in ground four has not been proved to the required standard. For the reasons given, we see no reason to interfere with the lower Court's finding on this ground. It has no merit and it is dismissed.

The fifth ground is that there was an illegal roadblock set up by a Mr Zachariah Chikete. That the road block was set up with the knowledge of the Respondent as it was expressly intended to benefit him. The trial Court found that some UPND youths blocked the road in Maamba on the instruction of Mr Zachariah Chikete but found that the Appellant had failed to prove that the Respondent had any knowledge of the road block or had consented to it.

We have again perused the evidence on record, especially that of the Appellant's key witness. The testimony of PW 13, the officer in charge of Maamba Police, was that the illegal road block was mounted under the direction of Mr Chikete. However, he was unable to say whether the Respondent was aware of the road block. This is not evidence upon which a finding that the Respondent was aware of the roadblock can be made. There is no cogent evidence to prove to a fairly high degree of convincing clarity. The principle we applied earlier that there must be cogent evidence

(2061)

linking the Respondent to the illegal activity stands. The presumed beneficiary of a particular illegal act cannot be liable without proof of his knowledge and consent or approval. We cannot fault the Court below for finding that the allegation had not been proved. This ground is dismissed for lack of merit.

In ground six, the Appellant alleges that despite establishing that UPND members were campaigning on polling day, the trial Court erred in finding that the Respondent was not aware of the alleged campaigning. It was argued that there was evidence that on the last day of campaigning, the Respondent had been heard telling his supporters to camp at the polling station and continue to campaign. The Court found that there was sufficient evidence to substantiate the testimony of the Appellant's witnesses. That this came from PW15 the ZANIS reporter's footage showing that UPND cadres were campaigning during voting. We accept the trial Court's finding that campaigning did take place at some polling stations and this was a breach of the EPA, 2016. However, the Court then found that there was no evidence proving that the Respondent or his agents were aware of the campaigning at the polling stations.

We have examined the evidence on record. The Respondent testified that he voted early in the morning and then left for Choma. No

(2062)

one testified to seeing him at any of the polling stations during the course of the day. PW13 in fact testified that the Respondent was in Choma on polling day. Further, PW14, the officer in charge of Sinazongwe Police Post, confirmed the Respondent's absence but testified that he phoned the Respondent and told him that UPND cadres were intimidating voters at Sianyuka. The Respondent acknowledged the phone call. It is our considered view that if the Respondent did not know about what was happening at Sianyuka earlier, he certainly knew after he received the phone call from PW14 and promised to address the UPND supporters as soon as he arrived from Choma. We found no evidence on record that the Respondent showed up at the polling station to address the unruly cadres. PW14 in fact testified that he phoned another UPND official who was able to reason with the cadres and persuaded them to move away from the polling station.

We therefore find that the Respondent became aware of the campaigning that took place at Sianyuka polling station once he was told about it. However, having come to a conclusion that the Respondent was made aware of the campaigning at Sianyuka which is somewhat different

(2063)

from that of the trial Court, we find that it does not help the Appellant. This is because the Respondent's knowledge of campaigning at a polling station is only established at Sianyuka and there is more than one element to the offence. The Appellant still needed to establish whether the Respondent approved of or consented to the illegal campaigning. Secondly that the campaigning widespread. And thirdly that it did prevent or was likely to prevent the majority from electing the candidate of their choice.

We have again examined the evidence on record. PW9, a field monitor for PF, testified that he visited several polling stations at Maamba, Muchekwa, Simuka and Mweenda wards at which campaigning was taking place on the queues outside the polling stations because the ECZ staff were inside and the police were too few to maintain control. However, his evidence needed corroboration. PW 14 who went round the polling stations where his officers were deployed only found unruly cadres at one polling station, Sianyuka. PW14 said he tried to look for reinforcement from Choma to control the situation at Sianyuka. He called a UPND official who was able to address the cadres. They cooperated and moved away from the polling station. PW 13 stated that he received

(2064)

only one report of UPND supporters campaigning at the polling station and five reports of disrupting queues out of the 14 wards and 24 polling stations under his control. It is clear that there is no evidence that the campaigning was widespread.

The evidence also shows that no witness was able to connect the Respondent or his agents directly to any misconduct other than the violence on nomination day. Furthermore PW14 testified that after he told the Respondent that campaigning was going on at Sianyuka, the Respondent promised to travel to Sianyuka to address the cadres. On the basis of that testimony, we cannot find that the Respondent had consented to or approved of the campaigning at the polling station.

We hold that the campaigning at polling stations by the Respondent or his agents has not been proved to the required standard nor has it been proved that it was widespread and this is confirmed by the Appellant's own witnesses who testified to having voted freely. On the evidence on record, we cannot say that the campaigning at polling stations affected or

may have affected the majority of voters so as to prevent them from electing a candidate of their choice. We find that there is no basis upon which to sustain this ground of appeal. It is dismissed.

Having found that all the grounds of appeal have failed, the entire appeal fails and is dismissed in toto. We uphold the decision of the trial Court declaring the Respondent duly elected Member of Parliament for Sinazongwe Constituency. The appeal having raised serious constitutional issues, and in the interest of growing our jurisprudence, each party shall bear their own costs.

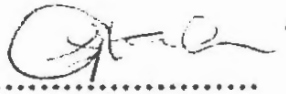
In closing, we are compelled as the Court mandated to interpret the Constitution of Zambia to state our deep concern over the reports of violence in the Sinazongwe Parliamentary election. As much as we have held that the alleged political violence did not impact the election result negatively, we nevertheless condemn the violence in the strongest possible terms. We further enjoin all political players at all levels of elective office to take heed that violence will not be tolerated by this Court as it carries serious consequences including nullification of elections

(2066)

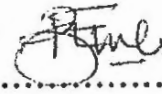
where it is proven to have been widespread and to have prevented the majority of voters from electing their preferred candidate.



.....
H. Chibomba
President
Constitutional Court



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



.....
E. Mulembe
Constitutional Court Judge



.....
P. Mulonda
Constitutional Court Judge



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