(885)

SELECTED JUDGMENT NO. 25 OF 2018

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

Appeal No.18/2016
2016/CC/A025

IN THE MATTER OF: **The Parliamentary Petition relating to Sioma Parliamentary Constituency elections held in Zambia on the 11th day of August, 2016.**

IN THE MATTER OF: **Articles 46, 51, 54 and 73 of the Constitution of Zambia Act, Chapter 1, Volume 1 of the Laws of Zambia.**

IN THE MATTER OF: **Sections 81, 82, 83, 84, 86, 87, 89, 91, 92, 94, 96, 97, 98, 99, 100 and 110 of the Electoral Process Act No. 35 of 2016 of the Laws of Zambia.**

IN THE MATTER OF: **Electoral Code of Conduct 2016.**

BETWEEN:

MBOLOLWA SUBULWA **APPELLANT**

AND

KALIYE MANDANDI **RESPONDENT**

Coram: Chibomba, PC, Sitali, Mulembe, Mulonda and Munalula, JJC
On 19th June, 2017 and on 14th June, 2018.

For the Appellant: Mr. K. Msoni of Messrs J. B. Sakala and Company together with Mr. P. Songolo of Philsong and Partners Legal Practitioners.

For the 1st Respondent: Mr. K. M. Shepande of Shepande and Company.

J U D G M E N T

Chibomba, PC, delivered the Judgment of the Court.

Cases referred to:

1. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and another (2005) Z.R. 138.
2. Khalid Mohammed v Attorney General (1982) Z.R. 49.
3. Leonard Banda v Dora Siliya SCZ Appeal No. 95 of 2012.
4. Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114 of 2007.
5. Gondwe v Namugala SCZ Appeal No. 175 of 2012.
6. Samuel Zulu v Victoria Kalima (2014) 1 Z.R. 14.
7. Mlewa v Wightman (1995-97) Z.R. 171.
8. Collet v Van Zyl Brothers Limited (1966) Z.R. 65.
9. Musamba v Simpemba (1978) Z.R. 175.
10. Kuta Chambers (sued as a firm) v Concilia Sibulo (Suing as Administratrix of the Estate of the late Francis Sibulo) Selected Judgment No. 36 of 2015.
11. General Nursing Council v Mbangweta (2008) 2 Z.R. 105.
12. Y.B and F Transport v Supersonic Motors Limited (2000) Z.R. 22.
13. Michael Mabenga v Sikota Wina and Others SCZ Judgment No. 15 of 2003.
14. Kenmuir v Hatting SCZ Judgment No. 31 of 1974.
15. Nkhata and Others v The Attorney General (1966) Z.R 124.
16. Attorney-General v Marcus Kampumba Achiume (1983) Z.R. 1.
17. Samuel Miyanda v Raymond Handahu (1994) Z.R. 187.
18. Steven Masumba v Elliot Kamondo CCZ Selected Judgment No.53 of 2017.
19. Sunday Chitungu Maluba v Rodgers Mwewa and The Attorney General Appeal No. 4 of 2017.

Legislation referred to:

1. Electoral Process Act No. 35 of 2016.
2. Electoral Code of Conduct, 2016.
3. Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.

Works referred to:

1. Halsbury's Laws of England, 4th Edition – The Reissue, Vol. 15 at paragraph 705; Vol. 28 at paragraph 10; Vol. 44 (1) at paragraph 1491.
2. Black's Law Dictionary, 9th Edition, edited by Bryan A. Garner.
3. Black's Law Dictionary, 10th Edition, edited by Bryan A. Garner.

(887)

The Appellant appeals against the Judgment of the High Court at Livingstone which nullified her election as Member of Parliament for Sioma Parliamentary Constituency.

The facts leading to this appeal are that the Appellant and the Respondent together with three others were parliamentary candidates for Sioma Constituency in the Western Province of the Republic of Zambia at the 11th August, 2016 election. The Appellant who stood as an independent candidate, having polled 4,168 votes, was declared as the duly elected Member of Parliament for Sioma Constituency.

Displeased with the said declaration, and in separate petitions filed at Livingstone and Lusaka, the Respondent in this appeal who stood on the United Party for National Development (UPND) ticket and the 2nd Petitioner in the court below who stood on the Patriotic Front (PF) ticket and who respectively polled 2,401 and 3,962 votes, challenged the declaration of the Appellant as the duly elected Member of Parliament for the said Constituency. The two petitions were subsequently consolidated by the court below and heard and determined as one.

The court below heard evidence from the parties which it considered together with the submissions. The learned trial Judge came to the conclusion that the consolidated petition had raised allegations bordering on corrupt and illegal practices, undue influence and bribery

(888)

under Part VIII of the Electoral Process Act No. 35 of 2016 (the **Act)**. He then proceeded to consider each one of the specific allegations raised which he dismissed on the ground that the allegations had not been proved to the requisite standard apart from the alleged character assassination.

On the alleged character assassination, the learned trial Judge found that character assassination and false accusations were rampant in the Constituency and that this was perpetuated by all the litigants as the Respondent's witnesses who attended the Appellant's campaign meetings testified that the most striking information from the rally speeches was that the Respondent, who was the 1st Petitioner in the court below, was a serial killer, a "Kunu", who would finish people if voted for as Member of Parliament. While the 2nd Petitioner in the court below was labelled a thief who had stolen relief maize from the Government and money meant for women's club and the youths. And further that the 2nd Petitioner in the court below when he was District Commissioner, had sent Zambia Wild Life Authority (ZAWA) officers to inflict inhuman treatment on members of the community in Mulambwa Ward.

The learned Judge found that the above messages about the Respondent and the 2nd Petitioner in the court below were supplemented

and spiced by a song which was played on loud speakers mounted on motor vehicles during rallies. He also found that at their respective rallies in different areas in the Constituency, the Respondent and the 2nd Petitioner in the court below also informed people that the Appellant was a prostitute, a satanist who moved with charms hidden in her stylish locked hair and that she was also moving with a witchdoctor. He, thus, found that the above message sent a wrong picture to the populace and affected their minds about the Appellant as their aspiring Member of Parliament.

On the basis of the above findings, the learned trial Judge came to the conclusion that the character assassination and name calling of each other by all the litigants was widespread and affected all the 38 wards in Sioma Constituency thereby warranting or rendering the election of the Appellant null and void. He therefore, held that the Appellant was not duly elected as Member of Parliament for Sioma Constituency thereby nullifying her election.

Dissatisfied with the nullification of her election, the Appellant has appealed against the Judgment of the court below advancing six grounds in the Memorandum of Appeal as follows: -

"1. The learned trial Judge misdirected himself both at law and fact when he nullified the election of the Appellant on the grounds that generally there was character assassination involving the Appellant and the

(890)

Respondents contrary to the provisions of Sections 84 and 97 of the Electoral Process Act No. 35 of 2016 in so far as the provisions provide for illegal practices of publishing false statements in respect of candidates and on the circumstances that may lead to an avoidance of election.

2. **The learned trial Judge misdirected himself both at law and fact when he nullified the election of the Appellant on the ground that generally there was character assassination involving the Appellant and the Respondents when the appropriate punishment for General Character Assassination where this is proven is merely a fine for first offenders under Section 15 of the Electoral Code of Conduct 2016.**

3. **The learned trial Judge misdirected himself both at law and fact when he held that the Appellant was involved in character assassination contrary to the evidence on record that did not indict the Appellant, her Election Agents or Polling Agents and contrary also to the Court's own finding that the Appellant's witnesses were more credible when they testified that the Appellant was not involved in character assassination.**

4. **The learned trial Judge misdirected himself both at law and fact when he held that the character assassination conducted in Sioma Constituency led to the majority of the voters in the Constituency not voting for a candidate whom they preferred contrary to the results of the election for Sioma Constituency which reflect otherwise.**

5. **The findings of fact that led to the nullification of the Appellant's election by the Hon. Court below were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts and or they were findings which on a proper view of the evidence, no trial court acting correctly can reasonably make.**

6. **The learned court below misdirected itself both at law and in fact when the Hon. Court ordered each party to bear its own costs when it was clear that the Petition against the Appellant was totally frivolous and vexatious."**

In support of this appeal, the learned Counsel for the Appellant, Mr. Msoni and Mr. Songolo, relied on the arguments in the Appellants Heads of Argument.

Grounds 1 and 2 were argued together. These attack the learned trial Judge for nullifying the Appellant's election on the ground that all the

(892)

of Conduct which is self-contained as regards punishment(s) for breaches of Regulation 15 (1). To press this point, Counsel cited and quoted the following authorities:-

i. **Halsbury's Laws of England, 4th Edition – The Reissue, Volume 44 (1), paragraph 1491** where it is stated that the term *ejusdem generis* has been attached to a canon of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character.

ii. **Black's Law Dictionary, 9th Edition by Bryan A. Garner, at page 594**.

It was contended that the usage of the phrase '*other misconduct*' in Section 97 (2) (a) must therefore, be restricted to the list of offences expressly mentioned in Part VIII itself which provides for election offences and other illegal activities or practices that can lead to the avoidance of an election conducted under the Act.

It was further contended that the court below did not indicate in its Judgment which specific offence or misconduct under Part VIII of the **Act** it relied on to nullify the Appellant's election under Section 97 (2). And that Section 84 which is the only section under Part VIII that comes close to the reasons the court below gave for annulling the Appellant's

(893)

election, namely, character assassination involving all the parties to the petition does not provide for defamation as it only refers to publishing false statements of illness, death or withdrawal of a candidate from an election. And that had the legislature intended that any other form of defamation was sufficient to nullify an election, that intention would have been expressly stipulated in the Act itself.

It was Counsel's further submission that no evidence whatsoever was led to suggest that the Appellant had informed the electorate that the Respondent was sick, dead or had withdrawn from the race and that even assuming that the Appellant had defamed the Respondent as claimed by calling him a ritualist, the ultimate punishment that could have been meted out by the High Court on the Appellant would have been a reference of the matter to the Electoral Commission of Zambia (**ECZ**) which under Section 110 is responsible for enforcing the Electoral Code of Conduct.

Counsel also argued that nowhere in the Act is the High Court empowered to nullify an election under Section 97 (2) for breach of the Electoral Code of Conduct. Hence, the learned Judge clearly misdirected himself. Counsel thus urged us to set aside the lower court's findings and uphold the election of the Appellant.

(894)

In support of Grounds 3 and 5 which were also argued together and in the alternative to grounds 1 and 2, the Appellant takes issue with the court below for holding that the Appellant was involved in character assassination on ground that this finding was contrary to the evidence on record and the court's own finding that the Appellant's witnesses were more credible when they testified that the Appellant was not involved in character assassination. It was argued that the evidence did not indict the Appellant, her Election Agents or Polling Agents to the appropriate degree. Counsel submitted that the law under Section 97 of the Act requires that the alleged malpractices or misconduct must have been committed by the candidate or with his knowledge or consent or that of the candidate's election or polling agent. In emphasising this point, Counsel cited the case of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and another**[1] on the applicable standard of proof in election petitions that for any petitioner to succeed, he/she must adduce evidence on the issues raised to a fairly high degree of convincing clarity that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the election result which cannot be

(895)

reasonably said to represent the true and free choice and will of the majority of voters.

The case of **Khalid Mohammed v Attorney General**[2] was also cited in which the Supreme Court guided that a plaintiff cannot succeed automatically if a defence fails and that he must prove his case whatever may be said of the opponent's case. It was submitted that in the current case, the Respondent did not prove his allegations.

It was Counsel's contention that there was no evidence to support the finding that the Appellant called the Respondent and the 2nd Petitioner in the court below a ritualist and a thief respectively as the allegation was successfully challenged through cross-examination. And that although the Respondent aligned this allegation to the contents of a song that was composed, produced and sang by 1RW1, most of the witnesses who testified were known PF cadres. And that these witnesses admitted this fact under cross-examination and that they would do anything to ensure that a by-election was held in Sioma Constituency.

It was contended that although the Respondent and the 2nd Petitioner in the court below called several witness in support of their allegations of hate speech and character assassination, all the witnesses, 1PW1, 1PW7, 1PW9, 1PW2, 1PW3, 2PW5, 2PW4, 2PW10,

(896)

2PW11, 1PW5, 2PW6, 2PW3, 2PW8, 2PW9, 2PW14, 1PW6, 2PW4, 1PW8, 2PW13, and 2PW7 used the same language and sequencing of the allegations and sounded totally rehearsed.

It was Counsel's submission that although attempts were made by these witnesses to get the names of the Respondent and the 2nd Petitioner in the court below to fit into the narrative of the song, the Appellant's evidence, that she had nothing to do with the song upon which the court below based its finding of character assassination and was responsible for the wide spread of the said message in Sioma Constituency, was corroborated by 1RW1's evidence.

It was submitted that 1RW1's evidence was that he was motivated to do the song by the Appellant's campaign message of taking care of orphans, the aged and vulnerable people which resonated well with him as he was an orphan. And that he decided to do something to ensure that the Appellant won the election by doing a song to help the people of Sioma make the right choice. Further, that the court below did not discredit the evidence of 1RW1 that he produced the song himself and that the Appellant had nothing to do with it

On the basis of this evidence, counsel argued, the song had other meanings contrary to those advanced by the Respondent and the 2nd Petitioner in the court below who were not even mentioned in it.

(896)

2PW11, 1PW5, 2PW6, 2PW3, 2PW8, 2PW9, 2PW14, 1PW6, 2PW4, 1PW8, 2PW13, and 2PW7 used the same language and sequencing of the allegations and sounded totally rehearsed.

It was Counsel's submission that although attempts were made by these witnesses to get the names of the Respondent and the 2nd Petitioner in the court below to fit into the narrative of the song, the Appellant's evidence, that she had nothing to do with the song upon which the court below based its finding of character assassination and was responsible for the wide spread of the said message in Sioma Constituency, was corroborated by 1RW1's evidence.

It was submitted that 1RW1's evidence was that he was motivated to do the song by the Appellant's campaign message of taking care of orphans, the aged and vulnerable people which resonated well with him as he was an orphan. And that he decided to do something to ensure that the Appellant won the election by doing a song to help the people of Sioma make the right choice. Further, that the court below did not discredit the evidence of 1RW1 that he produced the song himself and that the Appellant had nothing to do with it

On the basis of this evidence, counsel argued, the song had other meanings contrary to those advanced by the Respondent and the 2nd Petitioner in the court below who were not even mentioned in it.

(897)

It was also argued that there was further evidence that showed that the Appellant had nothing to do with the song in question as 1RW11's evidence was that when the Appellant first heard the song at Checha's shop, on 6th August, 2016 she was very upset and immediately called her Campaign Manager and instructed him that she did not want the song anywhere near her campaigns. And that this was corroborated by the Appellant's evidence as she told the court below that she did not engage anyone to do the song and that she immediately disapproved of it the very first time she heard it.

It was further argued that the court below did not make any finding of fact linking the Appellant or indeed, her election or polling agents to the production of the song in question as required by Section 97 (2) (a) of the Act. Rather, the court below dismissed the Respondent's evidence and that of his witnesses, 1PW10 and 1PW11 who attempted to link the production of the song to the Appellant. And that since the Judge found that 1RW10 was more credible, there was no material which could have satisfied the high burden of proof required in an election petition to justify the nullification of the Appellant's election under Section 97 (2) of the Act. Therefore, it was contended, the findings of the trial Judge that led to the nullification of the Appellant's election were perverse and made in the absence of any relevant evidence and upon a misapprehension of

the facts and are findings which on a proper view of the evidence, no trial court acting correctly can reasonably make having regard also to the standard of proof applicable in an election petition.

In support of Ground 4, it was submitted that the trial Judge misdirected himself both at law and in fact when he held that the character assassination in Sioma Constituency led to the majority of the voters in the constituency not voting for a candidate whom they preferred as the results of the election for the Constituency reflected otherwise. Counsel referred us to the results polled by each one of the five candidates. On that basis, he contended that basic arithmetic shows that in fact, the majority of the people in Sioma Constituency voted against the Appellant as she only polled 4,288 votes compared with the 9,551 who voted for the other candidates. Therefore, as per decision in **Leonard Banda v Dora Siliya**,[3] the Respondent failed to establish that the majority of voters were prevented from electing a candidate whom they preferred contrary to the requirement of Section 97 (2) (a) of the **Act**. To further press this point, Counsel cited the cases of **Mubika Mubika v Poniso Njeulu**,[4] **Gondwe v Namugala**,[5] **Zulu v Kalima**,[6] **and Mlewa v Wightman**.[7]

It was Counsel's further contention that it was not enough for the Respondent to simply show that there was widespread character

assassination in Sioma Constituency as evidence ought to have been led to show that the malpractice prevented voters from voting for their preferred candidate but that none of the witnesses who testified on behalf of the Respondent and the 2nd Petitioner in the court below told the court that they failed to vote or that if they voted, they voted for a candidate against their will as an indication of the alleged malpractice, if any.

In arguing Ground 6 which alleges that the learned trial Judge misdirected himself both at law and in fact when he ordered each party to bear its own costs when it was clear that the petitions against the Appellant were totally frivolous and vexatious, Counsel submitted that it is trite law that costs are in the discretion of the Court as has been repeatedly asserted by the Supreme Court in a plethora of cases including the cases of **Collet v Van Zyl Brothers Limited**,[8] **Musamba v Simpemba**,[9] **Kuta Chambers (sued as a firm) v Concilia Sibulo (Suing as Administratrix of the Estate of the late Francis Sibulo**[10]) and **General Nursing Council v Mbangweta.**[11] He submitted that a wealth of case law has crystallized the parameters for the exercise of the discretion on the award of costs. Among these is **Y.B. and F Transport v Supersonic Motors Limited**[12] where the Supreme Court stated that the general principle is that costs should follow the event, that in other

(900)

words, a successful party should normally not be deprived of his costs unless the successful party did something wrong in the action or in the conduct of it.

It was contended that in the current case the judgment of the court below shows that the grounds that the Respondent based his petition on were frivolous and vexatious. And that the learned trial Judge dismissed the allegations of impersonation, bribery and contravention of Article 51 of the Constitution levelled against the Appellant on ground that those allegations were not proved. And, that even the only ground that the court below used to nullify the election, namely, character assassination, is not capable of leading to a nullification of an election at law. Hence, the court below ought to have exercised its discretion on the award of costs in favour of the Appellant.

In his oral submissions, Counsel for the Appellant more or less repeated the arguments in the Appellant's written Heads of Argument. We do not intend to repeat these suffice to add the prayer that the appeal be allowed on the grounds argued above and that costs both here and in the court below be for the Appellant.

In opposing this appeal, the learned Counsel for the Respondent, Mr. Shepande, relied on the Respondent's Heads of Argument filed.

(901)

In response to grounds 1 and 2, it was submitted that the learned trial Judge was on firm ground when he nullified the election of the Appellant on the ground that generally, there was character assassination involving all the parties as the holding was not contrary to Sections 84 and 97 of the Act. Counsel argued that publication of false statements in respect of candidates is a ground that can lead to avoidance of an election as it falls under **illegal practice** or **other misconduct** under Section 97 (2) (a) of the Act. To press this point, Counsel cited the case of **Michael Mabenga v Sikota Wina and Others**,[13] where it was held that proof of one corrupt or illegal act is sufficient to void an election. And that character assassination is a false statement under Section 84 of the Act.

Counsel argued that the evidence from several witnesses of all the litigants on record shows that the trend of character assassination and false accusations was very rampant and was perpetrated by all the litigants. And that all the Respondent's witnesses testified that when they attended the Appellant's meetings the "most sticking" information from the rally speeches was that the Respondent was a ritual killer, a "kunu", who would finish people if voted for as a Member of Parliament. And that this message was supplemented and spiced by music played on loud

(902)

speakers mounted on motor vehicles at rallies and people danced to the music before and after the rallies.

It was Counsel's further submission that the learned trial Judge also observed that this was even confirmed by the Appellant herself and 1RW11 who testified that this song was in bad taste and that it was found being played in a shop. And further that this type of message was widespread in all the affected 38 Wards in the Constituency during the time of the campaign towards the Election Day and that it affected people's minds as to who to vote for. Therefore, the learned trial Judge analysed the evidence of the witnesses when he held that the Appellant was not duly elected as Member of Parliament for the Constituency in question.

In response to ground 3, Counsel submitted that there is sufficient evidence on record which implicates the Appellant and her election agents in character assassination. And that contrary to Counsel for the Appellant's assertion, there is nothing on record to indicate that the Appellant's witnesses were considered more credible when they testified that the Appellant was not involved in character assassination. Further, that the only reference to a credible witness in the Judgment is as regards 1RW10. He submitted that the trial Judge admitted the evidence of all the witnesses for the litigants on character assassination. Hence,

his holding that the trend was perpetrated by all the litigants. To press this point Counsel cited the following cases:-

i. **Kenmuir v Hattings,**[14] where it was held that where questions of credibility are involved, an appellate court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial Judge unless it is clearly shown that he has fallen into error;

ii. **Nkhata and Others v The Attorney General.**[15]

Counsel submitted that in the current case, the trial Judge properly directed himself in assessing and evaluating all the evidence before him before making a decision on the credibility of witnesses and that he did not fall into error. Hence, this Court should not interfere with the findings of fact made by the trial Judge.

In opposing ground 4, Counsel submitted that the learned trial Judge did not misdirect himself both at law and in fact when he held that the character assassination which was rampant in Sioma Constituency led to the majority of the voters in the constituency not voting for their preferred candidate. Counsel pointed out that there was sufficient evidence to support the finding that the character assassination was widespread in all the affected 38 wards in the Constituency during the campaigns and that it affected people's minds as to who to vote for as their Member of Parliament as required by Section 97 (2) (a) of the Act.

(904)

In responding to ground 5, Counsel for the Respondent submitted that the findings of fact that led to the nullification of the Appellant's election by the court below were not perverse. That in the face of the overwhelming evidence of witnesses on record, the conclusions of the trial Judge were not based on any misapprehension of the facts. To press this point, Counsel cited, among others, the case of **Attorney-General v Marcus Kampumba Achiume**[16] in which it was held that the appellate court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence, no trial court acting correctly can reasonably make.

In response to ground 6, it was submitted that the court below did not misdirect itself both in law and in fact when it ordered each party to bear its own costs and that in any event the Petition against the Appellant was neither frivolous nor vexatious, hence this appeal. And that this involved interpretation of the Constitution and the Electoral Process Act. Further, those matters of this nature have long been recognized to be of general importance where parties bear their own costs. In support of this argument, Counsel cited the following cases:-

(905)

i. **Samuel Miyanda v Raymond Handahu,**[17]
ii. **Samuel Zulu v Victoria Kalima,**[6] and
iii. **Leonard Banda v Dora Siliya**.[5]

In augmenting the Respondent's Heads of Argument, Mr. Shepande, also more or less repeated his written submissions. We do not intend to repeat these except the prayer that the appeal in this matter should be dismissed.

We have seriously considered this appeal together with the arguments in the respective Heads of Argument, the authorities cited therein 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. It is our considered view that the major question raised in this appeal is whether the learned trial Judge was on firm ground when he nullified the election of the Appellant as Member of Parliament for Sioma Constituency on the ground that there was general character assassination perpetuated by all the litigants.

In terms of our electoral law, the threshold for nullifying an election of a Member of Parliament where a corrupt practice, illegal practice or other misconduct is alleged in an election petition is provided for under Section 97(2) (a) of the **Electoral Process Act, 2016**. Section 97 (2) (a) is couched in the following manner:-

(906)

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

(a) 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;"

In our recent decision in **Steven Masumba v Elliot Kamondo**,[18] we stated in interpreting the above provision of the law that:-

> **"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."**

We repeat the above statement here. We also wish to add that the spirit of Section 97 (2) (a) is to ensure that elections are held in a free, fair and legal manner. This is in order to uphold as well as advance constitutional democratic tenets that provide and enable voters to elect a candidate of their own choice. In deciding this appeal therefore, we shall be guided by the above principles.

(907)

For convenience and to avoid repetition, Grounds 1 and 2 will be considered together as they are interrelated. Grounds 3, 4, and 5 will also be considered together as these raise similar issues. Ground 6 will be considered on its own. We also wish to make it clear from the outset that we are at large to consider all the evidence on record as the Appellant did not restrict her appeal to the evidence adduced by the Respondent only even though the appeal by the 2nd Petitioner in the court below was withdrawn before the appeal was heard.

The thrust of the Appellant's arguments in support of Grounds 1 and 2 of this appeal is that the learned trial Judge misdirected himself when he nullified the election of the Appellant on the ground that there was general character assassination involving all the litigants as general character assassination is not one of the illegal practices specified under Part VIII as an illegal practice upon which an election of a Member of Parliament can be nullified. That this is so because Section 84 of the **Act** is specific on the type of illegal practices or false statements that can lead to nullification of an election and limits this to false statements on illness, death or withdrawal of a candidate from an election. Further, that according to the *ejusdem generis* rule of construction, the words "*other misconduct*" used in Section 97 (2) (a) must be restricted to the

(908)

list of offences expressly mentioned in Part VIII of the **Act** for purposes of nullifying an election of a Member of Parliament.

The crux of the Respondent's arguments in response was of course to support the finding by the learned trial Judge that publishing false statements against other candidates can lead to nullification of an election under Sections 84 and 97 (2) (a) of the **Act**. And, that the learned trial Judge properly analysed and evaluated all the evidence on record and that this evidence showed that the Appellant had, during her rallies, made the false statements attributed to her against the Respondent and the 2nd Petitioner in the court below. And that the finding by the learned trial Judge that the song that was being played at rallies in the constituency supplemented the spread of these false statements and that this finding was supported by the Appellant's own testimony and that of her witness, 1RW11, as they confirmed that the song was in bad taste.

We have considered the above arguments. From the above submissions, it can be deduced that the main question raised under the two grounds of appeal is whether under the electoral law, general character assassination is a ground upon which an election of a Member of Parliament can be nullified. To ably determine the question posed

(909)

above, it is imperative that we first state what constitutes character assassination.

Generally, injury to reputation is covered under the law of torts. The learned authors of **Black's Law Dictionary, 10th Edition edited by Bryan A. Garner**, define the tort of defamation as follows:-

> **"1. Malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person....**
>
> **2. A false written or oral statement that damages another's reputation."**

The learned authors of **Halsbury's Laws of England, 4th Edition (Reissue), Volume 28, at paragraph 10** define what amounts to a defamatory statement as follows:-

> **"one which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt, or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling or trade or business"**(Underlining ours for emphasis).

The same authors in **Volume 15, at paragraph 705** of **Halsbury's Laws of England, 4th Edition (Reissue),** discuss the making of statements relating to a candidate's character and put it as follows:-

> **"It is an illegal practice if before or during an election any person, for the purpose of affecting the return of any candidate at the election, makes or publishes any false statement of fact in relation to the candidate's personal character or conduct, unless he can show that he had reasonable grounds for believing, and did believe, the statement to be true..... The false statement of fact need not be defamatory at common law, so long as it is a statement which is calculated to influence the electors ..... but it is essential that it should relate to the personal rather than the political character or conduct of the candidate."**

(910)

From the above, it is clear that in order for a statement to qualify as character assassination pertaining to a candidate in an election, that statement must be a false statement of the personal character or conduct of a candidate that is calculated to influence the voters in an election. The nature of the statement in question must be one that causes harm to the reputation of the individual and adversely affects how he/she is perceived by its recipients who in an election are the voters.

In this case, the three litigants were found to have defamed each other by publishing against each other certain false statements as follows: that the Appellant, at her campaign rallies, called the Respondent a ritual killer who would finish the people of Sioma Constituency if elected as Member of Parliament and that she used to show the people a photograph of a dead person whose heart and private parts had been removed and that she also stated that that person was a victim of the Respondent's ritual killings; that the Appellant called the 2nd Petitioner in the court below a thief who had stolen relief maize and money meant for youths and women clubs and that he was responsible for the ill treatment and beating of the people of Mulambwa Ward by ZAWA officers when he was the District Commissioner for Sioma. And

that on the other hand, the Respondent and the 2nd Petitioner in the court below called the Appellant a prostitute and a satanist who was hiding charms in her stylish locked hair and that she was carrying a pot of charms during her campaigns and that she was also moving with a witchdoctor.

The question that follows, is whether the publication of the false statements in question fall within the purview of Section 97 (2) (a) of the **Act**? Can that be a basis upon which an election of a Member of Parliament can be nullified? We say so because on one hand, Counsel for the Appellant has vigorously argued that it does not as Section 84 only prohibits publication of false statements relating to illness, death or withdrawal from an election of a candidate. On the other hand, Counsel for the Respondent argued that general character assassination falls within the ambit of both Sections 84 and 97 of the **Act** as an illegal practice or other misconduct. To answer the question posed above, it is imperative that the meaning of the terms "**illegal practice**" and **"other misconduct"** used in Section 97 be ascertained.

Section 2 of the **Act** defines "illegal practice" as follows:-

> **"2 "Illegal practice" means <u>an offence which is declared under this Act to be an illegal practice</u>."** (Underlining ours for emphasis)

(912)

Part VIII of the **Act** provides for corrupt and illegal practices and other election offences. Of relevance to this case is Section 84 which prohibits the publication of false statements in respect of candidates in an election. The section is couched in the following manner:-

> **"84(1) A person shall not, before or during an election, publish a false statement of the illness, death or withdrawal from election of a candidate at that election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not believing it to be true.** (Underlining ours for emphasis)
>
> **(2) A person who, contravenes subsection (1) commits an illegal practice, unless that person had reasonable grounds for believing, and did believe, the statement to be true."**

Perusal of the **Electoral Process Act** has shown that apart from Section 84, Regulation 15 (1) (c) of the **Electoral Code of Conduct, 2016** which is a schedule to the **Act**, also proscribes the publication of false statements. It provides as follows:-

> **"15 (1) A person shall not-**
>
> **(c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election."**

As regards "other misconduct" referred to in Section 97, the **Act** does not define this term. Therefore, the Court must give meaning to this term. The Appellant has argued with force and placed reliance on the *ejusdem generis* rule of construction in urging us to define the terms

"illegal practices" and "other misconduct" used in Section 97 to restrict the meaning of the terms to items of the same class as those listed in Section 84 (1) of the **Act.** That the term "other misconduct" should be restricted to false statements relating to 'illness, death or withdrawal' of a candidate from an election as itemized in Section 84 (1). On the other hand, Counsel for the Respondent contended that character assassination in form of false statements uttered against a candidate in an election amounts to "other misconduct" under Section 97 (2) (a) of the **Act.**

We have considered the above submissions. It is our firm view that in determining the meaning of the terms "illegal practice" and "other misconduct", every provision and enactment in the **Act** that has a bearing on this subject must be examined and considered. This is in keeping with the settled principle of law that in interpreting any provision of a statute, the statute must be read as a whole and every section or provision bearing on the subject matter in question must be considered. In this regard, Section 9 of the **Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**, is very specific and provides that every schedule to or table in any written law, together with notes thereto, shall be construed and have effect as part of such written law.

(914)

In view of the above position of the law, it follows that in giving meaning to the term "other misconduct", we shall be guided by the above principles.

The question therefore is, can it be said that the legislature intended to restrict illegal practices and other misconduct committed in connection with an election to publishing of false statements relating to illness, death or withdrawal of a candidate from an election as proscribed under Section 84 (1) and (2) of the **Act,** as has been vehemently argued by the Appellant? In order to answer the question posed above, Section 97 (2) (a) of the **Act,** which empowers the High Court to nullify an election of a Member of Parliament, must be examined together with other provisions of the **Act** relating to the same subject matter. We say so because the rules governing statutory interpretation guide that words used in an Act of Parliament must be given their ordinary meaning and that it is only where the ordinary meaning results into absurdity, that resort must be had to the purposive meaning so as to decipher what the legislature could have intended when the enactment was done.

Our view is that although Section 84 (1) and (2) of the **Act** prohibits only the publication of false statements relating to illness, death

(915)

or withdrawal of another candidate from an election, when Regulation 15 (1) of the **Code of Conduct** which prohibits general character assassination is read together with Section 97 (2) (a) of the **Act** which empowers the High Court to, among other grounds, nullify an election of a Member of Parliament for corrupt or illegal practices or other misconduct, the law in the Electoral Process Act has not restricted nullification to only publication of false statements about other candidates relating only to those itemized in Section 84 (1) of the **Act**. Further, and more importantly, Section 97 (2) (a) empowers the High Court to nullify an election of a Member of Parliament not only where an allegation of a corrupt or illegal practice is proved but also on ground of proof of other misconduct which is not at all defined in Section 2 of the **Act**.

For the reasons stated above, we do not agree with the Appellant's proposition that character assassination can only relate to the illegal practice of publishing false statements pertaining to the illness, death or withdrawal from an election by another candidate prohibited in Section 84 (1) because had that been the intention, the Legislature could have specified this. Therefore, the argument by the learned Counsel for the Appellant that the terms "illegal practice" or "other misconduct" should be restricted to false statements relating to illness, death or withdrawal of a

(916)

candidate, though forceful, is not tenable in that a candidate who publishes any false statement (s) against another candidate, no matter how damaging or injurious it is, would go scot free so long as such false statement (s) did not relate to illness, death or withdrawal of the other candidate from the election. That would certainly be absurd.

Further, the learned trial Judge did not state that the nullification of the Appellant's election was based on any of the grounds stated in Section 84 (1) and (2) of the **Act**. What he stated as ground for nullification is Section 97 (2) (a) of the **Act** only which empowers the High Court to nullify an election of a Member of Parliament where it is proved to the requisite standard that a candidate has committed a corrupt or illegal practice or some other misconduct. We reiterate that Section 97 (2) (a) read together with Regulation 15 (1) (c) of the **Code of Conduct** is thus wide enough to cover publication of false statements other than those specified in Section 84 (1) of the **Act**.

As regards the Appellant's reliance on Section 84 (1) and (2) of the **Act** to support her proposition that the publication of false statements other than those isolated in that Section has been consigned to the Electoral Commission of Zambia and not the High Court for determination or punishment, our brief response is that that proposition is flawed as it is not tenable at law. This is so because under our

electoral law, it is only the High Court which is empowered under the **Act** to nullify an election on ground of corrupt or illegal practices or any other misconduct which includes publication of false statements against other candidate(s) or a political party.

It is also our firm view that whether or not a false statement about another candidate is reported and punished by the Electoral Commission of Zambia pursuant to the Electoral Code of Conduct, this does not in any way prevent, preclude or prohibit the aggrieved candidate from petitioning the High Court to nullify the election on the ground of the false statement complained of. We say so because had that been the intention of the legislature, then this could have been specifically stipulated in the **Act**. We read no such intention from either Section 84 of the **Act** or the Electoral Code of Conduct. And most importantly, and as aforestated, Section 97 of the **Act** empowers the court to nullify an election of a Member of Parliament who is found guilty of having committed some other misconduct which both the **Act** and the Electoral Code of Conduct do not define thus leaving it to the court to determine the gravity of the alleged misconduct.

Grounds 1 and 2 have no merit. We dismiss them.

Grounds 3, 4 and 5 attack the learned trial Judge's finding that there was general character assassination involving the Appellant and

(918)

the Respondent and the 2nd Petitioner in the court below. The grounds also take issue with the Judge's finding that the character assassination in question affected the majority of voters in the Constituency in question. The question raised therefore is whether the findings in issue were supported by the evidence on record.

In urging us to find that the findings were not supported by the evidence on record, the thrust of Counsel for the Appellant's arguments was that no proof in form of evidence was adduced to show that the Appellant was involved in character assassination; it was not proved that the Appellant or her election or polling agents were involved in calling the Respondent and the 2nd Petitioner in the court below a ritual killer and a thief respectively; the finding by the learned trial Judge was based on the claim that a song composed, produced and sung by 1RW1 contained messages that portrayed the Respondent as a ritual killer and the 2nd Petitioner as a thief; that however, 1RW1, who composed and sung the song denied the allegation that the Appellant hired him to compose and produce the song and that the Appellant, in her evidence, also denied engaging anyone to compose or produce the song. Further, that the findings in issue were also contrary to the trial Judge's own finding that the Appellant's witnesses who testified against this allegation were more credible than those of the Respondent. Therefore, the

(919)

Respondent did not discharge the burden of proof required in an election petition which could have justified the nullification of the Appellant's election under Section 97 (2) of the **Act.** Hence, this is a proper case for this Court as the appellate court to interfere with the findings of fact made by the trial court.

The crux of the Respondent's arguments in response was that this is not a proper case for this Court as the appellate court to reverse the findings of fact made by the trial court as the learned trial Judge properly analysed and evaluated all the evidence before him in arriving at his findings that character assassination was perpetuated by all the parties before him and that it was widespread in all the 38 wards in the Constituency. Therefore, the trial Judge was on firm ground when he nullified the election in question.

We have considered the above arguments. To start with, we must state that it is settled that the appellate court will not lightly interfere with findings of fact made by the trial court unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence, no trial court acting correctly can reasonably make. The Supreme Court has taken this position in a plethora of decisions including the famous **Marcus**

Achiume[16] case. We recently adopted and affirmed the above position in the **Steven Masumba**[18] case.

In applying the above principles to the current case, we must say that we have combed through the evidence of all the witnesses who testified on the aspect of character assassination and whose evidence the learned trial Judge relied upon to support his finding that there was general character assassination involving the Appellant, the Respondent and the 2nd Petitioner in the court below which was the ground upon which he nullified the Appellant's election.

As regards the finding that the Appellant did publish false statements against the Respondent and the 2nd Petitioner in the court below, the learned trial Judge relied on the evidence of 1PW1, 1PW2, 1PW3, 1PW4, 1PW5, 1PW6, 1PW7, 1PW8, 1PW9, 1PW10, 1PW11, 1PW12 and 1PW13. Perusal of the evidence by the above witnesses has revealed that during her various campaign rallies, the Appellant told the people that the Respondent was a ritual killer who would finish the people of Sioma Constituency if elected as Member of Parliament as his motor vehicle would not be subjected to inspection at road check points; and that she also had a photograph of a dead person whose heart and genitals had been removed which she was showing people and alleging

(921)

that the dead person in the picture was a victim of the Respondent's ritual killing.

Further, that at her rallies, a song was being played whose message was that people should not vote for a ritual killer or a thief. The Respondent's witnesses listed in the preceding paragraph said they interpreted this to refer to the Respondent as the ritual killer and the 2nd Petitioner in the court below as the thief.

The evidence of the 2nd Petitioner's witnesses in the court below, namely, 2PW3, 2PW4, 2PW5, 2PW6, 2PW7, 2PW8, 2PW9, 2PW10, 2PW11, 2PW12 and 2PW13 was that they heard the Appellant make the same false statements against both the Respondent and the 2nd Petitioner in the court below at her campaign rallies that the Respondent was a ritual killer who was finishing the people in Sioma and that if elected as Member of Parliament, he would be able to transport people's organs as his car would no longer be subjected to inspection at road check points. And that she told the people that the 2nd Petitioner in the court below was a thief who had stolen relief maize and money meant for youths and women's clubs. And that he was responsible for the brutality they were suffering at the hands of ZAWA officers as he was sending them to beat up the people in his capacity as District Commissioner.

As regards the alleged false statements made by both the Respondent and the 2nd Petitioner in the court below against the Appellant, the learned trial Judge relied on the evidence of 1RW4, 1RW6, 1RW7 and 1RW8. The sum total of their evidence was that at their various respective campaign meetings, the Respondent and the 2nd Petitioner in the court below told the people who attended the meetings that the Appellant was a prostitute and a satanist who was putting on the same clothes all the time and who was hiding charms in her stylish locked hair and that she was carrying a pot of charms during her campaigns and that she was also moving around with her witchdoctor.

As a starting point, we wish to echo here the position we took in **Steven Masumba**,[18] where we made it clear that in terms of the requirement for corroborating evidence in election petitions, witnesses who belong to a candidate's own political party or who are members of the candidate's campaign team must be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood by such witnesses in an effort to tilt the balance of proof in favour of the candidate that they support.

As to what corroborating evidence is, we, in that same case, adopted the definition given by the learned authors of **Black's Law Dictionary, 10th Edition edited by Bryan A. Garner,** as follows:-

(923)

"Evidence that differs from but strengthens or confirms what other evidence shows."

It is clear from the above definition that corroborating evidence is independent evidence that strengthens or confirms other evidence.

Applying the above principles to the current case, we wish to state that although the record shows that most of the witnesses relied upon by the Respondent and 2nd Petitioner in the court below belonged to the same political parties as the Respondent and 2nd Petitioner in the court below respectively, and therefore, their evidence required corroboration, the record shows that the evidence of those witnesses who were partisan was corroborated by the evidence of other witnesses who either belonged to different political parties or who did not belong to any political party at all. In particular, as regards the Respondent's evidence, 1PW5 belonged to the PF but he testified on behalf of the Respondent who was a UPND candidate; 1PW6 was a peasant farmer who was part of the Appellant's own campaign team during campaigns but testified on behalf of the Respondent; and 1PW7, who testified on behalf of the Respondent, did not belong to any political party.

Coming to the evidence of the 2nd Petitioner, although the record shows that 2PW3 belonged to the UPND, he, however, testified in support of the alleged character assassination against the 2nd Petitioner

in the court below who was a PF candidate. Further, 2PW4, who was a UPND member but was the Appellant's campaign manager in Liumbo Village in Nalwashi Ward, testified in support of the 2nd Petitioner in the court below on the alleged character assassination against him by the Appellant. In addition, 2PW8 did not belong to any political party and he testified in support of the 2nd Petitioner in the court below. And 2PW9 who was a member of the FDD and yet, he testified in support of the 2nd Petitioner's case although the Petitioner was a PF candidate.

Similarly, the record shows that 1RW4 who was a PF member and also part of the campaign team for the 2nd Petitioner in the court below; 1RW6 who was also a PF member; PW7 who was the former UPND Ward Chairperson for Mulambwa Ward; and 1RW8 who did not belong to any political party, all testified on behalf of the Appellant on the alleged character assassination against her and repeated the evidence of the partisan witnesses which we have summarised above. Further, 1RW6's evidence, under cross-examination, was that although he spoke at a meeting that the 2nd Petitioner addressed in Mulambwa Ward on 28th June, 2016 and told the people who attended the meeting that the Appellant was a satanist, that this allegation was not true as it was only made to ensure the election victory of the 2nd Petitioner in the court below in that Ward.

(925)

In our view, the evidence of the independent witnesses supported the evidence of those witnesses who were partisan. Therefore, there was sufficient evidence that corroborated the evidence of partisan witnesses in so far as it related to the alleged publication of false statements against each other by the three litigants in the court below.

It is also our firm view that the above outlined evidence clearly shows that the Appellant on the one hand and the Respondent and the 2nd Petitioner in the court below on the other hand, all made false and inflammatory statements against each other that were aimed at injuring or damaging each other's personal characters in the eyes of the electorate in that Constituency. We, therefore, find that these statements attributed to each of the parties fall within the ambit of prohibited statements under our electoral law outlined above.

Having found that all the parties did make false statements against each other that were aimed at injuring or damaging each other's personal characters, the next question is: can it be said that the false statements complained of amounted to character assassination upon which the election of the Appellant could be nullified? In determining whether the parties made the false statements complained of against each other, we did go to great lengths as demonstrated above by referring to the evidence of the respective parties on record. This

evidence shows that indeed, all the parties did make false and inflammatory statements against each other during their campaigns.

In arriving at the above decision, we did take into account the contention by the Appellant that most of the witnesses who testified on behalf of the Respondent and the 2nd Petitioner in the court below were known PF cadres who admitted, under cross-examination, that they would do anything to ensure that there was a by-election in Sioma Constituency. However, our view is that this assertion is not supported by the evidence on record. Further, Counsel for the Appellant did not identify or specify the witnesses who testified to that effect. As regards the Appellant's argument that the witnesses for the Respondent and the 2nd Petitioner in the court below sounded rehearsed as they used the same language and sequencing of the allegations against the Appellant, our brief response is that we have not been able to decipher the basis of this assertion by Counsel for the Appellant from the record and the evidence.

Further, and as already stated, perusal of the record shows that not all the witnesses who testified on behalf of the Respondent or the 2nd Petitioner in the court below were partisan witnesses.

(927)

In this matter, Counsel for the Appellant has forcefully argued that the learned trial Judge contradicted his own finding when he found that there was general character assassination by all the parties as the Appellant's witnesses who testified in rebuttal of this allegation stated that she was not involved in character assassination were more credible than those of the Respondent who testified in support of this allegation. Our brief response is that this submission is not a correct reflection of the findings of the learned trial Judge on the issues raised in the court below. It is clear from the record that the learned trial Judge did not make any finding as regards the credibility of any of the witnesses who testified in support of or against the allegation of character assassination. What the record shows is that the issue of credibility of witnesses only arose when the trial Judge was determining the allegation that the Appellant had made donations of money during her campaigns. In this regard, the learned Judge stated that the evidence of the Appellant's witness, 1RW10, was more credible than that of the Respondent and the 2nd Petitioner in the court below's witnesses, 1PW10, and 2PW4.

The learned trial Judge cannot therefore be faulted for finding that there was general character assassination involving the Appellant, the Respondent and the 2nd Petitioner in the court below as the finding is

supported by the evidence on record. We say so because to call someone a ritualist who kills people and removes their body parts for ritual purposes; or a thief who stole relief maize and money meant for women's and youth clubs, as the Appellant called the Respondent and the 2nd Petitioner in the court below respectively; or to falsely allege that someone is a prostitute who hides charms in her stylishly locked hair and that she does not change her clothes and moves around with a pot of charms and a witch doctor, as the Respondent and 2nd Petitioner in the court below spoke of the Appellant, amounts to character assassination and is definitely aimed at impacting the choice of the voter as to who to vote for because the person whose character is assassinated will be viewed as one that is not a suitable candidate to be voted for in an election.

We are therefore, not satisfied that the finding in question was either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts. We thus find that the first limb under Section 97 (2) (a) of the **Act** that there must be proof of an alleged illegal practice or other misconduct was satisfied as the allegation of character assassination was proved to the required standard.

(929)

This finding is buttressed by the definition of character assassination given by the learned authors of Halsbury's Laws of England which we have quoted above that the nature of the statement complained of must be one that causes harm to the reputation of the individual and adversely affects how he/she is perceived by its recipients who in an election are the voters.

Having found that there was sufficient evidence to support the learned trial Judge's finding that there was general character assassination in Sioma Constituency perpetrated by the three candidates against each other contrary to Section 97 (2) (a) of the **Act**, the question that follows is whether the finding by the trial Judge that as a result of the character assassination in question, the majority of voters in Sioma Constituency were or may have been prevented from electing a candidate whom they preferred was supported by the evidence on record. In other words, was the alleged character assassination so widespread in the constituency that the majority of the voters can be said to have been prevented from choosing and electing a candidate of their preference? We say so because on one hand, the Appellant has argued that no such evidence was adduced while on the other hand, the Respondent argued that there was sufficient evidence.

(930)

To ably answer the above question, the term *'widespread'* in respect of an election petition must be given meaning. In **Sunday Chitungu Maluba v Rodgers Mwewa and The Attorney General,**[19] we adopted the meaning of the term *'widespread'* given by the Supreme Court in the **Mazoka v Mwanawasa**[1] case. Although the latter case involved determination of a presidential election petition, the meaning given in that case adds some clarity. The Supreme Court put it thus:-

> **"Since a presidential election involves all the 150 constituencies; the petitioners must prove electoral malpractices and violations of electoral laws in at least a majority of the constituencies."**

The Supreme Court echoed the above guidance in **Zulu v Kalima**[6] which involved a parliamentary election petition and stated as follows:-

> **"what was of import in the court below is whether the distribution of chitenge materials and bicycles was done on such a large scale that the majority of voters in that Constituency were or may have been prevented from electing a candidate of their choice."**

In the latter case, the Supreme Court went further and guided that whether or not the majority of voters were or may have been prevented from electing a candidate of their choice is a question of fact that must be determined based on the evidence before the court.

We, therefore, shall be guided by the above principles in determining the topical question whether the character assassination by

(931)

all the three parties in Sioma Constituency was widespread that it can be said it had an effect on the election result.

As regards the Appellant, none of her witnesses testified as to the number (s) of people who attended the campaign meetings at which the Respondent or the 2nd Petitioner in the court below uttered the inflammatory words against her. All that 1RW8 stated in his evidence is that there were a lot of people from different villages who attended the meeting that the Respondent held at Mwanzi village in Sinjembela Ward. He did not give any figure. The term "there were a lot of people from different villages at the meeting" is relative and could mean different things to different people. Therefore, the finding by the trial Judge that the character assassination against the Appellant by both the Respondent and the 2nd Petitioner in the Court below was widespread cannot be said to have been supported by the evidence on record and was thus not proved to the required standard. As such, the finding by the trial Judge that the character assassination by the Respondent and the 2nd Petitioner in the court below against the Appellant was widespread was not supported by the evidence on record. We reverse it.

As regards the Respondent, 1PW1, 1PW3, 1PW6 and 1PW7 gave evidence as regards the inflammatory statements made by the Appellant against him.

(932)

As regards the 2nd Petitioner in the court below, it was 2PW4, 2PW6, 2PW7, 2PW8, 2PW9, 2PW11, 2PW12 2PW13 and 2PW14 who attested to have heard the Appellant utter the statements attributed to her against the 2nd Petitioner in the court below.

Out of the above witnesses, the following witnesses neither belonged to the same political party as the party in whose favour they testified nor did they belong to any political party at all. These are 1PW6, 1PW7, 2PW4, 2PW6, 2PW8 and 2PW9.

As regards the character assassination against the 2nd Petitioner in the court below by the Appellant, 2PW4 told the court below that he attended the Appellant's campaign meetings at Lisheko and Liumbo in Nalwashi Ward. He put the number of people who attended the meetings at 320 and 300 respectively. 2PW6 testified that he attended the Appellant's meeting at Sinjembela Shopping Centre in Mulambwa Ward. He gave the number of people who attended that meeting as 100. 2PW8's testimony was that he attended the Appellant's meeting at Matebele in Mbeta Ward and that 150 people attended the meeting. 2PW9's evidence, on the other hand, was that at the Appellant's meeting at Kalengo in Kalongola Ward, 100 people attended the meeting.

(933)

As regards the character assassination against the Respondent, by the Appellant, 1PW6 testified that he attended the Appellant's campaign meetings at Liumbo and Lisheko in Nalwashi Ward, and that 200 people attended the meeting at Liumbo. 1PW7's evidence was that he attended the Appellant's campaign meeting at Mulele Shopping Centre in Sikabenga Ward and that 200-250 people attended the meeting.

From the evidence outlined above, the question is, can it be said that the character assassination against the Respondent and the 2nd Petitioner in the court below by the Appellant was widespread such that the majority of the voters in the said constituency were or may have been prevented from electing their preferred candidate? In other words, was the requirement of Section 97 (2) (a) of the **Act** satisfied by the evidence adduced as found by the learned trial Judge?

Although the witnesses we have identified above gave figures or number(s) of people that attended the various campaign meetings which were held and addressed by the Respondent and 2nd Petitioner in the court below as ranging from 100 to 320 people per meeting, we are not satisfied that this aspect of the Respondent's claim was proved to the applicable standard of proof, namely, a fairly high degree of convincing clarity. We say so because although there is evidence of the number (s)

of people that attended the various campaign meetings at which the Appellant is said to have uttered the inflammatory words against the Respondent and the 2nd Petitioner in the court below, there was no corroborating evidence to support the claim that the said character assassination was widespread. We repeat here our position in **Steven Masumba**[18] where we emphasized the requirement, in election petitions, for corroborating evidence of the witnesses who belong to a candidate's own political party or who are members of the candidate's campaign team in order to eliminate the danger of exaggeration and falsehood by such witnesses in an effort to tilt the balance of proof in favour of the candidate that they support in election petitions.

In keeping with the above principle, we have thoroughly combed through the evidence on record. We have found that none of the independent witnesses who attended the same campaign meetings as the partisan witnesses, who testified on the number of people who attended the meetings where the inflammatory statements were made by the Appellant, gave similar or tallying evidence as regards the number(s) of people who attended the same meetings as the partisan witnesses who gave the number (s).

Further, although 1PW7 was an independent witness who testified that he attended the Appellant's campaign meeting at Mulele Shopping

Centre in Sikabenga Ward on 5th August, 2016 which was also attended by 1PW1, who was a partisan witness, their evidence as regards the number of people who were present at the meeting did not tally. While 1PW1 said that over 400 people attended the meeting, 1PW7 said between 200-250 people were present. The difference in terms of numbers is between 150 and 200 people which is large. Further, the trial Judge did not make any finding as to which of the two contradictory figures he accepted nor did he give any reasons for accepting the difference.

Further, although 2PW4's evidence was that 320 and 300 people attended the Appellant's campaign meetings at Lisheko and Liumbo respectively which he too attended, under cross- examination, he told the court below that he cannot read and that he can only count up to 30. Clearly, his evidence as regards the number of people who attended the two meetings is unreliable because he could not possibly have counted up to 300 and 320 people since he can only count up to 30.

We are also at a loss as we have not been able to decipher the basis of the learned trial Judge's finding that the character assassination was widespread in all the 38 wards in the constituency. The Judge did not point at the evidence that showed that there were 38 wards in Sioma Constituency. What the evidence shows is that there were 38 polling

stations in Sioma Constituency as can be confirmed by the Record of Appeal at pages 459 to 461. This is also confirmed by the evidence of 2RW3, who was the Returning Officer for Sioma Constituency. His evidence was that he called a meeting of Presiding Officers for all the 38 polling stations in Sioma Constituency following a complaint by the PF that civil servants in Sioma should not participate in the election as they were actively involved in partisan politics. Further, there was no evidence from the independent witnesses who testified on the number (s) of people who attended the Appellant's campaign meetings, namely, 1PW6, 1PW7, 2PW4, 2PW6, 2PW8 and 2PW9, that the three litigants held campaign meetings in all the Wards in the Constituency which could have been the basis of the learned trial Judge's finding that the character assassination was widespread in the Constituency.

Moreover, the claim that the Appellant spoke the inflammatory words against the Respondent and the 2nd Petitioner in the court below at every rally that she held cannot on its own be proof that the character assassination was widespread. This is so because there is no evidence of the number of Wards in the Constituency as what was given as 38 is the number of polling stations in Sioma Constituency. We have thus failed to decipher the number of Wards in the Constituency which could have been the basis for the trial Judge's conclusion that the character

assassination was indeed widespread and that it did affect or may have affected the election result.

Further, as regards the song composed, produced and sang by 1RW1 which the learned Judge found to have spiced up the Appellant's campaign message that the Respondent was a ritual killer and the 2nd Petitioner in the court below a thief, the Respondent's evidence was that the song was being played on loud speakers at the Appellant's campaign meetings. The evidence by the Appellant and that of her witness, 1RW11 was that they found the song playing at the market in Nangweshi on 6th August, 2016 and that the song was in bad taste. The question however, is: can it be said on the basis of the above evidence that the character assassination was widespread? Our firm view is that this evidence is not sufficient to prove this aspect to the requisite standard of a fairly high degree of convincing clarity as there is no independent evidence to prove that the Appellant held campaign meetings in the majority of the Wards in the Constituency at which the song was being played. Further, the Appellant and her witness, 1RW11's evidence was that they found the song playing at a shop at the market in Nangweshi. This evidence on its own cannot be proof that the song was being played all over the Constituency so that it can be convincingly held that the message in the song was widespread as to

have affected the election result. This is so because the number of people who were present at the time the Appellant and her witness heard the song playing was not established. It was the Respondent's duty to adduce cogent evidence to prove this aspect of his allegation as required by Section 97 (2) (a) of the **Act.** We thus find that the Respondent's evidence as illustrated above was insufficient proof that the majority of the voters were prevented from electing a candidate of their choice.

For the reasons given above, we find that the learned trial Judge's finding that the character assassination in question was widespread and that it affected all the 38 wards in Sioma Constituency was not supported by the evidence on record. This, therefore, is a proper case for us as the appellate court to interfere with the findings of fact made by the trial court as the finding is not supported by the evidence on record and was a misapprehension of the evidence and the law. We, accordingly, reverse the finding that the character assassination by all the three litigants was widespread in Sioma Constituency as this was not proved to the applicable standard of a fairly high degree of convincing clarity.

We would also be failing in our duty if we do not show our dissatisfaction with the manner the learned trial Judge approached this

matter. It shows a lackadaisical attitude as he did not at all properly analyse the evidence. Had he done so, he would have seen that the constituency in question did not have 38 wards but rather that it had 38 polling stations. He clearly exhibited a lack of understanding of the difference between a ward and a polling station. This distinction is elementary. He thus applied wrong parameters thereby leading to the erroneous conclusion that the character assassination was widespread in all the 38 wards in the Constituency when the 38 referred to was the number of polling stations in the Constituency.

Although the first aspect of Section 97 (2) (a) of the **Act** was satisfied, as regards the finding that each one of the three litigants did character assassinate each other, the second requirement or aspect of that Section, that it must also be proved that the act complained of was widespread as to have affected the election result, was not proved as the evidence on record does not support the finding that the character assassination in question by the three litigants against each other was widespread.

Although Counsel for the Appellant did also argue under ground 4 that the finding by the learned trial Judge that the character assassination was widespread was contrary to the evidence of the election results on record which, according to Counsel, showed that the

majority of the people in Sioma Constituency voted for the other candidates and not the Appellant as shown by the aggregate total of 7,551 votes polled against the Appellant's 4,288 votes, our brief response is that we find this argument on its own insufficient ground for reversing the findings of the trial Judge more so, in view of the position that we have taken above. As such, we need not consider it any further.

Ground 6 criticizes the learned trial Judge for ordering each party to bear its own costs. It has been argued that this Court should reverse this order as the grounds relied upon by the Respondent and the 2nd Petitioner in the court below to prosecute their petitions against the Appellant were frivolous and vexatious as general character assassination is not a ground for nullifying an election of a Member of Parliament under the Act.

The crux of the Respondent's argument in response was that the learned trial Judge was on firm ground when he ordered each party to bear its own costs as the petition in the court below raised issues of general importance that required the interpretation of the Constitution and the **Act**.

We have considered the above arguments. As a starting point, it is settled as has been guided in a plethora of decided cases in our

jurisdiction that the award of costs is in the discretion of the court. It is also correct to say that discretionary powers must be judiciously exercised. The consolidated petitions in the court below raised serious issues which ultimately led to the nullification of the Appellant's election. It can thus not be said that the consolidated petitions were either frivolous or vexatious. We are also not satisfied that the learned trial Judge did not exercise his discretion properly when he ordered each party to bear its own costs. We find no merit in ground 6. We dismiss it.

In summing up, this appeal having succeeded on the aspect that it was not proved to the applicable standard of a fairly high degree of convincing clarity that the alleged character assassination was widespread such that it did affect or may have affected the election result, as required by section 97 (2) (a) of the **Act**, we reverse the finding by the trial Judge that the character assassination was widespread. Consequently, the Order nullifying the election of the Appellant as the duly elected Member of Parliament for Sioma Constituency is set aside. We instead declare the Appellant as the duly elected Member of Parliament for Sioma Constituency.

(942)

Since this appeal did raise serious issues for determination, we order that each party bears its own costs.

H. Chibomba
President
CONSTITUTIONAL COURT

A. M. Sitali
Judge
CONSTITUTIONAL COURT

E. Mulembe
Judge
CONSTITUTIONAL COURT

P. Mulonda
Judge
CONSTITUTIONAL COURT

M. M. Munalula
Judge
CONSTITUTIONAL COURT