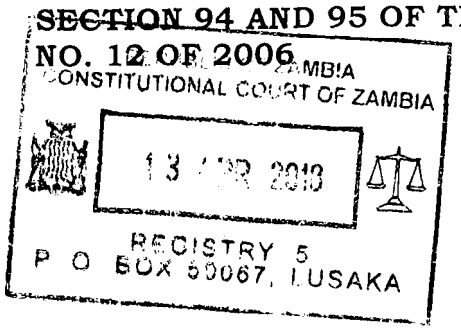
IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

APPEAL NO. 6 OF 2016
2016/CC/A23

IN THE MATTER OF:	A PARLIAMENTARY ELECTION PETITION FOR MWEMBEZHI CONSTITUENCY SITUATED IN THE SHIBUYUNJI DISTRICT OF THE LUSAKA PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THE 11TH OF AUGUST, 2016
IN THE MATTER OF:	SECTION 79(1) (C) OF THE ELECTORAL ACT NO. 12 OF 2006
IN THE MATTER OF:	ARTICLE 51 OF THE CONSTITUTION OF ZAMBIA
IN THE MATTER OF:	SECTION 88 OF THE ELECTORAL ACT NO. 12 OF 2006
AND IN THE MATTER OF:	SECTION 93 OF THE ELECTORAL ACT NO. 12 OF 2006
AND IN THE MATTER OF:	SECTION 94 AND 95 OF THE ELECTORAL ACT NO. 12 OF 2006



BETWEEN:

AUSTIN C. MILAMBO	APPELLANT
AND	
MACHILA JAMBA	RESPONDENT

For the Appellant: Mr. B. C. Mutale of Messrs BCM Legal Practitioners
Mr. C. Sianondo of Messrs Malambo and Company

For the Respondent: Mr. B. Chileshe and Mr. M. C. Besa of Messrs Besa Legal Practitioners

Coram: **Sitali, Mulenga, Mulembe, Mulonda and Munalula JJC on 22nd June, 2017 and 13th April, 2018**

JUDGMENT

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:

1. **C & S Investments Limited, ACE Car Hire Limited and Sunday Maluba v The Attorney General (2004) Z.R. 216.**

2. Patrick Sakala v The People (1980) Z.R. 205
3. David Zulu v The People (1977) Z.R. 151
4. Davies Chisopa v Sydney Chisanga, SCZ Appeal No. 179 of 2012
5. Newton Malwa v Lucky Mulusa, SCZ Appeal No. 125 of 2012
6. Josephat Mlewa v Eric Wightman (1995 - 1997) Z.R. 171
7. Micheal Mabenga v Sikota Wina and 2 Others (2003) Z.R. 110
8. Reuben Mtolo Phiri v Lameck Mangani SCZ Judgment No. 2 of 2013
9. Stephen Katuka and Another v The Attorney General and Ngosa Simbyakula and 63 Others, Selected Judgment No. 29 of 2016
10. Sturdy Mwale v Michael Katambo 2011/HP/EP/50
11. Barclays Bank Zambia Limited v Weston Luwi and Suzgo Ngulube, SCZ Appeal No.7 of 2012
12. Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114 of 2007
13. Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Others CCZ Ruling No. 3 of 2016
14. Boniface C. Bota v Chifumu Banda 2011/HP/EP/62
15. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Chiluba SCZ No.14/1998
16. Jonathan Kapaipi v Newton Samakai CCZ Appeal No. 13 of 2017
17. Mubita Mwangala v Inonge Mutukwa Wina SCZ Appeal No. 80 of 2007
18. Sibongile Mwamba v Kelvin Sampa CCZ Appeal No. 12 of 2017
19. Webster Chipili v David Nyirenda SCZ Appeal No. 35 of 2003
20. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138
21. Teper v R [1952] A.C. 480
22. Sunday Chitungu Maluba v Rodgers Mwewa and Attorney-General CCZ Appeal No. 4 of 2017
23. Margret Phiri v Peter Daka CCZ Appeal No.4 of 2016

Legislation referred to:

1. Electoral Act No.12 of 2006
2. Electoral Process Act No. 35 of 2016
3. The Constitution of Zambia (Amendment) Act No. 2 of 2016
4. The Electoral (Code of Conduct) Regulations 2011

The Appellant appeals against the Judgment of the High Court dated 23rd November, 2016 in which the learned trial Judge held

that the Respondent, Machila Jamba, was the duly elected Member of Parliament for Mwembezhi Constituency.

It is common cause that both the Appellant and the Respondent were Parliamentary candidates during the 11th August, 2016 elections for Mwembezhi Constituency in the Shibuyunji District in the Lusaka Province of the Republic of Zambia. The Respondent who emerged winner, stood as an independent candidate and polled a total of 9,631 votes. The Appellant stood on the UPND ticket and polled a total of 8,432 votes. The remainder of the votes were shared among the candidates from the Patriotic Front (PF), the Forum for Democracy and Development (FDD) and the Rainbow Party. Being dissatisfied with the election results, the Appellant petitioned the High Court alleging that:-

(i) **During the campaign period, the 1st Respondent while holding rallies in the constituency promised the electorate that he was going to drill boreholes to ensure that the people had safe drinking water.**

(ii) **Between the 23rd and the 31st of July, 2016, the 1st Respondent sunk three boreholes in the constituency and promised the people of the area that if they voted for him, he was going to sink more boreholes.**

(iii) **The 1st Respondent was a member of the United Party for National Development (UPND) and only decided to contest the elections as an independent candidate after the UPND declined to adopt him as its candidate.**

(iv) **At the time the 1st Respondent was contesting the elections as an independent candidate, he was still a member of the UPND as he never resigned from the party.**

(v) **The 1st Respondent in his campaigns told the people of the area that he was contesting the election as an independent candidate but was a member of the UPND and throughout his campaigns, he used the UPND regalia, symbol and campaigned for the UPND presidential candidate and made the people to believe that the party President wanted him to be the Member of Parliament for the area and that the UPND did not approve that the Petitioner contests the election on the UPND ticket.**

(vi) **The 1st Respondent was still a member of the UPND and as such, he was disqualified from contesting the seat as an independent candidate.**

(vii) **On the 11th August, 2016, the polling day, the 1st Respondent at Nampundwe polling station was flashing his symbol of "an axe" to the electorate who had gathered to vote.**

(viii) **The 1st Respondent also solicited for votes from people who had gathered to vote at Nampundwe Polling Station on the actual polling day.**

The Appellant alleged that as a result of the corrupt and illegal practices committed, the Respondent was not duly elected or returned and that the election was void *ab initio*. The Appellant prayed for the following reliefs:-

(i) **A declaration that the election was null and void *ab initio*.**

(ii) **A declaration that the Respondent was not duly elected.**

(iii) **An order for costs of and incidental to the petition.**

At trial evidence was tendered by both parties. The Appellant testified and called eight witnesses and equally the Respondent

testified and called four witnesses. According to the record, the Appellant sought to have the Respondent's election nullified pursuant to sections 79(1) (c) and 88 of the **Electoral Act, No. 12 of 2006.** Further it was the Appellant's allegation that the Respondent was not qualified to stand as an independent Parliamentary candidate pursuant to the provisions of Article 51 of the Constitution of Zambia as amended.

Before proceeding to consider the matter, the trial court observed that the petition was made pursuant to the **Electoral Act No. 12 of 2006**, an Act repealed by the **Electoral Process Act No. 35 of 2016** (hereinafter referred to as the Act) which Act was assented to on 6th June, 2016 and was therefore the law applicable to the petition. This observation was equally raised by the Respondent.

After considering the evidence and submissions made by the respective parties, the trial court identified the following issues for consideration:-

(i) **Whether Universal and Mining Chemical Industries Limited (UMCIL) was bound at all times to implement projects under the re-settlement plan only through the Nsanje Hill Community representatives and not through any other persons.**

(ii) **Whether the Respondent canvassed and solicited for votes on poll day at Nampundwe polling station such that this had the result of affecting the outcome of the election in the constituency.**

(iii) **Whether the Respondent was a UPND member at the time of party nominations and when filing nomination papers as an independent candidate; and**

(iv) **Whether the Respondent engaged in character assassination though not pleaded by the Appellant.**

In considering the allegation of corrupt practice, the trial Judge evaluated the evidence in support of the allegation tendered by PW6, Jewel Kabo, who testified that the Respondent, during his rallies, promised the electorate boreholes in order to secure safe drinking water and that shortly thereafter, three boreholes were sunk in Mululuma and Sichibangu villages. PW6 further testified that this development was well received by the community who as a result voted for the Respondent. A further allegation was that the Respondent sunk a fourth borehole in Mwembeshi area. PW4, Prashamph Sama, testified that payment for the borehole was made by the Respondent on behalf of Trade Kings. The trial Judge found PW6 to be a credible witness as his testimony went uncontroverted.

In rebuttal, RW3, Edward Mundia, denied that the Respondent ever promised boreholes to the electorate although during cross

examination he conceded that the promise could have been made at rallies he did not attend. In respect of the fourth borehole, the Respondent did not dispute the fact that he made payment for sinking the borehole in Mwembeshi but stated that he did so as an agent of Trade Kings, as he did consultancy work for them.

The trial Judge found that the three boreholes were sunk by Universal Mining and Chemical Industries Limited (UMCIL), a subsidiary of Trade Kings outside the provisions of the Memorandum of Understanding (MOU) between UMCIL and the Nsanje Hill Community. However, that there was no evidence adduced to show that UMCIL could not do any projects outside the provisions of the MOU. It was the trial Judge's view that the MOU did not create a legally binding relationship between Nsanje Hill Community and UMCIL. Regarding the alleged collusion by the Respondent and Trade Kings, the lower court found no evidence on record to that effect.

The trial Judge found that the defence raised by the Respondent that he did not sink the boreholes and that it is in fact UMCIL that did so, was never rebutted by the Appellant who bore the burden on a higher degree of convincing clarity. The lower court further found

that the Appellant failed to show that the Respondent actually provided funds to sink the borehole in Mwembeshi as the evidence of his signature and phone number on the receipt was insufficient proof more so that the Respondent did consultancy work for Trade Kings.

Further, it was the lower court's finding that the Appellant did not adduce any evidence to show that the Respondent induced UMCIL to sink the boreholes, or that they were sunk with the Respondent's knowledge. The lower court found that while the payment for the Mwembeshi borehole was made by the Respondent, it was Trade Kings that in fact provided the funds.

The second allegation was that the Respondent canvassed and solicited the electorate at Nampundwe polling station to vote for him. In support of the allegation, PW9, Beston Imbila, testified that on Poll day, he found the Respondent showing the symbol of an axe to the voters, conduct which he reported to a police officer present. The trial Judge found the witness to be credible as his testimony remained unshaken in cross examination. The Respondent in rebuttal submitted that PW9's testimony had not been corroborated even though he did not raise any issue as to why the evidence of the

witness required corroboration. The trial Judge found the witness credible and whose allegation the Respondent did not dispute. The trial Judge therefore found that the Respondent did canvass and solicit for votes on Poll day at Nampundwe polling station.

However, the trial court could not draw an inference from the evidence on record as to how many people gathered to vote when the Respondent showed the symbol of an axe for it to establish whether this act affected the outcome of the election in the Constituency.

The trial Judge, therefore, while having found that the Respondent did show the electorate his campaign symbol at Nampundwe polling station found that, this illegal act did not influence the overall outcome of the election, so that it can be said that the majority of the voters were prevented from electing the candidate of their choice and as such dismissed this allegation.

The third allegation is that the Respondent was not qualified to be elected as an independent Member of Parliament pursuant to Article 51of the Constitution as amended. It was alleged that the Respondent was a UPND cadre who only decided to stand as an

independent candidate when he was not adopted to stand on that party's ticket. The trial Judge found that the Appellant relied on the application form filled out by the Respondent in which he stated that he had joined the UPND in 2010 and was the UPND Trustee for Munali Constituency. RW3 on the other hand who was the Constituency Vice-Chairperson at the time told the Court that he was part of the interview panel and explained that the Respondent had failed to produce his party card as evidence of his party membership and on that basis, despite emerging winner in the ward elections was not adopted. The trial Judge went on to establish that the Respondent not being a member of the UPND, at the material time, the provisions of Article 51 of the Constitution did not apply to him, and he could therefore stand as an independent candidate in the parliamentary election.

The last allegation, which was not pleaded, was that the Respondent during the campaigns told the electorate in the Constituency that he was UPND though standing as an independent but whose candidature had been approved by the UPND presidential candidate whom he campaigned for using UPND regalia and symbol.

The trial Judge observed that the allegation though not pleaded was not objected to by the Respondent who infact cross examined the Appellant's witnesses and led evidence to counter the allegation. The trial Judge found the allegations proved. However, there was no evidence to show how many voters were privy to what the Respondent said. It was the Judge's view that for the Petition to succeed on this ground it needed to be shown that the statements made affected the majority of voters in the Constituency. It was therefore the Court's conclusion that the evidence adduced was insufficient to show that the said false statements were made on a large scale in the Constituency for them to meet the threshold required to nullify the election and as such dismissed it.

The trial Judge found that of the four allegations against the Respondent two of the allegations on corrupt practice and eligibility respectively were not proved while the two proved did not meet the required threshold for voiding an election. The Judge, therefore, came to the conclusion that the Respondent, Machila Jamba was duly elected as Member of Parliament for Mwembezhi Constituency and dismissed the Appellant's petition.

Dissatisfied with the decision of the learned trial Judge in the court below, the Appellant now appeals to this Court advancing sixteen (16) grounds of appeal namely that:-

1. **The learned trial Judge misdirected herself when she held, without having due regard to the import of Section 97(2) (b) and (c) of the Electoral Process Act No. 35 of 2016. ("The Act"), that there are only three grounds upon which an election may be voided, namely upon proof of the commission of corrupt practices, illegal practices or other misconduct.**

2. **The learned trial Judge erred in law and in fact when she held that there was no direct evidence to show that the respondent sunk three boreholes during the campaign period when there was cogent circumstantial evidence proving the contrary.**

3. **The learned Judge erred in law and in fact by holding that one of the boreholes was sunk outside Mwembezhi Constituency without considering evidence which was adduced showing that the borehole was actually sunk within Mwembezhi Constituency.**

4. **The Court below erred in law and in fact when she held that the sinking of boreholes in the Constituency did not go beyond philanthropic activities and consequently when it held that the petition could not stand on that basis.**

5. **The Court below misdirected itself when it held, without having due regard to the provisions of Section 97 (2) (b) of the Act, that under the Act an election cannot be nullified on the ground of a corrupt practice, an illegal practice or other misconduct committed by a person other than a candidate or that candidate's election or polling agent or without their knowledge or consent and when she went further to hold that wrong doing not associated with a candidate or the candidate's polling or election agents cannot be a ground for nullifying an election.**

6. **The learned trial Judge fell into grave error when she held that the authorities relied upon by the Appellant before the Court below did not apply and when she consequently ignored them without having due regardtothe provisions of Section 97 (3) of the Act and the effect thereof.**

7. The learned Judge erred in law and in fact when she held that while the Respondent was found wanting in canvassing and soliciting for votes at Nampundwe polling station, the Appellant failedto show how many people had gathered to vote to influence the outcome of the election without considering the margin in the number of votes between the Appellant and the Respondent and without considering the full import of Section 97 of the Electoral Process Act No. 35 of 2016 ("the Act") as to the circumstances under which an election may be voided.

8. The learned Judge erred in law and in fact when she held that the Respondent was a mere supporter of the United Party for National Development ("UPND") and not a member and when she disregarded the overwhelming evidence on record which shows that the Respondent was a member of the UPND who at all material times campaigned to the electorate as a UPND member.

9. The learned Judge erred in law and in fact by holding a wrong assumption that the Respondent had resigned from the UPND by virtue of him filing his nominations as an Independent Candidate disregarding the evidence in form of a recording in which the Respondent clearly stated that he was still a member of the UPND.

10. Alternatively to grounds that the learned trial Judge fell into grave error when she failed to consider that by holding himself out to be a UPND member, the Respondent breached the electoral laws thereby committing a misconduct warranting the avoidance of the election.

11. The learned Judge erred in law and in fact when she held that in as much as the Respondent violated the Electoral Code of Conduct by calling the Petitioner a thief, the Petitioner failed to show the number of electorate who were affected by such false statements.

12. The learned Judged erred both in law and fact by holding that Mwembezhi Constituency is a rural Constituency and therefore it is not known how many people own radios and who could have listened to the false statements published on Radio Mazabuka without considering the fact that Radio Mazabuka covers the entire Mwembezhi Constituency and without considering the standard of proof prescribed under Section 97 (2) (a) (ii) of the Act.

13. **The lower court erred both in fact and law by holding that the Respondent did not use the UPND regalia and colors when there was sufficient evidence showing that the Respondent actually used the UPND regalia and colors.**

14. **The learned Judge erred both in law and fact by holding that the Respondent's actions which violated the provisions of the Electoral Laws were not widespread in Mwembezhi Constituency and consequently upheld the election of the Respondent without considering the provisions of Section 97 (3) of the Act.**

15. **The Court below erred both in fact and law by holding that the Respondent was duly elected as Member of Parliament for Mwembezhi Constituency despite rampant electoral malpractices.**

16. **Any other ground that may arise.**

Mr. Mutale and Mr. Sianondo, counsel for the Appellant relied entirely on the Heads of Argument filed into court on 29th December, 2016. In ground 1 of the appeal, Counsel contended that the court below misdirected itself when it concluded that there were only three grounds upon which an election petition could be voided. That thetrial Judge ought to have had section 97(2) (b) and (c) of the Act in contemplation when passing her Judgment on this particular ground and the other grounds of appeal that followed. That failure to take into consideration the said provisions from the very start led to a number of errors.

Grounds 2, 3, and 4 were argued together. It was contended that the Court below fell into error when it drew the conclusion that a

perusal of the evidence on record showed no direct evidence of collusion to sink boreholes between the Respondent and Trade Kings.

It was submitted that evidence in form of a chain of events was tendered that was sufficient for the trial court to draw an inference linking the Respondent to the boreholes. That the evidence showing payment for the boreholes by the Respondent on behalf of Trade Kings and the evidence of PW5, Simon Evans Mayaba, that the boreholes were sunk without the involvement of the Nsanje Hill Community in accordance with the MOU was sufficient circumstantial evidence needed to tie the Respondent to the boreholes. In advancing this argument, counsel stated that the standard of proof in criminal cases was much higher than that required in election petitions and citedthe case of **Patrick Sakala v The People**[2] a criminal case in which circumstantial evidence was stated to be sufficient to warrant a conviction. Counsel submitted that circumstantial evidence was defined in the case of **David Zulu v The People**[3] by the Supreme Court as not being direct proof of a matter in issue but rather as proof of facts not in issue but relevant

to the fact in issue and from which an inference of the fact in issue could be drawn.

It was counsel's submission that had the lower court appreciated the overwhelming circumstantial evidence, the Respondent's election would have been voided on account of corrupt and illegal practices. The case of **Chisopa v Chisanga**[4] was cited which in turn cited the case of **Newton Malwa v Lucky Mulusa**[5]. It was argued that in the **Malwa**[5] case, the Court stated that:-

> **"We wish to point out as we did in the case of Reuben Mtolo Phiri v Lameck Mangani at page J21 that both paragraphs 93 (2) (a) and 93 (2) (c) of the Electoral Act No. 12 of 2006 deal with corrupt or illegal practices committed during an election. The distinction between the two paragraphs is that under paragraph (a), the corrupt or illegal conduct is not attributed to the candidate in that election but to other persons who may engage in such corrupt or illegal practices. This paragraph also requires wide influence of the electorate. Paragraph 93 (2) (c), on the other hand, is specific to the candidate in that it relates to illegal or corrupt conduct by or with knowledge of the candidate or his agents. In this case, paragraph (c) applies because the conduct complained of is attributed to the Respondent himself. The strict requirement of only one proven illegal act is meant to safeguard the electoral system so that candidates who may become leaders are persons of integrity."**

In concluding the submission on this cluster of grounds, it was maintained that the Court below misdirected itself when it held that the fourth borehole which was paid for by the Respondent was sunk outside Mwembezhi Constituency in an area called Mpamba. Reference was made to a borehole drilling report in the Appellant's

bundle of documents appearing at page 158 of the Record of Appeal, where Mpamba is not shown.

Counsel argued grounds 5 and 6 of the appeal together. Counsel contended that the court below misdirected itself when it held, without having due regard to the provisions of section 97(2) (b) of the Act, that an election could not be nullified on grounds of corrupt and illegal practices or other misconduct committed by a person other than a candidate or with knowledge andconsent or approval of a candidate or of that candidate's polling orelectoral agent. It was also submitted that the trial Judge fell into grave error when she disregarded authorities relied upon by the Appellant without having due regard to the provisions of section 97(3) of the Act. That the trial Judge erroneously maintained the view that in order for an election to be nullified, any non-compliance with the Act had to be attributed to the Respondent thereby closing her mind to the open-ended nature of section 97(2)(b) which does not limit the non-compliance to the Respondent. Further that the trial Judge failed to appreciate that a corrupt or illegal practice or act of misconduct amounted to non-compliance with the Act under section 97(2)(b) capable of affecting the election result.

Cast differently, counsel contended that under section 97(2)(b) of the Act, a prescribed test could be deduced, which shows that even one incident of non-compliance with the Act would be sufficient to nullify an election if it related to the conduct of the election and if it did affect the result of that election. To illustrate the alleged erroneous reasoning by the court below, a portion of the Judgment at pages J74 to J75 was quoted as follows:

> **"The 2016 Act has taken away the provision that was found in Section 18 (2) of the Electoral Act of 1991 and Section 93 (2) (a) of the Electoral Act of 2006 which was ground for nullifying an election where the corrupt practice, illegal practice or other misconduct was committed by persons other than the candidate or the candidate's election or polling agents, which did not require the candidate's or their agents knowledge or consent.**
>
> **Therefore to that extent, where wrong doing not associated with the candidate or their polling or an electoral agent is proved, the current law does not recognize such acts as grounds for nullifying the election. The cases of Josephat Mlewa v Eric Wightman and Reuben Mtolo Phiri v Lameck Mangani do not apply to this matter based on that provision, as it is no longer law. It follows therefore that the petition relying on these cases with regard to that aspect of the law cannot stand."**

That the trial Judge failed to appreciate the true import of section 97(2)(b) of the Act despite finding that even one incident of malpractice was sufficient to a have an election nullified. That the disputed results were close, with a difference of 1199 votes, that even one incident of non-compliance could have easily affected the

result. That it was a misdirection by the trial Judge to hold that the cases of **Mlewa v Wightman**[6] and **Mtolo Phiri v Mangani**[8], were no longer good law owing to the new provisions in the Act.

In the alternative, counsel submitted that should this Court find that UMCIL sunk the boreholes without the Respondent's direct involvement then based on section 97(2)(b) of the Act, the election ought to be annulled. That the trial Judge acknowledged the Respondent's submission that he was linked to the sinking of boreholes following a promise made to the electorate to that effect, and the fact that the boreholes were sunk by UMCIL, a subsidiary of Trade Kings, outside the MOU entered into with the Nsanje Hill community. That the trial Judge went onto recognize the fact that the sinking of the boreholes was "badly timed in view of the fact that the said boreholes were sunk during the campaign period". Counsel submitted that the sinking of the boreholes had a direct bearing on the results recorded in Nampundwe Ward where the Respondent received an overwhelming number of votes following the sinking of the boreholes and that this was supported by the testimony of the Appellant which went unchallenged.

It was further submitted that the trial Judge did not give due regard to the effect of the link between the Respondent promising to sink boreholes and the electorate being happy about it shortly after he promised it would be done as testified by PW6. Section 81(1) (c) and (d) of the Act and Regulation 15(1) (h) of the Code of Conduct were cited which inter alia, prohibit giving of any gifts to the electorate. It was submitted that UMCIL gave no explanation for drilling the boreholes at the time when election campaigns were on going. That the lower court, under the circumstances, ought to have drawn the inference that the conduct of UMCIL was in breach of Section 81(1) (c) and (d) of the Act and Regulation 15(1)(h) of the Code of Conduct.

It was contended that the trial Judge misdirected herself when she held that a single incident of malpractice was not sufficient to cause the avoidance of an election considering the provisions of section 97(3) which are couched in mandatory terms. That had the trial Judge made the distinction between the provisions of subsection (2) and subsection (3), she would have declared the election void as the distinction primarily lies on the candidate who commits even a single corrupt or illegal practice as provided under subsection (3). It

was argued that had the converse been true, our laws would have suffered a lacuna to the effect that a candidate would have been at liberty to engage in any single or multiple malpractices without sanction if it did not affect "the majority of voters".

It was argued that the payment made for sinking the borehole by the Respondent amounted to a corrupt or illegal practice which fell under the provisions of section 97(3) of the Act, thereby rendering the election a nullity. That further and according to counsel's interpretation of section 97 of the Act, the trial Judge erred when she dismissed the cases of **Mlewa**[6] and **Mtolo Phiri**[8] as no longer good law sufficient to nullify an election under the circumstances of this case. On the persuasive nature of the above authorities we were referred to our pronouncement in the case of **Stephen Katuka and Another v The Attorney General, Ngosa Simbyakula and 63 Others**[9].

Ground 7 was argued on its own. The gist of the argument under this ground was to the effect that the court below erred in law and in fact when it held that the canvassing and soliciting for votes by the Respondent at Nampundwe polling station had no bearing on the outcome of the election, without considering the full import of

section 97 of the Act. That the court below in its findings stated that the Respondent had in fact, canvassed and solicited for votes at the polling station but that despite this finding, the trial court did not invoke section 89(1) (e) of the Act which prohibited such conduct. The said section provides that:-

> **"A person shall not 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 meters from the entrance to such polling station**
>
> **(i) Canvass for votes;**
>
> **(ii) Solicit the vote of any person;"**

Further, that in the face of evidence that the Respondent had canvassed and solicited for votes on the polling day, the trial Judge should have declared the Respondent's election void in accordance with section 97(2) (b) of the Act, as this was a clear violation of section 89(1) (e) of the Act.

Grounds 8, 9 and 10 were argued together. It was contended that the trial Judge misdirected herself when she held that the Respondent was a mere supporter of the UPND despite overwhelming evidence that he was still a member of the said party. In support of this position, the provisions of section 97(2) (c) of the Act were cited as follows:-

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

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

Further, that Article 51 of the Constitution as amended sets out the eligibility of an independent candidate. It provides that:-

"A person is eligible for election as an independent candidate for a National Assembly seat if the person –

(a) is not a member of a political party and has not been a member of a political party for at least two months immediately before the date of the election; and

(b) meets the qualifications specified in Article 70 for election as a Member of Parliament."

It was submitted that, going by the evidence on record, it was not in dispute that the Respondent signed and filled in an application form for adoption to contest under the UPND ticket. However, the Respondent's only response was that the contents of the document were false as he was coerced into filling the said form. Further, that the Respondent together with two agents appeared on Radio Mazabuka to maintain the position that the Respondent was still a member of the UPND even after filing his nomination as an independent candidate. It was therefore a misdirection by the court

below to ignore such evidence, which should have been sufficient to void the Respondent's election.

Grounds 11, 12 and 14 were argued together. It was submitted that the trial Judge erred in law and in fact when she held that the false and malicious statements made by the Respondent were not widespread in Mwembezhi Constituency and therefore had no impact on the result of the election. Counsel for the Appellant submitted that the trial Judge acknowledged at page 105 of the Record of Appeal that the Respondent did call the Appellant a thief, a description communities frowned upon. That despite the above finding, the court below dismissed the Appellant's claim on the ground that it was not known how many people had radios in Mwembezhi Constituency or listened to the Radio Mazabuka program were the Respondent made the offending statement notwithstanding the provisions of section 97 (2) (a) and (b) that prohibit such misconduct. Counsel submitted that the false statement affected the election result thereby warranting nullification of the election under section 97(2) (b) of the Act. The case of **Stardy Mwale v Michael Katambo**[10] was cited where the High Court nullified the election of Michael Katambo as a Member

of Parliament on account of uttering false statements against the Petitioner. Counsel urged this Court to reverse the decision of the trial Judge, as the said actions of the Respondent, prevented the electorate from voting for a candidate of their choice because Radio Mazabuka was an effective platform for campaign and it reached the majority of voters.

The provisions of section 97(2) (a) of the Act were said to have been ignored by the court below, which provision not only requires actual evidence of voters being prevented from choosing a candidate of their choice, but also encompasses a mere likelihood of such prevention. That the words "were or may have been" in section 97(2) (a) of the Act give the Court leeway to annul an election on the basis of actual evidence that voters were prevented or where it is clear that there was a likelihood of such prevention.

In support of the argument, counsel submitted that the requirement put forward by the trial Judge regarding the failure to produce evidence of the number of people that had radios or listened to the radio program was a serious misdirection. That, in so doing, the trial Judge set a standard of proof which was not only impossible, but exceeded the standard required in election

petitions. It was submitted that the court below ought to have considered the coverage of the radio station, which as seen from the record at page 107, enjoyed wide coverage stretching from Mazabuka through to Mwembezhi Constituency and beyond. That as a result, the defamatory remarks uttered by the Respondent on the said radio station prevented the voters from voting for the Appellant, an act which offended the provisions of section 97(2) (a) of the Act.

In arguing ground 13 of the appeal, it was submitted that the trial Judge erred in law and in fact when she held that the Respondent did not use UPND regalia or colours. Counsel urged this Court to refer to the Appellants' submissions filed in the court below and appearing at pages 210 to 232 of the Record of Appeal whose substance was that there was sufficient evidence to show that the Respondent did in fact use the UPND regalia during his campaigns, an act which confused the electorate into believing that he belonged to the said party. Grounds 15 and 16 were merely restated but not argued or submitted upon. We therefore consider them abandoned.

In summation, this Court was urged to use its authority under section 99 (b) of the Act to declare that the Appellant, rather than

the Respondent, was duly elected as Member of Parliament for Mwembezhi Constituency in view of the narrow difference in votes attained by the two candidates.

In opposing the appeal, the Respondent relied entirely on the Heads of Argument filed on 14th February, 2017. In responding to ground 1, it was submitted that the trial Judge did take into account section 97(2) (b) and (c)of theAct including the aspect of the qualification of a candidate to contest in an election, in spite stating that there were only three grounds upon which an election could be voided. Section 97of the Act was reproduced in its entirety. This Court was urged to dismiss ground 1 of the appeal based on the fact that the court below arrived at the correct decision when it dismissed the petition based on the totality of the evidence presented before it.

In opposing ground 2, counsel submitted that the trial Judge was on firm ground when she held that there was no direct evidence to show that the Respondent sank three boreholes during the campaign period. That it was a finding of fact based on the overwhelming evidence, establishing that the boreholes were sank by UMCIL. Counsel cited the case of **Barclays Bank Zambia**

Limited Plc v Weston Luwi and Sugzo Ngulube[11] wherein the Supreme Court stated that a finding of fact cannot be easily overturned by an appellate court unless the findings are perverse, based on a misapprehension of facts or the findings are such that on a proper view of the evidence no trial court acting correctly can reasonably make.

Further, it was submitted that there was only one witness, PW6, who testified that the Respondent promised to sink boreholes during the campaign period. It was also submitted that the Respondent was not to blame for the alleged "violation" of the MOU executed between UMCIL and the Nsanje Hill Community and thatthe learned trial Judge was on firm ground when she held that despite acting outside the MOU, UMCIL was not legally obliged to always follow the provisions of the said memorandum. That further, no evidence was led to show that UMCIL was either an election or polling agent of the Respondent to satisfy the provisions of section 97(2) of the Act.

It was contended that despite the Respondent providing consultancy services to Trade Kings Limited, the parent company of UMCIL, it was not circumstantial evidence to fall within the

authorities of **Patrick Sakala v The People**[2] and **David Zulu v The People**[3] as cited by the Appellant in the court below. That the court below was on firm ground when it held that the Appellant had not adduced sufficient evidence with convincing clarity upon which the trial Judge could annul the election of the Respondent. Counsel submitted that it was correct for the trial Judge to have held that the three boreholes were sunk without the knowledge of the Respondent, therefore this Court was urged to dismiss ground 2 for lacking merit.

Grounds 3 and 4 were opposed together. Counsel submitted that the trial Judge was on firm ground when she held that one of the boreholes was sunk outside Mwembezhi Constituency and that the sinking of boreholes in the Constituency did not go beyond philanthropic activities. Our attention was drawn to the evidence of PW4, a representative of the company that drilled the borehole on behalf of Trade Kings Limited, who described the location of the borehole as being outside Mwembezhi Constituency. That this evidence was corroborated by that of PW5 and that of the Respondent and by the receipt appearing at page 157 of the Record of Appeal. That it was also a finding of fact that the said borehole

was sunk outside the Constituency, which finding of fact as demonstrated in the case of **Barclays Bank Zambia Limited Plc v Weston Luwi and Sugzo Ngulube**[11], cannot be easily overturned.

To demonstrate that the sinking of boreholes by UMCIL did not go beyond philanthropic activities, the case of **Reuben Mtolo Phiri v Lameck Mangani**[8] was cited where the Court held that:-

> **"Philanthropic activities is the practice of helping the poor and those in need, especially by giving money and services: See Oxford Advanced Learner's Dictionary (7th Edition), page 1089. In Zambia Philanthropic activities include developmental projects, even when they had some influence on the voters, did not constitute corruption or illegal practice, and hence not petitionable: See LEWANIKA & OTHERS V. CHILUBA."**

It was counsel's submission that the sinking of boreholes by UMCIL, fell within the definition of philanthropic activities which are not the subject of the petition and which did not call for the invocation of non-compliance under section 97(2) (b) of the Act. Counsel urged this Court to dismiss grounds 3 and 4 of the appeal in light of the overwhelming evidence on record and in the face of the authority on philanthropic activities.

In responding to grounds 5 and 6 of the appeal on the allegation of corrupt or illegal practices, counsel submitted that the court below correctly applied the provisions of section 97(2) of the Act. It was

stated that despite the trial Judge erroneously stating that an election could not be nullified on the ground of corrupt or illegal practice or other misconduct committed by a person other than the candidate, that candidate's election or polling agent or without their knowledge or consent, she nevertheless arrived at the correct decision after considering the evidence before her. It was submitted that the provisions of section 97(2) of the Act are very clear and do not need any rules of interpretation aside from the literal rule.

In addressing the issue of the authorities disregarded by the court, below which were, **Josephat Mlewa v Eric Wightman**[6] and **Reuben Mtolo Phiri v Lameck Mangani**[8], counsel submitted that the trial Judge was on firm ground as there was no illegal practice established against the Respondent. That the said cases did not apply as they showed widespread illegal practices attributed to the respondents therein which was not the case with the Respondent in this case. Further, it was submitted that it would be unfair to place responsibility on the Respondent for the actions that were not under his control or without any demonstration of how such illegal practices affected the result of the election. To support this position, the case of **Chisopa v Chisanga**[4] that was cited by the Appellant was called in aid.

It was further submitted that if the Court entertained the Appellant's submission that any widespread non-compliance during an election, regardless of who was responsible, should result in nullification, then that would lead to a situation where every election will be blameworthy and petitioned. That such a situation was not the intention of the Legislature because it would result in unnecessary drain on the national treasury.

Section 97(2) (b) and subsection (4) of the Act were cited and argued to be interdependent in order to arrive at a correct decision.

In support of their argument, counsel submitted that the use of the phrase "affect the result of the election" implied that a petitioner who was relying on the two subsections could not escape the burden of demonstrating how the non-compliance affected the result of the election. Regarding the required standard of proof for an election petition, it was submitted that the Appellant failed to demonstrate by way of evidence how the result of the election was affected by the alleged non-compliance with the Act. It was conceded that under section 97(3) of the Act, a single act of corruption or illegal practice was enough to warrant a nullification

of an election, but that no such act was established against the Respondent. That, therefore the provisions of section 97(3) of the Act did not apply in this case. This Court was urged to dismiss grounds 5 and 6 for lack of merit.

In response to ground 7 of the appeal, it was submitted that section 97 of the Act was considered in its totality when the trial Judge held that the Appellant had not adduced cogent evidence to the required degree in election petitions. That this position was supported by the case of **Micheal Mabenga v Sikota Wina and Others**[7]. Counsel submitted that the Appellant ought to have shown how any alleged breach of the law substantially affected the election and that this was not done in the court below. That the Appellant had failed to prove the allegation on canvassing and soliciting for votes on a widespread scale as provided for in section 97(2) (b) of the Act.

To support this argument, reference was made to the case of **Mubika Mubika v Poniso Njeulu**[12] where the Supreme Court dealt with the grounds for nullifying an election on account of misconduct, corruption or illegal activity and stated that:-

> **"The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or, might have been prevented**

from electing a candidate of their choice. It is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate."

Counsel for the Respondent urged us to dismiss ground 7 of the appeal based on the above submission.

Grounds 8, 9 and 10 were responded to together. It was submitted that the trial Judge was correct in holding that the Respondent was not a member of the UPND but a mere supporter and that assuming he had been a member, he was deemed to have resigned from the UPND upon filing his nomination as an independent candidate. Alternatively, it was submitted that the trial Judge did not fall into any error when she refused to annul the election on the allegation that the Respondent illegally held himself out as a UPND member.

This Court was urged to uphold the finding of fact made by the trial Judge that the Respondent was not a member of the UPND. It was argued that based on the evidence on record, the Appellant and his witnesses had failed to establish the Respondent's membership

while the Respondent successfully proved that he was only a supporter of the said party. Further, that the failure to be adopted as a candidate on the UPND ticket could not be used against the Respondent. It was pointed out that the lower court correctly applied the provisions of Article 51 of the Constitution and section 97(2)(c)of the Act when it made a finding of fact that the Respondent was not a member of the UPND but a mere supporter. That the finding of fact could only be overturned if the requirements set out in the case of **Barclays Bank Zambia Plc v Weston Luwi and Suzgo Ngulube**[11] were satisfied. Counsel urged this Court to uphold the alternative decision of the court below to the effect that if the Respondent was ever a member of the UPND, then he was deemed to have resigned from the party upon filing his nomination as an independent candidate.

In response to the Appellant's claim on qualification to stand as a candidate, counsel argued that this claim was out of time and as such, ought to be dismissed. In support of this argument, the provisions of Article 52(4) of the Constitution were cited which stipulate a time frame within which to challenge a nomination.

It was pointed out that although the above provision used the words "may", it had a mandatory effect due to the special nature of election petitions. This, it was argued was in line with this Court's ruling in the case of **Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu & Others**[13] where we stated that in election petitions, time was of the essence. Further, that the court below was on firm ground when it refused to nullify the election of the Respondent on grounds of alleged misconduct as it was not demonstrated how widespread the alleged misconduct was or how it influenced the voters.

It was submitted that the court below found as a fact that the Respondent was elected based on his symbol of an axe as there was no evidence on record to show that voters were influenced to vote for the Respondent because he held himself out as a member of UPND. It was argued that despite the population in the constituency being illiterate and depending on symbols and also having full knowledge of the symbol for the UPND, voters went ahead and voted for the Respondent based on his axe symbol. Therefore this Court was urged to dismiss grounds 8, 9 and 10 for lack of merit.

In responding to grounds 11, 12 and 14, counsel submitted that the court below was on firm ground when it refused to nullify the election of the Respondent in the face of evidence that he defamed the Appellant as it was not shown how this affected the result of the election. It was also submitted that the trial Judge did not err in holding that the alleged violations of the Act were not widespread to warrant a nullification of the election result. Counsel submitted that in an election petition, it was not enough to just prove that misconduct had been committed, but that evidence had to be adduced to demonstrate how the said alleged misconduct influenced the voters. That it was a requirement under section 97 (2) (a) of the Act that the misconduct complained of should have influenced the majority of the voters.

With regard to the standard of proof to satisfy section 97(2)(a) of the Act, it was submitted that aside from the Appellant himself, no other witness testified to have listened to the radio program on Mazabuka Radio. The case of **Boniface C. Bota v Chifumu Banda**[14] was cited where Mutuna J, as he then was, stated as follows:-

> **"My expectation from the Petitioner in this respect, was that he would lead evidence that would show analysis of the number of persons in the areas where the alleged corrupt and or illegal practices by the First Respondent took place. This analysis would**

> **then be weighed against the margin or difference between the votes polled by the First Respondent and those of the Petitioner, in an effort to show that the First Respondent received the majority of his votes in the areas where the acts took place. This would lead to the logical conclusion that the requirements of Section 93 (2) (a) of the Electoral Act had been satisfied."**

It was further submitted that the standard of proof adopted by the court below was within the standard set out in the case of **Micheal Mabenga v Sikota Wina & Others**[7] regarding the difference between the balance of probabilities and beyond reasonable doubt. Counsel also called in aid the case of **Akashambatwa Mbikusita Lewanika and Others v Frederick Jacob Chiluba**[15] where the Supreme Court stated that:-

> **"Parliamentary election Petitions are required to be proven to a standard higher than on a mere balance of probabilities."**

It was pointed out that the court below was therefore on firm ground when it held that the alleged misconduct of calling the Appellant a thief, holding himself out as a UPND member and canvassing or soliciting for votes was not widespread and did not affect the result of the election. Further, that contrary to the required standard of proof for election petitions and the requirements of section 97(3) of the Act, the Appellant failed to

show how the election result was affected by the alleged misconduct.

In responding to the difference in votes between the two candidates, counsel submitted that such difference ought to be attributed to the Respondent's popularity in Mwembezhi Constituency as demonstrated during the UPND primary elections where out of the 200 votes cast, the Respondent obtained 114 votes while the Appellant obtained 60 votes. Further, that the difference in votes could not be attributed to the alleged misconduct as there was no evidence to show this on record. We were urged to dismiss grounds 11, 12 and 14 for lack of merit.

In response to ground 13 of the appeal, counsel submitted that the court below did not err in holding that the Respondent did not use the UPND regalia and colours as there was no cogent evidence adduced before it. We were referred to the summary of the evidence in the Court's Judgment at pages J96 to J100 and urged to uphold the finding of fact made by the court below. It was pointed out that the trial Judge could not be faulted on the finding of fact based on the evidence adduced before it during trial. Therefore, counsel

urged this Court to dismiss ground 13 for lack of merit and for being frivolous.

We have considered the grounds of appeal, the heads of argument and the authorities cited and reviewed the Judgment of the court below.

As our starting point, we will consider the law under which an election of a Member of Parliament may be voided. Therefore, section 97(2) (a) (b) and (c) of the Electoral Process Act No. 35 of 2016 is the law under which an election may be voided and provides that:

> "(2) **The election of a candidate as a Member of Parliament, Mayor, Council Chairperson or Councillor shall be void, if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
>
> (a) **a corrupt practice, illegal practice or other misconduct has been committed in connection with the election**
>
> (i) **by a candidate; or**
>
> (ii) **with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**
>
> **the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in the constituency, district or ward whom they preferred.**
>
> (b) **subject to the provisions of subsection (4), there has been non-compliance with the provisions of the Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election; or**

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

Section 97(2) (a) (b) and (c) of the Act is clear and unambiguous. As we stated in the case of **Jonathan Kapaipi v Newton Samakai**[16] with regard to the import of section 97(2)(a), an election of a candidate cannot be nullified unless the person challenging the election of the candidate proves to the satisfaction of the Court that the candidate personally committed a corrupt practice, an illegal practice or other misconduct in relation to the election or that the corrupt or illegal practice or other misconduct was committed by another person with the candidate's knowledge and consent or approval or with the knowledge and consent or approval of the candidate's election agent or polling agent. We further stated that section 97(2)(a) requires that where it is proved that a corrupt or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or that of his election agent or polling agent, the petitioner must further prove that as a result of that corrupt or illegal practice or misconduct, the majority of the voters in the constituency, district or ward were or may have been prevented from electing the

candidate in that constituency, district or ward whom they preferred. We stated that a petitioner needed to prove that the proscribed act was widespread enough to prevent or potentially prevent the majority of the voters from electing the candidate they preferred. Further in our decision, we agreed with the positions taken by the Supreme Court in the cases of **Mubika Mubika v Poniso Njeulu**[12]and **Mubita Mwangala v Inonge Mutukwa Wina**[17]**.**

In the **Njeulu**[12] case the Supreme Court stated that:

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

While in the **Wina**[17]case, the Supreme Court said that:

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

Regarding section 97(2) (b) we stated in the case of **Sibongile Mwamba v Kelvin Sampa**[18] that paragraph (b) addresses acts of non-compliance with the provisions of the Act in the conduct of

elections which has an effect on the results of the election. We in that matter stated that Article 229(2) (b) of the Constitution of Zambia as amended vested the power to conduct elections in the Electoral Commission of Zambia and that therefore paragraph (b) related to the discharge of the Commission's functions during an election. The position we stated was made clear by the fact that paragraph (b) of section 97(2) is subject to subsection (4) of section 97 which provides that an election will not be declared void due to an act or omission by an election officer in breach of his official duties in relation to the conduct of the election. We wish to re-echo what we said then that this provision is not new but is a re-enactment of section 93(2) (b) and (4) of the repealed Electoral Act No. 12 of 2006 which the Supreme Court pronounced itself in the case of **Webster Chipili v David Nyirenda**[19]where it stated as follows:-

> **"The subjection of paragraph (b) means that once evidence of non-compliance with the Electoral Act by election officers in the conduct of an election is established to the satisfaction of the High Court, which evidence is capable of affecting the result of an election, the lower Court is obliged to invoke sub-section (4) of section 93 as a matter of course. This is done to enable the lower Court review the acts or omissions of the election officers in the conduct of the election in order to determine whether the election was so conducted as to be substantially in accordance with the provisions of the Act and whether such acts or omissions did affect the result of the election."**

Regarding section 97(2)(c), we equally wish to state that this provision like section 97(2) (b) is not new but is a re-enactment of section 93(2)(d) of the repealed Electoral Act No. 12 of 2006. Paragraph (c) on qualification or disqualification in the case of a Member of Parliament is informed by Articles 51 and 70 of the Constitution as amended. In this case, Article 51 (a) is of particular interest and provides that:

> **"A person is eligible for election as an independent candidate for a National Assembly seat if the person-**
>
> **(a) is not a member of a political party and has not been a member of a political party for at least two months immediately before the date of the election."**

It is with these law principles in mind that we shall consider the grounds of appeal.

In ground one, the Appellant submitted that the court below misdirected itself in holding that there are only three grounds upon which an election may be voided without having due regard to the import of section 97(2) (b) and (c) of the Act. It was the Appellant's argument that had the trial court taken the provisions of section 97 (2) (b) and (c) into consideration, it would not have made a number of errors in its Judgment.

In response, the Respondent argued that the trial Judge actually did take into account the provisions of section 97(2) (b) and (c) of the Act when she stated that there were only three grounds upon which an election may be voided, namely upon proof of the commission of corrupt practices, illegal practices or other misconduct and even reproduced the entire section 97.

In our view what falls for our consideration in ground one is whether the three grounds as outlined by the court below at page 63 of the record are what constitute grounds upon which an election may be voided under section 97(2) and if not whether this affected the manner in which the court below arrived at its decision.

To begin with section 97(2) has three paragraphs (a), (b) and (c) with paragraph (a) having three categories of proscribed acts as mentioned above. We wish to state that section 97(2) of the Act is similar to section 18(2) of the Electoral Act of 1991 and section 93(2) of the Electoral Act No. 12 of 2006. With regard to section 18(2) which had four paragraphs (a), (b,) (c) and (d), the Supreme Court in the case of **Josephat Mlewa v Eric Wightman**[6] held that the section set out four clear grounds upon which the election of a Member of the National Assembly could be voided in reference to

the four paragraphs of section 18(2) of the Electoral Act 1991. A careful consideration of section 18 (2) (a) of the Electoral Act, 1991 shows that the three categories of proscribed acts namely corrupt practice, illegal practice and other misconduct all fell under paragraph (a) of the section not as separate grounds as is stated by the court below but as part of paragraph (a) considered a single ground. Our view is that the three paragraphs (a), (b) and (c) under section 97(2) of the Act are what constitute the three grounds upon which an election may be voided. The trial Judge thus erred when she held that the three grounds as enumerated in her decision at page 63 of the record of appeal are what constitute the three grounds of appeal under the Act.

With respect to the argument that the trial Judge did not take into account the import of section 97 paragraphs (b) and (c) in arriving at her decision, we wish to restate what we said above based on the case of **Sibongile Mwamba v Kelvin Sampa**[18] that in relation to paragraph (b) of section 97 (2) the ground relates to the conduct of elections by the mandated institution, the Electoral Commission of Zambia (ECZ) which was not in issue in these proceedings.As such the argument that paragraph (b) ought to have been taken into

account when considering the petition in the court below cannot stand. Regarding paragraph (c) of section 97 (2) quoted above, it is clear that the provision is informed by Articles 51 and 70 of the Constitution as amended which provide the basis upon which a candidate may not be qualified or disqualified for election. A reading of the Record of Appeal from pages 89 to 98 shows that the trial Judge did address herself to the provisions of paragraph (c) of section 97(2) when considering Articles 51 and 70 of the Constitution. It is therefore our view that the trial Judge though having wrongly enumerated the grounds upon which an election could be voided did in fact consider paragraph (c) when interrogating the allegation that the Respondent was not qualified to stand as an independent candidate. We therefore find no merit in ground one and as such dismiss it accordingly.

Grounds two, three and four all relate to the allegation of corrupt practices during the campaign period. The Appellant challenges the findings of the court below that there was no direct evidence linking the Respondent to three boreholes sunk in Nampundwe Ward during the campaign period when there was cogent circumstantial evidence to the contrary that the borehole sunk in Mwembeshi was

outside Mwembezhi Constituency in an area called Mpamba and lastly that the sinking of the boreholes in Nampundwe Ward did not go beyond philanthropic activities and, therefore, the petition could not stand on that basis.

It was submitted that following the promise to drill boreholes in Nampundwe Ward by the Respondent, three boreholes were sunk and more promised if the Respondent was voted into office. That as a result of this development people voted for the Respondent. Further that the Respondent on 27th May, 2016 paid for a borehole in Mwembeshi in the name of Trade Kings, a parent company of UMCIL which is on record as having sunk the three boreholes in Nampundwe Ward.

The Appellant argues that the chain of events surrounding the drilling of the boreholes provided cogent evidence from which the court below could have drawn an inference that the Respondent sunk the three boreholes. In rebuttal, RW5 testified that the three boreholes in issue were sunk by UMCIL pursuant to an agreement and consultations with one Headman Mululuma a fact which went unshaken in cross examination.

In dealing with the issue of circumstantial evidence we wish to borrow from the words of Lord Normand in **Teper v R**[20]at page 489 where he stated as follows:

> **"A fact-finder should proceed with circumspection when drawing firm inferences from circumstantial details: "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house 'put my cup, the silver cup, in the sack's "mouth of the youngest", and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of theaccused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".**

What we see in the case at hand are two co-existing circumstances besides the chain of events outlined by the Appellant as constituting cogent circumstantial evidence. Firstly it is difficult to draw an inference that the three boreholes were sunk by the Respondent in the face of RW5's testimony that the boreholes were sunk by UMCIL a fact that went uncontroverted in cross examination. In fact PW5's testimony clearly showed that the representative of the community was not sure of who sunk the boreholes. Secondly, the inference linking the Respondent to the boreholes following the payment he made on behalf of Trade Kings, UMCIL's parent company, is weakened if not destroyed by the fact

that the Respondent does consultancy work for the firm and in fact made payment in that capacity as the record reveals.

The Appellant submitted that the sinking of the boreholes induced the voting pattern in Nampundwe Ward where the Respondent won convincingly by a large margin. The record shows no witness apart from PW6, Jewel Kabo, who testified to the fact that the boreholes influenced the voters. This was a partisan witness with an interest to serve whose evidence was not corroborated and who in fact acknowledged in cross-examination that he had no knowledge of who paid for the boreholes.

With regard to the Mwembeshi borehole, the Respondent testified that the borehole was not sunk in Mwembezhi Constituency but Mwembeshi at a place called Mpamba in Chilanga District whose people did not even know that he was contesting the elections for Member of Parliament of the Mwembezhi Constituency. This evidence went unrebutted in cross examination. The trial Judge, therefore cannot be faulted for holding that the borehole was outside the constituency and was thus irrelevant to the petition.

Lastly, the Appellant would want us to fault the trial Judge's finding that the sinking of boreholes in Nampundwe Ward did qualify to be called a philanthropic activity. In the **Mtolo Phiri**[8] case, the Supreme Court of Zambia had occasion to define what philanthropic activities meant in Zambia and stated that these included developmental projects, even when they had some influence on voters and were not subject to petition. The Court went on to state that the position has not changed. However, in the same **Mtolo Phiri**[8] case the Court stated that philanthropic activities that went beyond acceptable limits amounted to corruption. In that regard reference was made to **Mumba v Daka**[21] where the conduct of the appellant went beyond philanthropic activities. In the case at hand there is no evidence on record demonstrating that the sinking of boreholes by UMCIL went beyond philanthropic activities as defined in the **Mtolo Phiri**[8] case. As such we cannot fault the trial Judge for holding that the borehole drilling activity did not go beyond philanthropic activities as defined. We find no merit in grounds 2, 3 and 4 and accordingly dismiss them.

In grounds five and six the Appellant submitted that the trial Judge misdirected herself when she held, without having due regard to the

provisions of section 97(2) (b) of the Act, that under the Act an election cannot be nullified on the ground of a corrupt practice, an illegal practice or other misconduct committed by a person, other than a candidate or with his knowledge and consent or approval or that of the candidate's election or polling agent and when she went further to hold that wrong doing not associated with a candidate's polling or electoral agents cannot be a ground for nullifying an election. That the trial Judge erred when she held that the authorities relied upon by the Appellant in the court below did not apply and when she consequently ignored them without having due regard to the provisions of section 97(3) of the Act and its effect.

The Appellant submitted that the trial Judge maintained the view that in order for the election to be nullified, any non-compliance with the Act had to be attributed to the Respondent and that in doing so the trial Judge closed her mind to the fact that the wording used in section 97(2) (b) is open ended and does not specify that the non-compliance in issue should be committed by the Respondent. Further, that the trial Judge failed to consider the fact that an act of corrupt or illegal practice or other misconduct amounts to non-compliance with the Act relating to the conduct of elections. It was

the Appellant's submission that section 97(2) (b) only refers to the result of the election being affected without requiring the majority threshold. It was contended that one incident of non-compliance with the Act was sufficient to trigger nullification of an election if it affected the result.

In rebuttal, the Respondent submitted that the trial Judge correctly applied section 97(2) of the Act. It was submitted that though the trial Judge erroneously stated that an election cannot be nullified on the ground of a corrupt or illegal practice or other misconduct committed by a person other than the candidate or the candidate's election or polling agent or with their knowledge and consent or approval, the court below, nevertheless arrived at the correct decision after considering the evidence before it. That the trial Judge was on firm ground when she held that the authorities of **Josephat Mlewa v Eric Wightman[6], and Reuben Mtolo Phiri v Lameck Mangani[8]** do not apply to the case *in casu* as the two cases relate to widespread illegal practices attributed to the respondents which was not the case in the present matter. Further that it would be unfair to hold the Respondent responsible for the actions of another person whom the Respondent did not have control over.

It was the lower court's view that the Electoral Process Act of 2016 had done away with the provisions as found in section 18(2) (a) of the Electoral Act of 1991 and section 93(2) (a) of the Electoral Act of 2006 that permitted the nullification of an election on account of a corrupt practice, illegal practice or other misconduct having been committed by any persons in relation to an election. The trial Judge therefore, held that where wrong doing not associated with the candidate or their polling or election agents is proved, the current law does not recognise such acts as grounds for nullifying the election. She further held that the cases of **Mlewa[6] and Mtolo Phiri[8]** do not apply to this matter based on the new provision in section 97 (2) (a).

We have considered the submissions and in our view what falls for our consideration is firstly whether the alleged corrupt and illegal practices amount to non-compliance with the Actwithin the contemplation of section 97(2) (b). Secondly whether wrong doing committed by a person not being the candidate or with their knowledge and consent or approval or their polling or election agent can be a ground for nullifying an election and thirdly whether the authorities of **Mlewa[6] and Mtolo Phiri[8]** relied on by the Appellant

apply to the case at hand within the context of section 97(3) of the Act.

As we stated in the case of **Sibongile Mwamba v Kelvin Sampa[18],** section 97 (2) (b) of the Act relates to the conduct of elections by the Electoral Commission of Zambia who are not Respondents in this matter and as such the provisions of section 97 (2) (b) do not apply in the circumstances. We do not agree with the Appellant's argument that the commission of corrupt and illegal practices or other misconduct amounts to non-compliance with the Act within the contemplation of section 97 (2) (b). To take such a view would, in effect, amount to establishing two thresholds for the nullification of an election based on the same facts which could not have been the intention of Parliament. Further, to take section 97 (2) (b) as being open ended in terms of applicability would in our view create an absurdity in view of Article 229 of the Constitution as amended when read together with section 97 (2) (b). We agree with the trial Judge that where wrong doing not associated with the candidate or their election or polling agents is proved, the law as it stands now does not recognize such wrongs as grounds for nullifying an election. Section 18(2) (a) of the Electoral Act of 1991 and section 93 (2) (a) of the Electoral Act of 2006 upon which the **Mlewa[6]** and

Mtolo Phiri[8] cases were decided respectively no longer exist on our statute book and as such do not apply in this case to that extent only. Consequently, the Judge cannot be faulted for discounting the **Mlewa**[6]**and Mtolo Phiri**[8]cases on the facts of this case. Grounds five and six therefore have no merit and are dismissed.

Ground seven relates to the allegation that the Respondent canvassed and solicited the electorate at Nampundwe polling station to vote for him. The Appellant challenges the learned trial Judge's finding that while the Respondent was found wanting in canvassing and soliciting for votes at Nampundwe polling station, the Appellant failed to show how many people had gathered to vote to influence the outcome of the election without considering the margin in the number of votes between the Appellant and the Respondent and without considering the full import of section 97 of the Act as to the circumstances under which an election may be voided.

In support of this allegation, PW9, Beston Imbila testified that on the voting day while monitoring elections at Nampundwe polling station he found the Respondent showing the symbol of an axe to

the voters and that he reported this incident to a police officer who talked to the Respondent.

In rebuttal the Respondent stated that the Appellant had not adduced cogent evidence to support the allegation and that PW9's testimony had not been corroborated especially that this witness in cross-examination testified that he only reported the matter to a police officer named Zulu without making any follow up to ensure that such a serious offence was recorded at a police station and subsequently prosecuted.

The trial Judge in evaluating the evidence, found PW9 to be a credible witness and that his failure to report the illegal act to a police station could not be a reason to require his evidence to be corroborated and considering that his evidence was unshaken during cross-examination. The trial Judge further found that while the Respondent did show the electorate his campaign symbol at Nampundwe polling station, this illegal act did not influence the overall outcome of the election, so that it can be said that the majority of the voters were or could have been prevented from electing the candidate of their choice in the Constituency. The trial Judge stated that PW9 did not tell the court below how many people

had gathered to vote that the Respondent gave the axe symbol to or indeed estimate such numbers in order for her to draw an inference that such an act had the result of affecting the outcome of the election.

Considering the evidence on the Record of Appeal and the threshold to be achieved under section 97(2) (a), requiring that the majority of voters need to be influenced by an illegal act committed by the candidate or by his election or polling agent or with their knowledge, consent or approval, we agree with the trial Judge that the Appellant, while proving that the Respondent did canvass and solicit for votes on the election day at Nampundwe polling station, failed to show how many people were or could have been influenced by this illegal act more so that, as stated, Nampundwe polling station was only one polling station in Nampundwe Ward, which itself is only one of the wards out of the ten in the Constituency. We further agree with the trial Judge that the record does not show that the Respondent was seen at the other polling stations within the Constituency showing people his symbol as a way of obtaining their vote, such that it can be concluded that this act influenced or may have influenced the electorate in the Constituency to vote for

the Respondent. Ground seven therefore has no merit and is dismissed.

Grounds eight, nine and ten relate to the allegation that the Respondent was not qualified to be elected as a Member of Parliament pursuant to Article 51 of the Constitution. The Appellant challenges the finding of the trial Court that the Respondent was a mere supporter of UPND and not a member and for disregarding the overwhelming evidence on record which shows that the Respondent was a member of the UPND who at all material times campaigned to the electorate as a UPND member, and further for holding a wrong assumption that the Respondent had resigned from UPND by virtue of him filing his nomination as an independent candidate disregarding the evidence in form of a recording in which the Respondent clearly stated that he was still a member of the UPND. Further that in the alternative, the trial Judge failed to consider that by holding himself out to be a UPND member, the Respondent breached the electoral laws warranting the avoidance of the election.

The Appellant testified that the Respondent was a UPND cadre who only decided to stand as an independent candidate when he was

not adopted to stand on the UPND party ticket. The Appellant relied on an application form for adoption as Parliamentary candidate filled in and signed by the Respondent dated 31st August, 2016 on which he stated that he had joined the UPND in 2010 and was the Trustee for Munali Constituency and whose party membership card number was 542. PW2, Jimmy Muntanga, testified that the Respondent applied to be adopted as the UPND candidate alongside three others. That Austin Chiyobeka Milambo, the Appellant, was adopted as the party's candidate through the party structures. He testified that no communication was received from the Respondent that he had resigned from the UPND.

In rebuttal, the Respondent did not dispute that he applied to be adopted under the UPND but stated that he did so in response to calls for him to stand, particularly from the late Constituency Chairperson a Mr. Makala who pleaded with him to stand as the UPND candidate and undertook to secure for him a party card and a position as Trustee for Munali Constituency. RW3, Edward Mundia, testified that he was part of the panel that interviewed applicants who wanted to contest on the UPND ticket in Mwembezhi Constituency. It was his testimony that Jamba

Machila, the Respondent, did not have a party card despite having a number. That the Respondent, though having won the primary elections could not be adopted as he failed to produce his party card as evidence of his membership to the party.

The trial Court noted that the Appellant considered the Respondent a member of the party based on the application form filled in by the Respondent and the attempts by the party hierarchy to intervene on his behalf following his non-adoption. It was the trial Judge's view that PW2, who was the Constituency Secretary should have established the aspect of the Respondent's membership to the party as he was better placed to conduct a due diligence. That in any case the Appellant bore the burden of proving how one becomes a member of the party. According to the trial Court, none of the Appellant's witnesses led any evidence to establish the criteria that must be met for one to be considered a member of UPND. It was the Court's view that the evidence of the Respondent and RW3 clearly showed that possession of a membership card was proof of membership to the UPND and that this evidence was never rebutted by the Appellant. The trial Judge observed that senior UPND members attempted to influence the adoption of the Respondent by

the party but that this did not succeed as he did not meet the criteria to be adopted which was a party card.

The Court below defined a member as one who enjoyed full rights of participating in an organisation except to the extent that the organisation reserves those rights to certain classes of membership anddefined a supporter as one who supports a particular idea or group of persons. That having established that a membership card was proof of membership in UPND, the Respondent who had none could only qualify to be a supporter of the party. The trial Judge therefore, held that not being a member of the UPND, the provisions of Article 51 of the Constitution did not apply to the Respondent and he could therefore stand as an independent candidate in the parliamentary election. The evidence on record shows that the UPND does have rules for conducting its business which includes recognition of membership to the party through a party card. It is clear from the record that despite having emerged winner during the primary elections the Respondent nonetheless could not be adopted on account of failure to produce a party card as proof of membership. This position was confirmed by RW3's testimony that the party rule on membership was enforced during adoption. The

trial Court cannot be faulted for finding that the provisions of Article 51 of the Constitution did not apply to the Respondent.

Concerning the allegation that the Respondent had not resigned from UPND, it was the lower Court's holding that he could not have resigned from the party when he had never been a member. We equally agree with the view taken by the trial Court that going by the evidence on record and assuming the Respondent was a member, he would fall in a class of members who need not notify the party of their resignation and the very act of filing in as an independent candidate was sufficient constructive notice. Further, the fact that the evidence on record did not establish his membership in the party but actually discounted it implies that he was incapable of resigning from the said party. The trial court cannot be faulted for finding as it did.

The last ground under this cluster stems from the allegation that the Respondent held himself out during campaigns as a UPND member whose candidature had been endorsed by the party President as opposed to the Appellant. This particular allegation was not specifically pleaded, however, the Appellant relied on the case of **Anderson Kambela Mazoka and others v Levy Patrick**

Mwanawasa and others[22] where the Supreme Court held that where an un-pleaded matter is not objected to in evidence, a court is not precluded from considering that evidence. The Appellant, therefore, urged the trial Court to nullify the election on account of misconduct by the Respondent. PW3, the Station Manager at Radio Mazabuka produced a recording of 5th August, 2016 where the Respondent and his agents bragged to be UPND members, a fact acknowledged by the Respondent. The trial Judge considered the issue of the un-pleaded allegation and agreed with the Appellant that though not pleaded there was no objection from the Respondent to preclude a consideration by the court. The Appellant submitted that by holding himself out as a member of UPND, the Respondent misconducted himself thereby warranting the avoidance of the election. In response, the Respondent submitted that there was no cogent evidence adduced to demonstrate that the alleged misconduct prevented the majority of the voters from electing a candidate of their choice andthat no witness was called to testify that they were influenced to vote for the Respondent as a result of his holding himself out as UPND.

The court below found that the Respondent's election was based on his symbol, an axe, in a constituency that was predominantly

illiterate and depended on symbols to vote. Our combing of the record establishes that no voter testified to being swayed to vote for the Respondent on account of his holding himself out as UPND and we are of the view that the majority of voters being illiterate relied on party symbols and the use of the UPND symbol would not have benefited the Respondent in any way if anything it should have benefited the Appellant. We see no reason to fault the trial Judge's finding. We find no merit in grounds 8, 9 and 10 and dismiss them accordingly.

In grounds 11, 12 and 14 the Appellant urges this Court to fault the trial Judge's holding that in as much as the Respondent called the Appellant a thief, the Appellant failed to show the number of voters affected by the false statement and that Mwembezhi Constituency being rural made it difficult to establish how many people owned radios and actually listened in when the false statement was made despite the provisions of section 97(2)(a) of the Act. Further, that the Respondent's misconduct was not widespread in the constituency and consequently upheld the election of the Respondent without considering the provisions of section 97(3) of the Act.

PW8, Namachila Shanzala, testified to the false statement made by the Respondent at two political meetings held on 4th August, 2016 to the effect that the Appellant had stolen the Respondent's adoption certificate. In rebuttal, the Respondent stated that the evidence of PW8 required corroboration and therefore fellshort of the standard of proof in election petitions. The trial Court found this argument lacked merit considering that the Appellant's testimony was not rebutted in cross-examination and that the fact that the contents of the recording were not disputed by the Respondent was itself corroboration of PW8's evidence. That the case of **Stardy Mwale**[10] was distinguishable from the case *in casu* in that the former concerned an impression of insecurity created in the minds of the electorate while the latter involved name calling which passed for political rhetoric and was only done once at a political rally.

The trial Court found that to call the Appellant a thief without basis violated Regulation 15 (1) (c) of the Code of Conduct under the Act. The trial Court, however, noted that the number of registered voters or even an estimated number that attended the rallies was not stated nor was the portion size of the constituency where the

meetings took place, in terms of numbers, provided for the court to draw the necessary inference of how the electorate could have been affected by the false statement thereby interfering with their choice.We equally have combed through the record and note that in as much as the false statement was made, no evidence graced the record showing how far this statement went in terms of constituency coverage for it to satisfy the majority threshold. It would, in our view be unsafe to assume that because the statement was made at two meetings the majority of the electorate were exposed to it especially that no attempt was made to demonstrate that this was the case as is evident from the Record of Appeal. We, therefore, cannot fault the trial Judge for finding as she did. With regard to the radio broadcast, apart from the Appellant's testimony, no other witnesses were called to testify that the radio broadcast reached them and affected them in their choice of a candidate. We are of the view that to take the radio station coverage area as a measure of the approximate number of listeners in the absence of other supporting evidence regarding listenership would be, in our view, lowering the majority threshold requirement assuming we were to consider the limb of section 97 (2) (a) concerning the likelihood of the misconduct affecting the majority of voters.

The Appellant submitted that the holding by the court below that the misconduct of false statement was not widespread in Mwembezhi Constituency was an error in view of the provisions of section 97 (3) of the Act. We wish to restate what we said in the case of **Sunday Chitungu Maluba v Rodgers Mwewa and Attorney-General**[22] at J48 that:

> **"Section 97(3) is not a standalone provision couched on the lines of the repealed section 93(2) (a) creating "strict liability". This is apparent from the use of the terms, "subject to (2) at the beginning of section 97 (3) as well as the subsequent words "further finds" which in our considered view subjects section 97 (3) to section 97(2). To argue that it is not so would mean succumbing to flawed reasoning where the law creates two parallel thresholds for the nullification of an election. This could mean that a party who fails under section 97 (2) (a) ....could in the alternative, succeed under section 97 (3) ....because the provable elements under the latter would be fewer. This would create an absurdity and that cannot be said to have been the intention of Parliament."**

We find no merit in grounds 11, 12 and 14 and we dismiss them.

Ground 13 equally was not pleaded but based on the **Mazoka v Mwanawasa**[20] case passed for consideration by the court below. The Appellant challenges the finding of the court below that the Respondent did not use UPND regalia and colours when there was sufficient evidence to that effect. PW7, Hikabonga Kalinga, testified that the Respondent continued to use UPND regalia and even UPND colours after the conflict resolution meeting resolved that each party uses its own distinct regalia and that the Respondent uses

alternative colours apart from red and yellow. The Appellant's allegation was based on photographs at pages 159-165 of the Record on Appeal taken at a funeral for Headman Mungwala where the Respondent's regalia and colours were worn with those of the Appellant's party the UPND. The Respondent denied responsibility for what was displayed and further called evidence to the effect that the persons depicted in the photographs were actually from the Appellant's party. We have considered the evidence on record and we agree with the trial Court that the Respondent did not use the UPND regalia and colours. Ground 13 has no merit and we dismiss it.

As grounds 15 and 16 were not submitted on by the Appellant though responded to by the Respondent, we consider them abandoned and will say nothing more.

Before concluding our Judgment we wish to state that we note that the petition in the court below was filed pursuant to the provisions of the repealed Electoral Act No. 12 of 2006.

When the matter was brought to the attention of the trial Court, the learned Judge held that the filing of the petition pursuant to the provisions of the repealed Act was not fatal to the petition as the

relevant provisions had been re-enacted by the Electoral Process Act No. 35 of 2016. The position taken by the lower court was not correct. As we guided in the case of **Margret Phiri v Peter Daka**[23] the provisions of section 97(1) of the Electoral Process Act No. 35 of 2016 are couched in mandatory terms and the effect of bringing an election petition under repealed law is fatal as it goes to the root of the petition. We proceeded to state that this rendered the petition a nullity and incompetent.

In conclusion, the entire appeal fails and is accordingly dismissed. We uphold the trial Court's declaration of Machila Jamba as duly elected Member of Parliament for Mwembeshi Constituency. We further order that each party shall bear their own costs.

A.M. Sitali
Judge
CONSTITUTIONAL COURT

M.S. Mulenga
Judge
CONSTITUTIONAL COURT

E. Mulembe
Judge
CONSTITUTIONAL COURT

P. Mulonda
Judge
CONSTITUTIONAL COURT

M.M. Munalula
Judge
CONSTITUTIONAL COURT