SELECTED JUDGMENT NO.12 OF 2018 P. 470

IN THE CONSTITUTIONAL COURT OF ZAMBIA **APPEAL NO. 11 of 2016**
HOLDEN AT LUSAKA **2016/CC/A017**
(Constitutional Jurisdiction)

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

AND
IN THE MATTER OF: ARTICLE 46, 54, 57 AND 73 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

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

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

BETWEEN:

MUHALI GEORGE IMBUWA **APPELLANT**
AND
ENOCK KAYWALA MUNDIA **RESPONDENT**

CORAM: Chibomba PC, Mulenga, Mulembe, Mulonda and Munalula JJC on 21st June, 2017 and 19th March, 2018.

For the Appellant: Mr. W. Mweemba of Messrs Mweemba and Company
For the Respondent: Mr. L. E. Eyaa and Ms. D. Mwewa both of Messrs KBF and Partners

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JUDGMENT

Munalula JC, delivered the judgment of the Court.

Cases referred to:

1. Marcus Kampumba Achiume v Attorney General (1983) Z.R. 1
2. Nkhata and four Others v Attorney General (1966) Z.R. 147
3. Priscilla Kamanga v Attorney General (2008) Z.R. 7
4. Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela (2003) Z.R. 100
5. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138
6. Subramaniam v Public Prosecutor [1956] 1 W.L.R. 965
7. Mutambo and 5 Others v The People(1965) Z.R. 15
8. Boniface Chanda Chola, Christopher Nyamonde and Nelson Sichula v The People (1988-89) Z. R. 163
9. Shamwana and Others v The People (1985) Z.R. 41 (S.C.)
10. GDC Hauliers (Zambia) Ltd v Trans Carriers Ltd S.C.Z Judgment No. 7 of 2001
11. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z. R. 49 (S.C)
12. Saul Zulu v Victoria Kalima S.C.Z Judgment No. 2 of 2014
13. Gastove Kapata v The People (1984) Z.R. 47
14. Batuke Imenda v Alex Cadman Luhilo S.C.Z Judgment No. 3 of 2003
15. Sunday Chitungu Maluba v Rodgers Mwewa and Another C.C.Z Appeal No. 4 of 2017
16. Steven Masumba v Elliot Kamondo Selected C.C.Z Judgment No. 53 of 2017
17. Richwell Siamunene v Sialubalo Gift Selected C.C.Z Judgment No. 58 of 2017
18. Samson Mbavu and others v The People (1963-1964) Z. and N.R.L.R. 164 (C.A.)
19. Wadada Rogers v Sasaga Isaiah Jonny & Electoral Commission Election Petition No.31 of 2011 (Uganda Court of Appeal)
20. DPP v Hester [1972] 3 All E.R. 1056
21. Mwape v The People (1976) Z.R. 160 (S.C.)
22. Simasiku Kalumiana v Geofrey Lungwangwa and ECZ 2006/HP/EP/17

Legislation referred to:

Electoral Process Act, No. 35 of 2016

The Constitution (Amendment) Act No. 2 of 2016

Electoral Act No. 12 of 2006 (repealed)

Work referred to:

Rupert Cross on Evidence, 1986, 3rd edition.

The Appellant, George Muhali Imbuwa (Respondent in the court below) appeals against the nullification by the High Court of his election that was held on 11th August, 2016, as Member of Parliament for Nalolo Constituency in the Western Province of Zambia. The Appellant had initially campaigned for adoption on the United Party for National Development (UPND) ticket but lost in the primaries. Belinda Moola Lutanga Lweendo was instead adopted as the UPND Nalolo Constituency Parliamentary candidate. The Appellant then opted to contest the Nalolo Constituency Parliamentary election as an Independent Candidate. The Appellant was among several contenders who included Belinda Lweendo of the UPND, Enock Kaywala Mundia of the Patriotic Front (PF), Akoyombokwa Catherine of the Forum for Democracy and Development (FDD), and Imalimbila Namabunga of the United National Independence Party (UNIP). The election was duly held on 11th August 2016.

On 14th August, 2016 the Returning officer, Mr. Kangongo Sladen declared the following results:

George Muhali Imbuwa 5060
Belinda Moola Lutanga Lweendo 4879
Enock Kaywala Mundia 4455
Akoyombokwa Catherine 590
Imalimbila Namabunga 114

The Appellant was declared winner of the Nalolo Parliamentary Constituency seat. Two election petitions were filed shortly thereafter. The first petition No.2016/HP/EP0013 was filed by Enock Kaywala Mundia (the Petitioner in the court below) against the Appellant seeking nullification of the election because of alleged non-compliance with electoral laws and alleged illegal practices which were alleged to have affected the majority of voters concerned and to have prevented them from exercising their freedom to vote for a candidate of their choice.

The petition was founded on a number of grounds. First that although the Appellant stood as an independent, he never left UPND as required by Article 51 of the Constitution; second that he participated in acts of vote

buying while campaigning; third that he engaged in acts of character assassination by falsely accusing the Respondent of being a Satanist among other things. At the end of the trial, the Court found the allegations of UPND membership and vote buying unsubstantiated and dismissed them but found that there was evidence of character assassination. The trial court further found that the allegation of Satanism made by the Appellant in his campaign message was so widespread in Nalolo Constituency that it influenced the majority of voters. The court then declared the Nalolo Constituency election null and void.

The second petition No. 2016/HP/EP/0063 was filed by Belinda Moola Muntanga Lweendo, the UPND candidate against three Respondents; the Appellant herein, Muhali George Imbuwa; Enock Kaywala Mundia; and the Electoral Commission of Zambia (ECZ). It was heard by the same Judge. In her action, the Petitioner sought nullification of the 11th August, 2016 election in Nalolo Constituency, on the basis of the 1st and 2nd Respondents' alleged individual misconduct and the 3rd Respondent's conduct of the election, and further sought recount, verification and scrutiny of the votes cast in order to determine whether she was in fact the true winner. After hearing the petition the Judge dismissed all the allegations against all the Respondents but

reaffirmed the decision to nullify the election of the Appellant herein, pronounced in the first petition.

According to the Notice of Appeal, the Appellant now appeals against the Judgment in petition No. 2016/HP/EP 0013 and petition No. 2016/HP/EP 0063 which held that he was not duly elected as Member of Parliament for Nalolo Constituency. The Memorandum of Appeal states that the Appellant appeals against the whole Judgment of the High Court on the following grounds.

1. **The learned Trial Judge erred in law and in fact when he held that the Appellant was not duly elected as Member of Parliament for Nalolo Constituency. (sic)**
2. **The learned Trial Judge erred in law and in fact when he held that the Appellant was involved in character assassination of the Respondent during the campaigns for the 11th August 2016 elections.**
3. **The learned Trial Judge erred in law and in fact when he held that the allegation of Satanism made by the Appellant was so widespread that the electorate were prevented from voting for a candidate of their choice.**
4. **The learned Trial Judge erred in law and in fact when he held that the message of Satanism levelled against the Respondent spread throughout the Constituency of Nalolo despite evidence showing that the Appellant had only campaigned for a period of two weeks.**
5. **The learned Trial Judge erred in law and in fact when he held that the evidence on the allegations of Satanism made against the Respondent by the Appellant was well corroborated so as to meet the standard of proof in election petitions.**

We have taken note that although the Appellant claims in the Notice of Appeal that he is appealing against both the first and second petitions against him, the appeal against the second petition is of no consequence as it was dismissed in *toto*. In fact the only reference to nullification of the Appellant's election in the second petition is a misplaced statement by the judge at page J57 which reads *"Having dismissed all the allegations. The net result of this Petition is that it is unsuccessful. Be that as it may, having determined in the first Petition under Cause No. 2016/HP/EP0013 relating to this very Constituency that George Muhali Imbuwa's election was void, I declare that George Muhali Imbuwa was not duly elected as Member of Parliament for Nalolo Constituency." (sic).* The Appellant's mention of the second petition appears to be an attempt to cover all eventualities and we see no reason to allude to it further other than to state the trial Judge's comment in Cause No. 2016/HP/EP/0063 that the Respondent was not duly elected Member of Parliament for reasons given in his Judgment in Cause No. 2016/HP/EP/0013.

Both the Appellant and the Respondent filed written heads of argument which they augmented orally at the hearing on 21st June, 2017. The Appellant's grounds were argued in two parts. The first part consolidated grounds one to four which were argued together. The second part dealt with ground five on its own.

The Appellant began his submissions by arguing that this Court has the power to interfere with the findings of fact of the lower court. As authority, counsel for the Appellant, Mr Mweemba, cited the holding in **Marcus Kampumba Achiume v Attorney General**[1] in which the Supreme Court stated that the appellate court cannot reverse the findings of fact by the trial Judge unless it is satisfied that the findings are perverse, made in the absence of relevant evidence; or based upon a misapprehension of facts or are findings which on a proper view of the evidence no trial court acting correctly could reasonably make. He also cited the case of **Nkhata and four Others v Attorney General**[2] wherein the Supreme Court held that an appellate court can only reverse a trial Judge where it is positively demonstrated that the Judge erred in accepting the evidence he or she accepted or in assessing and evaluating the evidence by taking into account

some matter that he or she ought not to have taken into account or indeed failed to take into account some matter that should have been so taken.

The rest of the Appellant's submission sets out to demonstrate the errors made by the trial Judge in evaluating the evidence of the parties, by accepting evidence which he ought not to have accepted and taking into account matters which he ought not to have taken into account, and in some instances, making assumptions that are not supported by the evidence on record.

The first point raised by the Appellant was that the Judge made a finding on one charge based on evidence which he discounted in relation to several other charges directed at the Appellant. In his view, this raised two contradictory findings on the evidence of the same witnesses because the court departed from the required standard of proof and accepted evidence that should have been excluded.

The Appellant argued that the trial Judge found that the charges relating to campaigning on a UPND ticket and vote buying were not proven because the evidence fell short, yet the same evidence was used to conclude that the case of character assassination had been proved. The evidence is impugned for several reasons: Firstly, it is hearsay in that the independent

witness who testified that the voters were all carrying their own pens because they were afraid to use ECZ pens allegedly supplied by the Respondent who was allegedly a Satanist had not heard the Appellant make the said statement and was merely recounting what had been told to him by the voters.

Secondly, the Appellant argued that the evidence which had been accepted came from witnesses with a possible interest to serve and whose evidence for that reason was not accepted in the allegations in relation to vote buying. The Appellant then buttressed his claims with reference to the testimony and cross – examination of PW 2, PW 3, PW 4, PW 6, PW 16 and PW 17.

Thirdly, the Appellant averred that the trial court accepted opinion evidence. He stated that PW 6, PW 14 and PW 17 all gave their own opinions on the reasons why voters were using their own pens or why they voted in a particular manner as there was no factual evidence to support their statements. According to the Appellant, no witness testified that they voted for the Appellant because of fear of Satanism or witchcraft. That the court's conclusion was therefore based on speculation.

The Appellant then submitted that the allegation of character assassination was brought under the wrong law. In his view, it should have been raised under S. 84(1) of the Electoral Process Act No. 35 of 2016 (henceforth the "Act") which prohibits the making of false statements about the illness, death or withdrawal from an election of a candidate knowingly in order to promote the election of a different candidate. That the provision was specific in the type of allegation that it outlawed and did not include averments of Satanism. Hence even if such statements which are denied were made, they would not amount to an electoral malpractice. He concluded that the allegations did not fall under section 83(1) (a) and (b) of the Act as alleged by the Respondent nor under section 83(1) (c) (iii) of the same Act as decided by the trial court.

With regard to ground 5 on the standard of proof required in an election petition, the Appellant relied on the case of **Priscilla Kamanga v Attorney General**[3] wherein the Court stated that the standard is higher than a mere balance of probability. It was submitted that this was reiterated in the case of **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela**[4] wherein it was stated that the burden of proof is on the challenger. Finally, he referred to **Anderson Kambela Mazoka and Others v Levy**

Patrick Mwanawasa and Others[5] wherein it was stated that in order to support nullification, the defects must be such that the majority of voters were prevented from electing their preferred candidate or the election was so seriously flawed that the results do not represent the free choice and will of the majority of the voters.

Relying on this higher standard, the Appellant singled out the evidence of PWS 1, 2, 3, 4, 5, 6, 8, 16 and 17 as partisan and therefore not credible. He challenged the evidence of the civil servants engaged by ECZ in conducting the election and who did not attend the campaign meetings as hearsay and not admissible to corroborate the evidence of partisan witnesses. The result, in his view was that there was no evidence before the trial court to form the basis for its decision. He shored this up by linking the decision in the **Mazoka v Mwanawasa**[5] case to section 97(2) of the Act to underscore the view that the high standard set means that the election of a Member of Parliament cannot be easily nullified.

The Appellant then referred to the trial court's statement of taking judicial notice of the fact that Nalolo Constituency is a rural constituency with villagers for voters who are easily swayed by mention of Satanism and stated

that such a conclusion ought to have been based on direct evidence. That the same applied to the statement that the message of Satanism was widespread as, in his view, what was widespread was the allegation made by the partisan witnesses called by the Respondent. He further questioned the trial court's reference to the voter's register which was not produced in evidence or referred to by either the witnesses or the parties.

In closing, the Appellant attacked the claim by the Respondent that he would have won the election had his character not been maligned by the Appellant, noting that he came third. He prayed that the appeal should be allowed and that he should be awarded costs both in this Court and in the court below.

In response, the Respondent cited the same authorities as the Appellant, to argue that the court cannot reverse the trial court's findings of fact. In response to grounds one to four, it was submitted that the grounds of appeal were intended to mislead the court. The Respondent's Counsel recited the witnesses' testimony presented before the trial court to show its reliability. It was submitted that witnesses PW 1, 3, 4, 13, and 14 testified that they attended the various campaign meetings held by the Appellant and that they heard him call the Respondent a Satanist. That the court found that

five meetings took place between July and August, 2016 at Samba, Narita, Muoyo, Nasikona and Mwandi villages and that the meetings were confirmed by the Appellant's witnesses. That the evidence of the polling assistants and returning officers was meant to confirm that most of the electorate refused to use the ECZ pens for fear of death. Therefore, the evidence could not be regarded as hearsay. He cited the cases of **Subramaniam v Public Prosecutor**[6] and **Mutembo and 5 Others v The People**[7] where it was said that a statement is not hearsay and therefore admissible if it is tendered in order to establish not its truth but that it was made.

On the need for the trial court to have excluded partisan evidence, the Respondent cited the case of **Boniface Chanda Chola, Christopher Nyamonde and Nelson Sichula v The People**[8] wherein it was stated that the critical consideration in such circumstances is not whether the witnesses had interests of their own to serve but whether because they fell into that category or because of the prevailing circumstances they may have had a motive to give false evidence. He also cited **Shamwana and Others v The People**[9] and **GDC Hauliers (Zambia) Ltd v Trans Carriers Ltd**[10] which stated that findings of credibility by the trial court are not lightly to be interfered with. That the trial court recognized that the issue of credibility was

of paramount importance and had therefore treated the evidence with great care. That the trial court did not hold that all the witnesses were not credible. It merely raised issues of credibility in relation to allegations of bribery because evidence of the same was not sufficient to sway the majority of voters. That with regard to ground four, there was extensive proof of the statements made by the Appellant during his campaign rallies which statements were widespread and swayed the minds of the voters and that there were witnesses who saw and heard the Appellant make the allegations and that there were witnesses who saw what happened at the polling station.

With regard to the opinion evidence of PW6, PW15 and PW16, the Respondent argued that the trial court did not say it accepted the opinion evidence. In any case the witnesses testified to what they saw as they moved through most parts of Nalolo. He challenged the claim that the message could not have spread so rapidly as to affect the whole constituency. He stated that it does not require a substantial amount of time for information given as a campaign message attended by many members of the electorate from different parts of the constituency to spread rapidly.

In concluding the arguments in response to grounds one to four, that the issue of character assassination fell within section 84 (1) of the Act, the

Respondent argued that this issue was not raised by the Appellant in the court below.

In response to ground five, the Respondent referred us to **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba**[11] wherein it was stated that the standard of proof is higher than a mere balance of probability and must be established to a fairly high degree of convincing clarity. He cited Section 83(1) (c) (ii) of the Act and quoted an extract in **Saul Zulu v Victoria Kalima**[12] in which the Supreme Court held that the fact that there were a number of people who attended the meeting at which the alleged threats and false and malicious statements were uttered, made it apparent that the conduct complained of must or may have affected the outcome of the election.

The Respondent therefore averred that the standard of proof was met in this case. He dismissed the allegation that the former ECZ officials who testified on behalf of the Respondent did not hold an official ECZ position. That as they were called to testify as witnesses, they were therefore testifying to what they had perceived with their own senses. On whether the trial court wrongfully took judicial notice of Nalolo being a rural constituency without direct evidence being led to that effect, the Respondent disputed the

Appellant's interpretation of the court's position. He stated that the court took judicial notice of the type of area being rural. That based on the testimony of the majority of witnesses, the people mostly live in villages. He relied on the case of **Gastove Kapata v The People**[13] to show that there was no room for doubt that Nalolo Constituency is a very rural area and there was no need to adduce evidence of this.

On the reference to the voters' register, the Respondent quoted Rupert Cross on Evidence, 3rd Edition, where at page 19, it is stated that the court can find that a fact exists by judiciously noticing it either from the Judge's general knowledge or from inquiries to be made by himself for his own information from proper sources. That in the case in *casu*, the Judge made an inquiry on his own motion as to the contents of the voters' register which is readily available to any member of the public and is therefore, a proper source.

The Respondent ended by alleging that the Appellant had failed to substantiate the grounds of appeal and the same lacked merit. He referred to the case of **Batuke Imenda v Alex Cadman Luhilo**[14] where it was opined that those who think they can find their way to Parliament on a platform of

lies and calumnies intended to defame the characters of opponents, the message is that the courts will not hesitate to show them the door and eject them from Parliament. The Respondent prayed that the Appeal be dismissed with costs.

We have seriously considered the arguments by counsel on both sides. We have also scrutinized the Judgment of the learned trial Judge, together with the record of proceedings in the court below. In our considered view, the main issue to be determined, as set forth in ground one, is whether the decision by the trial Judge to nullify the election of the Appellant herein as the Member of Parliament for Nalolo Constituency is on firm ground.

We take note that the trial Judge nullified the Nalolo seat on the basis of evidence impugned in grounds two to five. This Court will therefore consider grounds two to five in order to determine ground one. For convenience, we will deal with grounds two and five together before turning to grounds three and four, also together. In so doing, we must determine whether the trial court rightly found, in relation to grounds two and five, that there was cogent evidence of character assassination of the Respondent by the Appellant during the 11th August, 2016 election held in Nalolo

Constituency. Further, in relation to grounds three and four that the character assassination was widespread and did or likely did prevent the majority of voters in Nalolo Constituency from voting for their preferred candidate.

We also take note that the Appellant argued that section 84 of the Act is applicable in place of section 83 as found by the trial court. Further, that the trial court relied on opinion evidence in reaching its decision. It is our firm view that the first argument is misplaced because it was not raised in the lower court and cannot now be raised before this Court. The second argument is also misplaced because the record shows that the judge did not rely on such evidence. We shall therefore make no further mention of either argument.

As is our practice often time, we begin with the law. Section 97 (2) (a) of the Act provides for nullification of an election and reads:

> **97. (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—**
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—**

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent;

and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred

It is well settled that the burden of proof in election petitions rests on the petitioner and that the applicable standard is higher than the balance of probability applicable in ordinary civil cases but less than beyond all reasonable doubt which is the requisite standard of proof in criminal cases.

As the Supreme Court held in the case of **Mbikusita Lewanika and Others v Chiluba:**[11]

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

Generally, the position at law is that the proscribed act has to be proved before a court can proceed to adjudicate on whether the majority of voters

may or were prevented from electing their preferred candidate in any given election under section 97 (2) (a) of the Act. This was our holding in the case of **Sunday Chitungu Maluba v Rodgers Mwewa and Another**[15] where we stated that elections will not be voided unless the Petitioner shows that the illegal practice that has been proved with the aid of cogent evidence, was so widespread that it had or may have prevented the majority of voters from electing the candidate of their choice.

We have equally held in **Steven Masumba v Elliot Kamondo**[16] and in **Richwell Siamunene v Sialubalo Gift**[17] among other cases that a petitioner has a duty to adduce credible or cogent evidence to prove his allegation to the required standard of proof. The evidence must be of a kind that is free from contradictions and truthful so as to convince a reasonable tribunal to give Judgment in a party's favour. Since the lower court found both aspects proved in the case before us, we will consider both sets of grounds.

And as the grounds of appeal attack both findings of fact and law, we wish to reiterate that as an appellate court, we are guided by the principle stated in the **Siamunene v Sialubalo**[17] case that we will not easily reverse the findings of fact made by a trial Judge unless we are satisfied that the findings in question were either perverse, or made in the absence of any

relevant evidence or upon a misapprehension of the facts, or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make.

Counsel for the Appellant, in arguing his brief, impugned the competence of the Respondent's witnesses before the trial court. He argued that the trial court erred in its consideration of evidence from witnesses who in his view were mostly partisan. That the trial court had in fact impugned the credibility of some of the witnesses in relation to separate allegations before accepting their testimony on the allegation of character assassination. Further, that the testimony of the partisan witnesses was not corroborated by independent evidence. That the only independent testimony was itself hearsay and thus fell short of the standard required to corroborate the evidence of witnesses who may have an interest to serve.

We are mindful that the burden to prove his case to the standard required by law in the court below, lay with the Respondent. That the evidence adduced by the Respondent before the trial court, as per the record of appeal, is only witness testimony. Further that, the rules of evidence entail that the competence, particularly credibility, of the witnesses that testified be

taken into account in determining the admissibility and weight of their evidence.

We are also mindful of the need to consider the entire witness testimony on record made on behalf of the Respondent since the trial judge said at page 66 of the record that:

> **After hearing the evidence of the Petitioner and the Respondent, I have come to the conclusion that the evidence adduced by most of the witnesses was largely subjective. They were either Party members with positions in their Party structures or were Cadres. A few neutral witnesses testified...**

For convenience, the Respondent's witnesses, as they appear in the record of appeal, have been divided into two groups. Group one is constituted by witnesses who allegedly heard the Appellant make the impugned statements. And group two consists of independent witnesses who observed voters using their own pens and were told by the same voters that they did so because the Appellant advised them to do so after calling the Respondent a Satanist who had provided the ECZ pens.

In group one we have included: PW1 the PF ward chairman of Kambai Ward who attended a meeting at Namalilo village at which the Appellant allegedly character assassinated the Respondent. He voted at Mwandi

polling station. PW3, the PF ward secretary in Kambai Ward, who attended a meeting at Nasikona village, who was allegedly bribed by the Appellant and witnessed the character assassination of the Respondent by the Appellant. PW 4 who was found to be a PF sympathizer by the trial Judge and who attended the same meeting at Nasikona and testified to receiving part of the alleged bribe given to PW3.

PW5 of Mwandi village who was the PF youth chairman at Kambai Ward and attended the same meeting at Nasikona and partook of the alleged bribe. PW7 who was the PF youth chairman at Kapungu and voted at Lilwachi polling station where he found out about the character assassination from other voters whilst on the voting queue. PW8 who was a PF polling agent at Na'la and who attended a meeting at Nasita village addressed by the Appellant. He testified to witnessing the alleged character assassination of the Respondent by the Appellant and to seeing voters coming to vote with pens in hand. PW11 of Libuba village, who was a PF polling agent at Kaanda polling station.

PW12 of Nalishi village also being the PF Roadside Branch secretary who witnessed the alleged character assassination at a meeting in Simbule village. PW 12 was also a polling agent at Sianda polling station. PW13 of

Moyo village whose political affiliation is not on record. She testified to attending a meeting in Moyo village and witnessing the character assassination of the Respondent by the Appellant and thereafter being bribed by the Appellant. She testified that on polling day she saw people using their own pens. That she voted for the Appellant because of the bribe she allegedly received. In cross-examination, however, she admitted to *"knowing the Respondent from his home village since 2013"* and not knowing the Appellant as she only met him at the meeting where he allegedly bribed her. Given her profile, we cannot rule out her partiality towards the Respondent. More so as her evidence of bribery was ignored by the trial court.

PW14 was a PF member and fish seller from Namyele village who attended a meeting at Samba village at which the Appellant allegedly bribed her and character assassinated the Respondent. She claimed to have voted for the Appellant at Nalucha polling station out of fear. PW16 who was the campaign manager for the Respondent and PW17 the Respondent himself who both testified that they visited ten polling stations, namely, Lwimba, Litoya, Mwandi, Nasikona, Na'la, Sikana, Sinungu, Nagwai, Makungu, Silowana, Kanda, Namabunga, and Kongalweti and were surprised to see

people using their own pens at all the named stations. That when PW16 made inquiries, he was told by PW2 that it was because of the Appellant's character assassination of the Respondent. That PW17 obtained this information from PW16. PW17 further stated that although he had heard during the campaign that he was being character assassinated by the Appellant he did not complain to the police.

The credibility of the witnesses in group one is in question because of their political affiliation or inclination. Lack of credibility is in fact the reason why the trial judge dismissed allegations of bribery against the Appellant. The trial Judge found, and we quote from page J70 of the Judgment, lines 3-13, that:-

> **From the record it is clear that there are no independent witnesses to RW1 giving money to PW1 and PW3. Instead, what is available is evidence of PW3, a Patriotic Front Party Ward Secretary, who said that he was given K600. 00 by RW1 as an inducement and shared it with his colleagues, PW4 and PW5..... Their testimonies raise credibility issues. PW3, PW4 and PW5 are all PF members.**

Subsequently, however, at page J92, lines 9 to 19; page J73 lines 26 to 27 and page J74 lines 1 to 2 of the Judgment, the trial judge said:

The Respondent has urged this Court to treat PW1, PW2, PW3, PW4, PW5, PW6 and PW8 with caution because they are PF members, therefore, they are witnesses with an interest to serve. .....

.....I note that PW1, PW3, PW4, PW5, PW8, PW13 and PW14 all testified that they attended the various meetings addressed by RW1 and his campaign team between 27th July, 2016 and 7th August, 2016, at which they assassinated the character of the Petitioner.....

.. The relevant evidence on record in support of this allegation is that of PW1, PW3, PW4, PW5, PW13 and PW14 who testified that they attended the various meetings addressed by RW1 and heard him character assassinate the Petitioner.

In the first part, the Judge gives reasons for questioning the credibility of PW1, PW3, PW4 and PW5 whom he found to be PF members. Even though the trial Judge had acknowledged that the Appellant had urged the court to treat PW1, PW2, PW3, PW4, PW5, PW6 and PW8 with caution, when he addressed the allegation of character assassination, he did not reinstate his earlier position that all the above named witnesses had an interest to serve. We take note that the Respondent had countered this by averring that the Judge did not at any point hold that all witnesses were not credible and neither did he extend the reasoning to other aspects of the case. In our considered view, that is not the issue. The issue is that the witnesses belonged to a category of witnesses that are considered suspect. To make

the point we wish to cite a case which though of a criminal nature and merely of persuasive value, is nevertheless helpful. It is the case of **Boniface Chanda Chola and 2 Others v The People**[8] wherein it was stated that:

> **The critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence.**

Further, in the case of **Masumba v Kamondo**[16] we stated that once a witness or complainant has been shown to be untruthful in material respects, his or her evidence can carry very little weight.

It is on this basis that even though as an appeal court, we will normally accept that the trial judge, having seen the witnesses first hand, is better placed to determine their credibility, we feel compelled, in the circumstances, to take a different position. We are fortified in taking this step by the case of **Samson Mbavu and others v The People,**[18] another criminal case of merely persuasive value that we find equally helpful, and wherein the Court of Appeal stated that:

> **When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses**

from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the court of appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a

question of fact turning on the credibility of witnesses whom the court has not seen.

We have such a pertinent situation before us in the sense that the trial Judge found that the evidence of PW1, PW3, PW4, PW5, PW8, PW13 and PW14 showed that they attended the various meetings addressed by the Appellant and his campaign team between 27th July, 2016 and 7th August, 2016 where the Appellant and his team allegedly character assassinated the Respondent; he subsequently found that the evidence of PW1, PW3, PW4, PW5, PW13 and PW14 was the relevant evidence in support of this allegation.

These findings are contradictory to the Judge's initial position when he addressed the allegation of vote buying as the record shows that no reason is given by the Judge for finding the same witnesses whose credibility he questioned in relation to the allegation of vote buying to be credible

witnesses with regard to the allegation of character assassination. Their testimony continued to have less weight. We therefore agree with the Appellant that this was a misdirection and the trial court should have considered its earlier position in so far as the same applied to PW 1, PW 3, PW4 and PW5.

This finding leaves the testimony of PW7, PW8, PW11, PW12, PW13, PW14, PW16 and PW17. Although the trial Judge did not impugn the credibility of these witnesses, we note that he did not use their evidence to support the other allegations which were dismissed. Be that as it may, the impugned as well as remaining witnesses in group one all fall within the category of witnesses who because of their political inclination or affiliation maybe suspect; there is need to rule out any falsity or exaggeration on their part. It is therefore our considered view that the testimony of the Respondent and his witnesses, because of the category in which they fell, carried less weight and needed corroborating as a matter of law. We are persuaded to so hold by the Ugandan case of **Wadada Rogers v Sasaga Isaiah Jonny and Electoral Commission**[19] wherein it was stated that:

> **In election matters partisan witnesses have a tendency to exaggerate claims about what might have happened during elections. In such situations, it is**

necessary to look for 'other' evidence from an independent source to confirm the truthfulness or falsity of the allegation.

In turning to the issue of corroboration, we take on board the reasoning in **DPP v Hester**[20] wherein at page 1065, Lord Morris stated:

Corroborative evidence will only fill its role if it itself is completely credible evidence.

We have already observed from the record of appeal that in anticipation of the corroboration requirement, the Respondent presented five witnesses that we, for convenience, assigned to group two. We are mindful that these witnesses because of the category in which they fall, carry more weight; however it is only with regard to what they perceived with their own senses. They are equally subject to other rules of evidence such as the rule against hearsay. With this in mind, we have carefully considered their testimony as it appears on the record of appeal.

The status and testimony of the group two witnesses in a nutshell is this: PW2 was a polling assistant at Mwandi polling station who testified that voters were using their own pens and that they told him they did so because the Appellant told them the ECZ pens were provided by the Respondent who was a satanist; PW6 was the assistant presiding officer at Nasikona who

observed a female voter, who was marking a presidential ballot paper and refused to use an ECZ pen. He testified that she told him and others, it was because of the allegations of Satanism made by the Appellant against the Respondent. He further testified however that the person he directly witnessed telling people not to use ECZ pens because of the Respondent's Satanism was Mr Hakainde Hichilema the President of the UPND and not the Appellant. PW9 was a polling assistant at Na'la who testified that she saw one female voter using her own pen. That the voter told her that 'they' were told not to use ECZ pens as their vote would be transferred to the Appellant.

PW10 was a polling assistant at Sikana who testified that he was surprised by one voter who refused to use the ECZ pen and told him the pens were satanic and linked to the Respondent. He also testified however that after the police officer told the voters in the queue that they were not allowed to use their own pens, that "that was the end of the matter" and that "there was peace." PW15 was a presiding officer at Siapoya polling station in Naducha ward, who testified that most of the voters refused to use the ECZ pens and told him that it was because they were told not to do so by

the Appellant. He admitted however that both candidates received votes at the same polling station.

The testimony of all these witnesses cannot offer adequate corroboration because it is hearsay in relation to the allegation of character assassination. Furthermore it is inconsistent. For instance PW9 who was at the same polling station as PW8, contradicts PW8 in a material particular by consistently stating both in the examination in chief and in cross examination (at pages 274 and 277 of the record) that the effect of using ECZ pens was that the vote would go to the Appellant as opposed to the Respondent. Further, the evidence from PW6 about Hakainde Hichilema's speech was not tied to the Appellant as required by section 97(2) (a) of the Act. The evidence of PW10 was also general and not tied to the Appellant. The corroborating evidence of PW2 regarding Mwandi polling station and PW15 relating to Siapeya polling station in Naducha Ward in any case does not support the character assassination as it is hearsay on that point.

After much anxious consideration, it is our firm view that the independent evidence, is not cogent on the question of whether the Appellant engaged in character assassination and whether that character assassination had an influence on the voters' choice. The independent

witnesses were all told about the character assassination on polling day. Their evidence is admissible only to establish that voters at five polling stations were carrying their own pens in order to protect their vote. This is the evidence of the Respondent's own witnesses' such as PW1, PW13 and PW14 who testified that they carried their own pens when they went to vote whilst other witnesses particularly PW2, PW6, PW9, PW10 and PW15 attested to the fact that people came to vote using their own pens.

We have not overlooked the testimony of PW1 PW13 and PW14 that because of the character assassination of the Respondent by the Appellant, they elected to vote for the Appellant and this led to the Appellant, emerging as winner of Nalolo Constituency. Their claims have not been corroborated. And even if they had been corroborated, the few votes can hardly be said to constitute evidence that the majority were or could have been affected by the alleged character assassination.

There is no cogent evidence to the required standard of a high degree of convincing clarity that the voters in Nalolo did not exercise their free will. In fact, there is evidence on record from the Respondent's own witnesses that they did exercise their free will despite the alleged character assassination. The testimony of PW12 is illustrative. PW12 testified that he

was surprised when voters came in to Sianda polling station with their own pens and said they feared death at the behest of the Respondent if they used ECZ pens. He however admitted in cross examination at page 293 to 294 of the record that people voted freely and the Respondent won the vote at the polling station. The record reads:

A. I was there even when they announced the winner.
Q. You were there, who was announced winner at that polling station?
A. It was Enoch Mundia.
Q. It was not Imbuwa right?
A. Yes my Lord.
Q. So witness can you see that if those things were said, they had no effect on the people at all?
A. The people used their own pen and voted for the one they wanted.
Q. people were free to vote for their candidate of choice?
A. People were voting according to their choice.

Having carefully assessed the evidence on record in its totality, it is our considered view that Grounds two and five have merit. We now turn to address grounds three and four.

Grounds three and four attack the trial court's finding that the allegations of Satanism were widespread and prevented the majority from electing their desired candidate in about eight out of the ten wards in Nalolo Constituency. That Nalolo Constituency is largely a rural area with people

living in villages, where belief in Satanism or witchcraft is wide spread and taken seriously. That the allegations spread rapidly and the electorate voted in fear. We have again carefully examined the record of appeal. This part of the petition was in our considered view insufficiently pleaded, prompting the trial Judge to fill in the gaps by taking judicial notice of some issues before him.

Counsel for the Appellant argued that the Judge's finding is therefore mere speculation made without any evidence having been led to establish it and that the facts he alluded to are not notorious. In addressing the issue, we wish to refer to the position outlined in the case of **Mwape v The People**[21] wherein it was stated that:

> **A court may, and in some cases must, take judicial notice of various matters. It will, for instance, take judicial notice of matters of common knowledge which are so notorious that to lead evidence in order to establish their existence may be unnecessary and could be.....an insult to the intelligence to require evidence**

In this regard, the trial court was in order to take judicial notice of the fact that Nalolo Constituency is a rural area with ten wards and a total of about 28, 891 voters. But what we fail to appreciate is how the Judge arrived at the position that beliefs in Satanism and witchcraft are so widespread and

taken so seriously that the slightest idea of the same causes misapprehension in the villages. That in the circumstances, the allegations of character assassination spread rapidly and were proved in about eight of the ten wards. Further, that the allegations had an impact on the majority of the electorate in Nalolo Constituency such that they were or may have been prevented from electing the candidate of their choice. The nature of the evidence on record does not support such findings and indeed, these were not notorious facts. If anything they were in contention.

There is no evidence on the record of appeal to show the geographical set up of the wards or villages, numbers and location of polling stations in each ward or communication facilities showing how quickly the allegation could have spread during the campaign period in question.

Indeed, the Respondents own witnesses, namely, PW2, PW3, PW6, PW7, PW8, PW9, PW10, PW11, PW12, PW15, PW16 and PW17 the Respondent, all testified that they were surprised to see voters at the polling stations on 11th August, 2016 coming in with their own pens and when some of them inquired as to why, they were told about the character assassination. PW 11 in particular testified that he knew nothing about the character assassination until he was told about it at the polling station by someone he

said was from the Appellant's camp and by other PF members. PW 16 and PW17 had to make inquiries to find out why people were using their own pens.

The finding that the meetings where the character assassination had taken place had been attended by many people and that the message spread fast is contradicted by the testimony of PW16, who testified that the Appellant's meetings were poorly attended. Not only is there no independent testimony to corroborate either position but what would amount to "many people" is relative and would depend on the circumstances of each case. Section 97 (2) (a) of the Act is specific that the majority must have been or were likely to have been affected.

We stated in **Maluba v Mwelwa and the Attorney General**[15] that the "majority" is the greater number of a part. That the word is used only with countable nouns. That the numerical sense of "majority" has been further elaborated through the use of the term "widespread" which means widely distributed or disseminated. We relied on **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others**[5] in which the Supreme Court stated that

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

In the instant case there is no evidence to show whether "many" comprised or could have comprised a significant part of the population of the Constituency, especially the electorate. More so when the Appellant, in the same manner as the Respondent, only got a minority of votes, with about two thirds of the voters voting against him.

The trial Judge relied on the evidence of PW2, PW9, PW10 and PW15 to establish the voting pattern of the electorate at certain polling stations. The record of appeal does not show the official results either in full or at the polling stations concerned. It does not show the voter turnout at each polling station or that each polling station alluded to, represented a different ward.

The trial Judge also referred to the case of **Simasiku Kalumiana v Geofrey Lungwangwa and ECZ**[22] where it was stated that the testimony of witnesses such as police officers and monitors during an election is more credible than that of party officials and election officers, a position we agree with. But whilst we agree with the Judge's finding that the witnesses confirmed the irregular pattern of voting, we do so only in so far as the same

applied to the polling stations where they conducted their respective duties during the elections on 11th August, 2016.

Although the Judge found that the evidence of PW2, PW4, PW6, PW9, PW10 and PW15 was credible and corroborated the testimony of the other witnesses, it is evidence of what happened at Mwandi, Nasikona, Na'la Siapoya and Sikana polling stations only. It is evidence that at the stated polling stations, voters were using their own pens for unsubstantiated reasons. It cannot corroborate the allegation that the alleged character assassination was widespread or affected the majority of voters.

In our considered view, the evidence on record of the impact or potential impact of the alleged character assassination on the electorate does not meet the standard of a high degree of convincing clarity. We say so because the Respondents evidence carried less weight for reasons we have stated and the facts established were clearly deficient.

We find that Ground three and four have merit. Consequently, ground one has merit. The whole appeal succeeds.

We reverse the decision of the trial Judge and find that the Appellant is the duly elected Member of Parliament for Nalolo Constituency. We order that each party bear their own costs in the court below and before this Court.

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H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT

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M.S. Mulenga
CONSTITUTIONAL COURT JUDGE

.....

E. Mulembe
CONSTITUTIONAL COURT JUDGE

.....

P. Mulonda
CONSTITUTIONAL COURT JUDGE

.....

M. M. Munalula
CONSTITUTIONAL COURT JUDGE