

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

APPEAL NO. 9/2017  
2016/CC/A031

IN THE MATTER OF: THE PARLIAMENTARY PETITION RELATING  
TO SHANG'OMBO PARLIAMENTARY  
CONSTITUENCY ELECTIONS HELD IN ZAMBIA  
ON THE 11<sup>TH</sup> AUGUST, 2016

IN THE MATTER OF: ARTICLES 46, 51, 54 AND 73 OF THE  
CONSTITUTION OF ZAMBIA ACT CHAPTER 1  
VOLUME 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SECTIONS 82, 83, 84, 86, 89, 91, 92, 94, 96, 97,  
98, 99, 100, 110 OF THE ELECTORAL  
PROCESS ACT NO. 35 OF 2016

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

BETWEEN: REPUBLIC OF ZAMBIA  
CONSTITUTIONAL COURT OF ZAMBIA

PONISO NJEULU 07 MAR 2019 APPELLANT

AND  
REGISTRY 3  
P O BOX 10067 LUSAKA  
MUBIKA MUBIKA RESPONDENT

Coram: Chibomba, PC, Sitali, Mulembe, Mulonda and Munalula, JJC  
On 4<sup>th</sup> October, 2017 and 7<sup>th</sup> March, 2019.

For the Appellant: Mr. T. Chali of Messrs. H.H. Ndhlovu and  
Company

For the Respondent: Ms. M. Mushipe of Messrs. M. Mushipe and  
Associates.

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## JUDGMENT

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Mulembe, JC delivered the Judgment of the Court.

Cases referred to:

1. Anderson Mazoka and others v Levy Mwanawasa and others (2005) Z.R.138
2. Akashambatwa Mbikusita Lewanika and others v Fredrick Titus Jacob Chiluba (1998) Z.R. 79
3. Levison Mumba v Peter Daka, Appeal No. 31 of 2003
4. Mubika Mubika v Poniso Njeulu, Appeal No. 114 of 2007
5. Christopher Kalenga v Annie Munshya and others, 2011/HK/EP/03
6. Saul Zulu v Victoria Kalima (2014) Z.R. 14
7. Michael Mabenga v Sikota Wina and others (2003) Z.R. 110
8. Subramaniam v Public Prosecutor [1956] 1 W.L.R 965
9. Kufuka Kufuka v Mundia Ndalameli, Appeal No. 80 of 2012
10. Josephat Mlewa v Eric Wightman (1995/1997) Z.R. 171
11. Simon Malambo Choka v The People (1978) Z.R. 243
12. Nakbukeera Hussein Hanifa v Kibule Ronald and another (2011) UGHC 64
13. Margaret Mwanakatwe v Charlotte Scott and another, Selected Judgment No. 50 of 2018
14. Austin Liato v Sitwala Sitwala, Selected Judgment No. 23 of 2018
15. Chrispin Siingwa v Stanley Kakubo, Appeal No. 7 of 2017
16. Brelsford James Gondwe v Catherine Namugala, Appeal No. 175 of 2012
17. Nkandu Luo and another v Doreen Sefuke Mwamba and another Selected Judgment No. 51 of 2018
18. Richwell Siamunene v Sialubalo Gift Selected Judgment No. 58 of 2017
19. Steven Masumba v Elliot Kamondo Selected Judgment No. 53 of 2017
20. McGraddie v McGraddie [2013] UKSC 58
21. Mwiya Mutapwe v Shomeno Dominic Appeal No. 19 of 2017
22. Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1
23. Attorney General v Kakoma (1975) Z.R. 273

Legislation referred to:

The Constitution of Zambia (Amendment) Act No. 2 of 2016

The Electoral Process Act No. 35 of 2016

When we sat to hear and consider this appeal, our brother, the Honourable Justice Mulonda, sat with us. However, at the time of this Judgment Justice Mulonda was outside the jurisdiction. This is, therefore, a judgment of the majority.

This is an appeal against the judgment of the High Court dismissing the Appellant's election petition which challenged the

election of the Respondent, Mubika Mubika, as Member of Parliament for Shang'ombo Constituency.

The background to this appeal is that the Appellant, Poniso Njeulu, and the Respondent were candidates for Member of Parliament for Shang'ombo Constituency in the general elections held on 11<sup>th</sup> August, 2016. The Respondent, who stood on a United Party for National Development (UPND) ticket, polled 10,128 votes and was declared the winner, while the Appellant, contesting under the Patriotic Front Party (PF), polled 5,514 votes. Dissatisfied with the results, the Appellant filed a petition in the High Court in which he asserted that the election of the Respondent was invalid on the ground of non-compliance with the provisions of the Constitution of Zambia (Amendment) Act No.2 of 2016 ("the Constitution") and the Electoral Process Act No. 35 of 2016 ("the Act").

It was alleged that on 24<sup>th</sup> July, 2016 a PF cadre was stabbed with a knife at Lenge Village, Liyuwayuwa area by a named UPND cadre who was in the company, and on the instructions, of the Respondent. That immediately after the incident, the Respondent offered K200 as inducement for votes. It was further alleged that on 26<sup>th</sup> July, 2016, a UPND ward councillor, with the knowledge of

the Respondent, assaulted a PF cadre at Beshe polling station and that on 29<sup>th</sup> July, 2016 at Ngandwe market, the Respondent threatened an old woman whom he found wearing PF regalia by pointing a gun at her.

Further allegations were that on 4<sup>th</sup> August, 2016 with the knowledge of the Respondent, a PF cadre was badly beaten by named UPND supporters. It was also alleged that on 9<sup>th</sup> August, 2016 UPND cadres attacked PF officials at Matunda and stole food and other personal belongings. Other allegations were that the Respondent and his agents brewed eight drums of local beer for the electorate at Shang'ombo and that on 9<sup>th</sup> and 10<sup>th</sup> August, 2016 the Respondent broke into the Food Reserve Agency (FRA) shed and stole a total of 110 bags of maize and distributed the same to voters as inducement for votes.

Another allegation was that the Respondent and his agents engaged in character assassination by calling members of the PF, the Appellant and the PF presidential candidate drunkards and thieves. Other allegations were that an agent of the Respondent donated iron sheets to Mbolwa community and that PF campaign posters were removed and destroyed by the Respondent and his agents.

Various other allegations were that on 11<sup>th</sup> August, 2016 the Respondent pointed a gun at a PF cadre for advising him not to campaign on polling day and within the polling station; the Respondent and his agents chased away PF supporters along routes leading to polling stations and prevented them from voting; UPND cadres distributed money, pens for marking ballot papers, and ferried voters to several polling stations in Shang'ombo constituency.

It was asserted that as a consequence of the illegal practices committed by the Respondent and his agents, the majority of the voters were prevented from exercising their freedom to elect their preferred candidate.

The Respondent filed an Answer in which he disputed all the allegations made against him by the Appellant and made allegations of his own against the Appellant; that the Appellant was engaged in unauthorised distribution of maize, distribution of motor cycles to the electorate, distribution of beer and slaughtering of animals and that the Appellant used Government resources in the election campaign.

At the trial, both the Appellant and the Respondent called 18 witnesses each in support of their respective positions. The

Appellant testified as PW1 and the Respondent as RW1. In its judgment, the trial court began by outlining the law relating to election petitions. In this regard, the learned trial Judge cited Article 73(1) of the Constitution as providing for the filing of an election petition to challenge the election of a Member of Parliament. He stated that the applicable law on election petitions had changed by the repeal and replacement of the Electoral Act No. 12 of 2006 with the Act. Citing the law as it currently stands in section 97 of the Act, the court below stated that the petitioner bears the burden of proof to the required standard and that to succeed in his petition under section 97(2)(a), the petitioner has to establish to a fairly high degree of convincing clarity that there has been some illegal conduct, misconduct or breach of the Electoral Code of Conduct by the respondent personally or by his agents or with his knowledge or consent or that of his agent and that as a result the majority of the voters were prevented from voting for a candidate of their choice. For authority the court below cited the cases of **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others**,<sup>1</sup> **Akashambatwa Mbikusita Lewanika and others v Fredrick Titus Jacob Chiluba**,<sup>2</sup> **Levison Mumba v Peter Daka**<sup>3</sup> and **Mubika Mubika v Poniso Njeulu**.<sup>4</sup> The court below also pointed out that nullification could also be premised on section

97(2)(b) and (c) of the Act, dealing with the conduct of elections and non-qualification at the time of elections, respectively.

On the allegations of violence, the court below found PW12, who was attacked by UPND cadres on his way to Lenge village, as a truthful witness and found that he was assaulted as alleged. He discounted the Respondent's testimony that PW12 was injured in a stampede that ensued following a bomb scare at a meeting. However, the court below found that there was no evidence linking the Respondent to the assault or that he sanctioned or had knowledge of the attack. Further, that there was no evidence that the named assailants were the Respondent's polling or election agents and dismissed the allegation as not having been proved to the required standard.

On PW7, who was attacked in July 2016 on his way to attend a meeting that was to be addressed by the Appellant, the trial court found this witness as consistent, stable and truthful and discounted the Respondent's testimony that PW7 had a mental condition. The trial court also discounted the testimony of RW9, RW10 and RW11 that PW7 fell from a moving vehicle but that the medical report was consistent with the testimony of PW7 and PW1 that PW7 was in fact assaulted. However, the court below found

that there was no evidence linking the Respondent to the assault of PW7 and dismissed the allegations on the ground that the conditions set in section 97(2)(a) of the Act had not been met.

The third allegation of violence involved PW9, who testified that on his way back from a meeting addressed by the Appellant on 30<sup>th</sup> July, 2016 he was attacked by a UPND councillor for Beshe ward for attending a PF meeting. The court below found that PW9 was assaulted as alleged but did not find anything in the evidence to connect the Respondent to this assault and that the threshold in section 97(2)(a) of the Act had not been met and accordingly dismissed the allegation. The court below also dismissed the alleged threats with a gun by the Respondent on PW13 at Ngandwe market and PW15 on the voting queue at Natukoma polling station as not having been proved to the required standard. Also dismissed as not proved was the allegation of the assault of one Mutinta reported to the Appellant by Pumulo Munyumbwe at Ngandwe polling station as Mutinta was not called to testify and no other evidence was led in support of the allegation.

On the allegations that the Respondent and his agents manned routes leading to polling stations throughout Shang'ombo on election day and chased PF voters, preventing them from voting,

it was the trial court's position that there was no shred of evidence linking the Respondent to the alleged incidents. Further, that of the 39 polling stations in Shang'ombo Constituency, the allegation affected only two, namely, Shang'ombo and Nkanga. The court below believed the testimony of RW3, the returning officer, that there were no reports on electoral malpractice for any of the polling stations brought to his attention and held that the allegations had not been proved and dismissed them accordingly.

On allegations of character assassination throughout the constituency, the court below found that the witnesses who gave evidence on this allegation- the Appellant himself, PW4, PW8 and PW10 - were credible and convincing witnesses. The learned trial Judge had little doubt the Respondent uttered the remarks attributed to him, that the Appellant was a thief and a drunkard and that it was defamatory and may have an effect on an electorate in deciding whom to vote for. However, the court below found that there was no evidence of how widespread the character assassination was and, citing **Mubika Mubika v Poniso Njeulu**,<sup>4</sup> held that the derogatory words were uttered to a limited audience and could not be said to be representative of the majority of voters in

the constituency, falling short of the threshold in section 97(2)(a) of the Act.

There were several allegations of bribery and corruption. On the allegation that the Respondent paid K200 to PW12, and that the money was a bribe for PW12 not to disclose how he sustained his injuries, the learned trial Judge noted that in the petition the money was meant as an inducement for votes and found that it was at variance with the evidence led. The trial court also found that there was no witness to the alleged payment and that PW12 gave two accounts of what transpired to the police. According to the trial court, section 81(1)(f) of the Act entails that both the giver and receiver commit a crime; that the receiver is in that sense an accomplice requiring corroboration. The trial court found no corroborative evidence and dismissed the allegation as not proven to the required standard.

In regard to allegations that there was brewing and distribution of beer to voters, it was the trial court's finding that RW3 had received no such reports and that there was no evidence linking the Respondent to the brewing of the beer. The trial court, therefore, dismissed the allegation.

The other allegation was that pens were distributed to people with instructions for them to vote for the Respondent in return for a K50 bribe, and that voters in queues were given money as an inducement to ~~vote~~ for the Respondent. The trial court found that there was no evidence linking the Respondent to the allegations or that he had approved or had knowledge of the same. Further, that RW3 received no reports of distribution of pens on the queues at Nkanga and Natukoma polling stations. The court below dismissed the allegation as not having been proved to the required standard.

On the alleged donation of iron sheets at Mboiwa ward in exchange for votes, PW6 testified that he collected 10 iron sheets from the Respondent and Mwiya Mutapwe after a rally in July 2016 and was asked to vote for the Respondent. RW7 and RW8, on the contrary, testified that the iron sheets for the clinic were bought in 2015. The learned trial Judge found RW8's explanation, that he (RW8) oversaw the collection of contributions from the local villagers for the project and gave the money to RW7 to purchase the iron sheets from Lusaka, credible and dismissed the allegation.

On the alleged corrupt ferrying of voters by the Respondent and his agents from Kasha to Siwelewele to facilitate their voting,

the court below found no evidence linking the Respondent to the transportation of people as alleged or that Neta Imbula, who according to PW16 was the owner of the truck, was the Respondent's agent. And that there was no evidence brought to dispel the evidence of RW16, a UPND councillor, that he (RW16) was also involved in the transportation of people. The court below referred to the Supreme Court case of **Christopher Kalenga v Annie Munshya and others<sup>5</sup>** and held that the allegation of ferrying of voters was not proved.

The next allegation was that the Respondent and his agents were involved in the theft of Food Reserve Agency (FRA) relief maize which they corruptly distributed to lure voters. According to the court below, there were three separate but connected incidents referred to in the evidence. The first was the invasion of the Shangombo FRA shed on 9<sup>th</sup> August, 2016 by named suspects who broke the gate locks, gained access to the shed and left with six bags of maize. Though the matter was reported to the police and two suspects found, no arrests were made. It was also alleged that the following day, the Respondent, who was positively identified, arrived at the shed with a crowd and ordered one of his associates to open the gate and invited the crowd to help themselves to the

maize. This evidence was led by PW2, PW4, PW5 and PW18. The Respondent denied the allegations claiming that the witnesses were coached. The learned Judge disagreed with the Respondent and found that the witnesses were credible and reliable, with sufficient corroboration on record that placed the Respondent at the shed on 10<sup>th</sup> August 2016. That the guards on duty, PW5 and PW18, positively identified the Respondent to have been at the scene and the court below accepted their testimony as a true reflection of the events of 9<sup>th</sup> and 10<sup>th</sup> August, 2016. On the contrary, the court below declined to accept the testimony of RW2 that 640 bags of maize destined for Natukoma ward were collected by a Mr. Sepiso Solochi. The trial court found RW2 to be calculating and evasive in his responses and that his evidence was discredited in cross-examination. The learned trial Judge found the allegation as proved to the extent that the Respondent aided the crowd to get maize from the shed.

Having so found, the next question for the court below was to consider whether the majority of the voters were prevented or influenced from voting for a candidate of their choice. The court below heard evidence that there were about 200 people at the shed and that, according to PW4, people were carrying a bag or more

each. That 110 bags were looted, meaning there could have not been more than 110 people that benefited from the maize. The learned Judge also measured the looted bags against 15,632 valid votes cast in which the Respondent polled 10,128 and the Appellant obtained 5,514 votes. According to the court below, it could not be argued that there was widespread distribution and he did not find that the majority of the voters were or may have been prevented from voting for their preferred candidate. Thus, the court below found that the threshold under section 97(2)(a) of the Act was unfulfilled and dismissed the allegation.

Evidence relating to the other incidents of theft and distribution of maize was led by PW14, PW16 and PW17. According to PW14 and PW16, the Respondent and two agents went to Musa Mapulanga's (RW12) shop at Matunda and forcibly collected 30 bags of maize contending that it was stolen FRA maize. RW12 disputed this account of events and the trial court dismissed the allegation.

The court below also dismissed as unsubstantiated counter-claims by the Respondent that the Appellant and PW3 were involved in the sale of relief maize and abuse of Government facilities during the campaigns. The court below found that RW3

explained that the distribution of relief maize was a Government programme and was not an illegal activity, citing **Lewanika v Chiluba**.<sup>5</sup> The trial court was of the view that the Respondent's counter allegations were not supported by any credible evidence and they were dismissed accordingly.

On the whole, the court below dismissed the petition on the ground that the Appellant had not proved the allegations to the required standard and declared Mubika Mubika duly elected Member of Parliament for Shang'ombo Constituency.

Aggrieved with the decision of the court below, the Appellant appealed to this Court on the following grounds:

1. That the learned trial Judge erred both in law and in fact when he held that despite the allegations of violence having been proved at trial the legal requirements to nullify an election for a Member of Parliament were not met.
2. That the learned trial Judge erred both in law and fact when he held that the allegations of character assassination having been proved at trial, the legal requirement to nullify an election for Member of Parliament was not met.
3. That the learned trial Judge erred both in law and in fact when he held that despite the stealing, looting and distribution of relief and or/ Food Reserve Agency (FRA) maize by the Respondent and other UPND officials to the voters having been proved at trial, the legal requirements to nullify an election of Member of Parliament were not met.
4. That the learned trial Judge erred both in law and fact when he held that no known incidents of blocking of voters happened and /or were reported to Electoral Commission of Zambia or the Police and the Respondent is not linked to the blocking of voters.

5. That the learned trial Judge erred both in law and fact when he held that all the allegations of corruption and bribery were not proved at trial.

In support of the appeal, the Appellant relied on Heads of Argument filed into Court on 26<sup>th</sup> January, 2017 and augmented with oral submissions.

The Appellant opened his submissions on ground one by making reference to section 83(1)(a), (b), (c) and (5) of the Act. It was submitted that the Respondent used violence and threats of violence, thus, breaching the electoral laws. That the court below accepted the evidence of PW12 as consistent and corroborated by RW6. It was further submitted that the Respondent was at the scene and even drove PW12 to the police and to the hospital, confirming that the assault on PW12 took place. It was contended that the Respondent's agents were involved and the violence was committed with the Respondent's knowledge and consent. It was the Appellant's further contention that the Respondent was linked to the assault as he personally assured that the victim, PW12, was made to wear a UPND t-shirt and instructed to lie about him being a UPND member and about the bomb scare. That PW12 testified that his whole village knew about his assault.

The Appellant further submitted that the court below accepted the evidence of PW7 but held that the Respondent had

no knowledge of the attacks. It was asserted that the Respondent brought witnesses- RW8, RW9, RW10 and RW11- who the court below adjudged as discredited. It was contended that PW7's assault was well known by everyone in the village as he was hospitalized for 15 days. It was the Appellant's further submission that the court below also found that PW9 was assaulted by a UPND councillor who was campaigning for the Respondent.

The Appellant contended that the trial court wanted the Respondent to be physically present at all incidents when it was clear the people who committed the acts of violence were acting in the name of the Respondent, who did not deny them at the trial as his campaign people. It was the Appellant's further contention that his testimony on violence was not hearsay as he was the one who took PW7 to the hospital and the police.

On ground two, it was the Appellant's submission that the court below agreed that the Appellant's character was assassinated by the Respondent, as testified by the Appellant, PW4 and PW10; that this practice was widespread at all the Respondent's rallies, though the court below disagreed, saying that it was up to the Appellant to lay such evidence. The Appellant contended that as shown on page 684 of the record of appeal, it

was clear that the court below was strict on the number of days each party was allocated to prosecute their case and the Appellant's case was closed due to time constraints.

Under ground three the Appellant submitted, citing section 81 of the Act, that PW4, PW5 and PW18 all identified the Respondent as the person who led a huge group that looted 104 x 50 kg bags of white maize from the FRA shed on 10<sup>th</sup> August, 2016. That PW2, the Police officer-in-charge, confirmed receipt of the report and police rushed to the scene. It was contended that the Respondent's own witness, RW2, an FRA employee, confirmed the incident. It was also submitted that on 9<sup>th</sup> August, 2016, the Respondent's agents led by one Mwiya Mutapwe and Sondo stole 6 x 50 kg bags of white maize from the FRA shed. It was contended that the Respondent did not lead any evidence and never called any witnesses to rebut the allegation. The Appellant submitted that the Respondent confirmed holding a rally on 10<sup>th</sup> August, 2016 in Shang'ombo but did not bring any witness who attended his rally to rebut the allegation of PW4 who stated that, after the rally, the Respondent invited everyone present, a huge crowd, to follow him to receive maize and that PW4 got a bag. It was further

asserted that, according to PW14, the Respondent also got 30 x 50 kg bags of maize meant for the construction of a clinic.

The Appellant proceeded to submit that the actions of the Respondent were in breach of section 81 of the Act and that, as the record shows, the trial court found the Appellant's witnesses credible and held that the allegations were proved. It was the Appellant's contention that maize distributed to over 200 people in a village could not only benefit 200 people and that it affected the whole constituency as word went round that the Respondent was in charge in Shang'ombo. The Appellant pointed out that the record shows that Shang'ombo was in famine and as a result Government had put it on relief maize programme. It was submitted that the distribution of maize had the potential to influence the majority of voters to vote for the Respondent, citing **Saul Zulu v Victoria Kalima<sup>6</sup>** for authority.

The Appellant's submissions on ground four were brief. Making reference to section 83 of the Act, it was submitted that the court below relied on the fact that the absence of reports to the Electoral Commission of Zambia (ECZ) and the Zambia Police Service implied that the blocking of voters was non-existent. It was the Appellant's contention that the test is whether the incidents as

narrated by him and PW11 were true. According to the Appellant the incidents happened outside the voting arena and, therefore, reports to the ECZ and police would not be there. The Appellant wound up this ground by reminding this Court, again, of the time constraints during trial leading to the closure of the Appellant's case.

In regard to ground five, the Appellant submitted that PW6, the medical person at Mboiwa Health Centre, gave testimony on how the Respondent made him stand at a rally during campaigns and promised iron sheets for the health centre. That the following day the Respondent made a donation of 10 iron sheets. And recounting, briefly, the various testimonies from PW8, PW11 and PW16 on the ferrying of voters, distribution of money, pens and beer to voters, the Appellant contended that section 81(1)(c) and (d) of the Act makes it an electoral offence to make any gift, promise, offer and to procure the return of votes as a consequence of the gift, promise or offer. Also that section 89(1)(e) forbids the canvassing or soliciting of votes or inducing of voters on polling day. It was submitted that the Respondent was in breach of sections 81 and 89 of the Act. The Appellant contended that the

breaches were widespread in the whole constituency and greatly disadvantaged him.

The Appellant wound up his written submissions by urging this Court to uphold the corruption and bribery allegations and that on the totality of the evidence, the election of the Respondent as Member of Parliament for Shang'ombo Constituency be nullified.

At the hearing of the appeal, learned counsel for the Appellant, Mr. Chali, relied on the heads of argument filed into court and the reply filed on 19<sup>th</sup> September, 2017. Mr. Chali submitted that the gist of the appeal was that section 97(2)(a) of the Act was breached by the Respondent in the August 2016 elections. Learned counsel submitted that the term "majority" had not been defined in section 97(2)(a) and that it was incumbent upon this Court to attach what it deemed to be the meaning of majority. In offering his interpretation of the term "majority of voters", counsel stated that it would be electoral malpractices occurring in at least 50% of the wards in a constituency. Mr. Chali submitted that since most Zambians do not know the names of their wards, and in order to satisfy the requirement of the majority clause, the Appellant brought witnesses from 17 different villages

and three, the Appellant, PW2 and PW3, testified on malpractices covering the whole constituency and not just what they witnessed in their villages.

In reference to the assault on PW7 and PW12, Mr. Chali submitted that despite the Act restricting the number of election agents to those registered with the ECZ, the Court needed to take judicial notice that there are many people that campaign for a candidate and that they should be regarded as having the approval of a candidate. Mr. Chali further submitted that ground three could render the election of the Respondent a nullity as the Respondent led a large group of people to loot the relief maize in the FRA shed and in a rural setting like Shangombo which was put on relief food supplies by the Government, people were likely to vote for the person who supplied the maize to them.

In rebuttal, the Respondent filed lengthy skeleton arguments on 5<sup>th</sup> September, 2017. The Respondent began by submitting that an election of a Member of Parliament cannot be declared null and void in an election petition on mere allegations of electoral malpractice unless it is established by evidence, to the required standard of proof, that a candidate did actually commit any alleged act of electoral misconduct.

The Respondent pointed out that the burden of proof was on the petitioner to establish electoral misconduct to a fairly high degree of convincing clarity, citing the case of **Michael Mabenga v Sikota Wina and others**<sup>7</sup> for authority. And citing section 97(2) of the Act, it was submitted that it is clear with respect to when an election of a Member of Parliament can be nullified. It was contended that the Appellant alleged various electoral misconduct on the part of the Respondent which he failed to establish as the evidence adduced in the court below was not of the acceptable standard required in an election petition.

The Respondent submitted that in arguing the Appellant's grounds of appeal, reliance would be placed on the decision in **Mubika Mubika v Poniso Njeulu**,<sup>4</sup> wherein the Supreme Court held that where electoral misconduct is proved, it must be shown that the prohibited conduct was widespread in the constituency and influenced the voters in their choice of candidate.

In response to ground one alleging breach of section 83(1)(a), (b) and (c) of the Act, the Respondent submitted that according to that provision, evidence must be adduced to the satisfaction of the court showing that a person either directly or indirectly made use of or threatened to make use of force, violence or restraint on

another person. Recounting various allegations of violence, it was contended that the Appellant's testimony was based on reports that the Appellant received and not on what he himself perceived or witnessed. That the Appellant clearly testified that he was not present when the incidents of the alleged violence were happening but that he received reports from his agents. Further, that with respect to the evidence of the Appellant physically seeing a UPND cadre stopping known PF supporters on polling day from voting, it was the Appellant's testimony that he actually did not see the incident but that he was informed by one Mr. Sililo. Citing the case of **Subramaniam v Public Prosecutor**,<sup>8</sup> the Respondent submitted that the evidence of the Appellant, in the circumstances, amounted to hearsay in that the Appellant in his evidence aimed at establishing the truth of the alleged acts of violence which he did not witness himself; that the evidence of the Appellant could not reasonably be expected to fall within the exceptions to the hearsay rule and that the learned trial Judge was on firm ground to hold as he did.

Referring to the alleged attacks on PW7 and PW12, the Respondent, citing **Lewanika v Chiluba**,<sup>2</sup> contended that none of the evidence adduced by the Appellant, PW7 and PW12 established

the fact that the Respondent directly or indirectly committed the purported acts of violence nor did the evidence establish the fact that the people who were purported to have committed the alleged acts of violence were actually appointed agents of the Respondent or that they were acting for or on behalf of the Respondent. It was submitted that with respect to the assault on PW7, it was the evidence of RW14 that he was at Natukoma Police when PW7 was brought in by the Appellant and PW3, the District Commissioner. That PW3 ordered the arrest of Nawa Mubika, Mwakamui Mulema and Inonge Mubika, suspects in the assault of PW7. According to RW14's testimony, the police followed the order to arrest the trio for assault but they could not locate Nawa Mubika and Mwakamui Mulema as their whereabouts were unknown.

It was submitted that, notwithstanding the allegations against the Respondent and the UPND, it was the evidence of the Respondent that his car was actually smashed by the Appellant's brother in full view of the public and that he was even arrested by the police but the Appellant, using his influence as a Provincial Minister, ordered his release. Further, that PW2, a police officer, also gave evidence that despite being brought to testify on behalf of the Appellant with respect to complaints of violence by the

UPND, it was his evidence that there were numerous complaints by the UPND made against the PF with respect to acts of violence. It was the Respondent's submission that, despite the evidence by the Appellant, PW7 and PW12 that the acts of violence were perpetrated by the UPND cadres and the Respondent's relatives, the evidence did not establish the fact that the said people were appointed agents of the Respondent or that they were acting on instructions from the Respondent. It was contended that not everyone wearing party regalia or a party member is automatically deemed to be an agent of a candidate except where specifically appointed as such.

Responding to allegations of character assassination at Kapengela village and Natukoma in ground two, the Respondent's submission was to the effect that the evidence of the Appellant, PW4 and PW10 merely showed that the Respondent referred to the Appellant as a thief and a womanizer but did not establish how many people were subjected to these remarks. Further, that the evidence on record did not show how many people attended these meetings and, therefore, heard the purported remarks of the Respondent referring to the Appellant as a thief and a womanizer. It was the Respondent's contention that the Appellant failed to

conclusively establish how widespread the vilification of the Appellant was and did not indicate the number of registered voters who attended the meetings to assist the Court on the scale of the influence the said remarks might have had in the constituency owing to the fact that the evidence of character assassination by the Appellant, PW4 and PW10 before the court below was with respect to the two places only, Natukoma and Kapengela village. The Respondent contended that the court below was on firm ground in holding that the incidents of character assassination were not widespread, citing **Mubika Mubika v Poniso Njeulu**<sup>4</sup> and **Kufuka Kufuka v Ndalamai Mundia**<sup>9</sup> for support.

The Respondent rounded off submissions on this ground by pointing out that the evidence of the Appellant on record was inconclusive with respect to the allegations of character assassination and did not establish how the said remarks of character assassination affected or influenced the election so as to prevent the electorate from voting for their preferred candidate and, as such, the learned Judge in the court below was on firm ground to hold as he did.

On ground three, the Respondent went to great length recounting the testimony of PW3, PW4, and PW17 regarding the

looting of maize from the Shang'ombo FRA shed and Natukoma allegedly by the Respondent and other people. In the interest of brevity, and considering that we make reference to the testimonies ahead in this Judgment, suffice it to state that the Respondent submitted that the learned trial Judge was on firm ground when he concluded that the distribution of maize to about 200 people could or might not have prevented the majority of voters from electing a candidate whom they preferred.

It was the Respondent's contention that the Appellant's assertion that maize distribution to over 200 people in the village could not only benefit 200 people as this affected the whole constituency as word went around that the Respondent was in charge in Shang'ombo was not only misguided but also misconceived. Citing the case of **Michael Mabenga v Sikota Wina and others**<sup>7</sup> it was submitted that the burden to prove any allegation with respect to electoral misconduct was placed on the Appellant to establish, to a fairly high degree of convincing clarity, that word actually went around the constituency regarding the Respondent distributing maize signifying the degree of influence the same had on the electorate. It was contended that the alleged maize distribution was only in Kapengela village to 200 people.

It was further argued that the Appellant's assertion that the distribution of maize was a big issue and had the effect of boosting the Respondent's chances of winning, and that it in fact did, was a clear misconception. The Respondent's contention was that the **Saul Zulu v Victoria Kalima**<sup>6</sup> case was distinguishable from the present case as, in that case, there was evidence that the distribution of bicycles was at a large scale and there was no doubt that the distribution was or may have been aimed at boosting the respondent's chances of being elected. That in the present case the evidence by the Appellant before the court below failed to show how the majority of voters were affected or may have been influenced by the alleged distribution of maize to 200 people in one ward when there were 10 wards in the constituency. It was submitted that the court below was on firm ground in its holding as the Appellant did not establish to the required standard of proof that the alleged distribution of maize complained of had widespread effect nor did it prove to the satisfaction of the court the scale of the alleged wrongdoing. The case of **Mlewa v Wightman**<sup>10</sup> was cited for authority.

It was the Respondent's further submission that the argument by the Appellant that the Respondent did not lead any

evidence and never called any witness to rebut the allegation by PW4 who stated that after the rally the Respondent invited everyone to follow him to receive maize was misconceived at law. Citing **Mazoka v Mwanawasa**,<sup>1</sup> it was submitted that the burden to establish any allegation of misconduct in an election petition was on the person alleging and it was not enough for the Appellant to only state that the Respondent failed to call witnesses to rebut an allegation. That contrary to assertions by the Appellant, there was evidence before the court below that the Appellant actually got maize from the FRA shed and distributed it in areas where the PF actually won and that there was evidence that the Appellant was using his Government position to influence elections.

The Respondent concluded on this ground by reiterating that the Appellant failed to establish the effect that the allegation with respect to the maize distribution had on the majority of the electorate in the constituency and that the court below was on firm ground to hold as it did.

The submissions on ground four were to the effect that an election petition like any other civil matter depends on the pleadings and that the burden of proof is on the challenger of that election to prove all allegations to a standard higher than a mere

balance of probabilities. Recounting the testimony of PW11 on the alleged blocking of PF supporters on their way to polling stations, the Respondent submitted that the evidence of PW11 was not supported by any independent evidence owing to the fact that PW11 was a PF polling agent and accordingly his evidence was *prima facie* partisan and should have been supported by other evidence. In support of this point, we were referred to the case of **Simon Malambo Choka v The People**<sup>11</sup> and the Ugandan case of **Nakбуkeera Hussein Hanifa v Kibule Ronald and another**.<sup>12</sup> It was further asserted that the testimony of the Appellant and PW11 did not establish that the people who were alleged to have been blocking voters or beating up PF supporters were the Respondent's agents or acting on his instructions. And citing the cases of **Kufuka Kufuka v Ndalameli Mundia**<sup>9</sup> and **Lewanika v Chiluba**,<sup>2</sup> the Respondent submitted that simply because a person was carrying a poster of the UPND presidential candidate did not mean that he was the Respondent's agent as there should have been evidence showing that he was specifically appointed as such or that he was acting on the instructions of the Respondent.

The Respondent stressed that there was no evidence showing how widespread these acts were in Shang'ombo and how they

affected the majority of voters in the constituency owing to the fact that the incidents were only reported in two wards out of the 10 wards in Shang'ombo Constituency. Further, that the failure to adduce evidence with respect to the reports of malpractices to the ECZ and the police not only entailed that the alleged acts were non-existent, but also that the Appellant failed to satisfy the required standard of proof. And that RW3, the returning officer, gave evidence that there were no reports of electoral malpractice with respect to, among others, blocking of voters by the participating political parties throughout the polling day. It was further submitted that even if it was accepted that these incidents did happen, they would not lead to the nullification of the Respondent's election because there was no evidence showing how widespread the purported acts were as the same were isolated incidents that purportedly occurred in two wards out of the whole constituency. The Respondent also submitted that the allegations in ground four were misconceived, aimed at misleading this Court and should accordingly be dismissed.

Much of the Respondent's submission on ground five consisted of recounting various witness testimonies on alleged donations of iron sheets; that the UPND cadres were seen coming

with beer inside the 400 metre radius on polling day and campaigning on queues; and, acts of voter influence. We refer to the relevant testimony ahead in this Judgment. Suffice to state here that the Respondent's submission was to the effect that the learned trial Judge was on firm ground when he dismissed the said allegations as they were not proved to the required standard of proof. The Respondent concluded by stressing the point that the appeal lacks merit as it did not satisfy the requirements of section 97(2) of the Act.

At the hearing, learned counsel for the Respondent, Ms. Mushipe's oral submissions were largely a reiteration of the Respondent's written submissions.

In reply, the Appellant chose to focus on two issues. The first concerned the majority requirement in section 97(2)(a) of the Act. It was the Appellant's submission that to ascertain whether the majority of voters were affected by the electoral malpractice, the court needed to accept evidence from at least 50.1% of the wards in the constituency or in its absence, where witnesses did not know the name of the ward in which they lived, the villages or compounds where witnesses lived. The Appellant submitted that the latter applied to this case and the Appellant called witnesses

from various villages in the constituency. It was the Appellant's further submission that his testimony regarding reports of electoral malpractice by the Respondent from the whole constituency went unchallenged in cross-examination. The Appellant contended that PW2, the officer-in-charge for Shang'ombo district, testified how he received a lot of reports of assault and electoral malpractice by UPND and the Respondent during the campaign, and that the Respondent also called police officers, RW5 and RW6, who did not contradict the testimony of PW2. Further, that PW3, the District Commissioner for Shang'ombo, testified on a lot of electoral malpractices by the Respondent, including how the Respondent stole FRA maize and distributed to voters. It was the Appellant's contention that his testimony and that of PW2 and PW3 spanned the whole constituency.

The next point the Appellant addressed in his reply was the alleged misconduct by the Respondent or his agents. To emphasise this point, the Appellant recounted various incidents of violence he said were upheld by the court below in an effort to connect the Respondent to the same. In this regard, the Appellant pointed out that the assault on PW7, by the Respondent's brother

Nawa Mubika and his sister Inonge Mubika, had the consent and approval of the Respondent as they were campaigning for him. On the assault of PW12 at the Respondent's rally, the Appellant stressed that the Respondent himself took PW12 to the hospital, stopping en route to have PW12 change into a UPND shirt. It was also submitted that PW9 was assaulted by RW15, who had confirmed that he was campaigning for the Respondent. Also, that PW4, PW5, PW8 and PW10, testified that the character assassination upheld by the Court below came directly from the Respondent. Further, that the testimony of PW2, PW5, PW18 and PW17 supported the fact that the Respondent was in the forefront to order that the FRA relief maize be distributed to the voters and that the Respondent was in the company of people that had stolen FRA maize.

The Appellant submitted that on the totality of the evidence, the election of the Respondent as Member of Parliament for Shang'ombo constituency should be nullified.

We have carefully considered the grounds of appeal, the written and oral submissions, the authorities cited and the judgment of the court below. The key question in this appeal is whether the Respondent was not validly elected as Member of

Parliament for Shang'ombo Constituency on account of the alleged electoral malpractice during the campaign period.

Of particular significance to us is that the election petition in the court below failed because none of the allegations, based on the evidence proffered in support of the same, reached the threshold in section 97(2)(a) of the Act, the relevant provision for the nullification of the election of a member of parliament. In the premises, it is clear to us that this appeal is anchored on the scope and meaning of section 97(2)(a).

Section 97(2)(a) of the Act reads as follows:

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

- (a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-
- (i) by a candidate; or
  - (ii) with the knowledge and consent or approval of a candidate or of that of a candidate's agent or polling agent; and
- the majority of the voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;"

This Court, in several cases now, has had occasion to pronounce itself on section 97(2)(a) of the Act. As we have clarified before, a reading of section 97(2)(a) reveals key elements that must be established in order for a petitioner to succeed in having an election nullified. The petitioner must prove, to the satisfaction of

the court, that the candidate whose election is challenged personally committed a corrupt or illegal practice or other misconduct in connection with the election or that the electoral infractions were committed by another person with the candidate's knowledge and consent or approval or were committed with the knowledge and consent or approval of that candidate's election or polling agent.

An additional requirement under section 97(2)(a) is that the petitioner must prove that as a result of the corrupt or illegal practice or misconduct the majority of the electorate in the constituency, district or ward were or may have been prevented from electing their preferred candidate. In **Margaret Mwanakatwe v Charlotte Scott and another**<sup>13</sup> we stated, citing our earlier decisions in **Austin Liato v Sitwala Sitwala**<sup>14</sup> and **Chrispin Siingwa v Stanley Kakubo**,<sup>15</sup> that:

“...it is not sufficient for a petitioner to prove only that a candidate committed an electoral offence in relation to the election without further proving that the electoral offence was widespread and prevented the majority of the voters from electing a candidate of their choice.”

Further, it is trite that the burden of proof in an election petition, as in any civil matter, rests on the petitioner. Zambian jurisprudence, however, shows that, unlike in ordinary civil cases, the standard of proof in an election petition is higher than a mere

balance of probabilities. In **Brelsford James Gondwe v Catherine Namugala**,<sup>16</sup> which we have cited with approval in a number of our recent decisions, the Supreme Court succinctly stated:

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

And in **Lewanika v Chiluba**,<sup>2</sup> it was stated that:

“...it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability....It follows that the issues raised are required to be established to a fairly high degree of convincing clarity.”

Thus, in the present case, it was incumbent upon the Appellant to adduce cogent evidence in the court below in order to surmount the burden and standard of proof in election petitions as articulated in the long line of authorities. We shall determine this appeal based on those principles and on the provisions of the electoral law applicable to this case.

In ground one of the appeal, the Appellant challenged the finding of the court below that despite the allegations of violence having been proved, the legal requirements for nullification of the election had not been met. The gist of the Appellant’s contention is that the Respondent’s campaign was characterized by violence contrary to the provisions of section 83(1)(a), (b) and (c) of the Act.

The Appellant contended that the assaults on PW7, PW9 and PW12 were committed by the Respondent's agents or people campaigning for him. That the Respondent instructed PW12 to lie to the police on how he got injured.

PW7, Mutumwa Mutumwa, testified that in July, 2016 he was attacked by UPND cadres while on his way to a PF rally organized by the Appellant at Ngandwe. It was his testimony that a motor vehicle stopped and the occupants disembarked and started beating him. PW7 testified that he was able to identify Inonge Mubika and Nawa Mubika, whom he said were the Respondent's siblings, and Sililo Mwakamui, as the assailants. As shown at page 478 of the record of appeal, PW7 claimed he was beaten so much that he lost consciousness and that when he regained consciousness, he found himself in the hospital at Shang'ombo where he was admitted for 15 days.

PW9, Paulus Namate, testified that on 30<sup>th</sup> July, 2016 while in the company of one Fatale Mufalari, he was attacked by Mutole Ilumba, a UPND councillor for Beshe ward, and other people for attending a PF meeting in Sote area. He testified that Mutole Ilumba hit him on the head with a stick. The incident was reported to the police at Shang'ombo.

PW12, Johannes Kakomwisa's testimony was that on 25<sup>th</sup> July, 2016 whilst on his way to the market with one Munalula Lubinda, they were accosted and attacked by UPND cadres at Lenge in Liyuwayuwa. That one Pumulo Munyumbwe stabbed him with a knife. It was PW12's further testimony that the Respondent made him wear a UPND shirt and gave him K200 as inducement to tell the police a falsehood as to how he sustained his injury. Under cross-examination, PW12 maintained his position regarding events surrounding his alleged assault.

In rebuttal, the gist of the Respondent's testimony was to the effect that it had not been established that he (the Respondent) had directly or indirectly committed the alleged acts of violence against PW7, PW9 and PW12, or that the alleged perpetrators of the violence were his duly appointed agents or acting on his behalf. RW9, Namitondo Imasiku, testified that on 4<sup>th</sup> August, 2016, he saw a Toyota Noah vehicle stop at Ngandwe station. Two people disembarked and when it left, he noticed PW7 hanging at the rear of the vehicle. That when the vehicle hit a pothole, PW7 lost his grip and fell off the moving vehicle and he sustained bruises on his head and hand. RW10, Simasiku Mulukisi, also testified to seeing PW7, fall from the named vehicle on the same date as it was

heading towards Shang'ombo. He added that he saw what he suspected to be the Appellant's vehicle parked near where PW7 fell. The testimony of RW11, Patricia Nasilele Nyambe, a nurse, was that on 4<sup>th</sup> August, 2016 she received PW7 who was said to have been beaten. Upon examining him, RW11 testified that PW7 smelled of beer and that PW7's injuries were consistent with a fall and not a beating as the medical report from the police stated.

The lower court's finding was that PW7, PW9 and PW12 were assaulted as alleged but that there was no evidence to link the Respondent to the acts of violence; that the threshold in section 97(2)(a) had not been fulfilled.

We have carefully considered the submissions on this ground and the evidence on record. In his submissions, the Appellant referred us to section 83(1)(a), (b), and (c) of the Act, which reads:

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

- (a) make use or threaten to make use of any force, violence or restraint upon any other person;
- (b) inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means, or pretended supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person;
- (c) do or threaten to do anything to the disadvantage of any person in order to induce or compel any person –
  - (i) to register or not register as a voter;
  - (ii) to vote or not to vote;
  - (iii) to vote or not to vote for any registered political party or candidate;
  - (iv) to support or not to support any political registered party or candidate; or

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

The foregoing provision is clear. Violence of any kind is proscribed in the electoral process as it amounts to undue influence. As we said recently in **Nkandu Luo v Doreen Sefuke Mwamba**,<sup>17</sup> we frown upon and condemn all forms of electoral violence and reiterate our position that campaigns must be peaceful and in strict adherence to the Electoral Code of Conduct. We note that the court below found as a fact that the assaults on PW7, PW9 and PW12 happened as alleged. The learned trial Judge found the witnesses as credible and discounted the versions proffered by the Respondent's witnesses. However, the court below was of the view that there was no evidence to link the Respondent to the violent incidents and that the threshold in section 97(2)(a) of the Act had not been achieved and dismissed the allegations on that basis.

We earlier outlined the elements that must be established for an election to be nullified according to section 97(2)(a) of the Act. The Appellant contended that the Respondent's agents were involved in the assaults and that the violence was committed with the Respondent's knowledge and consent.

We have perused the record of appeal. We find no basis upon which to fault the findings of the learned trial Judge on this aspect. Although the acts of violence themselves were proved as alleged, the Appellant did not adduce cogent evidence linking the Respondent directly or indirectly to the same. In **Richwell Siamunene v Sialubalo Gift**,<sup>18</sup> we said the following:

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

We reaffirm that position here.

Learned counsel for the Appellant, Mr. Chali, submitted that the Court needed to take judicial notice that there are many people that campaign for a candidate and that they should be regarded as having the approval of a candidate. We find that line of argument untenable. Zambian jurisprudence is well established in regard to the liability of a candidate for the electoral infractions committed by other people. In several of our recent decisions, we cited with approval the holding of the Supreme Court in the case of **Lewanika v Chiluba**<sup>2</sup> that:

“...a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard,

we note that not everyone in one's political party is one's election agent since...an election agent has to be specifically so appointed." (emphasis added)

Further, section 2 of the Act is clear on who an "election agent" is and puts it as follows:

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

The burden the Appellant needed to discharge in regard to the incidents of violence on PW7, PW9 and PW12 was to present cogent evidence that the Respondent was directly or indirectly responsible in accordance with section 97(2)(a) of the Act. To simply assert that the Respondent was responsible because his supporters perpetrated the violence is not enough. We reiterate what we said in **Richwell Siamunene v Sialubalo Gift<sup>18</sup>** that:

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

We find ground one unmeritorious and dismiss it accordingly.

Ground two attacks the trial Judge's finding that the allegations of character assassination did not meet the legal requirement for the nullification of an election of a Member of Parliament. The Appellant testified that the election in

Shang'ombo was heavily marred by, among other things, character assassination and that character assassination was widespread at the Respondent's rallies. PW4, Lingunga Nguvu, testified that on 10<sup>th</sup> August, 2016 the Respondent, at a rally in Kapengela village, urged the electorate not to vote for the Appellant because he was a thief who had stolen a lot of things in Shang'ombo district. When asked in cross-examination to clarify what he meant by 'a lot of things', PW4 stated that the Respondent alleged that the Appellant stole the UPND presidential candidate's cattle, though he could not say how many cattle were stolen.

PW8, Mumbeko Salimbozi's testimony was that the Respondent, together with Mwiya Mutapwe, at a meeting held at Sikalu Branch, urged people to vote for UPND candidates and not for the Appellant and Dominic Shomeno, a candidate for Council Chairperson, saying they were thieves; that they were stealing maize and selling it in Angola and that the Appellant had stolen 10 heads of cattle given by the UPND presidential candidate; also, that the PF presidential candidate was a drunkard. PW10, Sicecani Kambungo, who described himself as the Respondent's in-law, stated that the Respondent, at a meeting in Natukoma, urged people not to vote for the Appellant as he was a thief and a

womanizer and that he had stolen cattle that was donated by the UPND presidential candidate. PW10 claimed the Respondent asked him to leave the meeting when he asked where the stolen cattle were.

The gist of the Respondent's submission in rebuttal was that the Appellant had not established how many people were subjected to the alleged remarks of character assassination; that the Appellant failed to conclusively establish how widespread the vilification of the Appellant was and the scale of the influence the alleged derogatory remarks had in the constituency.

The court below found that the witnesses who gave evidence on this allegation were credible and unshaken in cross-examination. The learned trial Judge found that he had little doubt that the Respondent uttered the remarks attributed to him and said:

“I therefore find the calling or referring to someone running for public office as a thief defamatory and may have an effect on an electorate in deciding whether or not to vote for a particular candidate.”

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

“15. (1) A person shall not –

...  
(c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election;”

It is clear that regulation 15(1)(c) prohibits the making of a false or defamatory allegation against a person or his or her political party. The court below found as a fact that the defamatory utterances were made and that they were attributable to the Respondent.

We have carefully perused the record on this aspect. We find no basis upon which to fault the learned trial Judge's finding. An electoral offence was committed by the Respondent contrary to regulation 15(1)(c) of the Electoral Code of Conduct. The key issue, from our perspective, is whether the defamatory utterances by the Respondent influenced the majority of the electorate from voting for a candidate of their choice.

We note that after finding as a fact that the Respondent uttered the defamatory remarks attributed to him, the learned trial Judge stated:

"However, aside from the meetings in Kapengula village, Sikalu branch and Natukoma where the defamatory remarks were made, there is no evidence of how widespread this conduct was. RW3 testified that there are as many as 39 polling stations in Shangombo. The Petitioner left it to the court to speculate on the number of wards and people that may have been affected opting to merely state that the character assassination was widespread and occurred throughout the whole of Shangombo. I do not find such evidence on record." (emphasis added)

Further, the learned trial Judge held:

"On the whole, I find that the derogatory words uttered in this case were done to a limited audience and cannot be said to be representative of the

majority of voters in the constituency which as I have said were spread over 39 polling stations and 10 wards in the constituency. I find that the Petitioner has not satisfied the requirements under section 97(2)(a) and I dismiss the allegation accordingly.”

We agree. A careful perusal of the record reveals no evidence that the character assassination was widespread. In **Steven Masumba v Elliot Kamondo**,<sup>19</sup> we put it thus:

“...it is a legal requirement under section 97(2) of the Electoral Process Act that the petitioner must not only prove the commission of a corrupt or illegal act or misconduct by the respondent or his/her election or polling agent, he/she must also prove that as a result of that illegal act or misconduct, the majority of the voters in that constituency were or may have been prevented from electing their preferred candidate.”  
(emphasis added)

We retain that position here.

Our firm view is that the learned trial Judge was on firm ground when he found that, despite the allegation of defamatory utterances made by the Respondent having been proved, the evidence on record does not meet the threshold for nullifying the election of a member of parliament under section 97(2)(a) of the Act. Ground two of the appeal is devoid of merit and we dismiss it accordingly.

In ground three, the Appellant contends that the learned trial Judge erred both in law and in fact when he found that despite the looting and distribution of FRA maize by the Respondent having been proved, the legal requirements for the nullification of an

election of a member of parliament were not met. It was the Appellant's submission that the Respondent was identified as the person who led a huge crowd on 10<sup>th</sup> August, 2016 that looted 104 bags of maize from the FRA shed. It was also submitted that on 9<sup>th</sup> August, 2016, agents of the Respondent led by Mwiya Mutapwe stole six bags from the FRA shed. The Appellant contended that the maize was distributed to over 200 people and that word went around that the Respondent was in charge of Shang'ombo. The Appellant submitted that Shang'ombo was in famine and the distribution of the maize had potential to influence the majority of voters to vote for the Respondent.

PW4, Lingunga Nguvu, testified that on 10<sup>th</sup> August, 2016, the Respondent addressed a rally at Kapengela village; that the Respondent then told the crowd to follow him so that he could give them bags of maize in return for their vote. It was PW4's testimony that the Respondent instructed the crowd to go into the shed and collect the maize and that those who could manage carried two or three bags. PW4 testified that he voted for the Respondent and the UPND presidential candidate because they gave him food and, under cross-examination, he testified that he was hungry and was grateful for the bag of maize.

PW5, John Nyundu, a security guard at FRA, testified that he reported the looting of the maize to the police with his workmate Shita Kayumbi Mayumbelo, PW18; that Mwiya Mutapwe and Petulu Sondo stole maize from the FRA shed on 9<sup>th</sup> August, 2016 and that the Respondent led a crowd to the shed on 10<sup>th</sup> August, 2016. It was PW5's testimony that the Respondent came with more than 200 people.

PW18's testimony was that on the night of 9<sup>th</sup> August, 2016 he was with PW5 when a white vehicle came and parked at the gate to the FRA shed around 20:00 hours. PW18 stated that some people, who he described as coming from the UPND, disembarked from the vehicle and broke the lock to the gate. That when he and PW5 tried to intervene, they were threatened with beatings and overpowered. PW18 testified that six bags of maize were taken and the alleged intruders placed their own lock at the gate and locked PW18 and PW5 inside and left. Later, PW18 and PW5 climbed over the fence and went to report the theft to the police; that two of the "intruders" came back and said they were the ones that had locked the gate and went away. It was PW18's testimony that the police also went away saying there was nothing they could do. Further testimony from PW18 was that on 10<sup>th</sup> August, 2016, the

Respondent came with a large crowd and instructed the crowd to help themselves with the maize. That PW18 and PW5 could not do anything against the large crowd. PW18 testified that the Respondent told the crowd to vote for him and the UPND presidential candidate on 11<sup>th</sup> August, 2016.

PW17, Lawrence Mboma Kapama, who described himself as the Chairperson for relief food at Natukoma, testified that relief food for places like Beshe, Kaungamashi, State Ranch, Mbunda and Natukoma was usually stored at Natukoma shed. It was PW17's testimony that on 9<sup>th</sup> August, 2016 he received 530 bags of maize from a non-governmental organization called Shang'ombo Food Organisation (SHAFO), intended for Beshe and that he was expecting another 110 bags. That on 9<sup>th</sup> August, 2016 around 14:00 hours, a police officer called Kakundu telephoned PW17 and instructed him to hand over the keys to the shed as the Respondent wanted them. It was PW17's testimony that he refused but was informed later that evening that new locks had been put on the shed and the old ones removed. PW17 and his committee confirmed the removal of the old lock and proceeded to find out from Kakundu, who informed them that the Respondent had replaced the locks in the presence of a police officer. PW17

testified that the District Commissioner informed him that the remaining 110 bags of maize had been removed from the Shang'ombo shed by the Respondent.

In rebuttal, the Respondent submitted that the learned trial Judge was on firm ground when he held that the distribution of maize to 200 people could not have prevented the majority from voting for a candidate of their choice. The Respondent contended that the burden lay with the Appellant to establish to a fairly high degree of convincing clarity that word actually went around the constituency that the Respondent was distributing maize. The Respondent submitted that the Appellant had failed to show how the majority of the voters were affected or may have been influenced by the alleged distribution of maize to 200 people in one ward when there were 10 wards in the constituency.

The Respondent further testified that on 9<sup>th</sup> August, 2016 he addressed a rally at Natukoma. He denied knowing anything about the invasion of the FRA shed and the stealing of six bags of maize. The Respondent also denied knowing about the 10<sup>th</sup> August, 2016 invasion of the FRA shed and looting of 104 bags of maize. Though he conceded to holding a meeting, he denied leading a crowd to the FRA shed and that he had not been

summoned by law enforcement officials over the matter. In cross-examination, the Respondent admitted that Inonge Mubika, Butole Ilumba and Mwiya Mutapwe campaigned for him but that they were not his agents. The Respondent claimed that PW5 and PW18 were paid to tell about the looting.

RW2, Clive Kongwa, who described himself as the FRA district facilitator, food security, testified that a Mr. Sepiso Solochi collected 640 bags of maize on 9<sup>th</sup> August, 2016; that the maize was loaded in the Appellant's truck and that a Goods Issued Note was issued. He denied seeing the Respondent carry anything from the shed. Under cross-examination, RW2 stated that the 640 bags of maize, collected from Natukoma shed were owned by a non-governmental organization, SHAFO. He conceded that the said 640 bags were not for FRA. Further testimony from RW2 was that he knew PW5 and PW18; that though he did not receive a report from them on the 9<sup>th</sup> and 10<sup>th</sup> August, 2016 incidents, PW5 and PW18 would not lie about the thefts. RW2 testified that he got a report from the warehouse manager, one Konga Namushi, that the FRA shed had been attacked on the 9<sup>th</sup> August, 2016 and he rushed to the shed in the company of the officer-in-charge, a Mr. Donald Mulenga. That on 10<sup>th</sup> August, 2016 he got a call from the

officer-in-charge around 16:20 hours that he (the Officer-in-charge) was at the FRA shed trying to protect it from a mob of looters who got away with 110 bags of maize.

We have carefully considered the submissions, testimony and findings of the court below on this aspect of the appeal. We note that while the learned trial Judge found as a fact that a total of 110 bags of relief maize was looted or stolen from the FRA shed on 9<sup>th</sup> and 10<sup>th</sup> August, 2016, it was his considered view that it could not be argued that there was widespread distribution of the maize and that the majority of the electorate were prevented from voting for a candidate of their choice and, hence, that could not be the basis for nullifying the election. As we see it, the key question that falls for our consideration is whether the learned trial Judge was on firm ground to find and hold as he did.

As the record shows and for purposes of this ground, there were two alleged incidents of theft or looting of FRA maize. The first allegedly occurred on 9<sup>th</sup> August, 2016. The Appellant contended that agents of the Respondent led by one Mwiya Mutapwe stole six bags of maize from the FRA shed. In support of the allegation both PW5 and PW18 testified that six bags of maize

were stolen on the evening of 9<sup>th</sup> August, 2016 and that they reported the theft to the police.

Earlier in this Judgment, we stated, as we have done in numerous other cases, that section 97(2)(a) of the Act requires that for the election of a member of parliament to be rendered void, it must be proved to the satisfaction of the court that a corrupt practice, illegal practice or other misconduct has been committed in connection with the election by the candidate or with knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent. In his submissions, the Appellant described the persons that stole the six bags of maize from the FRA shed on 9<sup>th</sup> August, 2016 as "agents" of the Respondent. Also, in paragraph (xii) of the Election Petition, the Appellant described Mwiya Mutapwe as "an agent of the Respondent". The Respondent denied that the individuals concerned were his agents though, as we noted earlier, he admitted in cross-examination that they campaigned for him.

Earlier in this Judgment, we referred to section 2 of the Act which defines an "election agent" as a person appointed as an agent for a candidate for the purpose of an election and who is so specified in the candidate's nomination paper. Further, regulation

55(1) of the Electoral Process (General) Regulations, 2016 provides that:

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

As we stated in *Chrispin Siingwa v Stanley Kakubo*,<sup>15</sup> regulation 55(1) aforesaid is succinct. For a person to be a candidate's election agent, he or she must be specifically named in the candidate's nomination paper. According to the record, the Appellant described the three persons who allegedly invaded the FRA shed on 9<sup>th</sup> August, 2016 as "officials of UPND"; that Mwiya Mutapwe was the candidate for UPND for the position of Council Chairperson, Petulu was "an agent for the respondent" and Sondo Mutapwe was the young brother to Mwiya Mutapwe.

We have carefully perused the record. We find no evidence to support the Appellant's claim that the three persons who invaded the FRA shed on 9<sup>th</sup> August, 2016 were the Respondent's duly appointed election agents in accordance with regulation 55(1) of the Electoral Process (General) Regulations, 2016. We have also seen no evidence that the Respondent or his duly appointed election agents knew about or approved of the alleged theft of maize at the FRA shed on 9<sup>th</sup> August, 2016. A perusal of the

judgment of the court below reveals that the learned trial Judge did not address the question whether or not the Respondent, who was not at the FRA shed on 9<sup>th</sup> August, 2016 was responsible for the theft of the six bags of maize pursuant to section 97(2)(a)(ii) of the Act. The Appellant had contended that the theft of maize on 9<sup>th</sup> August, 2016 was committed by the Respondent's agents and, therefore, in our considered view, it was imperative for the court below to interrogate the Respondent's connection, if any, and in accordance with section 97(2)(a)(ii), to the illegal act of theft of six bags of FRA maize by the three named suspects. In other words, other than the mere claim that the named theft suspects were agents of the Respondent, our considered view is that the Appellant did not present any evidence to satisfy the terms of section 97(2)(a)(ii) of the Act.

We are mindful of the fact that the Respondent conceded that the three individuals campaigned for him but maintained that they were not his agents. Zambian jurisprudence is very clear on the culpability of a candidate for the electoral infractions of other persons. Earlier in this Judgment we reiterated our approval of the holding of the Supreme Court in **Lewanika and others v Chiluba**<sup>2</sup> where it was held that a candidate is only answerable for

those things which he has done or which are done by his election agent or with his consent and that not everyone in one's political party is one's election agent.

It was not sufficient for the Appellant to merely allege that the persons involved in the maize theft on 9<sup>th</sup> August, 2016 were UPND officials. The Appellant had the additional burden of demonstrating, through tangible evidence, that the Respondent was culpable on the basis that the suspects were his duly appointed election agents or that they committed the theft with his knowledge or approval as required in section 97(2)(a)(ii) of the Act.

Further on this aspect, we note that the learned trial Judge made the following finding:

"Evidence on record confirmed that on 9<sup>th</sup> of October (sic) 2016 the FRA shed was invaded by named suspects who broke the gate locks, gained access to the shed and left with 6 bags of maize. The locks for the gate were changed in the process. The matter was reported to the police who inspected and found 2 of the suspects but made no arrests." (emphasis added)

PW5 and PW18 testified that they reported the theft to the police. However, we note that there was no police report produced in evidence before the court below to support the allegation.

The other allegation was that on 10<sup>th</sup> August, 2016 the Respondent led a large crowd of more than 200 people to the FRA

shed and urged the crowd to help themselves with the bags of maize; that 104 bags of maize were looted. Evidence on behalf of the Appellant in support of the allegation was led by PW5 and PW18. The learned trial Judge, in finding that the Respondent was involved in the looting of the FRA maize on 10<sup>th</sup> August, 2016 stated as follows:

"The Respondent dismisses this claim and evidence as being that of coached witnesses and that he was nowhere near the shed on the material day. I disagree. I found these witnesses to be credible and reliable with sufficient corroboration on record to place the Respondent at the shed on the 10<sup>th</sup> August 2016." (emphasis added)

The learned trial Judge further held:

"The guards on duty PW5 and PW18 also positively identified the Respondent to have been at the scene. I do not agree that the evidence of these witnesses was coached and I accept their testimony as a true reflected (sic) of what transpired on the 9<sup>th</sup> and 10<sup>th</sup> of August 2016."

In **Chrispin Siingwa v Stanley Kakubo**,<sup>15</sup> we made reference to the English case of **McGraddie v McGraddie**<sup>20</sup> wherein the United Kingdom Supreme Court confirmed that matters of credibility and reliability of witnesses were pre-eminently a matter for the judge at first instance and that an appellate court should not generally interfere with the judge's findings of fact. The learned trial Judge, who had the advantage of observing PW5 and PW18 at trial, found the two witnesses as credible and reliable. As an appellate court, we have no such advantage. We note that it is largely on the basis

of the testimony of the two witnesses that the learned trial Judge made a finding of fact that the Respondent led a large crowd to the FRA shed and instigated the looting of 104 bags of relief maize.

In our review of the record on this aspect, we note that though PW18 testified that he and PW5 reported the matter to the police, the record shows that there was no police report produced in evidence in the court below to confirm the looting and who was involved. The only document on record making reference to both the 9<sup>th</sup> and 10<sup>th</sup> August, 2016 incidents is a letter written by Lawrence Nyambe, District Commissioner, to the Vice President dated 1<sup>st</sup> October, 2016 almost two months after the alleged thefts and looting. The testimonies of PW5, PW18 and PW17 all seemed to indicate that the police had knowledge of the incidents at the FRA shed. Even the Respondent's witness, RW2, testified that on 10<sup>th</sup> August, 2016 he got a call from the police officer-in-charge that he (the officer-in-charge) was at the FRA shed trying to protect it from a mob of looters who got away with 110 bags of maize. We are, therefore, of the considered view that production of a police report was cardinal for such a grave allegation.

A further review of the record shows that no witness was called from FRA to confirm or support the allegation of the theft

and looting of maize from its shed. Recently, in **Mwiya Mutapwe v Shomeno Dominic**,<sup>21</sup> we noted that the FRA is a statutory body with the important responsibility of ensuring food security in Zambia. The alleged theft of a total of 110 bags of maize from one of its facilities, in our considered view, was a glaring incident and records should have been availed as evidence or proof that the bags of maize in question were indeed illegally removed from the FRA shed as alleged. Without a police report and without documentary proof from the FRA that the alleged number or indeed any number of bags of maize were illegally removed from its shed, we are unable to accept the lower court's finding that the allegation was proved to the required standard of convincing clarity.

We are mindful of the well settled principle articulated in **Attorney General v Marcus Kampumba Achiume**<sup>22</sup> that an appellate court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make. In the instant case, our considered view is that the finding by the learned trial Judge that 110 bags of maize were

looted from the FRA shed is not supported by the evidence on record as no police report or statistical evidence was produced to prove the alleged wrongful act. The absence of evidence showing how many bags of maize were in the shed before and after the alleged theft and looting has made it difficult for us to ascertain whether or not the alleged act of looting and theft did happen. In view of the absence of such relevant evidence on record, we hold that this is a fit and proper case in which, as an appellate Court, we can and should reverse the findings of fact made by the trial Judge and we accordingly do so.

In view of the foregoing, we find it unnecessary for us to address the question whether or not the majority of the voters in the constituency were influenced by the alleged distribution of maize. Ground three is without merit and we dismiss it accordingly.

Ground four impugns the lower court's finding that there were no known incidents of blocking of voters reported to the police or to the ECZ and that the Respondent was not linked to the blocking of voters. The Appellant submitted that although the court below relied on the fact that there were no reports made to the ECZ or the police, the test was whether the incidents as

narrated by himself and PW11 were true. It was submitted that the incidents happened outside the voting arena, hence the absence of reports to the ECZ and the police. The Appellant testified that he was a voter at Shang'ombo polling station and he saw UPND cadres, Petulu Tololi and Siyunda, on the route making sure that no known PF supporter went to vote and that they were acting on instructions from the Respondent. PW11, Fly Kapama, a polling agent, testified that on 11<sup>th</sup> August, 2016 on his way to Nkanga polling station with one Kabuli Limbimbizi, they met two UPND cadres standing by the roadside who asked them where they were going. That the UPND cadres told them they were at the roadside to stop PF supporters from going to vote. That PW11 and Kabuli Limbimbizi were only allowed to go when a third person, Funete, arrived at the scene.

In rebuttal, the Respondent submitted that the burden of proof was on the Appellant to prove all allegations to a standard higher than a mere balance of probabilities. It was submitted that PW11 was a partisan witness and his testimony should have been supported by other evidence. Further, that the Appellant and PW11 did not establish that the alleged blocking or beating of PF supporters was perpetrated by the Respondent's agents or that

they were acting on his instructions. The Respondent contended that there was no evidence showing how widespread the purported acts were as the same were isolated incidents.

RW3, the returning officer for Shang'ombo constituency, testified that he did not receive any reports of the blocking of voters from any of the polling stations throughout the election day. RW5, Morgan Shangwele, a police officer, testified that on 11<sup>th</sup> August, 2016 he was deployed with two other officers at Shang'ombo polling station. It was his testimony that on polling day, there were no malpractices reported to him or the other officers and that he did not see anyone in political party regalia within the vicinity of the polling station

We have already referred to section 83(1) of the Act. That provision, among other things, prohibits the making of threats or use of force by any person, directly or indirectly, to prevent another person from voting in an election. Specifically, section 83(1)(c)(ii) states:

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

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

...  
(ii) to vote or not to vote;  
(emphasis added)

The court below found that out of the 39 polling stations in Shang'ombo constituency, evidence led on the allegation of blocking voters affected only two polling stations and there was no evidence linking the Respondent to the alleged incidents or to support the claim that incidents of blocking voters occurred throughout the constituency.

We agree with the learned trial Judge. We have perused the record on this aspect and we have found no evidence on record to show that the blocking of voters occurred or that it was widespread in Shang'ombo constituency and that it affected the majority of the electorate from voting for their preferred candidate. Evidence led on this aspect by the Appellant related to only two alleged incidents. At Shang'ombo polling station, the Appellant said he was informed that Petulu Tololi was chasing away PF supporters. None of the people the Appellant claims informed him of the actions of Petulu Tololi were called to testify, rendering, in our considered view, the testimony of the Appellant on this aspect as hearsay.

The Respondent submitted that PW11 was a partisan witness requiring corroboration, citing the Ugandan case of **Nabukeera Hussein Hanifa v Kibule Ronald and another**<sup>12</sup> where the court

observed that in an election petition, just like in the election itself, each party is set out to win and the court must cautiously and carefully evaluate all the evidence adduced by either party; that evidence of partisans must be viewed with great care and caution, scrutiny and circumspection.

PW11 identified himself as a polling agent for the PF. We have carefully perused the record and agree with the Respondent that there was need for PW11's testimony to be supported by other independent evidence. We have not seen any such evidence on the record.

The requirements of section 97(2)(a) of the Act were not satisfied and we find ground four as being without merit and we dismiss it.

In ground five, the Appellant contends that the learned trial Judge erred both in law and in fact when he found that all the allegations of corruption and bribery were not proved at trial. There were several allegations made by the Appellant against the Respondent which are the subject of this ground: the donation of iron roofing sheets in exchange for votes; the ferrying of voters to polling stations and the distribution of pens and money to voters; and, the brewing of beer for the electorate.

The Appellant submitted that section 81(1)(c) and (d) of the Act makes it an electoral offence to make a gift, promise, offer and to procure the return of votes as a consequence of the gift, promise or offer. It was also submitted that section 89(1)(e) of the Act prohibits the canvassing or soliciting of votes or inducing of voters on polling day. The Appellant submitted that the Respondent was in breach of sections 81 and 89 aforesaid and that the breaches were widespread in the whole constituency and greatly disadvantaged him.

In regard to the allegation that the Respondent donated iron roofing sheets for a health centre in return for votes, PW6, Poniso Nakweti, testified that he attended a meeting addressed by the Respondent where the Respondent promised to donate 10 iron roofing sheets for the community health centre. PW6 stated that the Respondent, in the company of Mwiya Mutapwe, donated the 10 iron sheets the following day as promised and asked PW6 to vote for him. It was PW6's further testimony that the iron sheets were erected on 18<sup>th</sup> July, 2016.

On behalf of the Respondent, RW7, Libongani Mbwenga, testified that on 1<sup>st</sup> May, 2015 at Mboyiwa village, RW8, Pumulo Namitondo, gave him K930 to buy iron sheets for the clinic from

Lusaka. RW7 bought the iron sheets and delivered them to RW8. Under cross-examination, RW7 testified that he transported the iron sheets at his own cost. RW8's testimony was that on 1<sup>st</sup> May, 2015 he took K930 to RW7 to request him to buy eight iron sheets for a clinic. In cross-examination, RW8 maintained that the clinic was built in 2015; that the money for 10 iron sheets was collected from the community. RW8 testified that he did not hear the Respondent mention anything about the clinic at a rally in Mboyiwa in 2016 during the election campaigns.

In support of the allegation that the Respondent ferried voters and distributed pens and money to voters, PW8, Mumbeko Salimbozi, testified that the Respondent and Mwiya Mutapwe, at a meeting in Sikalu Branch, requested RW13, Salimbozi Mbangu, to organize ox carts to transport people to the polling station and that every ox cart would be given K200. It was also PW8's testimony that the Respondent promised K20 for people that would walk to the polling station, a hammer mill for women and to buy jackets for the headmen on 24<sup>th</sup> October, 2016. PW8 testified that he organized five ox carts with RW13 on 10<sup>th</sup> August, 2016; that each ox cart could carry eight people and that they urged the people to vote for the Respondent. PW8 also testified that the people who

were carried were given pens to vote with and that they were told that computers would detect if they did not vote "on the hand". In cross-examination, PW8 testified that the voters were instructed to return the pens after voting and that he was given K20 after returning the pen. PW8 conceded that he did not know of any other place where the Respondent ferried and paid people. In rebuttal, RW13 testified that it was not true that he gave instructions to his younger brother, PW8, on 10<sup>th</sup> August, 2016 to carry out an exercise on behalf of the Respondent and that he was not with him on that date. RW13 denied paying people to be transported to the polling station in ox carts and that it was not true that the Respondent promised to buy jackets for headmen. RW13 also testified that he did not see anyone with beer in the precincts of the polling station; he denied owning an ox cart, paying people K20 to walk to the polling station or distributing pens for people to go and vote with.

In other testimony on the ferrying of voters and distribution of pens and money, PW16, Kayunde Sitali, testified that on 10<sup>th</sup> August, 2016 the Respondent used one Imbula Neta's vehicle to ferry voters; that people were brought to come and vote at Siwelewele from Kasa by one Mayeya Mayeya, a UPND councilor.

It was his testimony that four trips were made using a DAF truck that could carry 150 people. PW15, Kamuti Katiba, testified that on polling day, the Respondent arrived at Natukoma polling station in a vehicle with a UPND flag on it; that the Respondent told him that he had given people pens to use in the voting and that PW15 was refusing them and he threatened to shoot PW15 and remove his eyes for "creating trouble". PW15 testified that he was scared and did not vote.

On the alleged brewing of beer, PW11, Fly Kapama's testimony was that beer was being brewed at one Kanyanga Minjenje's house, a UPND cadre and that some people came drunk to the voting queue; that they were flashing the UPND symbol. PW11 testified that he witnessed Kanyanga Minjenje distributing pens and K50 notes to people, a matter which he reported to a police officer. Further, that a lady called Mushimbe explained to PW11 that if he marked on the ballot paper in a place other than for UPND, the computer would reveal. Under cross-examination, PW11 admitted that he did not see where the beer was being brewed but only saw people drinking it at Nkanga polling station; that he did not go to Kanyanga Minjenje's house or see anyone drinking from Minjenje's house.

Section 81 of the Act proscribes acts of bribery and corruption in the electoral process. In particular, section 81(1)(a), (b), (c) and (d) read:

"(1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly-

- (a) give, lend, procure, offer, promise or agree to give, lend, procure or offer, any money to a voter or any other person on behalf of a voter or for the benefit of a voter in order to induce that voter or to vote or refrain from voting or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election;
- (b) give, lend or procure, offer, promise or agree to give, lend, procure, offer or promise, any money to a voter or for the benefit of a voter or to any other person or on behalf of that person on behalf of any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;
- (c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;
- (d) upon or in the consequence of any gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure, the return of any candidate at any election or the vote of any voter to any election; advance or pay or cause to be advanced or paid any money to or for the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election;"

The learned trial Judge addressed the allegations of corruption and bribery of voters specific to this ground at pages 125 to 130 of the record of appeal. In regard to the allegation that the Respondent

donated iron roofing sheets in exchange for votes, the court below was faced with two conflicting versions. PW6, a community health worker, testified that the Respondent, at a rally in June 2016, promised to donate the iron roofing sheets for a health centre; that the Respondent, in the company of Mwiya Mutapwe, brought 10 iron sheets the following day to PW6 and asked PW6 to vote for him. For the Respondent, RW7 and RW8's testimony was that RW8 gave RW7 K930 to buy iron sheets in May, 2015; that the clinic was built in 2015 and the money was collected from the community. The learned trial Judge found the explanation given by RW8 plausible and that he was not broken in cross-examination and dismissed the allegation.

We have carefully considered this aspect of the appeal and we agree with the finding of the learned trial Judge. In **Steven Masumba v Elliot Kamondo**,<sup>19</sup> we cited with approval the sound principle in **Attorney General v Kakoma**<sup>23</sup> where the Supreme Court guided that a court is entitled to make findings of fact where the parties advance conflicting stories and that the court must make those findings on the evidence before it, having seen and heard the witnesses giving that evidence. Applying the above principle to the current case, we must state that the learned trial Judge had the

benefit of listening to and observing the demeanour of the witnesses on this aspect. He found the Respondent's version, as given by PW7 and PW8 plausible. As an appellate court, we have not had the benefit the court below had. Further, we have not seen any evidence on the record that would compel us to reverse the finding of fact of the court below.

On the allegation of brewing and distribution of beer, the Appellant's key witness, PW11, testified that beer was being brewed at one Kanyanga Minjenje's house. Under cross-examination, he conceded that he did not go to Minjenje's house or see anyone drinking at Minjenje's house; that he did not see where the beer was being brewed but only saw people drinking at Nkanga polling station. The court below dismissed the allegation on the ground that there was no evidence linking the Respondent to the brewing of the beer or that Minjenje was the Respondent's polling or election agent.

We have carefully perused the record of appeal on this particular aspect. We affirm the learned trial Judge's finding that there was no evidence linking the Respondent to the alleged beer brewing and distribution. More so, there were clear credibility issues with PW11. PW11 clearly testified that "the local brew was

done at Kanyanga Minjenje's house who was a UPND cadre." Yet, under pressure of cross-examination, PW11 conceded that he did not see where the beer was being brewed. Further, PW11 confirmed that he was a polling agent for the Appellant. As we noted earlier, and in agreeing with the Respondent, PW11 was a partisan witness with an interest to serve and his evidence required corroboration. We have seen no evidence in the record corroborating PW11's testimony.

In regard to the ferrying of voters, PW16, for the Appellant, testified that on 10<sup>th</sup> August, 2016, the Respondent used one Imbula Neta's vehicle which he described as a DAF truck, to transport voters from Kasa and Kasheshe with a UPND councilor, Mayeya Mayeya (RW16); that the truck made four trips and that it could carry 150 people. In rebuttal, RW16 denied being involved in ferrying people to polling stations. It was his testimony that people walked from their villages to the polling stations. He also denied knowing Neta Imbula. As regards this issue, the learned trial Judge found as follows:

"There is nothing in the evidence to dispel the evidence offered in rebuttal nor was there anything that I noticed about RW16 demeanour that might discredit his credibility." (emphasis added)

We note that the decision of the court below anchored on the credibility of the witnesses. In **Steven Masumba v Elliot Kamondo**,<sup>19</sup> we said the following at page J40:

"It is settled that the question of demeanour of a witness relates to the credibility of that witness and the weight that the court puts to his evidence. In Nkhata and others v The Attorney General the Court of Appeal discussed the question of demeanour of a witness and observed, *inter alia*, that a trial Judge sitting alone without a jury can only be reversed on questions of fact if it is positively demonstrated to the appellate court that the judge did not take proper advantage of having seen and heard the witnesses or where the judge has relied on the manner and demeanour of the witnesses but there are however, other circumstances which indicate that the evidence of the witnesses have on some collateral matter deliberately given an untrue answer."

We reaffirm that position here.

We have closely examined the evidence on record on this aspect and the finding of the court below. We find no basis upon which to fault the learned trial Judge. The court below also held that:

"Furthermore, I find that there is no evidence linking the Respondent to the transportation of people as alleged or of the fact that Neta Imbula was his agent."

Neither do we. There is no evidence to show that the Respondent was linked to Neta Imbula or that he knew about or approved of the transportation of voters as alleged.

On the alleged distribution of pens and money to voters, the sum of the evidence on behalf of the Appellant on this aspect was that voters were given pens to go and vote with and that computers

would later detect how they voted. RW3 testified that he did not, as returning officer, receive any report of distribution of pens and money to the electorate. RW5, a police officer at Shang'ombo polling station also testified that there were no reports of any particular political party giving out money to solicit for votes. The position of the court below was as follows:

"It is therefore difficult to see how assuming it were true, the distribution of the pens and money would prevent the majority of the voters from voting for a candidate of their choice in those circumstances as their preferred candidates in this area were already known and being supported by this group. I further find that there is no evidence of the Respondent being involved in the distribution of the pens or money to the people ferried in the ox carts that PW8 testified about. There was further no evidence to suggest that he approved or had knowledge of such distribution."

We have carefully examined the evidence on record and the finding of the court below. We see no basis upon which to fault the findings of the learned trial Judge and we thus agree that this allegation was not proved to the required standard.

On the whole, we find that the Appellant has not proved any of the aspects in ground five to a high degree of convincing clarity as to meet the threshold in section 97(2)(a) of the Act. Ground five of the appeal is devoid of merit and we dismiss it.

All the grounds in this appeal have failed and, therefore, the appeal is dismissed. We order that each party bear their own costs.



.....  
H. Chibomba  
President  
**Constitutional Court**



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



.....  
E. Mulembe  
**Constitutional Court Judge**



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