

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT KASAMA
(CONSTITUTIONAL JURISDICTION)**

2021/HP/EP/027

IN THE MATTER OF:

**ARTICLE 47 (2), 54,68, 72(20 (c),73(1)
OF THE CONSTITUTION OF THE
REPUBLIC OF ZAMBIA.**

IN THE MATTER OF:

**SECTIONS 81,83,89,97(1), 98 (C),
99 AND 100 (2) (A) OF THE
ELECTORAL PROCESS ACT NO. 35 OF
2016 OF THE LAWS OF
ZAMBIA.**

IN THE MATTER OF:

CODE OF CONDUCT RULES 15

IN THE MATTER OF:

**PARLIAMENTARY PETITION
RELATING TO PARLIAMENTARY
ELECTION HELD IN THE
MPOROKOSO CONSTITUENCY ON
12THAUGUST, 2021.**

AND

IN THE MATTER OF:

**AN ELECTION PETITION BY SAMPA
JOHN.**

BETWEEN:

SAMPA JOHN

PETITIONER

AND

**MUNDUBILE BRIAN
ELECTORAL COMMISSION
OF ZAMBIA**

**1ST RESPONDENT
2ND RESPONDENT**

Before:

The Hon. Mr. Justice Charles Zulu.

For the Petitioner:

**Mr. B. H. Sitali of Messrs Butler and
Company.**

For the 1st Respondent:

**Mr. J. Tembo of Messrs Linus Eyaa and
Partners.**

For the 2nd Respondent:

Mr. C. Nahri of Nahri Advocates.

J U D G M E N T

Cases referred to:

1. ***Kafuka Kafuka v. Mundia Ndalamei (CCZ Appeal No. 15 of 2016).***
2. ***Nkandu Luo and Another v. Doreen Sefuka Mwamba (CCZ Selected Judgment No. 51 of 2018).***
3. ***Chrispin Siingwa v. Stanley Kakubo (CCZ Appeal No. 7 of 2017).***
4. ***Richwell Siamunene v. Sialubala Gift (Selected Judgment No. 58 of 2017).***
5. ***Shamwana v. The People (1985) Z.R. 41.***
6. ***Colorado v. New Mexico 467 US 310 (1984).***
7. ***Akashambatwa Mbikusita Lewanika & Others v. Frederick Jacob Titus Chiluba [1998] Z.R. 79.***
8. ***Steven Masumba v. Elliot Kamondo (Selected CCZ Judgment No. 53 of 2017).***
9. ***Attorney General v. Kakoma (1975) Z.R. 212.***
10. ***Mushemi Mushemi v. The People (1982) Z.R. 71.***
11. ***Cambridge v. Makin (2011) EWHC 12 (QB).***
12. ***Lazarous H. Chota v. Patrick Mucheleka & Another (SCZ Appeal No. 18 of 2015).***

Legislation referred to:

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 ***The Electoral Act No. 12 of 2006 (repealed).***

Other works referred to:

1. ***Evans Bell, An Introduction to Judicial Fact Finding (Commonwealth Law Bulletin 2013, page 519).***

INTRODUCTION

On August 12, 2021, Zambians registered as voters were voting in the general election to elect *inter alia* their respective members of parliament. In Mporokoso Constituency, four parliamentary candidates contested the election, namely; the petitioner, John Sampa sponsored by the United Party for National Development (UPND), the first Respondent, Brian Mundubile sponsored by the Patriotic Front (PF), Elizabeth Kabwe sponsored by the Socialist Party (SP) and Winfridah Musonda backed by the Development Party (DP).

On August 13, the Returning Officer, Joseph Kapepo, declared the results of the poll as follows:

NO.	NAME OF CANDIDATE	POLITICAL PARTY	VOTES
1.	MUNDUBILE BRIAN M.	PF	12,438
2.	SAMPA JOHN M.	UPND	5,765
3.	MUSONDA WINFRIDAH	DP	289
4.	KABWE ELIZABETH	SP	155
REJECTED AS INVALID VOTES			313

The first Respondent, Brian Muntayalwa Mundubile was declared as the duly elected Member of Parliament for Mporokoso Constituency. However, on August 27, the Petitioner being dissatisfied with the said election results and alleged electoral malpractices and events preceding the polls, took exception and issued the present petition seeking nullification of the election, essentially pursuant to section 97(2)(a) of the **Electoral Process Act No. 35 of 2016 of the Laws of Zambia** (hereinafter referred to as 'the EPA'), which provides:

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

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

And the relief sought by the Petitioner are:

- i. a declaration that the election was null and void ab initio;**
- ii. a declaration that the 1st Respondent was not duly elected;**
- iii. costs of incidental to this petition; and**
- iv. such declaration or order as this honorable court may deem fit.**

BACKGROUND

The gist of the Petitioner's petition was that campaigns conducted by the first Respondent in the said election were characterized by bribery, corruption, voter inducement and general violations of the EPA. And a summary of the said allegations as deciphered from the petition are reproduced in the proceeding paragraphs.

1. Allegation of collusion between the first Respondent and the Electoral Commission of Zambia.

The Petitioner alleged that on the night of August 6, instead of delivering ballot papers to Mporokoso District Council where the Petitioner and other stakeholders were waiting for the ballot papers, the second Respondent, the Electoral Commission of Zambia (ECZ), in collusion with the first Respondent delivered the ballot papers to Kutemwa Lodge where the first Respondent and his agents were lodging.

Further, that a motor vehicle, Toyota Land Cruiser registration mark BAL 203 belonging to the first Respondent's campaign manager (election agent) was hired by the ECZ, and was used to ferry election materials in the constituency despite the owner of the said motor vehicle being a campaign manager for the first Respondent, and that this fact was well known to the ECZ. And that the Petitioner's complaint thereof was ignored.

2. Allegation of under age voters' registration supposedly recruited by the first Respondent.

The Petitioner alleged that during the registration of voters, the first Respondent with his agents facilitated the registration of persons who had not attained the prescribed age to be registered as voters by giving K5 to each to register as voters. And that the first Respondent assigned the PF constituency officials to manage and unduly direct the said under-age voters on how to vote.

3. Alleged electoral violence, prior and during election.

26th June 2021: in regard to pre-election violence, the Petitioner alleged that on June 26, as the UPND team was conducting campaigns in Lumangwe, Mumbuluma and Njalamimba Wards, they were attacked by the first Respondent's agents who fired three gunshots at the UPND campaign team within Chikosa Village.

29th of June 2021: that on this date, the first Respondent's agents burnt a house and maize shed belonging to Mr. Situmba, a UPND member. And that the first Respondent's agent also burnt a kitchen and toilet belonging to Mr. Mike Lukwesa, and a shop belonging to Mr. Kalonga, members of the UPND.

1st of July 2021: that on this date, the first Respondent's agents severely assaulted Mr. Mumpa's wife.

12th August 2021: the Petitioner alleged that on the polling day, as voters were in a queue to vote in Mutotoshi Ward at Nyimbwi Polling Station, the first Respondent's agent discharged a firearm to scare voters. It was alleged that this act scared voters from turning up to vote for a candidate of their choice.

It was also alleged that on August 12, the first Respondent's agents threw tear gas at Bulangililo Totaling Center in order to stop the Petitioner and his team from attending to the process of totaling the results, resulting in the Petitioner and his team being excluded from the counting process.

Further, that as the counting was taking place at the Civic Center (sic), the first Respondent's campaign manager whilst driving the first Respondent's Land Cruiser chased the Petitioner's car and fired gun shots. And that the first Respondent's agent(s) continued to discharge gunshots to scare the UPND members from attending the counting process at the totaling center. And that the trouble-makers were eventually apprehended by members of the Defence Forces and disarmed.

According to the Petitioner, the aforestated acts of violence were calculated to spread terror in the minds of the UPND members with intent to stop them from campaigning, and to stop the electorates from voting for a candidate of their choice.

4. Allegation of political victimization and intimidation of civil servants perceived to be sympathizers of the UPND.

The Petitioner alleged that civil servants such as police officers, teachers and the council secretary perceived to be sympathizers of the UPND were in some cases threatened by the PF cadres with dismissals and were eventually transferred. And that the said transfers, were at the instigation of the first Respondent and his agents. That this was calculated to instill fear in the minds of other public officers who were not willing to support the first Respondent, that they would suffer the same fate.

5. Allegation of hostile campaign environment and perpetuation of hate speech.

The Petitioner alleged that throughout the campaign period, the UPND was not allowed to campaign freely in the entire constituency

as their campaigns were continuously disrupted by the first Respondent's agents. And that when the UPND presidential candidate tried to visit Mporokoso Constituency to drum up support for the Petitioner, the first Respondent's agents organized thugs to prevent the UPND presidential candidate from addressing any campaign rally in the constituency.

Further, that the first Respondent's agent(s) and the PF in general preached hatred against the UPND, accusing the party of being a tribal party, and vilified its leadership as being tribal and that it was therefore not welcome in Luapula, Muchinga and Northern Provinces. That these utterances influenced the electorates from exercising their free choice to vote for their preferred parliamentary candidate.

6. Allegations of abuse of government facilities to campaign for the first Respondent.

The Petitioner alleged that the first Respondent and his agents used a government motor vehicle registration mark GRZ 314 CH to conduct his campaign activities.

It was also alleged that the first Respondent's agents abused a government motor vehicle registration mark GRZ 875 CE to conduct their campaigns for the first Respondent, and that during the said campaigns, the registration mark of the said motor vehicle was illegally changed.

That the first Respondent with the assistance of his agents hijacked the disbursement of social cash transfer funds in the entire Mporokoso Constituency from officers who were duly authorised to disburse the said funds.

7. Allegations of electoral malpractices on the polling day touching on bribery and feeding of electorates to induce voters to vote for the first Respondent.

That on August 11 and 12, the first Respondent with the assistance of his agents set up pay points for payment of social cash transfer on various routes to the polling stations, and proceeded to make payments to electorates on their way to the polling stations regardless of whether or not such persons were eligible to receive the said funds. That these payments were a bribe and an inducement to the electorates to vote for the first Respondent. Further, that voters that were bribed were threatened that there were cameras placed at voting booths to monitor how they would vote. And that electorates were warned that if they did not vote for the first Respondent, they faced being disqualified from receiving social cash transfer and youth empowerment support.

It was also alleged that on the polling day, the first Respondent with the assistance of his agents prepared nshima with beef and chicken and positioned the distribution of food on various routes leading to all polling stations. That electorates were given K20 each and were advised to vote for the first Respondent, and that if they did not vote for him, they would not partake in the said meals.

The First Respondent's Answer/Defence

In opposing the petition, the first Respondent filed an answer and an affidavit in support of his answer. The first Respondent traversed seriatim each and every allegation levelled against him. The first Respondent contended that he was duly and validly elected as the Member of Parliament for Mporokoso Constituency.

The Second Respondent's Answer/Defence

The second Respondent, ECZ denied allegations of colluding with the first Respondent, and rejoined that the truck carrying ballot papers was briefly parked at the lodge by the driver pending directions to Mporokoso Council Offices. And that the ballot papers were safe.

The allegation of registration of under age voters was denied, and averred that the parliamentary election for Mporokoso Constituency was conducted in conformity with the **Constitution of Zambia** and the EPA.

SUMMARY OF THE PETITIONER'S CASE (ORAL TESTIMONIES)

The Petitioner apart from himself called nine (09) witnesses, referred to as the Petitioner's Witness(s) (PW(s)). And the first Respondent apart from himself called two (2) witnesses, referred to as the Respondent's Witness (RW)(s). There was no evidence led by the second Respondent.

PW1 was the Petitioner, John Mwamba Sampa. The Petitioner testified that he was nominated as the UPND parliamentary

candidate for Mporokoso Constituency in the Northern Province of Zambia on May 17. He said following his nomination, the ECZ gave political parties campaign timetables for the parties to campaign in wards at a given time to avoid collisions. He said on June 27, while in Mulungu Village, he and his team were approached by a cadre from the Patriotic Front (PF) named Charles Kashishi. He said this cadre was the first Respondent's best friend and was at that material time, driving a Toyota Rav 4 in the company of Chongo Fumapo, the Commander of the PF security team in Mporokoso Constituency. He explained that Chongo Fumapo, remarked that the PF had already won the election and whatever the Petitioner was doing would make no difference.

He said thereafter, he and his team proceeded to a place called Kansalu. And the Petitioner's complaint as regards Kansalu was that, he did not find people he expected to address because the people had been taken by Charles Kashishi, to a place where the first Respondent had promised to build a school for the community.

According to the Petitioner, since he had other alternative wards where to go and campaign, he decided to proceed to Chimpolonge Ward and had a stopover at Mabinga. And that while at Mabinga, he realized that the said Charles Kashishi had followed them. And that later, he saw another motor vehicle, a Toyota Mark II, driven by Ernest Musonda commonly known as "Chinzi America". That upon noticing the second motor vehicle, he advised his team that it was no longer safe to proceed with the campaigns, but to return to Mporokoso, and that on their return, they were trailed.

He added that, he and his team decided to stop at Chikosa Village. He said when the two motor vehicles that were trailing them arrived at Chikosa, two gunshots were discharged from the Mark II. He said as the whole team was scampering for their safety, Bertha Musonda (PW2), was deliberately hit by the Toyota Mark II driven by Chinzi America causing her to suffer a fractured leg.

He said even after escaping from the scene, they were still being chased/ followed by the same PF team until they reached a point where they found a team of police officers including the Police Chief Investigations Officer (CIO) for Mporokoso District, Mr. Samakai (PW8). That as soon as they stopped, the driver of the Mark II, Chinzi America, arrived at the same scene, got out of his vehicle with a machete and a wheel spanner and started smashing the Petitioner's Toyota Hilux in the presence of police officers and the CIO. PW1 added that at the same scene, Chinzi America was saying: "where is this Sampa, I want to kill him". He said Chinzi America threatened the CIO that he was going to fire him.

The Petitioner said Chinzi America was apprehended, but was only detained for *thirty* (30) minutes. He said with the release of Chinzi America, he complained to the officer-in-charge, and the officer-in-charge responded that they were following instructions from above.

The Petitioner further stated that on June 27, the PF cadres started following the UPND supporters. He said the first Respondent had recruited a lot of PF cadres from the *twelve* (12) wards of Mporokoso Constituency. He added that the PF cadres went and burnt Mr.

Situmba's maize shed, and burnt Mr. Lukwesa's kitchen, the UPND youth chairperson. And that the PF cadres also assaulted Mr. Mumpa's wife. He said it became too dangerous to campaign and that his campaign manager, Mr. Brian Muyuni alerted him that Chinzi America was after his life.

He said he could not even hide in his house, and had to travel to Ngandwe Chonda near the border with the Democratic Republic of the Congo for safety. He added that he complained to the Vice- President of the UPND, Mrs. Mutale Nalumango, who advised him to be brave because the situation was the same everywhere in Zambia.

According to the Petitioner, Mporokoso was full of the PF cadres as a result of which, he and his team stopped campaigning for a period of three weeks. He said his team only resumed campaigns when the UPND presidential campaign team visited Mporokoso, but was chased upon arrival.

He further testified that on May 26, the PF influenced the change of poll staff from the list compiled by Mr. Ndelema, the Council Secretary. He said Mr. Ndelema was later put on forced leave and replaced. According to him, the new list did not contain all the names that were on the first list.

On the alleged collusion between the first and second Respondents, he said on August 6, he and his team were expecting the arrival of ballot papers to be delivered at the District Council. He added that when the truck carrying the ballot papers arrived around 20:00

hours, the truck was driven to Kutemwa Lodge. He said they trailed the truck up to Kutemwa lodge, where the first Respondent and Charles Kashishi were lodging. He said he queried the police officers escorting the truck why the truck was driven to Kutemwa Lodge. He said thereafter the truck was taken to the Police Station and later to the Civic Centre.

The Petitioner further alleged that on August 10 and 11, he and unnamed persons witnessed some people being given money set apart for social cash transfer. And that the disabled were given mealie meal from the social welfare in Solwezi. He also stated that the under-aged thus; persons below the voting age voted in the election. And that some had two national registration cards.

He stated that on the August 11, he travelled to his home village to vote, and voted on August 12, at Bweupe Primary School. He said on his way back, he passed through a number of polling stations. He said people were complaining that some voters were unduly directed on how to vote. He said at Kambobi Polling Station, a teacher named Susan was showing people how to vote. He added that he was informed by a UPND cadre that at Nyimbwi Polling Station, a PF cadre, Mukupa discharged gun shots causing voters to scamper. He said when he got to the said polling station, he did not find people there.

He, however, stated that the said Mukupa was threatening voters to say: whoever was going to vote for the UPND would be killed. He said he complained to a police reserve officer, who responded that he had

tried to do his best. According to him, when he contacted the officer-in-charge, it was confirmed that he had received a report, but had no man power to deal with the situation. He said a similar incident happened at Lupungu Polling Station involving the same Mukupa.

The Petitioner said he later returned to Mporokoso Town. That as he was heading toward the filling station, his motor vehicle was trailed by a Land Cruiser driven by Wilbroad Musonda, the first Respondent's election agent. He said Wilbroad Musonda fired a gunshot and the matter was reported to the Police. And that as a result of this attack, he did not attend to the totaling of results, but went home to sleep. And that on August 13, he was called by the Officer-in-Charge, Mr. Kangelesa, who directed him to report the case to the CIO. He said a report was made and he was assured that Wilbroad Musonda would be arrested. He said Wilbroad Musonda was never arrested, was instead seen moving freely in Mporokoso District.

In cross examination, he conceded that the first Respondent was not at Kutemwa Lodge on August 6, but only saw Charles Kashishi. He also admitted that Charles Kashishi was not the first Respondent's appointed election agent. According to him, anything that a PF cadre did was done for the first Respondent. That as far as the issue of ballot papers was concerned the matter was resolved.

And regarding the allegation in respect of registration of under-age voters, he admitted that no complaint was made to the Conflict Management Committee in Mporokoso Constituency.

PW2 was Martha Bwalya (hereinbefore mentioned), a business lady and a youth member of the UPND. She said on June 26, she was in the company of other UPND youths in a Toyota Hilux that the Petitioner, (Mr. Sampa) was being driven in. That while at Chikosa, and upon arrival of a Rav 4 motor vehicle carrying Kashishi and Chongo Fumapo, Chongo Fumapo discharged a firearm causing she and her team to jump off the Hilux and scamper for safety.

She added that there was another vehicle driven by Chinzi America, and as she was running to safety, Chinzi America followed her and hit her on the leg. She said after she was hit, she was taken to the police where a report was made and later to the hospital. She made reference to her medical report dated June 26, wherein the medical doctor recorded that his findings were consistent with the circumstances alleged.

PW3 was Sam Chimfwembe, the Petitioner's driver. He also testified to events that happened on June 26. Suffice to state that his testimony was similar to what the Petitioner had stated regarding the alleged attack by Chinzi America and Charles Kashishi.

PW4 was Edward Musonda Kasonde of Chikosa Village in Mporokoso District. He said on June 26, at around 14:00 to 15:00hours, while at his village in Chikosa, he witnessed Martha Bwalya (PW2), being

hit by a Mark II. He said he also saw Chongo Fumapo who was in a Rav 4 together with Charles Kashishi, discharge a firearm.

PW5 was Richard Chansa, of Mwashikaluba Village, Mporokoso District. He testified that on August 12, he was the driver to the Petitioner, Mr. Sampa. That as he was driving the Petitioner back from Chandamali Polling Station, at around 20:30 hours, at Liberty Radio Station, they were trailed by a Land Cruiser driven by Wilbroad Musonda also known as "Kokai". He said he decided to drive off the road to park, and Wilbroad Musonda also parked parallel to him and produced a black pistol and fired three gunshots. He said the matter was reported to the Police.

In cross examination he stated that on August 12, he was throughout with the Petitioner from 06:00 hours. He said they visited Chandamali Polling Station at around 20:30 hours, and later they went to Lupungu and Mutotoshi at around 21:00hours. He said they reported the shooting incident at the police station at around 20:30 hours.

PW6 was Jeremiah Lombe of Mutitima Village, Chikulu Ward in Mporokoso District and a member of the DP party. He said on August 11, the first Respondent, addressed a gathering of people in Mutitima. According to PW6, at the said gathering, the first Respondent warned the people that during voting, cameras were installed to detect how people were voting. And that if a person did not vote for the PF, that person would be detected and would not be entitled to receive farm in-puts. He added that Mr. Mundubile lined

up people and dished out K10 to each, and assured the people that if they voted for the ruling party, the (PF), they would qualify to receive mealie meal and money.

He further stated that on the day of voting, August 12, there was a motor vehicle that was prepared to ferry electorates to vote and that after voting, they were fed and were given an additional K10 each.

In cross examination he stated that Mr. Mundubile visited Mutitima on August 11, at around 14:00 to 15:00hours. And that on the polling day he went to eat the said prepared food at around 13:00hours. He said he was a member of the DP party, but because of the money he received, he got influenced to vote for the PF.

PW7 was Emmanuel Mulenga of Sunkutu Village of Chikulu Ward cum the P.T.A Chairman of Mutitima Primary School of Mporokoso District. He said on August 10, an announcement was made that Mr. Mundubile would be visiting the area on August 11. He said he and the headmaster saw the visit as an opportunity to present to the Honorable the uncompleted teacher's house at the school. He said he went to where Mr. Mundubile was addressing the people that had gathered. According to him, at the said gathering, Mr. Mundubile said that whoever was not going to vote for the PF, would not be entitled to receive money via social cash transfer and that he had bought 10 hectares of land in Sunkutu Village.

He said the people that attended the meeting were given money. He said Mr. Mundubile also told them that mealie meal had arrived and that after voting, people should go and eat. PW7 said Mr. Mundubile

warned the people that whoever was not going to vote for all the PF candidates, would be detected by machines that had been bought by President Edgar Chagwa Lungu. According to PW7, with the said warning, many people, including him were scared.

He added that on the polling day, August 12, after voting, people were picked and taken to where food was prepared. According to him, this confirmed what Mr. Mundubile had said on August 11.

In cross examination he said Mr. Mundubile visited the area around 11:00hours and the meeting came to an end around 12:30hours. He said he was not a member of the UPND.

For convenience, I will proceed to give a summary of **PW9**'s testimony. PW9 was Emmanuel Musonda, a farmer of Chishamwamba Village in Mporokoso District. He said he was non-partisan. He kindled his testimony by bemoaning that there was a lot of confusion and bribery during the campaigns in the immediate past general election, which he also denounced. He said on August 11, a truck of mealie meal arrived in his village for distribution. And that on the same date around 10:00 hours, Mr. Mundubile, Kokai, Chongo Fumapo and other PF cadres and leaders visited Chishamwamba. He said people were gathered and given K10 each and were told to vote for the PF. He said the people were warned that, if they did not vote for the PF, they would not be given social cash transfer, and they would be removed from cooperatives.

He added that when Mr. Mundubile was leaving, he left K10,000.00 to a group called Kola which he was part of and released a motor

vehicle to the group to go and distribute K8,000.00 in Ng'andu and Chenda, and that he executed the assignment. He said each member of the Kola group was given K100 out of the said K10,000.00.

He said on August 12, at Chishamwamba Polling Station, Chomba Mfula, the brother in-law to Mr. Mundubile was standing 10 meters away from the entrance of the polling station in the company of Chisha Kankonko and Fred Chimfwembe. He said the trio were asking people if they had voted, and if the answer was no, they would dish out a K10 with instructions to vote for Edgar Chagwa Lungu, Brian Mundubile and all the PF candidates. That after voting people were directed to where food was prepared.

In cross examination he stated that on August 11, Mr. Mundubile arrived with a truck load of mealie meal in the village around 11:00hours.

PW8 was Detective Chief Inspector Stembridge Samakai. He said on July 28, at around 14:30 hours, he was directed by the Officer-in-Charge, Assistant Superintendent Katongo to go to Kalabwe Village, upon receipt of a complaint that a member of the PF in Kalabwe Village was assaulted by a member of the UPND.

He said he mobilized a team of nine (09) officers and set off along Mporokoso-Kawambwa Road. He said on their way, they intercepted a Toyota Hilux belonging to the Petitioner. He said in the process, he noticed that the Toyota Hilux was trailed by a Toyota Mark II, which came to a halt at the point where the Toyota Hilux was intercepted.

He said the driver of the Toyota Mark II was Ernest Chinzi also known as Team America, a member of the PF.

He said Ernest Chinzi came out of the motor vehicle armed with a wheel spanner and started smashing the Toyota Hilux, and continued with an axe after having failed to restrain him. PW8 said this prompted him to direct his officers to apprehend Chinzi, neutralize him and took him to the police station. He said at the police station a docket of case of malicious damage to property was opened against Chinzi, and that Chinzi was detained from 17:00hours up to 20:00hours, when the officer-in-charge received instructions that Chinzi should be released on police bond. And that when Chinzi was released, he was expected to appear the next morning at 08:00hours, but he did not.

He added that on June 27, the PF party officials including Ernest Chinzi "the accused" visited the officer-in-charge, and that he was part of the said meeting. He said in that meeting, the PF officials warned the officer-in-charge and he, that they would be dismissed or transferred to Chilubi or Lunga Islands.

He said on June 29, he and the officer-in-charge were transferred to Kasama. He made reference to the Zambia Police Message Form dated June 29, actualizing the said transfer.

The last witness for the Petitioner was PW10, Daniel Chitalu Kangelesa, the Assistant Superintendent and Officer-in-Charge at Mporokoso Police Station. He said on the August 12, he received a complaint via his mobile phone from Mr. John Sampa (the Petitioner)

that whilst he was patrolling around 20:00 hours, he was shot at by Wilbroad Musonda (RW2). He said he advised the Petitioner to lodge a complaint. He added that upon receipt of the complaint he advised his officers to visit the alleged crime scene, but no cartridges or firearm was recovered. And that a docket of case was opened and forwarded to the Divisional Police in Kasama. He further stated that Wilbroad Musonda was arrested on August 14, but upon instructions from the Provincial Police Command, Mr. Nsokolo and Mr. Mbunda, the DCIO, Wilbroad Musonda was released.

In cross examination he stated that Wilbroad Musonda was charged with unlawful discharge of a firearm, and since the firearm and cartridge were not recovered, the case was discontinued. He said the only witness to the said shooting was the Petitioner and that there was no proof regarding the discharge of the firearm.

SUMMARY OF THE FIRST RESPONDENT'S CASE (ORAL TESTIMONIES)

RW1 was the first Respondent, Brian Muntayalwa Mundibile. He responded to the allegations seriatim denying each allegation that the Petitioner relied on in his petition.

Regarding the allegations of collusion between he and the ECZ, he said on June 26, he never lodged at Kutemwa Lodge in Mporokoso District. He said on that material date, he was in Kasama. And that his only election agent, Wilbroad Musonda was equally not a lodger at Kutemwa Lodge at the alleged time.

And in relation to the allegations of registration of under-age voters, he said the allegation was not true because the mandate to register voters was vested in the ECZ.

He acknowledged that his campaign manager owned a Land Cruiser which from October 2020 to the date of election, was hired by the ECZ through a sub-contractor. He noted that the hiring of the motor vehicle by the ECZ, not only happened way before he was adopted, but also way before Wilbroad Musonda was appointed as his election agent.

And in relation to allegations of violence intimidation or threats against the Petitioner and his team, he said the alleged events of June 26, were never brought to his attention. He said what he recalled on that date was that, he received a complaint from a member of the PF from Kalabwe in Lumangwe Ward, to the effect that the Petitioner and his campaign team had assaulted a couple both of whom were teachers at Kalabwe Primary School for refusing to accommodate them. According to him, he proceeded to convey the complaint to Mr. Martin Katongo, the Officer-in-Charge at Mporokoso Police Station.

He said the incidence involving the burning of Mr. Situmba's maize shed was never brought to his attention. He added that the said Mr. Situmba of the UPND was his brother-in-law, and that he never mentioned to him anything of this sort happening.

Similarly, he said he was not aware about the burning of Mr. Lukwesa's kitchen and toilet. He, however, stated that the said

Michael Lukwesa was his nephew. And that Michael Lukwesa's father never mentioned to him about the alleged incident.

And regarding the allegation that his agents and PF cadres assaulted a wife of a UPND member, he said to the best of his knowledge his election agent, Wilbroad Musonda was not involved in such an act.

And in respect of allegations accusing his election agent, Wilbroad Musonda of discharging a firearm, he said to the best of his knowledge his election agent was not involved in any of the alleged act.

He also denied having a political hand in the transfer of police officers or any other civil servants from the district. He explained that matters relating to management of personnel in the council, such as council secretary was the preserve of the Local Government Commission. He added that, it was not true that it was at his instigation the then Council Secretary, Mr. Collins Ndelema was transferred.

He denied that he or/and his election agent used government motor vehicles to disburse social cash transfer during campaigns and during the election period. He explained that disbursement of social cash transfer was the preserve of the Ministry of Community Development.

The allegations to do with preparation of food and feeding of electorates on the poll day were described as false. He said neither he nor his election agent prepared food to fed electorates on that

material date. And that no money was given to electorates on the poll day as alleged.

The first Respondent said on the poll day, August 12, including August 13, he and his election agent were throughout at Misokolo Village awaiting the results of the polls. He said the allegation of discharge of a firearm by his agent at Nyimbwi Polling Station was equally false.

He added that the civic centre in Mporokoso was not the totaling center, but that the totaling of results took place at Bulangililo. He said the alleged incident at the civic centre was non-existent.

Regarding the allegations that the UPND was not allowed to freely campaign by the PF; he said the allegation was not true. He said what was true was that the UPND and other political parties campaigned freely and placed their campaign materials throughout the constituency. He added that the Vice President of the UPND and Mr. Felix Mutati campaigned freely in the constituency. And that it was not true that the PF hired thugs to interfere with the UPND's campaign programme.

He recounted that his campaigns were opened on the day of filling nominations, May 17, and his last day of campaigns was August 10, in Mapande Village. And that on August 11, he and his campaign supervisors spent the whole day at Misokolo Village at his home. He denied being elsewhere apart from Misokolo Village where he was also awaiting the arrival of his spouse and children.

RW2 was Wilbroad Musonda, the first Respondent's election agent. He said the place of his operation throughout the campaign was at Misokolo Village. And that his role as an agent and campaign manager was to ensure that foot soldiers were released for campaigns in the field.

He denied all the allegations of being involved in: registration of under-age voters; transfers of teachers or any other civil servants; using government vehicles to campaign; abusing social cash transfer; cooking of nshima on the poll day to feed voters; and being involved in acts of violence against the UPND members.

And in relation to the motor vehicle registration mark BLA 203, which was hired by the ECZ, he admitted that this was his motor vehicle, but he denied personally hiring it out to the ECZ. According to him, his motor vehicle was hired by a company called Chidrum in the year 2020, way before he was even appointed an election agent for the first Respondent.

Further, he said, the allegation of unlawful discharge of a firearm at both Mutotoshi and Nyimbwi Polling Stations were not true. He said he had no opportunity to leave his office in Misokolo to go in those polling stations at the alleged times. Likewise, he denied the allegation of firing gunshots as alleged by the Petitioner. Again he said at the material time, he was in Misokolo Village. And he denied being arrested by the Police for the alleged offence.

In cross examination, he said on the day the Petitioner alleges that ballot papers were delivered to Kutemwa Lodge on August 6, he was

at Misokolo Village, while the first Respondent was not in Mporokoso, but was attending to other party responsibilities elsewhere.

RW3 was Raphael Chansa, the District Chairman for the PF in Mporokoso District. He said his role was mobilization of the PF party throughout the *twelve* (12) wards of the constituency. According to him, August 10, was the last day for campaigns for the first Respondent and the PF. He said the campaigns ended at Mapande Village in Chikulu Ward. And that on August 11, the PF team and the first Respondent were at Misokolo Village. He said the first Respondent was awaiting the arrival of his family and friends who were travelling to Mporokoso to vote.

According to RW3, since he was the one who was mandated to draw up the campaign programme, the allegation of distributing mealie meal at Chishamwamba was not true, as there was no such programme.

As earlier stated there was no evidence led by the second Respondent.

THE PETITIONER'S SUBMISSIONS

Counsel for the Petitioner, Mr. Sitali in his introductory statement submitted that since the first Respondent was only answerable for his own act or/and acts of his election agent or, done with his consent, his focus in the first place would be on the actions of the first Respondent and his election agent, Wilbroad Musonda. He also stated that the second limb of his submissions was on general violations of the EPA. And with this introduction Mr. Sitali went

straight to address his mind to the incident that happened on August 12, whereby it was alleged that Wilbroad Musonda fired gunshots against the Petitioner.

It was argued that this shooting incident instilled fear and terror in the minds of the Petitioner and his supporters, such that they did not meaningfully participate in the counting of votes, to protect his votes. It was argued that the absence of the Petitioner and the UPND at the totaling center provided room to the first and second Respondents to announce the results as they pleased.

Mr. Sitali acknowledged that for an electoral malpractice or illegality to be cogent enough to result in overturning the results of an election, the act(s) complained of must be widespread to sway the majority of voters from electing the candidate of their choice. However, Mr. Sitali submitted that this threshold was not applicable in every case. According to Him, the acts of the first Respondent's election agent were too serious and sufficient to have the election annulled. In his own words, Mr. Satali argued that:

To hold that such a malpractice or illegality should first be widespread would lead to absurdity as candidates would be dead by that time.

It was also argued that even if the act complained of was done after close of polls, but during the counting of votes, the test above stated should not be applied. He added that if a party was prevented e.g., by use of firearm from attending to the totaling center, the results cannot be said to be legitimate.

It was argued that the campaigns were characterized by violence against the Petitioner, and that in the face of violence, the police was rendered helpless due to the first respondent's 'invincible hand'.

In the light of the above, Mr. Sitali concluded his submissions by stating that the Petitioner's evidence on record had met the required standard of proof in an election petition. I was thus urged to declare the election as null and void. And for the avoidance of doubt Mr. Sitali, did not in his submissions specifically address his second limb of his submissions on what he termed "general violations of the EPA".

THE RESPONDENTS' SUBMISSIONS

Counsel for the first Respondent, Mr. Tembo in his submissions addressed all the issues in contention. In his preamble, he cited the cases of *Kafuka Kafuka v. Mundia Ndalamei (CCZ Appeal No. 15 of 2016)*, and *Nkandu Luo and Another v Doreen Sefuka Mwamba (CCZ Selected Judgment No. 51 of 2018)*, in which the Constitutional Court held:

In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a) there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the Court that the person whose election is challenged personally or through his duly appointed election or polling agents committed a corrupt practice or illegal practice or other misconduct in connection with the election or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent... in addition to proving the electoral malpractice or misconduct alleged, the Petitioner has a further task of adducing cogent evidence that the electoral malpractice

or misconduct was so widespread that it swayed or may have swayed the majority of the electorates from electing the candidate of their choice.

The case of **Chrispin Siingwa v. Stanley Kakubo (CCZ Appeal No. 7 of 2017)** was cited in which the Constitutional Court stated 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.

In line with the above, the case of **Richwell Siamunene v. Sialubalo (Gift CCZ Selected Judgment No. 58 of 2017)**, was also vouched in which the Constitutional Court held:

...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 incited the UPND supporters to act as they did. To do so would amount to speculation and it is not the duty of this court to make speculation based on nothing more than party membership and candidacy in an election.

Mr. Tembo submitted that the fact that cadres or supporters of the PF were implicated in corruption, violence or illegal activities was not enough to attach liability to the first Respondent or to his duly appointed election agent as a basis to annul the election.

It was argued that allegations raised by the petitioner thus: allegations of collusion with ECZ in the delivery of ballot papers; registration of under-age voters, including arson was never proved against the first Respondent to the required standard of proof namely, *a fairly high degree of convincing clarity*, to warrant

nullification of the election. He added that the electoral process of voter's registration was the preserve of the ECZ.

And regarding the hiring of the election agent's motor vehicle by the ECZ through a third party; Mr. Tembo submitted that this allegation was baseless and the Petitioner did not demonstrate how this made him lose the election.

It was also contended that the alleged use of government vehicles, and abuse of the social cash transfer by the first Respondent and his election agent was unfounded and without proof.

Regarding violence allegedly committed on August 6, by Chinzi America, Fumapo and Kashishi; relying on the case of **Richwell Siamunene** (supra), it was argued that, there was no connection between the alleged PF cadres' actions and the first Respondent or his election agent.

He also argued that there was no evidence linking the first Respondent or his agent to the transfer of the said police officers, two teachers or indeed any civil servant in the district. Mr. Tembo observed that, the Petitioner did not demonstrate how the alleged transfer of civil servants affected the election results in a constituency of *twelve* (12) wards and *fifty-five* (55) polling stations.

Mr. Tembo argued that allegations of bribery on August 11, as alleged by PW6, PW7 and PW9 was not credible. That on August 11, the Petitioner did not conduct campaigns on that day. He added that the Petitioner's witnesses as to the alleged times when he was in the said

wards, Chikula (Sunkutu) and Chishamwambwa was inconsistent. That it was not true that the first Respondent could have been in Sunkutu and Chishamwambwa around 11:00 hours given the distance of 90km that separates the two wards.

And in relation to the allegation of violence on the poll day, August 12, Mr. Tembo submitted that as regards the alleged discharge of a firearm at Mutotoshi Ward, the same could not be linked to the first Respondent's agent and that no witnesses were called. That acts of a cadre could not be imputed on the first Respondent.

And regarding the alleged tear gassing at Bulangililo; it was submitted that the Petitioner never personally perceived this incidence, and his testimony was hearsay.

As to the allegation of violence upon the Petitioner by the first Respondent's agent, Wilbroad Musonda; Mr. Tembo observed that the only witness to the alleged incident were the Petitioner and his driver, PW5. He contended that the two (the Petitioner and PW5) contradicted each other; as to the number of gunshots, that whereas the Petitioner said it was a single gunshot, PW5 said the gun shots were three. Counsel added that there was also contradiction as to the time frame of the alleged shooting. That whereas PW5 said it was at 20:30 hours, the same time the matter was being reported, PW10, the Officer-in-Charge said he received a phone call of the alleged incident at 20:00 hours and at 20:03 he instructed his officers to go to the scene to investigate. According to Mr. Tembo, the testimony of PW10 can never be considered as corroboration. In this regard the

case of *Shamwana v. the People (1985) Z.R. 41* was cited wherein it was held:

In defining what constitutes corroboration, Lord Reading CJ said in the classic case of R v. Baskerville 1916 658 at 667 that: we hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime was committed, but also that the prisoner committed it.

And in relation to the alleged discharge of a firearm at the civic centre, Counsel submitted that no event of an electoral nature took place at the said places, as such the allegation was baseless.

Further, that the allegations that the first Respondent prevented the UPND's presidential campaign team from entering Mporokoso and that the first Respondent campaigned on tribal lines; it was submitted that no evidence was led to substantiate these allegations.

Lastly, regarding the allegation that the UPND presidential candidate was prevented from entering Mporokoso by the first Respondent's campaign team on tribal grounds, Mr. Tembo observed that no evidence was led against the first Respondent to support this allegation. And I was urged to dismiss the whole petition.

Counsel for the second Respondent, Mr. Nahri in his submissions essentially concurred with Mr. Tembo's arguments. He also reiterated that the Petitioner had failed to prove his case against the

Respondents to the required standard of proof. He contended no evidence of wrong doing was adduced against the ECZ.

In reply Mr. Sitali, in shedding more light on the meaning of *a fairly high degree of convincing clarity* synonymous with *clear and convincing evidence standard*, he had recourse to overseas, to the United States of America in the case of **Colorado v. New Mexico 467 US 310 (1984)** wherein the Supreme Court of United States held:

Clear and convincing evidence, which is higher than preponderance of the evidence but less rigorous than beyond all reasonable doubts, means that the evidence is highly probable and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.

And in specific reply to the shooting incidence allegedly committed by Wilbroad Musonda against the Petitioner on August 12, it was argued that the Petitioner's evidence was more likely to be true than untrue. And that there was no material contradiction between the testimony of the Petitioner and PW5. It was submitted that the alleged shooting by Wilbroad Musonda, as the counting of votes was on-going was very serious and reckless, deserving of stern action from the Court.

DETERMINATION

I have carefully considered the evidence adduced by the Petitioner and his witnesses, the first Respondent and his witnesses, including the parties' respective submissions.

It is opportune for me to start by acknowledging that the **Electoral Process Act No. 35**, came into force in 2016, upon repeal of the Electoral Act No. 12 of 2006. The 2016 general election was beset by unprecedented parliamentary elections ever filed in the history of the electoral process in Zambia. Over *eighty* (80) petitions were filed in the High Court, and some went on appeal to the Constitutional Court. In the process of adjudication on those cases, it is considerably safe to say that some jurisprudence under the EPA 2016, has emerged regarding parliamentary petitions, and the EPA has been tested as to its strength or weakness in effectively combating electoral illegalities. Therefore, the 2021 parliamentary petitions, being the second set of petitions under a general election governed by the EPA 2016; the present petitions are relatively graced with sufficient home-grown case law, which this Court can easily have recourse to. Nevertheless, development of case law in this regard is unavoidably continuous, compounded by the fact that a case may have unique features never tried or determined before, especially that the political environment under which elections are conducted are invariably never the same.

The standard of proof required in an election petition has remained immutable. In **Akashambatwa Mbikusita Lewanika & Others v. Frederick Jacob Titus Chiluba [1998] Z.R. 79** Ngulube CJ., stated that:

... we wish to assert 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.

Ngulube CJ, further held:

It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity.

And the Constitutional Court in the case of **Steven Masumba v. Elliot Kamondo (Selected CCZ Judgment No. 53 of 2017)**

reaffirmed the standard of proof by holding that:

In election petitions the applicable standard of proof is higher than a mere balance of probability applicable in ordinary civil cases but less than beyond all reasonable doubt.

The EPA in section 97 promulgates grounds upon which an election of a candidate as a member of parliament may be declared void. The relevant portion, namely section 97 (2)(a)(b)(c) of the EPA is quoted hereunder:

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

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

(i) by a candidate; or

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

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

- (b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or*
- (c) the candidate was at the time of the election a person not qualified or a person disqualified for election.*

The test and approach to be applied whether to annul an election or not within section 97(2)(a) of the EPA was well outlined in the case of Richwell Siamunene (supra) thus:

First that a corrupt or illegal practice or other act of misconduct was committed by the Respondent in connection with the impugned election. Second, that the prohibited practice or illegal act was committed with the knowledge as well as the consent or approval of the Respondent's election or polling agent. Thirdly, that as a result of the misconduct, the majority of voters in the Constituency were or may have been prevented from electing the candidate in the Constituency whom they preferred.

An election or polling agent envisaged within the tenor of section 97(2)(a) is one duly appointed by a candidate in a prescribed format in accordance with section 35 of the EPA which provides:

35(1) A candidate may appoint-

- (a) two polling agents for each polling station; and*
- (b) two election agents for each venue where counting of the votes will take place.*

(2) An election or polling agent-

- (a) shall be a Zambian citizen or resident permit holder;*
- (b) shall not be a candidate in an election.*

(3) The appointment and revocation of appointment of a person as an election agent shall be effected in the prescribed manner.

In the present case it should be pointed out that, the first Respondent only had one election agent, namely, Wilbroad Musonda, who was appointed in accordance with section 35 of the EPA.

As stated above, it must be proved that the corrupt practice, illegal practice or misconduct thereof affected the majority of voters in a constituency, whereby the majority of voters were or may have been prevented from electing the candidate whom they preferred. And by majority, I reckon it mean that the corrupt practice, illegal practice or misconduct was wide spread in the majority of the wards in thw constituency.

If the question is answered in the negative that during campaigns or on poll day, the corrupt or illegal practice or other acts of misconduct was not committed by the respondent, or by his election agent or polling agent, or without the respondent's knowledge or consent or approval of the respondent's election or polling agent, but by others, other than the above named, such as ordinary party supporters, cadres or sympathisers on their own volition, the respondent cannot be held liable. And by law it is apparent that it matters less that the act or misconduct complained of was widespread and affected the fairness of the election.

This Court has no discretion to cast the net wider beyond the prescription of the law maker, and include corrupt acts or

misconduct of others not mentioned by the lawmaker to constitute wrongdoing to nullify an election.

The interpretation of corrupt practice under the EPA means any conduct which is declared to be corrupt in accordance with section 81 of the *EPA*, which generally covers instances of bribery. And illegal practice is defined to mean an offence which is declared under the Act to be an illegal practice. Additionally, section 97(2)(a) of the EPA invests in the Court wide discretion to consider other misconducts albeit not specifically listed, provided they have been committed in connection with an election.

And with the above guidance, I proceed to determine the allegations seriatim; and as pleaded and responded to by the first Respondent.

1. Allegations of collusion between the first Respondent and the Electoral Commission of Zambia

There is absolutely no evidence whatsoever to support this allegation that the first Respondent, his election agent, Wilbroad Musonda and the second Respondent colluded to interfere with ballot papers, so as to put the first Respondent in some form advantageous position than his competitors. It is not the first Respondent or his agent that directed the ECZ truck to go to Kutemwa Lodge, instead of going straight to the civic centre. What is even more evident is that at the material time the first Respondent and his election agent were not at the said lodge.

According to the testimony of the Petitioner, the truck was safely delivered to the civic centre. In fact, the Petitioner in cross-examination stated that this matter was resolved. Therefore, I do conceive how this allegation is capable of nullifying the election, when nothing illegal was occasioned concerning the ballots papers.

Likewise, the hiring of Wilbroad Musonda's motor vehicle by the ECZ through a third party cannot be construed to mean that it was meant to be used for illegal activities to benefit the first Respondent as a candidate in the said elections. In fact, the vehicle was hired in 2020, before the election agent was appointed, and even before the first Respondent was nominated as a candidate. The assumption that the hiring of Wilbroad Musonda's motor vehicle by the ECZ may have had an impact on the fairness of the poll was not proved to the required standard. The allegation was typically speculative and hinged on unfounded perception or fear of electoral malpractice.

2. Allegation of under age voters' registration supposedly recruited by the first Respondent.

It should be noted that recruitment and persuasion of persons not entitled to register as voters to register as a voter is unlawful with penal sanctions; section 81(1)(3)(4) of the EPA provides:

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

...

(3) A person, knowing that another person is not entitled to be registered as a voter, shall not— (a) persuade that other person that, that other person is entitled to be registered as a voter; or (b) represent to anyone else that the person is entitled to be registered as a voter.

(4) A person, knowing that another person is not entitled to vote shall not— (a) assist, compel or persuade that other person to vote; or (b) represent to anyone else that the other person is entitled to vote

In determining this allegation, I am mindful that registration of voters as prescribed by section 7 of the EPA is the preserve of the ECZ, which by law is supposed to discharge its functions independently and in an impartial manner. The allegation that the first Respondent instigated the ECZ to register under-age voters by bribing parents of under-age children to vote for the first Respondent is a very serious allegation, and given its gravity must be proved in accordance with the required standard of proof, thus a *fairly high degree of convincing clarity*. It is not enough to simply plead an allegation in the pleadings without adducing satisfactory evidence in support.

There is absolutely no proof to support this allegation. There is no proof that the first Respondent or his election agent illegally colluded with the ECZ and that the ECZ compromised its constitutional values, to allow registration of under-age voters in Mporokoso Constituency to favour the first Respondent. The Petitioner exhibited national registration cards and voters' cards of three individuals at pages 30 to 37 of his bundle of documents, however no witness was ever called to speak to those documents, not even did the Petitioner speak to the documents.

Inconceivably, the Petitioner said he did not consider it necessary to lodge a complaint, because he never thought that this was an issue,

and never thought of losing the election. Clearly, the allegation is unfounded.

3. Alleged electoral violence, prior to the election and during the election.

A parliamentary election is a competitive process, which demands that the parties participating in the process, especially the candidates render themselves governable by the Constitution of Zambia and the EPA. The EPA embodies the Electoral Code of Conduct enforceable by the ECZ. The Code serves as a guide to participants about what is and what is not acceptable behavior. This is necessary to bring about credibility, transparency, accountability, legitimacy, propriety, integrity, equality and fairness to the electoral process.

Above all, Article 45 of the Constitution of Zambia supremely ordains principles of electoral system and process, which *inter alia* include holding of free and fair elections, devoid of violence and intimidation.

Therefore, acts of violence, intimidation and threatening violence by a candidate or his election agent against his fellow candidates is unacceptable and unlawful. Such conduct is plainly made unlawful by section 83(1)(a) and (b) of the EPA. And such acts are amenable to constitute misconduct within the ambit of section 97(2)(a) of the EPA, and capable of nullifying an election if proved to the required standard.

The assault on the Petitioner as a parliamentary candidate on the UPND ticket and on his supporters, in particular Bertha Bwalya, malicious damage to his motor vehicle in full view of the police, and acts of terror through discharge of a firearm on June 26, by the PF cadres, namely Ernest Chongo, aka Chinzi America, Fumapo, and Charles Kashishi was not only unacceptable in the electoral sense, but criminal as well.

However, acts of the said PF cadres cannot be imputed on the first Respondent, or his election agent. Once again the case of **Richwell Siamunene** is instructive, the Constitutional Court held:

When section 83 is read with section 97, it is clear that the violence of 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. There was insufficient evidence to support a finding that the documented acts of violence that occurred after the nomination day were linked to the Respondent. Mere proof that the UPND supporters were indeed involved in the said acts could 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 the Court to make assumptions based on nothing more than party membership and candidacy in an election.

Undoubtedly, the first Respondent cannot be held liable for acts purely done by supporters of the party which sponsored him. And while it is not farfetched that the said violence may have to some extent destabilized the Petitioner's campaigns, the first Respondent cannot still be held consequentially answerable, because it was not the first Respondent or his election agent that committed the said

acts in the first place, neither was it done with his knowledge or approval.

The above holding applies to all other alleged acts of violence allegedly committed by the PF supporters including acts of arson, damage to property and violence, allegedly occasioned on: June 29, against Mr. Situmba's shed and Mr. Lukwesa's shop; and on July 1, assault on Mr. Mumpa's wife. There, is no proof to hold the first Respondent or/ and his election agent liable.

Likewise, the alleged discharge of a firearm at Lupungu Polling Station, and at Nyimbwi, the first Respondent or/and his election agent cannot be held liable for want of proof; there is no proof that the alleged acts were sanctioned by the first Respondent or his election agent.

Turning to the alleged discharge of a firearm by Wilbroad Musonda directed at the Petitioner on August 12, around 20:30; the Petitioner said this act consumed him with fear and prevented him from attending to the totaling of results at Bulangililo. The assault or threatening violence regardless of who did it, assuming it happened, is in my considered opinion an extraneous matter, as it were. It has no bearing on the voting process and the results thereof, as envisaged by section 97(2)(a) of the EPA, because as the Petitioner pleaded in paragraph 34 of his petition, the incidence allegedly happened when the counting of votes in various polling stations was taking place rather than during voting. In fact, by the Petitioner's own acknowledgment, it only affected him in the sense that he feared for

his life, and opted not to witness the totaling of results, upon being persuaded by his team to stay away from the totaling centre.

Nevertheless, it was argued that the Petitioner's absence may have afforded an opportunity to the first Respondent to steal his votes. The *default* assumption is speculative. There is no evidence that the first Respondent or/and the ECZ altered the results by taking advantage of the Petitioner's absence. And it is not true that the Petitioner's representative as alleged in his petition were not at the totaling centre, because the testimony of RW3, Raphael Chansa was clear that, the declaration of the results of the poll document for Mporokoso Constituency otherwise dubbed 'Gen 21' was signed by two of the Petitioner's representatives, including Ronald Mushikiti.

And most importantly, under section 36 of the EPA, it is stated that, absence of an election agent or polling agent from a gazzetted or prescribed place where an electoral proceeding is being conducted shall not invalidate the voting or/and counting of ballot papers or/and announcement or/and declaration of results. It follows, the absence of the Petitioner at the totaling center cannot be used as basis to annul this election.

4. Allegation of political victimization and intimidation of civil servants perceived to be sympathizer of the UPND.

Firstly, it should be pointed out that the Electoral Code of Conduct proscribes public officers from engaging in any partisan political activity while still serving in the public service. Therefore, during political campaigns, public officers are dutifully called to discharge

their mandate in a non-partisan manner, without fear or favour. And political parties must respect and promote these values during campaigns.

It is utterly unacceptable that the transfers, in particular of the two Police Officers, Martin Katongo and Stenbridge Samakai (PW8) were politically motivated, at the instigation of the PF party officials, because the officers were perceived to be sympathizers of the UPND. In that delegation of the PF officials that stormed the office of the officer-in-charge on August 27, the notorious Chinzi America was part of it; a suspect who should have been facing prosecution against the complaint that was lodged by the Petitioner on August 26, but was busy persecuting the Officer-in-Charge, Martin Katongo and PW8. The officers were helplessly threatened with dismissals or transfers, and their threats were not mere political threats, void of sanctions, but were swiftly acted upon by the Police Command.

On August 29, the two officers were disgracefully transferred out of Mporokoso District. The coincidence of their transfers and political intimidation was certainly unusual, and highly censurable.

However, there is no proof that was adduced to demonstrate how this allegation swayed the majority of voters from voting for the Petitioner. Most importantly, there is no proof that the first Respondent was the mastermind or that he politically instigated the transfers of civil servants perceived to be anti-PF. Similarly, the said party officials that perpetuated the witch-hunt against the said officers were not

the first Respondent's election agent or polling agent. Therefore, the first Respondent cannot be held responsible for their misconduct.

5. Allegation of hostile campaign environment and perpetuation of hate speech.

The Petitioner alleged that throughout the campaign period, the UPND was not allowed to campaign freely in the entire constituency as their campaigns were continuously disrupted by the first Respondents' agents. This allegation was too general, no specific acts of illegality or misconduct was adduced under this head for which the first Respondent or his election agent can be held liable. And there was no evidence adduced whatsoever to support the allegation that the first Respondent or/and his election agent preached hatred against the UPND and its leadership accusing it of being tribal, and that it should be denied campaign access to Luapula, Northern and Muchinga Provinces.

Similarly, no evidence was adduced whatsoever to speak to the fact that when the UPND presidential candidate tried to visit Mporokoso constituency to drum up support for the Petitioner, the first Respondent or his agent organized thugs and prevented the UPND presidential candidate from addressing any campaign rally in the constituency.

6. Allegation of abuse of government facilities to campaign for the first Respondent.

This allegation was unsubstantiated. There was no evidence adduced that the first Respondent or/ and his election agent abused

government facilities or public social services as alleged to campaign to the disadvantage of the Petitioner or other candidates. It was not specifically proved how the first Respondent commandeered or hijacked the social cash transfer from the Ministry of Community Development, to use it to his personal advantage to bribe voters to vote in his favour. The alleged hijack or usurpation of the mandate was not confirmed by any independent government official from whom the mandate was withdrawn. And no beneficiary of the said cash was called to testify and materially confirm the allegation.

7. Allegation of electoral malpractices on the polling day touching on bribery and feeding of electorates in order to induce them to vote for the first respondent.

The evidence relied on by the Petitioner to support this allegation essentially came from PW6, Jeremiah Lombe, PW7 Emmanuel Mulenga and PW9, Emmanuel Musonda. The trio testified that on August 11, the first Respondent personally dished out funds to bribe voters to vote for him.

According to PW6, the first Respondent distributed the money on August 11, between 14:00 and 15:00hours when he addressed a meeting at Mutitima in Chikulu Ward. And that on August 12, food was prepared and he partook in the meal.

PW7 said money was dished out by the first Respondent on August 11, at 11:00hrs to 12:30hrs when he addressed a meeting at

Sunkutu Village at 11:00 hours and the meeting ended at 12:30 hours.

And according to PW9, the money to bribe voters was distributed by the first Respondent on August 11, around 08:00hrs when he addressed a meeting at Chishamwamba. He also alleged that during the said meeting, the first Respondent visited the area with a truck load of mealie meal earmarked to feed electorates on the polling day. And that after voting, people were directed where to eat from, having voted for the PF.

These allegations were denied by the first Respondent, he denied visiting the alleged places on that date and bribing voters. He said he ceased his campaigns on August 10, and on August 11, he was through-out the day at his home in Misokolo Village awaiting the arrival of his family, and to vote on August 12. The first Respondent called witnesses to support his defence.

In determining this allegation, I am generally faced with conflicting testimonies between the Petitioner's witnesses, on the one hand and the first Respondent and his witnesses on the other hand. In the case of Attorney General v. Kakoma (1975) Z.R. 212 the Supreme Court guided as follows:

A court is entitled to make findings of fact where the parties advance directly conflicting stories, and the court must make those findings on the evidence before it and having seen and heard the witness giving evidence.

And in the case of Mushemi Mushemi v. The People (1982) Z.R. 71 the Supreme Court held:

The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of a witness. The judgment of a trial court faced with conflicting evidence should show on the face of it why a witness has been seriously contradicted by others is believed in preference to others.

The assessment of credibility of witnesses in a judicial fact-finding process especially in a politically charged election petition, can be daunting. A jurist, Evans Bell in his publication "***An Introduction to Judicial Fact Finding***" (***Commonwealth Law Bulletin*** 2013, page 519) aptly describes the challenges generally associated with assessment of credibility:

There are no rules of law for assessing credibility anymore than there are rules for assessing relevance. There is no formula for doing it. The evaluation is essentially a subjective judgment as a result of a number of factors whose varying weight depends upon the circumstances.

In general, the factors to be taken into account in assessing credibility are: demeanor, character, reliability, consistency, veracity, and motive.

It is acknowledgeable that sometimes demeanor in the witness box can be misleading (see ***Cambridge v. Makin (2011) EWHC 12 (QB)***). Nevertheless, Evans Bell makes this compelling observation:

“One of the advantages of the adversarial process is that the inner realities of a case are often much more apparent to the judge who watches the battle played out before him than those engaged in the fray. The parties ask questions so as to test the witnesses’ veracity. The judge listens and observes. At the end, the judge decides which of them is being truthful and which is not. It is not a perfect or infallible system, but a better one has yet to be devised.

An election petition is usually a politically charged legal battle. It is realistically correct to state that such a trial is usually not short of testimonies tainted with exaggeration and disinformation inspired by political bias or politically charged ulterior motives, including self serving interests.

A helpful guide on how to deal with evidence of partisan witnesses is drawn from the Constitutional Court in the case of Steven Masumba (supra) wherein it was stated that:

The evidence of partisan witnesses should be treated with caution and requires corroboration from an independent source in order to eliminate the danger of exaggeration and falsehood.

And it should also be pointed that the mere fact that a witness is not partisan, does automatically mean that the witness is credible or reliable. The court must never lose its sense of alertness.

As earlier noted, the testimonies of PW6, PW7, and PW9 are in sharp contrast with the testimonies of the first Respondent and his witnesses regarding where he was on August 11. As guided in the case of Mushemi v. The People (supra) the testimonies or evidence of PW6, PW7, and PW9, in terms of credibility should not be assessed in isolation of what the first Respondent and his witnesses said.

In order for the testimonies of PW6, PW7 and PW9, to be believable, as hard facts, the same must first meet the threshold of *a fairly high degree of convincing clarity*, otherwise, an *alibi* raised by the first Respondent believable on a balance of probability is sufficient to materially discount the testimonies of PW6, PW7 and PW9.

The testimony of the first Respondent and his witnesses, that on August 11, he was through-out at Misokolo Village rather than at the places alleged by PW6, PW7, and PW9 is probable. And it should be pointed out that the testimonies of PW6, PW7 and PW9, were not respectively corroborated. That being the case, and in the circumstances of this case, it cannot be said the testimonies of PW6, PW7 and PW9 is both credible and reliable to *a fairly high degree of convincing clarity*. And for the avoidance of doubt having heard and seen the first Respondent and his witnesses, I do not think they colluded to make a false *alibi*.

PW6, PW7, and PW9 cannot be said to corroborate one another because they were in different places at different times when they allegedly encountered the first Respondent. It was alleged that apart from PW6, PW7 and PW9, including an identified group called Kola to which PW9 belonged and many others received bribes from the first Respondent, as an inducement to vote for him, however, none of those people were called to testify and corroborate the testimonies of PW6, PW7, and PW9, and possibly make the Court clearly and convincingly satisfied as to the veracity of the allegation, and possibly render the first Respondent's *alibi* improbable.

Apart from lack of corroboration as stated above, the character of PW9, Emmanuel Musonda of Chishamwamba, was highly suspect; casting aspersions on his credibility and reliability. Going by his testimony, he was not only quick to denounce and lament on the alleged corruption and malpractices, he was also paradoxically quick to gladly receive the money, and accepted to execute further

instructions beyond his village allegedly at the instance of the first Respondent yet he claims he was not a PF member, but non-partisan.

There is also no clear and convincing evidence that the first Respondent or/and his election agent on August 11 and 12, set up pay points, to bribe voters enroute to vote using social cash transfer to vote for him. Equally, there is no evidence that the alleged cooking of food on the poll day and ferrying of voters was sanctioned and sponsored by the first Respondent or/and his election agent. The allegation that some disabled people were unduly misdirected to vote for the first Respondent, at Kambobi Polling Station as alleged by the Petitioner was hearsay, with no linkage whatsoever to the Respondents.

CONCLUSION

Having carefully considered the evidence adduced by the Petitioner and the first Respondent respectively, it is safe to conclude that all the allegations pleaded in this petition have not been proved to the required standard to warrant nullification of the election within the purview of the whole section 97(2) of the EPA.

And for the avoidance of doubt, there is no evidence to find the ECZ wanting to warrant nullification, in particular within the ambit of section 97(2)(b) of the EPA for non-compliance with the EPA in the conduct of elections, so as to affect the results of the said election.

I, therefore, judicially and judiciously declare that the first Respondent, Brian Muntayalwa Mundubile was duly elected as

Member of Parliament for Mporokoso Constituency in the 2021 general election. The petition is entirely dismissed.

Finally, in an election petition, where the petitioner is unsuccessful, costs are awarded against the petitioner if there was no legal or factual justification for the petitioner to petition the election results (see *Lazarous H. Chota v. Patrick Mucheleka & Another (SCZ Appeal No. 18 of 2015)*). The mere fact that the petition is unsuccessful, does not automatically or necessarily mean that there was no legal or factual justification to take out the petition. Accordingly, in the present case, I make no order as to costs.

Leave to appeal granted.

DATED THIS 22ND DAY OF NOVEMBER, 2021.



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THE HON. MR. JUSTICE CHARLES ZULU