IN THE CONSTITUTIONAL COURT OF ZAMBIA 2021/CCZ/A0033

HOLDEN AT LUSAKA

(APPELLATE JURISDICTION)

IN THE MATTER OF:	ARTICLE 73(1) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016.
IN THE MATTER OF:	SECTIONS 97 (2) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.
IN THE MATTER OF:	SECTIONS 98(c), 99(a), 100(2) (a), 106 (1) (b), 108 (1) & (4) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF:	THE PARLIAMENTARY ELECTION FOR KAMFINSA CONSTITUENCY OF THE DISTRICT OF KITWE HELD ON 12TH DAY OF AUGUST, 2021.

BETWEEN:

SUBETA MUTELO K. APPELLANT

AND

KANG'OMBE CHRISTOPHER 1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA 2ND RESPONDENT

CORAM: Sitali, Mulenga, Mulonda, Chisunka and Mulongoti, JJC

On 17th May, 2022 and 29th July, 2022

For the Appellant:	*Mr. K. Chali of G.M. Legal Practitioners*
For the 1st Respondent:	*Mr. N. Simwanza, Mr. Y.S Simukonda and Mr. M. Mahenda of Noel Simwanza Legal Practitioners*
For the 2nd Respondent:	*Mr. B.M. Musenga, Ms. T.K. Phiri and Mr. M. Bwalya-In house Counsel-ECZ*

JUDGMENT

Mulongoti, JC, *delivered the Judgment of the Court*

Cases referred to:

1. *Margaret Mwanakatwe v Charlotte Scott and another CCZ Judgment No. 50 of 2018.*
2. *Brelsford James Gondwe v Catherine Namugala SCZ Appeal No. 129 of 2012.*
3. *Anderson Kambela Mazoka and others v L.P. Mwanawasa and The Attorney General, (2005) Z.R. 138.*
4. *Akashambatwa Mbikusita Lewanika and others v F.T.J. Chiluba (1998) Z.R. 79.*
5. *Mohamed v The Attorney General (1982) Z.R. 49 (SC)*
6. *Nkhata & others v The Attorney General (1966) Z.R. 124.*
7. *Zulu v Avondale Housing Project Limited (1982) Z.R. 172.*
8. *Abuid Kawanga v Elijah Muchima CCZ Appeal No. 8 of 2017.*
9. *Austin Milambo v Jamba Machila CCZ Appeal No. 6 of 2016*
10. *Jonathan Kapaipi v Newton Samakayi CCZ Appeal No. 13 of 2017.*
11. *Stephen Masumba v Elliot Kamondo CCZ Selected Judgment No. 53 of 2017.*
12. *Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General CCZ Selected Judgment No. 51 of 2018.*
13. *Kabwe Taulo Chewe v Patrick Mucheleka and George K. Mwamba CCZ/2021/0023*
14. *Mubika Mubika v Poniso Njeulu SCZ Appeal No.114 of 2007*
15. *Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014.*
16. *Austin Liato v Sitwala Sitwala CCZ Selected Judgment No. 23 of 2018.*
17. *Richwell Siamunene v Sialubalo Gift CCZ Selected Judgment No. 58 of 2017*
18. *Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia CCZ Appeal No. 2021/CCZ/A0012 (unreported)*
19. *Sithole v State Lotteries Board (1975) Z.R. 140, 151*

Legislation referred to:

1. *The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Electoral Process Act No. 35 of 2016*
3. *The Electoral Code of Conduct (Schedule) Act No. 35 of 2016*

Other works:

1. ***The International Foundation for Electoral Systems Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (2011, P86-87).***

[1.0] Introduction

[1.1] This appeal is against the decision of the High Court which dismissed the election petition of Subeta Mutelo K. (referred to herein as the appellant). The appellant sought nullification of the election of Kang'ombe Christopher (referred to herein as the 1st respondent) as Member of Parliament (MP) for Kamfinsa Constituency in Kitwe.

[1.2] In dismissing the petition, the High Court found that there were no statistics before it to prove that the alleged electoral malpractices committed by the 1st respondent, prevented the majority of the registered voters from electing their preferred candidate.

[2.0] Background facts

[2.1] On 12th August, 2021, the Electoral Commission of Zambia, the 2nd respondent herein, conducted general elections countrywide.

[2.2] The appellant and 1st respondent were among candidates vying for election as MP for Kamfinsa Constituency. The appellant was the

candidate for the United Party for National Development (UPND) while the 1st respondent was the candidate for the Patriotic Front (PF) party.

[2.3] At the close of the polls, the 2nd respondent declared the 1st respondent as the duly elected MP for Kamfinsa Constituency.

[2.4] Aggrieved by this outcome, the appellant petitioned the High Court alleging that the 1st respondent had committed electoral malpractices. The electoral malpractices relevant to this appeal were stated in the Petition appearing at pages 158 to 165 of the record of appeal verbatim as follows:

> ***5. In the referred to elections, the 1st respondent was NOT DULY ELECTED owing to the fact that the 1st respondent by himself, servants, agents and other persons on his behalf are guilty of general illegal and corrupt electoral offences and campaign malpractice which, inter alia, include-***
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> ***5.2 On 31st July, 2021 the 1st respondent used the Wesley Nyirenda Secondary School grounds, a government owned facility and held a campaign rally in contravention of the Electoral Act and Covid-19 Electoral Code of Conduct.***
>
> ***5.3 On 10th August, 2021 the 1st respondent held a rally in Mulenga compound in the Constituency contravening the Covid 19 rules and guidelines and Electoral Code of Conduct.***
>
> ***5.4 On 29th May, 2021 the 1st respondent organized and held a meeting at Ndeke Secondary School Hall, a government owned facility in contravention of the Electoral Act.***

8. *The 1st respondent by himself, servants, agents and other persons on his behalf breached the Electoral Process Act, the Covid 19 guidelines, caused voter intimidation, his campaign was characterized by severe malpractice and committed numerous electoral offences prior to and during the election, which include inter alia:*

8.1 *The petitioner reiterates that on 3rd June, 2021 the 2nd respondent through its Chief Electoral Officer suspended all campaign rallies and meetings.*

8.2 *On 11th August, 2021 at around 06:00 hours, the 1st respondent went to Kamfinsa Prison (the Prison), was allowed entry therein by the Prison officials and thereat held a campaign meeting where he introduced himself and said he was sent by the Republican President to tell the inmates that they should vote for him and the Republican President and let them know their problems.*

8.3 *The 1st respondent further asked if the beef that he had brought on 10th August, 2021 was enough. Upon being told it was not enough he arranged for more beef for the prisoners.*

8.4 *Further, the 1st respondent offered and gave the prison warders K20,000.00 for purposes of sharing the same to the prisoners of which it was shared among some of the prisoners and in addition some warders received K200 each.*

8.6 *A Mr. Chisanga Siame the Deputy Officer in Charge was going round the prison cell and telling inmates that they had to vote for the 1st respondent and all PF candidates.*

8.8 *On 2nd and 11th August, 2021 prison warders were given a bag of mealie meal each.*

8.10 *On the 8th July, 2021 the 1st respondent organized and conducted a door-to-door distribution of mealie meal in the Kamfinsa prison camp which was being carried on a Zambia Army truck.*

8.11 *On 2nd July, 2021 the 1st respondent together with the Kitwe District Education Board Secretary (DEBS), organised and held a campaign meeting with teachers of Kamfinsa Secondary School (the teachers) in the school hall, where he distributed mealie meal and K120.00 (One*

hundred and twenty Kwacha) each to all the teachers and people present.

8.12 The DEBS in fact enticed and told the teachers that they needed to vote for the 1st respondent and President Lungu and that they had no choice but to vote for the 1st respondent and President Lungu because the serial numbers of the ballot papers they would vote on would be known and a teacher who voted for UPND or the Petitioner would be retired in national interest.

9 The 2nd respondent by its agent, servants, workers and other persons on its behalf breached the Electoral Act, Electoral Code as well as committed proscribed electoral offences in the capture and entry of valid votes cast in numerous Polling Stations that consequently influenced the outcome of the election in the 1st respondent's favor and to the detriment of the Petitioner. (sic)

[2.5] Going by these allegations the appellant sought the following:

(i) That it be determined and declared that the said Kang'ombe Christopher was not duly returned or elected as Member of Parliament for Kamfinsa Constituency.

(ii) That it be determined and declared that both the 1st respondent's election and return were null and void. (sic)

(iii) That it be declared and ordered that the said Kang'ombe Christopher's seat is vacant.

(iv) That it be directed and ordered that costs of this Petition be borne by the respondents.

[2.6] The 1st and 2nd respondents filed their respective Answers denying the appellant's allegations. The 1st respondent averred that it was in fact the appellant who committed electoral malpractices. The 2nd respondent averred that its agents, servants, workers and

employees did not breach the Electoral Act and the Electoral Code and they did not commit any proscribed electoral offences.

[2.7] At trial the appellant called 17 witnesses. The 1st respondent called 6 witnesses while the 2nd respondent did not adduce any oral evidence.

[3.0] ***Decision of the High Court***

[3.1] After analysing the evidence adduced before it, which included videos, audios and pictures filed by both the appellant and 1st respondent, the trial court dismissed the appellant's case and declined to grant the prayers sought.

[3.2] In dismissing all the allegations the trial court found that the appellant failed to prove that money was paid to the people who attended the 1st respondent's campaign rallies held at Ndeke and Wesley Nyirenda Secondary Schools. Additionally, that the appellant's witnesses who testified that the 1st respondent bribed inmates and prison warders with money contradicted themselves as to the amounts given to the inmates and the warders respectively. The allegations were dismissed on that premise. Furthermore, that the appellant failed to prove that the three cows

which were delivered to Kamfinsa Correctional Facility (KCF) on 9th August, 2021 in the prison's truck were donated by the 1st respondent and meant to feed the inmates. The trial judge reasoned it could not make a finding of fact that the cows were supplied by the 1st respondent based on the evidence of the inmates only because their evidence had been discredited.

[3.3] The allegation that the 1st respondent held a rally in Mulenga Compound was also dismissed. The Court found that it could not be proved from the picture availed to it that the 1st respondent held a rally on the 10th of August, 2021 during the ban or suspension of physical campaigns.

[3.4] The trial court further found that the 1st respondent was not at the rally held at Kamfinsa Secondary School, as no video evidence was adduced by the appellant to prove it, as she did with the rallies held at Ndeke and Wesley Nyirenda Schools.

[3.5] The trial court concluded that all the appellant was able to prove to the requisite standard was that the 1st respondent held campaign rallies in government facilities at Ndeke Secondary School in Ndeke ward and at Wesley Nyirenda Secondary School in Bupe ward contrary to section 15(1) (k) of the Electoral Code of Conduct.

[3.6] Ultimately, the trial court dismissed the Petition on the premise that the appellant failed to prove that the majority of the registered voters in Kamfinsa Constituency were prevented from voting for their preferred candidate because of the campaign rallies as the appellant did not produce any statistics of registered voters who attended the rallies.

[3.7] Accordingly, that since no statistics were placed before it, the appellant had not discharged the burden of proving that the majority were affected with a high degree of convincing clarity.

[4.0] The Appeal

[4.1] Dissatisfied with the Judgment of the trial court the appellant appealed to this Court raising seven grounds of appeal couched thus:

1. ***At pages "J84, J86 and J100 lines 1 to 7", and at page "J118 lines 14 to 17" the Court below found as a fact that contrary to the Electoral Process Act, the 1st respondent held illegal Campaign rallies at Ndeke Secondary school and at Kamfinsa Correctional Facility, thus erred both in law and fact when she held that in view of the evidence before her, notwithstanding the Petitioner having proved the said allegations of electoral malpractice to the required high degree of convincing clarity, the said acts did not affect the outcome of the election and prevent the majority of voters from voting for their preferred candidate, and, that money was not given thereat as an inducement for votes.***

2. *At "J116" lines 3 to 7, the lower Court having found that the evidence of PW5, PW6 and PW7 of receiving mealie meal at the instance of the 1st respondent at Kamfinsa Prison Camp to solicit for votes was corroborated, the lower Court erred both in law and fact when it held that the petitioner has failed to prove the allegations of the 1st respondent giving out the said mealie meal by himself or with his knowledge to a high degree of convincing clarity.*
3. *The lower Court erred in both law and fact when it held that the allegation of the 1st respondent holding an illegal campaign rally in Mulenga Compound was not proved to the required standard and that it did not affect the outcome of the election despite finding as a matter of fact at page "J88 lines 22 to 24 leading to lines 1 to 6" that the 1st respondent held an illegal campaign rally in Mulenga Compound after the adoption process and during the campaign period contrary to the Electoral Process Act.*
4. *The lower Court erred both in law and fact when it was held that the allegation of the 1st respondent holding an illegal campaign rally at Kamfinsa Secondary School was not proved and it did not influence the outcome of the election and prevented the majority of voters from voting for their preferred candidate despite finding as matter of fact at page "J97" that the Kitwe District Education Board Secretary (DEBS) was at the said rally and that the Evidence of PW9, PW10, PW13 and RW3 placing the 1st respondent at the said illegal rally to solicit for votes was corroborated, and at page "J99 line 5 to 12" that the words of the DEBS at the said rally was an inducement and a threat.*
5. *The lower Court erred both in law and fact when it was held at page "J127 lines 9 and 10" that the petitioner failed to prove the allegations against the 2nd respondent to a high degree of convincing clarity notwithstanding the provided evidence of missing Gen 20 forms and the Record of Proceedings.*
6. *The lower Court erred both in law and fact when it was held at "J137 lines 16 to 25" that the petitioner had a burden to prove the statistics*

of the registered voters and to prove that the voters had change of heart due to the illegal conduct of the 1st respondent.

7. ***Having found as a fact that the petitioner had proved the allegations in the petition, the Court below fail into error in law and in fact when she held that the illegalities were not widespread in the constituency and the proved facts were not shown to sufficiently conclude that the voters were prevented from voting for their preferred candidate contrary to the evidence on record placing illegalities in all four wards of Kamfinsa Constituency.***

[5.0] The Arguments

[5.1] The appellant filed Heads of Argument in support of the appeal which Mr. K. Chali, counsel for the appellant, relied upon at the hearing of the appeal. Grounds one, two, three, four and seven were argued together.

[5.2] Counsel submitted that the arguments were premised on Article 73 (1) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and section 97 (2) (a) of the EPA. That a reading of section 97 (2) (a) of the EPA reveals that the key elements to be established before an election is nullified are that the candidate personally committed a corrupt or illegal practice or misconduct, or the same were committed by another person with the candidate's knowledge, consent or approval or with the knowledge, consent or approval of that candidate's election or polling agent. And, that the petitioner

must prove that as a result of the corrupt or illegal practice or misconduct, the majority of the electorate were or may have been prevented from electing their preferred candidate. The case of **Margaret Mwanakatwe v Charlotte Scott and another**[1] was cited in support of this argument.

[5.3] Regarding the standard of proof, it is argued that in election cases it is higher than the balance of probabilities for ordinary civil matters. Reliance was placed on the cases of **Brelsford James Gondwe v Catherine Namugala**[2]**; Anderson Kambela Mazoka and others v L.P. Mwanawasa and the Attorney General**[3]; and **Akashambatwa Mbikusita and others v F.T.J Chiluba**[4]. After quoting sections 81(1) (a) and 83 (1) (c) (iv) of the EPA on prohibited acts during election campaigns, counsel wondered how the trial court having found at paragraph 32.6, of the Judgment that PW16's testimony was plausible when he stated that he had received K20 from the 1st respondent, went on to contradict itself when it concluded that there was no evidence of money being paid out to people at Ndeke Secondary School rally.

[5.4] Learned counsel further impugned the trial court's finding, that the testimony of PW17 was credible when he testified that money was given at Wesley Nyirenda school, yet it discredited this evidence on

the basis that PW17 walked away and thus, did not know if it was the 1st respondent who gave out the money. Counsel argued that the trial court erred in this regard as a proper evaluation of the evidence should have been that money was given out at Wesley Nyirenda Secondary School.

[5.5] In relation to the allegation of the campaign rallies held at KCF as well as money and beef being given to the inmates, counsel argued that the trial court erred in holding at paragraph 32.58 of the Judgment that there were contradictions in the witnesses' evidence on where the money came from. It was counsel's view that the trial court contradicted itself as it had made a finding on paragraph 32.54 page 121 of the record of appeal that the evidence of PW2, PW3 and PW4 was corroborated with regards to the 1st respondent holding rallies, giving out meat and money to the inmates at KCF.

[5.6] Counsel further questioned the trial court's reasoning when it stated at paragraph 32.63 of the Judgment that it was at pains to accept statements of the inmates at KCF that they had never eaten meat provided by the prison. On the contrary, counsel maintained that the trial court did not properly evaluate the evidence of PW2 found at paragraph 7 on page 50 of the record of appeal where he stated

that part of their grievance was that the prison did not provide them with meat and that is what led the 1st respondent to promise them beef. That what the trial court assumed was a rehearsed and hollow testimony by PW2 that meat was never provided, was actually a fact and was sufficiently corroborated by PW3 and PW4.

[5.7] Furthermore, that there was video footage which showed the cows being delivered at KCF and the trial court's finding at paragraph 32.63 of the Judgment, that because the cows were delivered by the prison truck it is not the 1st respondent who provided them, was a misdirection in law and fact.

[5.8] With regard to the allegation that money was given to the prison officers at KCF, it is the appellant's contention that there was evidence through the testimony of PW5 at paragraph 10 on page 53 of the record of appeal, that the 1st respondent addressed the prison officers and stated that he would leave them something. After addressing them the 1st respondent went into the Office of Mr. Siame the Deputy Officer In Charge (DOIC) at KCF. After that Mr. Siame called the accountant who then distributed the money. Mr. Siame received a K200. According to counsel this evidence was corroborated by PW7 and PW8. Thus, the discrepancies between

the prison officers as to how much was left by the 1st respondent is normal and that it should not discredit the evidence that the 1st respondent paid the prison officers so that they could vote for him.

[5.9] Learned counsel canvassed further that the trial court, having found that the evidence of PW5, PW6 and PW7 who are prison officers, was corroborated on each one of them having received a bag of mealie-meal, erred when it held that the said mealie-meal could not have come from the 1st respondent. That a careful examination of the testimony of PW5 and that of PW6 shows that the bags of mealie-meal were delivered by Mr. Siame who stated that they were from the PF.

[5.10] It was contended that the trial court erred in not addressing her mind to the fact that Mr. Siame, being in a position of power as DOIC at KCF unduly influenced the prisoners to vote for the 1st respondent, a fact the Court acknowledged at paragraph 32.58 of the Judgment.

[5.11] With respect to the allegation that the 1st respondent held an illegal rally at Mulenga Compound, counsel argued that the trial court, having found at paragraph 32.19 of the Judgment that there was clear proof that the 1st respondent held an illegal rally in the said

compound, erred in holding that it had not been proved to the required standard of proof as the image produced to prove this assertion was not dated. It is submitted that the trial court misdirected itself in not considering the fact that the said picture of the rally was taken prior to 3rd June, 2021 before the ban of rallies by the 2nd respondent. The 1st respondent testified that the picture was taken prior to his adoption, an assertion which the trial court itself found improbable. Thus, the fact that the 1st respondent tried to paint that the picture was taken earlier, before the suspension of rallies, and the fact that he admitted being at Mulenga Compound on the material date, points to the fact that the said picture was taken during the suspension of rallies and the Court should have found as such.

[5.12] Regarding the rally held at Kamfinsa Secondary School, counsel contends that the trial court erred when it held that the said rally was neither held at the instance of the 1st respondent, nor was the 1st respondent in attendance. Counsel submitted that the presence of the 1st respondent at this rally was confirmed by the testimonies of PW9, PW10 and PW13 and that this fact was also noted by the trial court on paragraph 32.36 of the Judgment. And that their

testimony was confirmed by the 1st respondent's own witness' testimony, RW3, who stated at page 107 of the record of appeal that he saw the 1st respondent at Kamfinsa Secondary School. However, being a witness with an interest to serve RW3 stated that he saw the 1st respondent inspecting a classroom block.

[5.13] Still at Kamfinsa Secondary School, counsel submitted that the 1st respondent together with the DEBS and the Kitwe District Commissioner (DC) gave money as inducement for votes. The trial court therefore erred in holding that there was no evidence of the 1st respondent giving money on the basis of the inconsistencies and discrepancies in the testimonies of PW10 and PW13 as to the total amount of money given and what amount was attributable to the 1st respondent, the DEBS and the DC.

[5.14] In light of the above arguments, counsel maintained that the trial court not only should have found that the 1st respondent held illegal rallies at Ndeke Secondary School, Wesley Nyirenda Secondary School, KCF, Mulenga Compound and Kamfinsa Secondary School, but it should have made a finding that the said rallies affected the outcome of the election as opposed to the holding that the rallies were not widespread. Learned counsel amplified that the

1st respondent held rallies in three (3) out of the four (4) Wards that are in Kamfinsa Constituency and therefore, the malpractice was widespread as to influence the majority of voters in the constituency.

[5.15] On ground five, counsel submitted that the trial court, having found that the appellant had proved that the Gen 20 Forms had clerical errors, being overwritten or were illegible, should have addressed its mind to the fact that these discrepancies left room for the results to be manipulated.

[5.16] On ground six, counsel argued that the trial court erred when it held on paragraph 34.8 of the Judgment that the appellant should have adduced evidence in the form of statistics of registered voters in the areas where the 1st respondent perpetuated the malpractice, details of the number of polling stations affected or where people who attended the rallies came from. According to counsel the law as provided by Article 73 (1) of the Constitution of Zambia (Amendment) Act, section 97 (2) (a) of the Electoral Process Act and as held in **Margaret Mwanakatwe v Charlotte Scott and another**,[1] does not envisage this standard of proof.

[5.17] In concluding his arguments, counsel submitted that a proper analysis of the facts from the documents on the record of appeal and the appellant's arguments would show that the trial court erred in both law and fact when it held that the appellant had not proved the allegations to the required standard of proof of a fairly high degree of convincing clarity. The cases of **Mohamed v The Attorney General**[5]; **Nkhata and others v The Attorney General**;[6] and **Zulu v Avondale Housing Project Limited**,[7] were referred to, to highlight circumstances when an appellate court can interfere with findings of fact made by a trial court. We were urged to allow the appeal on the basis of these authorities and the appellant's arguments.

[5.18] The 1st respondent filed his Heads of Argument which his counsel Mr. Simwanza augmented at the hearing. It is the 1st respondent's submission that this Court should render the appellant's appeal unsuccessful on all grounds based on the fact that the appellant failed to prove her allegations to the requisite standard as established in the Supreme Court election case of **Anderson Kambela Mazoka, Lt. General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, Electoral Commission of Zambia and The Attorney General**[3] that *"As regards the burden of proof, the evidence adduced must*

establish the issues raised to a fairly high degree of convincing clarity", and restated by this Court in **Abuid Kawangu v Elijah Muchima.**[8]

[5.19] Citing the cases of **Austin Milambo v Jamba Machila**[9] and **Jonathan Kapaipi v Newton Samakai**[10] it is argued that an election can only be nullified where it is proved that the electoral malpractice was committed by the candidate himself/herself, or by another person with the candidate's knowledge and consent or approval or by the candidate's election or polling agent.

[5.20] Citing the cases of **Stephen Masumba v Elliot Kamondo;**[11] **Jonathan Kapaipi v Newton Samakayi;**[10] and **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General,**[12] it was the appellant's further submission that for an election to be nullified, it has to be proved that the electoral malpractice was so widespread that the majority of the voters were, or may have been influenced by it and prevented from electing a candidate of their choice.

[5.21] The gravamen of the 1st respondent's arguments on ground one is that the learned trial court was on firm ground when it found that the appellant only managed to prove to the required standard that campaign rallies took place at Ndeke Secondary School. There was

no cogent evidence to support PW16 that he was given K20 at Ndeke Secondary School. We were urged to dismiss this aspect of the appeal as it was wrongly challenging sound findings of fact contrary to our recent decision in the case of **Taulo Chewe v Patrick Mucheleka & George K. Mwamba.**[13]

[5.22] With regards to KCF, counsel submitted that the trial court considered the allegations of money and mealie-meal being given to the inmates and prison officers as inducement, as well as cattle being delivered to the prison at pages J103 to J118 of the Judgment. That the trial court considered the inconsistencies and discrepancies in the testimonies of PW2, PW3 and PW4 with regards to who or where the money came from and at what point the money was given, and consequently declined to make any findings of fact that the 1st respondent gave money to the inmates for campaign purposes. According to the 1st respondent, the only allegation that was proved was that of the rally being held, but the appellant failed to prove that the said rally prevented the majority of the electorate from voting for their preferred candidate.

[5.23] As regards ground two which assails the finding that there was no evidence attributing mealie-meal distribution at KCF to the 1st

respondent, counsel submitted that PW5, PW6 and PW7 who testified to mealie-meal being received at KCF, did not testify to the same being distributed by the 1st respondent himself nor with his knowledge or consent, in line with our decision in **Austin Milambo v Jamba Machila.**[9] Counsel submitted that this ground challenged the trial court's finding of fact but no evidence had been presented to fault the same. Reliance was placed on cases of **Zulu v Avondale Housing Project Limited**[7] and **Kabwe Taulo Chewe v Patrick Mucheleka & George K. Mwamba.**[13]

[5.24] On ground three, it is argued that the evidence which was produced in support of the allegation that the 1st respondent held a rally at Mulenga Compound was a photo. The trial court found that the appellant had not proved with convincing clarity that the picture/photo relied on depicted the 1st respondent holding a rally on 10th August, 2021 in Mulenga Compound, as the said picture did not have anything on it to confirm the date or indeed the venue of the said rally. It is argued that in the absence of such key evidence and authentication, the trial court was on firm ground in holding that the picture did not meet the required threshold of proof to a fairly high degree of convincing clarity.

[5.25] On ground four of the appeal relating to the holding of an illegal rally at Kamfinsa Secondary School, the respondent called in aid the case of **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General**[12] on the need to prove that the electoral malpractice was conducted personally by the person whose election is challenged or through his/her election or polling agent. Counsel submitted that the trial court held at page 111 of the record of appeal that the appellant did not provide any picture or video evidence to support the allegation that the 1st respondent held a rally at Kamfinsa Secondary School on 2nd August, 2021.

[5.26] It was the further submission of counsel that the trial court went on to find that there was no evidence that the giving or gifting of any inducement was attributable to the 1st respondent. That the green military truck which delivered the mealie meal could not be assumed to belong to the 1st respondent. In addition, that the trial court found at page 113 line 17 that the words of the DEBS although held to be an inducement, there was nothing before it to suggest that the words were made with the knowledge of the 1st respondent. The trial court was therefore on firm ground to hold that all

allegations at Kamfinsa Secondary School were not proved as having been at the instance of the 1st respondent.

[5.27] On ground five which assails the trial court's finding that the allegations against the 2nd respondent had not been proved, counsel contended that the trial court was on firm ground in holding that the act of PW11 being chased out of the polling station did not influence the outcome of the election in favour of the 1st respondent, to the detriment of the appellant as another agent of the appellant remained inside the polling station and observed the proceedings. Learned counsel amplified that it is not for the courts to delve into the ambit of assumptions nor is it the trial court's duty to prove a petitioner's case as suggested by the appellant in paragraph 47 of her Heads of Argument that the trial court should have addressed the discrepancies in the Gen 20 Forms.

[5.28] On ground six which impugns the trial court's finding that the petitioner had the burden to provide statistics of registered voters and to prove how the alleged illegal acts influenced the electorate, counsel argued that the petitioner bears the burden of proof and in election petitions it is higher than the standard in ordinary civil proceedings. Additionally, that the petitioner has to show how the

electoral misconduct influenced the electorate. The trial court at paragraph 34.15 of the Judgment, in addressing this fact, referenced the case of **Mubika Mubika v Poniso Njeulu**[14] where the Supreme Court stated that in proving the widespread of an electoral misconduct, statistics of registered voters should be given. That the trial court was therefore on firm ground in holding the way it did.

[5.29] Ground seven which contends generally that the trial court erred in holding that the illegalities were not widespread and that the proved facts were not shown to sufficiently conclude that the majority of the voters were prevented from voting for their preferred candidate, was argued on the premise that the trial court did not find that the petitioner had proved the allegations in the petition. That the only allegations proved were those relating to the rallies being held at Ndeke Secondary School, Wesley Nyirenda School and KCF and the rest of the allegations failed for lack of evidence supporting them to the required standard.

[5.30] Counsel maintained that the appellant failed to afford the trial court an opportunity to discern the majority principle when she did not adduce evidence of the statistics for the ward. As such, the appellant failed to discharge the burden of proof to the required

standard and urged us to dismiss the appeal and grounds raised for lack of merit.

[5.31] The 2nd respondent filed its Heads of Argument which Mr. Musenga relied upon at the hearing. It is submitted that the standard of proof in election petitions is to a high degree of convincing clarity as held in the cases of **Akashambatwa Mbikusita and others v F.T.J Chiluba**[4] and **Saul Zulu v Victoria Kalima.**[15] Citing the case of **Nkandu Luo v Doreen Sefuke Mwamba and another**[12] where this Court interpreted the import of section 97 (2) of the Electoral Process Act, counsel submitted that the petitioner must prove that the electoral malpractice was committed by the candidate whose election has been challenged, or by their election or polling agent. Furthermore, that it must be proved that the said malpractice was widespread and influenced the election outcome. That the burden of proof lies on the petitioner as held in the case of **Abuid Kawangu v Elijah Muchima**[8] and restated in **Austin Liato v Sitwala Sitwala.**[16]

[5.32] Learned counsel amplified that a candidate can only be held liable for their own misconduct or that of an appointed agent as held in **Akashambatwa Mbikusita and others v F.T.J Chiluba**[4] and that in accordance with the holding of **Richwell Siamunene v Sialubalo Gift**,[17]

a general allegation that the supporters of a particular party were implicated in a misconduct is not enough to attach responsibility to the respondent.

[5.33] On the basis of the authorities above, the 2nd respondent concluded that the trial court was on firm ground when it held that the appellant had the burden to prove the statistics of the registered voters and to prove that the voters had a change of heart due to the illegal conduct by the 1st respondent. Since there were no statistics that were availed to the trial court the appellant did not discharge the burden. In support of this argument, the cases of **Anderson Kambela Mazoka and others v L. P. Mwanawasa**[3] and **Mubika Mubika v Poniso Njeulu**[14] were relied upon.

[5.34] On ground five, the 2nd respondent argued that the trial court was on firm ground to hold that there were no witnesses called to support the host of allegations in paragraph 9 of the Petition regarding the Gen 20 forms. Our decision in the case of **Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia**[18] was relied upon to the effect that cogent evidence must be produced to prove that the election was not conducted in substantial conformity with the provisions of the EPA.

[6.0] Decision on Appeal

[6.1] We shall consider grounds one to four, six and seven simultaneously as they are interlinked. Ground five relates to the 2nd respondent and will be dealt with separately. As we see it, the cardinal issue this appeal raises is whether the appellant proved her case to the requisite standard of proof of a fairly high degree of convincing clarity that the majority of voters in Kamfinsa Constituency were prevented from electing a candidate of their choice due to the campaign rallies held during the ban at Ndeke and Wesley Nyirenda Secondary Schools and KCF. Key to the issue is the question whether the 1st respondent committed electoral malpractices during those rallies.

[6.2] We note that the grounds impugn findings of fact made by the trial court in dismissing the Petition.

[6.3] It is settled law that a trial court sitting alone without a jury can only be reversed on findings of fact when the conditions set out in the case of **Nkhata and others v The Attorney General**[6] are satisfied and demonstrated to the appellate Court as follows:

(a) by reason of some non-direction of mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanuor, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer

[6.4] We have echoed similar sentiments in several of our decisions including recently in **Kabwe Taulo Chewe v Patrick Mucheleka and George K. Mwamba**[13] where we elucidated that we can only disturb findings of fact made by the trial court if they are perverse and not supported by the evidence.

[6.5] In making the findings of fact the trial court in *casu* was guided by a plethora of our decisions which included the cases of **Stephen Masumba v Elliot Kamondo**,[11] **Mubika Mubika v Poniso Njeulu**,[14] **Jonathan Kapaipi v Newton Samakayi**[10] and **Austin Liato v Sitwala Sitwala**[16] wherein we pronounced that it is not sufficient for a

petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of the voters in the constituency from electing a candidate of their choice.

[6.6] In order to properly consider grounds one to four, six and seven, we take the liberty to disaggregate the categories of the allegations levelled against the 1st respondent and the findings by the trial judge as highlighted by the appellant in the said grounds of appeal which also question the standard of proof employed by the trial court in dismissing the Petition:

Campaign rally at Ndeke Secondary School:

[6.7] The allegation was that on 29th May, 2021 the 1st respondent held a campaign rally at the said school in the hall and gave out money to the people in attendance contrary to sections 81 (1) and 83 (1) (c) of the EPA. The trial judge after viewing the video and taking into account the oral evidence found that the video depicted events at Ndeke Secondary School and was supported by the oral evidence. Thus, the Court made a finding of fact that the appellant

had proved that the 1st respondent held a campaign rally at the school and not a PF meeting as he averred. The trial court, however, found that no money was paid to the people at that meeting. We note the appellant's arguments on this issue that the video evidence showed the appellant addressing a fully packed school hall at Ndeke School such that some people were observing the proceedings from the door and windows. That this was corroborated by PW16 who testified that the 1st respondent was lobbying for votes and gave out K20 notes to the attendees of the rally.

[6.8] In addition, it is argued that the trial court found that PW16's testimony was plausible and that he had nothing to gain from stating that he received K20, yet it ultimately found that no money was paid out and dismissed the allegation. That this is inconsistent with the available evidence as a proper evaluation should have been that money was given to the people at the rally.

[6.9] We note that the finding made by the trial court about PW16's evidence being plausible is at paragraph 32.6 lines 11 to 13 of the judgment. What the judge found to be plausible is *"on the fact of how he found out about this meeting, through a moving vehicle with*

a Public Address system and which informed people of the meeting at the school.."

[6.10] The rest of PW16's evidence was discounted. The trial judge noted the fact that PW16 said he received K20 at the said meeting. She nonetheless, observed that although PW16 had nothing to gain in conjuring up his evidence that he received K20, it was questionable why the appellant was unable to obtain the video clip to prove that the 1st respondent gave out money at the said meeting. The judge further observed that PW16 appeared hesitant and unsure when questioned about the money and admitted that he had not placed any evidence in support of the allegation. Clearly, the argument that the trial court found PW16's evidence to be plausible is misconstrued and erroneous as noted above.

[6.11] We cannot fault the approach taken by the trial judge in dismissing the allegation that money was given out at Ndeke School. We must add further that the evidence of PW16 needed corroboration for it to meet the requisite standard of proof of a fairly high degree of convincing clarity. This could have been corroborated by the video evidence of which the trial court only found to depict that a campaign rally was held but she was not convinced that money was

paid out. We therefore cannot interfere with the finding that money was not paid out as it is supported by the evidence. The trial court had the opportunity to observe the witness PW16, as being hesitant and unsafe which as an appellate Court we do not have. Based on this observation and all the evidence before it, it properly concluded that the appellant failed to prove that money was paid out at the rally at Ndeke School.

Campaign Rally at Wesley Nyirenda Secondary School Grounds:

[6.12] The appellant alleged that the 1st respondent held a rally at the said school grounds on the 31st of July 2021 contrary to the EPA and the Covid 19 guidelines by which physical campaign rallies were suspended on 3rd June, 2021. The trial court found as a fact that the rally was held but that no money was given out.

[6.13] The trial court examined the evidence of PW17, Gift Sheli, who testified that he rushed to Wesley Nyirenda School after he heard noise and a woman told him that the 1st respondent was giving out money at the said school grounds. That PW17 said when he got nearer to the school, he saw the 1st respondent who addressed the crowd and asked for their votes. The 1st respondent then asked them to form lines of women, youths and men and after which he

proceeded to give them money. However, the youths squabbled among themselves as they differed on how to share the money at which point PW17 left.

[6.14] The trial court observed that PW17 appeared to have no motive to come to Court and tell lies on a matter whose outcome would have no effect on his life. Nonetheless, the trial court opined that there was no proof of money having been paid and PW17 did not receive any. It concluded that the allegation of the 1st respondent having held a rally at Wesley Nyirenda School was proved but not the allegation of him giving money to the people at the said meeting.

[6.15] The appellant has taken issue with this finding and contends that the trial court misdirected itself when it disbelieved PW17 based on the fact that he voluntarily left when people were being bribed with money yet found him to have been a credible witness who appeared to have no motive to lie.

[6.16] Learned counsel contends that the finding is erroneous as it assumes that everyone is willing to be bribed in exchange of votes. Again, as we have stated above in relation to PW16 and the rally at Ndeke Secondary School, PW17's evidence needed to be supported and corroborated by independent evidence or witness

for it to have satisfied the burden of proof of a high degree of convincing clarity. However, there was no such evidence, hence, the finding that there was no proof of money being paid out at Wesley Nyirenda. We cannot interfere with this finding as it was supported by the oral evidence including video evidence. Our understanding of the inference made by the trial court on PW17 is not what the appellant insinuates that it assumes everyone is willing to be bribed in exchange of votes. The essence of the finding by the trial court is that the appellant failed to prove that money was paid out and her witness (PW17) did not receive any money. After a review of the evidence on record, our view is that indeed the appellant did not prove that the 1st respondent paid out money to people at the rally held at Wesley Nyirenda School grounds.

[6.17] We shall deal with the issue whether or not the rally was illegal later in this Judgment.

Rallies at KCF

[6.18] Several allegations were levelled against the 1st respondent regarding the campaign rallies and meetings at KCF as follows:

(*a) gifting inmates with money and cows/beef in exchange of votes*:

[6.19] The appellant alleged that the 1st respondent held rallies at KCF on the 8th, 9th, 10th and 11th of August 2021 at which *inter alia* money was paid to the inmates. The trial court found as a fact that the 1st respondent held campaign rallies at KCF. However, it discounted the evidence of the three inmates (PW2, PW3 and PW4) who testified that the 1st respondent gave the inmates K150 each to campaign and vote for him due to discrepancies and inconsistencies as to the amount given and where it was given from.

[6.20] Counsel for the appellant contends that the trial court erred in its holding as it contradicted its finding of fact on paragraph 32.54 of the Judgment, that the evidence of the three inmates (PW2, PW3 and PW4) was sufficiently corroborated regarding the 1st respondent's malpractices within KCF. The inmates alleged inter alia that the 1st respondent paid them K150 each as inducement for votes and for them to campaign for him. It was counsel's contention that there was consistent evidence that inmates were given K150 each at the chapel and that the money came from the 1st respondent. That the trial court misdirected itself in holding that there was no money given to the inmates by the 1st respondent

based on what she considered contradictions when she had in fact held that the witnesses' testimonies in relation to the same was corroborated.

[6.21] Learned counsel for the 1st respondent argued that the trial court was on firm ground for dismissing the allegation that money was paid to the inmates as the appellant failed to prove the same.

[6.22] Before we can state whether we support the finding on the allegation of giving money to the inmates, we will chronicle the trial court's analysis of the evidence that was before it. The evidence of paying inmates was adduced by three inmates (PW2, PW3 and PW4). According to PW2, on 8th August, the 1st respondent met the 'captains' including himself inside the office and asked them to inform all the other inmates to vote for him. Then he left with the 'chairmen' and when they returned, they found them seated inside the chapel. Names were called out and each one received K150 out of the K20,000 which the chairmen brought after meeting the 1st respondent. PW3 testified that when the 1st respondent visited the facility on 9th August, 2021, all the captains were invited to the chapel. Then the top chairman, Mr. Siame the DOIC and the 1st respondent went to the reception. Later, the chairman and the

DOIC returned with money and each one was given K150 after their names were called. PW4 testified that the 1st respondent visited KCF on 9th August, 2021. The rest of his testimony is similar to that of PW3. The trial judge concluded that the appellant failed to prove that money was given to the inmates by the 1st respondent because the videos of the rallies at KCF which she viewed did not reveal this fact. Thus, the inmates' evidence was not supported by independent evidence to attain the required proof of a fairly high degree of convincing clarity.

[6.23] At paragraph 32.54, of the Judgment, the trial court found that the evidence of PW2, PW3 and PW4 (the inmates), was substantially corroborated in respect of the events of the 8th to 11th August, 2021 regarding the allegations that the 1st respondent visited KCF on the said dates and held rallies, donated cows/beef and also paid the inmates.

[6.24] At paragraph 32.57 at page 122 lines 8 to 10, the trial court stated that the evidence of PW2, PW3 and PW4 supported the appellant's allegation that the 1st respondent used Mr. Siame to canvass and campaign for him within the facility. At paragraph 32.58, the trial court further made a finding that the evidence of PW2, PW3 and

PW4 was inconsistent and had several discrepancies concerning the dates and where the 1st respondent produced the money inside or outside the chapel. Moreover that whilst PW4 stated that there was confusion inside the cells on the issue of sharing the money, the trial court noted that PW2 and PW3 did not mention such confusion.

[6.25] In addition, that there was no evidence of how and where the K20,000 allegedly given to inmates to share came from and whether it was from whilst they met inside or outside the chapel or from Mr. Siame's office or how many 'captains' attended the meeting. The trial court questioned whether PW2's denial that politics were ever discussed amongst the inmates was realistic at a time when in the history of our country inmates were allowed to vote. The trial court discredited PW4's testimony that he was forced to vote for PF and was beaten, on the basis that there was no proof. The Court also considered the testimony of PW6 which was to the effect that he heard noise from all the 46 cells and that he was told by the captains that they (the captains) were campaigning for the 1st respondent. The Court concluded thus:

> ***...This heap of contradictory evidence does not lead me to making any findings of fact on the allegation of the 1st respondent having given money to the inmates for the purpose of voting or campaigning for him. I therefore find that this allegation of the 1st Respondent having given money to the inmates is not proved.***

[6.26] The issue which needed to be proved to a fairly high degree of convincing clarity was that the 1st respondent bribed the captains with K150 each to vote for him and to ask the other inmates to do so as well. The judge noted that the three witnesses corroborated each other in this respect but this is at variance with her finding that their evidence was full of inconsistencies and discrepancies and there was no video to support the same. PW5 a prisoner warder testified that he learnt from other officers that the 1st respondent left K20,000 for the special inmates to share. He said the video of the meeting was available though not before court.

[6.27] We are of the firm view that although the three inmates corroborated each other that they were paid K150 each, PW3 and PW4 said the 1st respondent met them on 9th August, 2021 and they did not state the exact amount allegedly left by the 1st respondent. PW2 and PW5 said K20,000 but they differed on the dates. PW2 said it was on 8th August, 2021 and PW5 said 11th August, 2021.

PW5 a prisoner warder testified about the inmates being paid based on what he was told, so his evidence in this regard is hearsay and inadmissible. We therefore uphold the finding that there was no independent evidence or something more to support the witnesses whose testimonies had discrepancies; to prove the allegation that money was paid to the inmates.

(b) *1st respondent's supply of beef/cows to inmates to vote for him*:

[6.28] The evidence on this allegation came from the same three inmates who also alleged that the 1st respondent paid them to vote and campaign for him. The trial judge dismissed this allegation due to discrepancies in the witnesses' testimonies. She found that despite the videos showing cows being delivered in the prison truck on 9th August 2021, the appellant failed to prove that it was the 1st respondent who had delivered them. She also discounted the testimony by PW2 that the prisoners never ate meat unless their relatives brought it for them.

[6.29] The appellant contends that the trial court erred when it stated on paragraph 32.63 of the Judgment that it was at pains to accept that the inmates had never eaten meat provided to them by the prison services other than when it was brought by relatives. It was

contended that the trial court erred by not properly evaluating the evidence of PW2 on paragraph 7 page 50, of the record of appeal, where he stated that part of the prisoners' grievance was that the prison did not provide them with meat and that that led to the 1st respondent promising to bring them beef.

[6.30] It was further contended that the trial court erred when it surmised that it would be naïve to hold the evidence as true, that the cows that were delivered to the correctional facility were at the instance of the 1st respondent only because the 1st respondent had said he would bring cows/beef. Counsel contended that the trial court misdirected itself by not properly considering the evidence as the sequence of events regarding the cows and the evidence on record which all point to the fact that the beef was supplied by the 1st respondent.

[6.31] The trial court's analysis of the issue to do with beef being supplied to KCF is set out in paragraphs 32.61 to 32.64 on pages 126 to 129 of the record of appeal. In lines 22 to 24 on page 126, the trial court considered the testimony of PW2 which was to the effect that the 1st respondent promised to provide meat in an address at KCF held on 8th August, 2021 and that they in fact ate meat on 10th August,

2021. The trial court also noted the testimony of PW3 who narrated that at the rally on 11th August, 2021, the 1st respondent asked if they had eaten meat to which they said they had and that it was not enough and the 1st respondent said he would provide some more.

[6.32] Furthermore, that PW4 confirmed having eaten meat and that PW5 a prison warder, testified that he had seen three slaughtered cows in the Prison Services Truck on 10th August, 2021 at 07:40 hours near the stores facility. After analyzing the video clips, which analysis is in paragraph 32.62 on page 127, the trial court made a finding on page 128, lines 1 to 3, that slaughtered cows were delivered to the facility on 9th August, 2021 at 22:35 hours in a white prison services truck registration number PS32287. The trial court went on to pose a question to itself, as follows: *"if, by the time the 1st respondent, met the inmates on the 8th August, 2021 and promised to provide meat, and on the 10th August, 2021 at 07:40 hours, slaughtered cows were delivered at the Correctional Facility, it can be said that the allegation had been proved to the required standard; that the cows had been delivered at the instance of, and with the consent and knowledge of the 1st respondent?"* In

addressing this question, the trial court stated as follows in lines 8 to 14 of page 129:

> ***... I cannot make such a finding as the allegation has not been supported to the level required. Any finding of beef having been supplied by the 1st Respondent, based on the evidence of the inmates alone, whose evidence has been discredited for reasons stated, would be a serious travesty, and would be speculative and conjecture on the part of the Court. I therefore find that this allegation has not been proved.***

[6.33] We have considered the competing arguments on this issue. The evidence revealed that the 1st respondent visited KCF on 8th August and 9th August, 2021 and asked the inmates if they ate beef and that he would supply the same. In the night of the 9th August, 2021, three slaughtered cows were delivered, a fact determined by the trial court at paragraph 32.62 of the Judgment. PW5 a prisoner warder said early in the morning of 10th August, 2021, he saw the slaughtered animals near the stores facility. Then on 10th August, 2021 the inmates ate beef. And on 11th August, 2021 the 1st respondent asked them if the beef was enough to which they said no and he promised to bring more. We are of the considered view that the sequence of events would lead to the inescapable inference that the beef which was supplied to the KCF on the 9th of August, 2021 was at the instance of the 1st respondent as the dates

referred to by the witnesses when the 1st respondent promised to supply beef and when the cows were delivered is supported by the video evidence.

[6.34] We are persuaded in making the inference that the 1st respondent supplied the cows by the Supreme Court decision in the case of **Mohamed v Attorney General** supra, which holds that:

> ***While it is accepted that the appellate court should not lightly reverse the findings made by a trial court, there is a world of difference between findings of primary facts and findings based on drawing of conclusions or inferences from undisputed primary facts. In the latter event, the appellate court is in a good position to draw the inferences or conclusions as the trial court.***

[6.35] We are equally persuaded by **Sithole v State Lotteries Board**[19] that the appellate Court is in as good a position as the trial court to draw inferences or substitute its own opinion for any opinion the trial court might have expressed.

[6.36] The trial court found that the 1st respondent visited KCF from the 8th to the 11th of August, 2021 and that the witnesses corroborated each other regarding this allegation. To require of the appellant to have produced a video of the 1st respondent actually delivering the cows, is tantamount to pushing the burden to proof beyond reasonable doubt, which is not the standard in election matters. The

trial court's finding on this matter is accordingly reversed. Be that as it may, there is still a further hurdle for the appellant to overcome that of proof that the majority of the voters were actually or might have been prevented from electing a candidate of their choice as a result of the 1st respondent supplying cows to feed the inmates. We shall revert to this issue later.

(c) *supplying prison officers/warders with bags of mealie meal and gifting them with money for votes*:

[6.37] Three prison warders (PW5, PW6 and PW7) testified that that they each received a 25kg bag of mealie meal on 8th August, 2021.That the mealie meal was delivered to all the officers' homes by the DOIC Mr. Siame. Upon inquiry they were informed that it was from the PF party. PW6 admitted that even he received a bag of mealie meal despite him being perceived as a UPND sympathizer by his superiors.

[6.38] Regarding the gifting of money to the prison officers, PW5 and PW8 testified that on 11th August 2021, they attended a meeting at the reception open area at KCF. The meeting was addressed by the 1st respondent. In concluding his address he informed the officers/warders that he had left something for them. Then the 1st

respondent and the DOIC left for the office. According to PW5 he stood near the office and saw the 1st respondent give K27,000 to Mr. Siame. When the 1st respondent left, Mr. Siame called PW8 the accountant and instructed her to pay each prison officer K200. PW8 retreated to her office from where she paid the officers as instructed, in his (PW5's) presence. PW8 confirmed this line of testimony except she said she was given K23,700 by Mr. Siame and she paid the 119 officers in the presence of the intelligence officer, a Mr. Bwembya Stanley, who was not called as a witness. According to PW8 Mr. Siame called her to his office immediately after the 1st respondent left and that some of the officers did not go back to work after the 1st respondent's address. They (including herself) waited for about 20 minutes while the 1st respondent and Mr. Siame were in the office. PW7 confirmed that he was called to PW8's office on the date in question and paid K200.

[6.39] Learned counsel for the appellant contended that the trial court erred when it held in paragraph 32.61 at page 126, of the record of appeal that there was no proof of that based on the discrepancies between the prison officers as to the total amount given. Yet,

according to counsel all the prison officers testified to having received K200 each from the 1st respondent.

[6.40] The trial court's reasoning on this issue was that Mr. Siame, from whom the money was said to have come, was not the agent of the 1st respondent and further that because of the many discrepancies in the dates and the amount given, the allegation had not been proved. We note that PW5's testimony that he saw the 1st respondent give the money to Mr. Siame was not corroborated by any other witness or evidence for it to attain proof of a fairly high degree of convincing clarity. Furthermore, his claim that he witnessed PW8 pay the officers was at variance with PW8's own testimony as she stated that it was Stanley Bwembya who witnessed to this fact. Furthermore, whereas PW5 said the money given was K27,000. PW8 who is the accountant and who received the money said it was K23,700. Clearly, therefore there were discrepancies in the evidence on this issue as noted by the trial court.

[6.41] Thus, we are of the considered view that although all the three witnesses were categorical that they each received K200, only PW5 testified that he saw the 1st respondent give money to Mr.

Siame which evidence was uncorroborated. PW8 said the money came from Mr. Siame. PW7 only confirmed being paid K200 by PW8. Additionally, a video of the 1st respondent addressing the officers on 11th August 2021 was produced but it had no audio. We therefore cannot fault the trial court for dismissing this allegation as it was not proved to the requisite standard that the 1st respondent donated the money which was used to pay the prison officers K200 each.

[6.42] With regard to the allegation that the 1st respondent gave a bag of mealie meal to each of the prison warders, the trial court accepted the testimonies of the three witnesses who testified that 25kg bags of mealie meal were delivered to their homes on 8th August, 2021. Upon inquiry they were told the mealie meal came from the PF party. The trial court further noted that the witnesses corroborated each other and appeared to have no motive or interest in the matter other than to offer testimony on the issue of mealie meal.

[6.43] The trial court reasoned that the fact that witnesses were informed that the mealie meal was supplied by the government of the day cannot be placed on the shoulders of the 1st respondent. It

concluded therefore that the 1st respondent did not give mealie meal to the prison warders as alleged.

[6.44] The appellant argues that the trial court did not properly evaluate the evidence as the three witnesses (PW5, PW6 and PW7) who are prison officers corroborated each other that they each received a bag of mealie meal. And that the bags of mealie meal were delivered by Mr. Siame who stated that it came from the PF. According to the appellant a careful examination of the evidence shows that Mr. Siame was heavily involved in the activities at the prison.

[6.45] We are of the firm opinion that the trial court properly evaluated the evidence. She accepted that bags of mealie meal were distributed to the prison warders and officers and they were told that the mealie meal was from the PF. It is settled law that a candidate must personally be involved in the illegal or corrupt practice or other misconduct or his election or polling agent must be involved with the candidate's knowledge and consent or approval for the election to be voided. Mr. Siame the DOIC was not a polling or election agent of the 1st respondent, for the latter to be liable for his actions. The appellant needed to adduce cogent evidence to prove this fact.

Furthermore, a candidate cannot be blamed for the activities of the party just because he is a member of the party. ***Richwell Siamunene v Sialubalo Gift***[17] refers.

[6.46] We therefore cannot disturb the finding that the allegation that the 1st respondent distributed mealie meal to prison warders was not proved as the finding was supported by the evidence on record.

Campaign rally at Mulenga Compound:

[6.47] About the allegation that the 1st respondent held a campaign rally at Mulenga Compound during the ban, the appellant argued that the trial court erred to find that it was not proved to the required threshold because the picture on which this allegation was premised, was not dated. Counsel contended that the trial court should have discounted the 1st respondent's assertion that the picture was taken prior to his adoption and found as a result, that the said picture was taken during the period when there was a suspension on campaign rallies.

[6.48] We note that at paragraph 32.19 of the Judgment, the trial court opined that the averment by the 1st respondent that the picture was an image from pre-adoption meeting was inconceivable.

Nonetheless it reasoned that as there was no corroborative evidence to confirm the date of the picture, it did not support the allegation of a rally being held at Mulenga Compound during the ban to the threshold required.

[6.49] We opine that the finding was supported by the evidence. It is settled that it is incumbent upon the Petitioner to prove the allegations in the petition to a fairly high degree of convincing clarity. In our view even if we were to agree with the appellant's counsel that the image was taken during the period when campaign rallies were banned, the issue was not proved to the requisite standard as to warrant nullification of the results as we shall discuss later in this judgment.

Rally at Kamfinsa Secondary School:

[6.50] The evidence regarding the campaign meeting at Kamfinsa Secondary School in Kamfinsa ward was that on 2nd August, 2021, the 1st respondent together with the DEBS met with teachers wives at the school where money and mealie meal was distributed and the people were urged to vote for the then Republican President Edgar Chagwa Lungu.

[6.51] After analysing the evidence of the Petitioner's witnesses and RW3, the trial court found that the 1st respondent was not present at the meeting although he had placed himself at the school. The Court reasoned that although the evidence of RW3, Joseph Katongo, was corroborated by the evidence of Moono Bwantu (PW9), Mirriam Chama (PW10) and Prudence Teswa Chola (PW13) on the directives and inducements made at the meeting, coupled with the violence, there was no evidence that the 1st respondent attended the meeting. Furthermore, that PW10 seemed hesitant, nervous and uncomfortable and was not convincing in her evidence. PW13 was also not convincing especially in light of the discrepancies in the amount of money alleged to have been given at the meeting.

[6.52] In addition, the trial Judge observed that RW6 was very casual in her approach and demeanor, her evidence seemed rehearsed and she displayed no serious understanding of why she was in Court, fidgeted with her mask when she appeared uncomfortable with the questions and could not really answer with conviction or clarity why she was even there or what purpose she served.

[6.53] The trial court also noted that after listening to the audio evidence, she heard the DEBS say words to the effect that the electorate should support the debt swap and asked if they should forget the person who gave them relief.

[6.54] The trial court found that these words uttered by the DEBS were both an inducement and a threat. The trial Judge concluded therefore that the words attributed to the DEBS, the gifting of mealie meal or money were not done with the consent, knowledge or approval of the 1st respondent and or that of his agent. She observed at paragraph 32.34 of the Judgment that the appellant had been able to place several videos and pictures in support of her various allegations save for the meeting at Kamfinsa School.

[6.55] The trial court's finding at page 113, lines 13 to 23 of the record of appeal, was as follows:

> ***I ask myself the critical question, in this Petition, as to whether the words attributed to the DEBS on the material day, and the gifting of mealie meal and or money, can be placed directly on the shoulders of the 1st Respondent, more so, that I have found that he was not present at the said meeting. There has not been any evidence presented to the Court, to the required threshold, to satisfy the Court that the words, actions and gifting alleged to have been done at the said meeting, was with the consent and or specific knowledge and***

approval of the 1st Respondent, and or with the consent of his agent. I therefore find that this allegation has not been proved to the required standard.

The allegation was accordingly dismissed.

[6.56] We note the appellant and the 1st respondent's arguments at paragraphs 5.1 and 5.2 respectively, in relation to the allegations that the 1st respondent donated K3000 and bags of mealie meal to the people who attended his campaign rally at Kamfinsa Secondary School.

[6.57] The gravamen of the trial court's decision is that although the 1st respondent placed himself at the scene, there was no evidence to prove that he was at the meeting where the DEBS uttered words which were both an inducement and a threat.

[6.58] The trial court observed that both parties' witnesses were unimpressive and problematic. It observed that RW3 who supported the 1st respondent's claim that he was at the Kamfinsa Secondary School to inspect a classroom block, was a witness with an interest to serve whilst RW6 was casual in her approach and demeanor in Court and her evidence appeared rehearsed.

[6.59] The trial court was equally not impressed with the appellant's witnesses as stated above. It is settled that an appellate Court will not lightly interfere with findings of a trial court based on demeanor as that Court had the opportunity of hearing and seeing the witnesses and is entitled to decide whom to believe. It was thus incumbent upon the appellant to prove to a fairly high degree of convincing clarity that the 1st respondent attended the meeting at Kamfinsa School and gave K3,000 to the attendees as alleged.

[6.60] Therefore, although the 1st respondent placed himself at the school, the appellant bore the burden to adduce cogent evidence that he was at the meeting in the school hall and addressed the people and gave money as alleged. All the appellant proved via audio evidence was that the DEBS addressed the people who gathered in the school hall as found by the trial court and this therefore corroborated the oral evidence of the witnesses. No audio or video evidence was produced to prove that the 1st respondent addressed the people and gave them money as alleged. We cannot fault the trial court for dismissing this allegation as it was not proved.

Were the rallies illegal? Were the majority affected?

[6.61] We hasten to state that the appellant's main argument in this appeal is that having found as a fact that the 1st respondent held illegal rallies at Ndeke and Wesley Nyirenda Secondary Schools and at KCF, the trial court should have made a finding that the said illegal rallies affected the outcome of the elections as the 1st respondent held rallies in three out of the four wards in Kamfinsa constituency. Therefore, the malpractice was widespread as to influence the majority of voters in the Constituency. Moreover, that the trial court erred when she held that the appellant had a burden to prove the statistics of the registered voters and to additionally prove that the voters had a change of heart due to the illegal conduct of the 1st respondent.

[6.62] Our perusal of the judgment does not reveal any finding by the trial court that the 1st respondent held illegal campaign rallies but that he held campaign rallies in government buildings contrary to the Electoral Code of Conduct. We note the appellant's insistence that the rallies were illegal because they were held during the ban which was effected by the 2nd respondent on 3rd June 2021, via the covid 19 guidelines. Furthermore, that the 1st respondent contravened

section 11(d) of the Electoral Code of Conduct and Article 229 of the Constitution, when he held the said rallies as the 2nd respondent is empowered by Article 229 of the Constitution to issue the said guidelines in its conduct of elections.

[6.63] We must state from the onset that these arguments are flawed and meritless. The appellant failed to prove how the appellant contravened the Constitution while section 11(d) of the Code simply empowers the 2nd respondent to impose any administrative measures on any person, candidate or political party for any breach of its Code. The EPA is clear in its provisions as to the grounds upon which an election can be nullified.

[6.64] Moreover, in finding that the appellant had not proved that the 1st respondent's conduct of holding rallies was so widespread, that it prevented or may have prevented the majority of voters from voting for the candidate of their choice, the trial court placed reliance on our decision in the case of **Margaret Mwanakatwe v Charlotte Scott and another**.[1]

[6.65] In concluding that the appellant did not provide statistics to prove that the majority of the electorates in the constituency were prevented from electing a candidate of their choice, the trial court

also relied on the Supreme Court decision in the case of **Mubika Mubika v Poniso Njeulu,**[14] that:

> ***The evidence therefore, does not indicate widespread vilification of the respondent, neither does it indicate that the majority of the registered voters were influenced by the respondent. In this type of allegation, statistics of registered voters who attended rallies should have been given to assist the trial court on the extent of influence in the Constituency.***

[6.66] We are alive to the fact that the burden of proof for election petitions is set by statute being the EPA as provided in section 97(2)(a) as follows:

> (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;***

[6.67] We have had occasion to pronounce ourselves on the import of section 97(2)(a) in a plethora of cases including **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General**,[12] where we illuminated that:

> ***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 agent, 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...***

Furthermore, that:

> ***In addition to proving the electoral malpractice or misconduct alleged, the petitioner has the 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 electorate from electing a candidate of their choice.***

[6.68] It is clear that the appellant apart from proving that the 1st respondent held rallies in government buildings contrary to section 15(1)(k) of the EPA as determined by the trial court, also needed to prove that the electoral malpractice or misconduct was so widespread that it prevented or may have prevented the majority of the electorate from electing a candidate of their choice.

[6.69] We reiterate that it is a legal requirement under section 97 (2) (a) of the EPA that apart from proving electoral malpractice; cogent evidence that the alleged electoral malpractice was so widespread that the majority of the voters were or might have been prevented from electing a candidate of their choice, must be presented before the trial court for an election to be voided. The appellant in *casu* failed to do so during trial. Not a single number or estimate of how many people attended the rallies held in the government buildings was given to demonstrate that the majority of voters in Kamfinsa Constituency were or might have been prevented from electing a candidate of their choice. It is also unknown as to how many inmates ate the beef supplied by the 1st respondent and, in line with the case of **Mubika Mubika v Poniso Njeulu,**[14] how many of those were actually registered voters.

[6.70] We are alive to the argument by the appellant that the 1st respondent held rallies in three out of the four wards, therefore the rallies were widespread. However, the appellant did not adduce any evidence concerning this assertion. For obvious reasons, we cannot take this argument for a fact.

[6.71] The trial court cannot be faulted for finding that the appellant failed to prove her case to the requisite standard set by section 97(2) (a) of the EPA. The trial court used the correct standard of proof as provided in the EPA and pronounced by this court in several of our decisions.

[6.72] In light of all the preceding paragraphs grounds one to four, six and seven have no merit except to the extent stated on ground one on supplying cows and ground seven that it was proved that campaigns were held in government buildings only.

[6.73] We now move to consider ground five which impugns the trial court's finding that the appellant failed to prove the allegations against the 2nd respondent to the requisite standard. It is argued that the available evidence was that the Gen 20 Forms were illegible and had clerical errors. And, that there were several irregularities and discrepancies in the Gen 20 forms which put the authenticity of the results in question.

[6.74] The 2nd respondent contends that the trial court made a finding of fact that the clerical errors by way of overwritten or illegible documents and being given the original as opposed to copies of the Gen 20 forms; did not cause any detriment or loss to the appellant.

Our decision in the case of **Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia**[18] was relied upon wherein we observed thus:

> ***Evidence on record shows that there were anomalies as regards 29 votes that were allocated in favour of a 5th candidate who was not a candidate for the ward in question. This anomaly was indeed an omission by the election officer in breach of his official duty in connection with the election. Evidence on record also shows that this anomaly was addressed and corrected once it was brough to the attention of the election officer, so that the name of the 5th candidate did not appear on the 2nd respondent's official Declaration of the Result of the Poll-Councilor Form on page 77 of the Record of Appeal. Apart from this anomaly there is no other cogent evidence that the election was not conducted substantially in conformity with the provisions of the EPA.***

[6.75] And also in **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General**,[12] wherein we elucidated:

> ***That where there has been substantial compliance with the provisions of the Electoral Process Act an election cannot be annulled on the basis of section 97 (2) (b) of the Act.***

[6.76] The 2nd respondent canvassed that the appellant did not call any witnesses to support the host of allegations on the Gen 20 Forms or tender any tangible evidence in the lower court to prove that the

election was so flawed and not conducted in substantial conformity with the law or that the clerical errors by the electoral officers did affect the election results.

[6.77] We note the arguments by both parties on this score. We are of the firm view as aforestated that the appellant had the burden to prove the allegation to the requisite standard against the 2nd respondent.

[6.78] The trial court took note of the appellant's witnesses' testimonies on the issue of Gen 20 Forms. She observed that PW11 Joseph Muyutu was the polling agent for the UPND at Cecina Stream 3 Polling Station in Bupe Ward and PW12 George Malupande was the polling agent at Kafue Bridge Secondary School Stream 1 in Kafue Ward. Therefore, their evidence only related to the two polling stations.

[6.79] The Judge found that when PW11 was removed from the polling station for about 45 minutes, another polling agent from the UPND party remained in the room and did observe whatever may have happened. The trial court opined that PW11's evidence was therefore based on apprehension of what may have or could have hypothetically happened as opposed to what actually happened at the polling station.

[6.80] With regard to George Malupande (PW12), who testified that he and other polling agents were sent out of the polling station at Kafue ward and allowed back after the intervention of the Petitioner and the Town Clerk, the trial court noted that PW12 conceded under cross-examination, that he made no report to the 2nd respondent. PW12 was shown the Gen 20 Form and he confirmed that he appended his signature to signify his agreement with the results attained at that polling station. The trial Judge further noted that PW12 admitted that he was present from 06:00 hours in the morning till 09:00 hours the following day when counting ended and he confirmed that UPND won at that particular polling station. Accordingly, his evidence was equally found to be speculative as no cogent evidence was adduced to support the allegations of electoral malpractice at the polling station.

[6.81] The trial court also analysed the appellant's evidence in relation to the Kamfinsa Correctional 01 polling station. The appellant testified that the total number of votes cast was 783 of which 41 were rejected giving a total of 778 votes. When referred to the 2nd respondent's bundle of documents, she agreed that her results and those of the 1st respondent were 299 and 406 respectively. The trial

court noted that the appellant conceded that the mistake in the total initially stated to be 783 was corrected to 778. The appellant also admitted that she did not know that the EPA empowers the 2nd respondent to correct clerical mistakes within 7 days. Based on the evidence adduced by PW11, PW12 and the appellant, the trial court came to the conclusion that the allegations against the 2nd respondent had not been proved to the required standard.

[6.82] As noted by the trial court, the appellant only called PW11 and PW12 who testified about what transpired at Bupe and Kafue Wards respectively. No witnesses were called to testify to the other allegations against the 2nd respondent. It was incumbent upon the appellant to adduce evidence to prove that the results were manipulated, which she failed to do even by her own testimony.

[6.83] It is not sufficient to make averments in a Petition and fail to adduce evidence to support the same.

[6.84] We cannot interfere with the finding of fact as it was based on the evidence presented by the parties to the trial court. Ground five also fails.

[6.85] The net result is that the appeal is devoid of merit and is accordingly dismissed. Consequently, we uphold the judgment of the trial court that the 1st respondent was duly elected as Member of Parliament for Kamfinsa Constituency.

[6.86] Each party to bear own costs.

A.M. SITALI
CONSTITUTIONAL COURT JUDGE

M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

P. MULONDA
CONSTITUTIONAL COURT JUDGE

M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE

J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE