

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

2021/CCZ/A0032

IN THE MATTER OF: THE PARLIAMENTARY PETITION RELATING  
TO THE PARLIAMENTARY ELECTIONS HELD  
ON 12<sup>TH</sup> AUGUST, 2021

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA ACT,  
CHAPTER 1 VOLUME 1 OF THE LAWS OF  
ZAMBIA

AND

IN THE MATTER OF: SECTIONS 96, 97, 98, 99, 100, 106, 107 and 108  
OF THE (ELECTORAL CODE OF CONDUCT)  
NO. 35 OF 2016 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016

BETWEEN:

CHILESHE MPUNGA CHILUFYA

AND

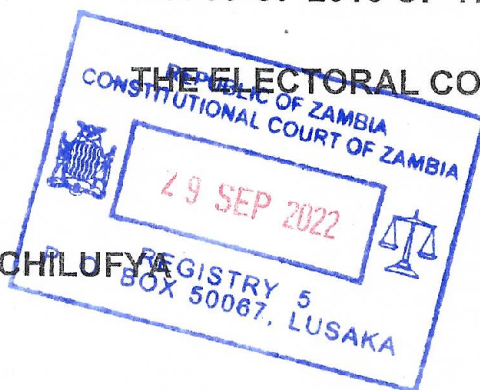
JEAN CHISENGA NG'ANDWE

ELECTORAL COMMISSION OF ZAMBIA

APPELLANT

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT



Coram: Sitali, Mulenga, Munalula, Musaluke and Mulongoti JJC. On  
18<sup>th</sup> May, 2022 and 29<sup>th</sup> September, 2022.

For the Appellant:

Mr. V. Michelo of V N Michelo & Partners

For the 1<sup>st</sup> Respondent:

Mr. G. W. Simukoko of G.W. Simukoko and Company and Mr. N Botha of Makebi Zulu Advocates

For the 2<sup>nd</sup> Respondent:

Mr. M. Bwalya In-House Counsel

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## JUDGMENT

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**Musaluke JC**, delivered the Judgment of the Court.

**Cases referred to:**

1. Abuid Kawangu v Elijah Muchima CCZ Appeal No. 8 of 2017
2. Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela (2003) Z.R. 110
3. Akashambatwa Mbikusita Lewanika & Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79
4. Giles Chomba Yamba Yamba v Kapembwa Simbao and Others CCZ Selected Judgment No. 6 of 2018
5. Herbert Shabula v Greyford Monde CCZ Appeal No. 13 of 2016
6. Kufuka Kufuka v Mundia Ndalamei SCZ Appeal No. 8 of 2007
7. Costa Tembo v Hybrid Poultry Farm (Z) Limited SCZ Judgment No. 13 of 2003
8. YB and F Transport Limited v Supersonic Motors Limited SCZ Judgment No. 3 of 2000



9. Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014
10. Nabukeera Hussein Hanifa v Kibule Ronald and Another (2011) UGHC 133
11. Nkandu Luo v Doreen Sefuke Mwamba and The Attorney General CCZ Selected Judgment No. 51 of 2018
12. Mwiya Mutapwe v Shomeno Dominic CCZ Appeal No. 19 of 2017
13. Wilson Masautso Zulu v Avondale Housing Properties (1982) Z.R. 174
14. The Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1

**Legislation referred to:**

1. Electoral Process Act No. 35 of 2016

**Other materials referred to:**

1. Banda, T, Kaaba, O, Hinfelaar, M and Ndulo, M (eds) 2021, *Democracy and electoral politics in Zambia*, Brill, Leiden & Boston
2. Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 15 Butterworth & Co. (Publishers) Limited 1977

**1.0 INTRODUCTION**

- 1.1 This is an appeal against the judgment of the High Court sitting at Mansa, which upheld the election of the 1<sup>st</sup> Respondent as Member of Parliament for Mambilima Constituency, in Mansa District of the Luapula Province in the Republic of Zambia.

## **2.0 BACKGROUND**

- 2.1 Following the 12<sup>th</sup> August, 2021 general elections, Ms. Jean Chisenga Ng'andwe (the 1<sup>st</sup> Respondent herein) was declared duly elected Member of Parliament for Mambilima Constituency.
- 2.2 Aggrieved by the outcome of the said election, the Appellant herein, filed a petition before the High Court on 26<sup>th</sup> August, 2021 in which he sought the nullification of the 1<sup>st</sup> Respondent's election, on the premise that the 1<sup>st</sup> Respondent was not validly elected because she and her agents committed corrupt and illegal practices during the campaign period and on the election day contrary to the provisions of the Electoral Process Act No. 35 of 2016 (EPA). It was also alleged that the elections were not free and fair.
- 2.3 The particulars of the illegal and corrupt practices were listed as follows:
- (i) Congolese nationals were allowed to register as voters and did vote in the 12<sup>th</sup> August, 2021 elections. That Chief Mulundu facilitated this and vehicles belonging to the 1<sup>st</sup> Respondent's father were used to ferry the Congolese voters.**
  - (ii) That the Disaster Management and Mitigation Unit (DMMU) with the help of the Patriotic Front (PF) officials distributed over 4000 x 12.5 KG bags of mealie meal to civil servants and members of the public in the Constituency although there was**

no disaster that had occurred in the said Constituency. That the mealie meal was distributed only to PF supporters in a bid to coerce other members of the public to join the PF.

- (iii) That the District Education Board Secretary, Mwansa Sabeta, threatened teachers who did not support the PF with dismissal, demotion and transfer. It was alleged that the threats were effected against Linety Mbozwa who was demoted and transferred to a smaller school.
- (iv) That the PF agents threatened members of the public that if they did not support them, they would be removed from the social cash transfer and the fertilizer support program.
- (v) That the PF used Mambilima Special Secondary School, which was a polling station, to store campaign material comprising of mealie meal, chitenge materials, cooking oil and T/shirts.
- (vi) That on polling day, the PF ferried registered voters to polling stations and were allowed to be within the perimeter of the polling station with a vehicle that had a public address system mounted which had been used by the 1<sup>st</sup> Respondent during the campaign.
- (vii) That the Petitioner was blocked from campaigning in the Constituency on 1<sup>st</sup> August, 2021 on the ground that President Lungu was in the province.
- (viii) The Petitioner prayed that the court declares that the 1<sup>st</sup> Respondent was not validly elected as Member of Parliament for Mambilima Constituency and that the election was void.

2.4 The 1<sup>st</sup> Respondent filed an answer to the petition on 16<sup>th</sup> September, 2021 in which she stated that the allegations of



malpractice and corrupt activities made by the Appellant were speculative and did not relate to the 1<sup>st</sup> Respondent or her polling agents. She also stated that the alleged incidents if proved were isolated and not capable of influencing the outcome of the election in the constituency which had 23,078 registered voters.

2.5 Regarding the alleged threats by the District Education Board Secretary, the 1<sup>st</sup> Respondent averred that the said Board Secretary was not her polling or election agent and therefore, she had no control over her actions.

2.6 The 1<sup>st</sup> Respondent also denied the alleged threats by the PF members that those who did not support her election would be removed from the social cash transfer and fertilizer support program.

2.7 The 1<sup>st</sup> Respondent further denied that she was involved in the distribution of mealie meal. She averred that she had no control over the activities of the DMMU and denied that her agents were involved in the distribution of mealie meal from APG Milling.

2.8 The 1<sup>st</sup> Respondent denied the allegation that Congolese nationals were allowed to vote or that they voted for her. She denied having ferried voters to the polling station during the election or that vehicles bearing registration No. ABE 6629, ACK

2520 and BCD 2538 belonged to her or her polling agents. She further stated that it was not true that the UPND President was barred from campaigning in Luapula Province by herself or her agents. As such the allegations lacked specificity and she denied having been involved in any corrupt or illegal practices.

2.9 According to the 1<sup>st</sup> Respondent, the election was conducted in accordance with the EPA and she was duly declared winner of the election. She thus prayed that the petition be dismissed with costs.

2.10 The 2<sup>nd</sup> Respondent filed its answer to the petition accompanied by an affidavit verifying the answer on 16<sup>th</sup> August, 2021. It was averred in the said answer that the 2<sup>nd</sup> Respondent did not receive any alarming notices of malpractice during the election period. As such, the election was validly conducted. The 2<sup>nd</sup> Respondent prayed that the petition be dismissed with costs.

### **3.0 PROCEEDINGS BEFORE THE HIGH COURT**

3.1 At trial in the court below, the Appellant called 10 witnesses inclusive of himself who testified as PW1, while the 1<sup>st</sup> Respondent called two witnesses in support of her case.

3.2 The learned trial judge considered the allegations in the petition, the respective answers to the petition by the 1<sup>st</sup>, and 2<sup>nd</sup>

Respondents, the evidence on record as well as the submissions filed.

- 3.3 Upon addressing her mind to the provisions of section 97(2)(a) and (b) of the EPA, which provides for the grounds upon which the election of a candidate as Member of Parliament can be nullified, the learned trial judge was of the considered view that the issue which fell for her determination was whether or not the Appellant had adduced sufficient evidence to show that electoral malpractice had been committed by the 1<sup>st</sup> Respondent or with her knowledge, which resulted in the majority of the voters being prevented from voting for their preferred candidate or that the election was not conducted in accordance with the provisions of the law and that such non-compliance affected the result.
- 3.4 The learned trial judge also reminded herself of the standard of proof in election petitions and relied on the authority of **Abuid Kawangu v Elijah Muchima**<sup>1</sup> to that effect.
- 3.5 After consideration of the evidence, the learned trial judge upheld the election of the 1<sup>st</sup> Respondent as duly elected Member of Parliament for Mambilima Constituency and dismissed the petition.



3.6 Dissatisfied with the decision of the High Court, the Appellant has now appealed to this Court.

#### **4.0 APPELLANT'S APPEAL AND HEADS OF ARGUMENT**

4.1 By the Memorandum of Appeal dated 13<sup>th</sup> December, 2021, the Appellant advanced four grounds of appeal as follows:

- i. The learned Trial Judge in the Court below misdirected herself in fact and law by holding that the self-confessed development projects carried out by the 1<sup>st</sup> Respondent in the Mambilima Constituency at the peak of the campaigns were charitable works and were not done with the view to induce voters to vote for the 1<sup>st</sup> Respondent.
- ii. The learned Trial Court misdirected itself in holding that the Appellant did not adduce evidence to show that the alleged developmental projects were done with the view to induce the voters to vote for the 1<sup>st</sup> Respondent.
- iii. That the learned trial Judge misdirected itself in fact in holding that the Appellant was also involved in charitable work when no evidence was adduced to that effect.
- iv. The learned Trial Court erred in condemning the Appellant to pay costs of the proceedings to the Respondent on ground that Election Petitions are cases of public interest and costs are rarely awarded.

4.2 At the hearing of this appeal, counsel for the Appellant, Mr. Michelo, relied on the grounds of appeal as contained in the

Memorandum of Appeal. He also augmented the written submissions. In regard to grounds one, two and three, counsel submitted that the best evidence in any matter be it criminal or civil is an admission or confession. That in the matter herein, the 1<sup>st</sup> Respondent admitted to carrying out projects throughout Mambilima Constituency at the heart of the campaign period which disadvantaged the other candidates. Particularly, that the 1<sup>st</sup> Respondent built a school in Michelo ward, extended the waterline from Nsumpi to Chansha ward, revamped 25 boreholes, and painted roofs for various schools. It was submitted that these projects were against the spirit of the EPA. Counsel therefore, urged us to nullify the 1<sup>st</sup> Respondent's election on the basis that it was not free and fair.

4.3 Counsel further argued that the learned trial judge erred when she held that the Appellant also did some developmental projects without citing any of the purported projects.

4.4 As regards ground four of the appeal, counsel submitted that the learned trial judge erred in condemning the Appellant in costs this is because election petitions are matters of public interest. Counsel contended that if this Court is to allow such precedent to be set, litigants will be discouraged from challenging electoral

malpractices for fear of paying enormous costs. As such, we were urged to reverse the order for costs made by the trial court.

## **5.0 1<sup>ST</sup> RESPONDENT'S HEADS OF ARGUMENT**

- 5.1 In opposing the Appeal, the 1<sup>st</sup> Respondent filed heads of argument on 28<sup>th</sup> March, 2022.
- 5.2 Reacting to grounds one and two of the Appellant's grounds of appeal, the 1<sup>st</sup> Respondent submitted that the Appellant listed seven (7) alleged corrupt practices by the 1<sup>st</sup> Respondent in the court below. The trial court found that the Appellant had not adduced any evidence to support the said allegations and consequently dismissed the petition with costs.
- 5.3 According to the 1<sup>st</sup> Respondent, grounds one and two of the grounds of appeal arise out of the provisions of section 97(2)(a)(i) and (ii) of the EPA, which provides for nullification of an election if the successful candidate was guilty of a corrupt practice, illegal practice or other misconduct in connection with the election and that for the corrupt practice to merit nullification of an election, it should be one that prevented the majority of voters in a constituency from electing their preferred candidate.



- 5.4 Reacting to the Appellant's assertion that the carrying out of developmental projects at the level and scale the 1<sup>st</sup> Respondent did cause the other candidates to be disadvantaged, it was submitted that the issue was not whether or not the activities of the 1<sup>st</sup> Respondent in the Constituency were done with the view to induce voters but rather whether those activities prevented the majority of the people in the constituency from voting for their preferred candidate. Further, that the issue was not whether or not the Appellant was disadvantaged in the election by the activities of the 1<sup>st</sup> Respondent as an election is a popularity contest in which all candidates aim to induce the electorate to vote for them, adding that promises by candidates of what they will do once elected is a form of inducement. As such, that inducement *per se* is not an electoral offence.
- 5.5 As to whether the 1<sup>st</sup> Respondent's activities prevented the majority of people in the constituency from voting for their preferred candidate, it was the 1<sup>st</sup> Respondent's submission that the same is a question of fact which requires to be proved by cogent evidence and that it cannot be assumed that the majority of the people who voted for the 1<sup>st</sup> Respondent did so because she dug boreholes in the constituency. In demonstrating that the

alleged inducements or gifts did not prevent the majority of the electorate from voting for their preferred candidate, the 1<sup>st</sup> Respondent cited two scenarios that occurred in the 2011 and 2021 General elections. It was submitted that in the 2011 General Elections, the Patriotic Front (PF) used the slogan “*Don’t Kubeba*” which was simply saying to its members not to refuse to take gifts or other inducements from the competitors but that after they take the gifts or inducements, they should vote for the PF. That the same occurred in 2021 General Elections in which the United party for National Development (UPND) used the “*Water Melon*” slogan in which they were saying that most people going about in PF regalia were actually UPND and like a water melon, they were green on the outside and red in the inside. That in both cases, the election results confirmed that in an election a voter will vote for a candidate of their choice.

- 5.6 The 1<sup>st</sup> Respondent went on to submit that counsel for the Appellant in his submissions before the trial court abandoned all the allegations of misconduct in his petition and latched on to the 1<sup>st</sup> Respondent’s revelation of the developmental projects she had done in the constituency during the campaign period and that his conclusion was that the same amounted to bribery. That

the trial court after considering the provisions of Section 81(1) of the EPA which deals with the offence of bribery, came to the conclusion that the Appellant had not adduced any evidence to support the view that the projects undertaken by the 1<sup>st</sup> Respondent amounted to bribery.

- 5.7 The 1<sup>st</sup> Respondent submitted that to nullify an election under the EPA, the court is required to adopt a three-tier process, the first tier being that the candidate must be personally involved and/ or alternatively the second tier being that he/she must have had the knowledge and consent or approval of the corrupt practice, illegal practice or other misconduct of the candidate's election agent or polling agent. That the said factors when proved, are still not enough to nullify an election until the third tier is satisfied, which is that the majority of the voters in the Constituency, District or Ward were or may have been prevented from electing the candidate whom they preferred. That in *casu*, the 1<sup>st</sup> Respondent testified that she undertook activities which need to be assessed in terms of section 97(2)(a) of the EPA and that the question for determination is whether or not the said activities amounted to a corrupt practice, illegal practice or other misconduct.



5.8 In addressing the above question, it was submitted that section 81 under Part VIII of the EPA which deals with election offences has two components; the corrupt offer and the intention to induce the offeree to vote or refrain from voting. That these questions of fact have to be proved to a higher degree than the balance of probabilities but lower than beyond reasonable doubt. In support of this, reliance was placed on the book titled '*Democracy and Electoral Politics in Zambia*' in which the concept of materiality in the context of an election petition was discussed and refers to a materiality inquiry which seeks to determine the question when does bad behaviour become unacceptable in elections? It was argued that in discussing the materiality inquiry, the learned authors opine as follows:

**In broad terms, the rationale behind the materiality requirement in election petition cases is to prevent an upset of the *status quo* on the basis of frivolous and relatively insignificant infractions. The *status quo* should only be upset, as per the materiality requirement, where substantial error and injustice would obtain were the *status quo* be maintained. Materiality is thus not primarily concerned with strict justice. The question is not whether the offending party has behaved unjustly per se,**

but rather whether such injustice had an injurious effect that meets a certain threshold.....

It must be noted that the materiality standard enunciated here is not whether the electoral outcome would have been different had the illegality not occurred. Instead, what must be shown is that the majority (not just a significant number) of voters were by the illegal act, prevented or potentially prevented from electing a candidate of their choosing.

5.9 In view of the materiality concept as elucidated above, it was submitted that in order to answer the question posed for determination, it must be shown that the 1<sup>st</sup> Respondent's activities were of an injurious nature within a certain factual matrix or that her behaviour was unacceptable and that evidence needs to be laid to establish the fact that the majority of the people in the Constituency were prevented from choosing a candidate of their choice and this calls for a high standard of proof.

5.10 Various authorities on the standard of proof in election petitions were relied upon these being: **Micheal Mabenga v Sikota Wina**, **Mafo Wallace Mafiyo and George Samulela<sup>2</sup>**, **Akashambatwa Mbikusita Lewanika & Others v Fredrick Jacob Titus Chiluba<sup>3</sup>**, **Giles Chomba Yamba Yamba v Kapembwa Simbao**

and Electoral Commission of Zambia<sup>4</sup>, **Herbert Shabula v Greyford Monde<sup>5</sup>** and **Kufuka Kufuka v Mundia Ndalamei<sup>6</sup>**.

- 5.11 As regards, the burden of proof, it was the 1<sup>st</sup> Respondent's submission that the burden of proof in an election petition, like in any other civil claim, rests on the challenger to that election.
- 5.12 That in the present case, most of the evidence led by the Appellant before the trial court was dismissed for not being factual. That therefore, grounds one and two of the appeal must be dismissed for lack of merit.
- 5.13 As regards, ground three of appeal, it was the 1<sup>st</sup> Respondent's submission that the said ground was devoid of any merit. That if the court below found as a fact that the Appellant was involved in charitable works in the run up to the August 2021 General Elections, this Court cannot overturn such a finding.
- 5.14 Regarding the Appellant's fourth ground of appeal, in which he has challenged the trial court's decision to condemn him in costs, the 1<sup>st</sup> Respondent deemed this argument as misplaced since costs are generally for the successful litigant. In support of this preposition, our attention was drawn to the case of **Costa Tembo v Hybrid Poultry Farm (Z) Limited<sup>7</sup>** in which the Supreme Court held that a successful litigant is entitled to costs.



5.15 It was further argued that the general principle at law is that costs should follow the event as was held in the case of **YB and F Transport Limited v Supersonic Motors Limited**<sup>8</sup>.

5.16 It was submitted that as there is no wrong doing that can be attributed to the 1<sup>st</sup> Respondent in the conduct of proceedings in the court below, the costs should follow the event not only in the court below but also in this Court. Additionally, that as the EPA gives discretionary power to the trial judge to make orders as to costs, the trial judge was within her powers when she made her order as to costs. That the trial court having found that the petition lacked merit, it was within her discretion to award costs. That ground four of appeal has no merit and ought to be dismissed with costs to the 1<sup>st</sup> Respondent.

5.17 At the hearing of the Appeal, Mr. Simukoko, learned counsel for the 1<sup>st</sup> Respondent submitted that the Appellant relied on the statement by the 1<sup>st</sup> Respondent in examination in chief that she conducted some philanthropic works in the Constituency. That based on this, the Appellant argued that these projects amounted to bribery of the voters in the Constituency. Mr. Simukoko however, submitted that bribery is a criminal offence which requires evidence to be proved beyond reasonable doubt. As

such, that the Appellant ought to have adduced evidence to support the allegation that these projects amounted to bribery of the voters in the Constituency. That there was no evidence adduced to that effect.

5.18 Counsel further submitted that if this Court accepts the Appellant's arguments, then the Court has to establish whether the said projects influenced the voters in the 10 wards to vote for the 1<sup>st</sup> Respondent. Further that without cogent evidence, it cannot be determined that all the ten thousand plus voters who voted for the 1<sup>st</sup> Respondent did so because of those projects that were carried out by her in the Constituency.

5.19 **2<sup>ND</sup> RESPONDENT'S HEADS OF ARGUMENT**

5.20 On 4<sup>th</sup> March, 2022 the 2<sup>nd</sup> Respondent filed its heads of argument in which it re-stated the principles governing the standard of proof in election petitions as affirmed by the courts in this jurisdiction. Particularly, the cases of **Lewanika and Others v Chiluba<sup>3</sup>** and **Saul Zulu v Victoria Kalima<sup>9</sup>** as well as the Ugandan case of **Nabukeera Hussein Hanifa v Kibule Ronald and Another<sup>10</sup>**.

5.21 The 2<sup>nd</sup> Respondent also restated the law relating to nullification of parliamentary and local government elections as set out under section 97(2) and (3) of the EPA, whose import was given by this Court in the case of **Nkandu Luo v Doreen Sefuke Mwamba and The Attorney General**<sup>11</sup>. In addition, the 2<sup>nd</sup> Respondent reiterated the long-standing principle as to the burden of proof which is that the burden of proof rests on the petitioner.

5.22 The 2<sup>nd</sup> Respondent submitted that it duly conducted the elections in substantial conformity with the law and in the premises, prayed that the appeal be dismissed with costs to the 2<sup>nd</sup> Respondent.

5.23 At the hearing of the appeal, Mr. Bwalya, in-house counsel for the 2<sup>nd</sup> Respondent entirely relied on the filed heads of argument.

5.24 In reply, Mr. Michelo submitted that the philanthropic works undertaken by the 1<sup>st</sup> Respondent were done with a view of gaining votes.

5.25 As regards the issue whether the said philanthropic activities did influence the majority of the voters, the Appellant responding in the affirmative submitted that sinking twenty-five boreholes throughout the constituency, did influence the majority of the voters in the constituency.



## 6.0 ANALYSIS AND DETERMINATION

- 6.1 We have carefully considered the grounds of appeal, the written and oral submissions by learned counsel for the respective parties. We have also considered the judgment of the High Court and the evidence on record.
- 6.2 The two issues for determination as can be discerned from the grounds of appeal are firstly; whether or not the self-confessed developmental projects carried out by the 1<sup>st</sup> Respondent in the Mambilima Constituency amounted to bribery under section 81(1) of the EPA and whether the said acts met the threshold for nullifying an election under section 97(2) of the EPA and secondly; whether or not the award of costs by the lower court was appropriate in this case.
- 6.3 As a starting point, it is trite that in civil proceedings, the burden of proof lies on the plaintiff. In the case of election petitions, which are equally civil in nature, the onus is on the petitioner to prove his or her allegations.
- 6.4 As regards, the standard of proof, it is settled that the standard of proof in an election petition is higher than that required in an ordinary civil action but lower than the standard of beyond reasonable doubt required in criminal matters. Furthermore, the

evidence adduced in support of the allegations made, must prove the issues raised to a fairly high degree of convincing clarity. This principle of law was elucidated by the Supreme Court in the case of **Lewanika and Others v Chiluba**<sup>3</sup>. The principle was also restated by this Court in the case of **Mwiya Mutapwe v Shomeno Dominic**<sup>12</sup>.

6.5 Further, in the case of **Abuid Kawangu v Elijah Muchima**<sup>1</sup> this Court restated that the standard of proof in election petitions remains higher and distinct from that required in an ordinary civil matter but lower than the standard of beyond reasonable doubt required in criminal matters.

6.6 The threshold for nullifying the election of a Member of Parliament where a corrupt practice, illegal practice or other misconduct is alleged in an election petition, is governed by section 97 (2) (a) of the EPA, which is couched in the following terms:

**The election of a candidate as 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.

6.7 The import of section 97 (2) (a) of the EPA was given by this Court in the case of **Nkandu Luo v Mwamba and Another**<sup>11</sup> in which we held as follows:

Section 97(2) of the Electoral Process Act is central to the judicial resolution of electoral disputes. In order to successfully have an election annulled, 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.....In addition, 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 electorate from electing the candidate of their choice.



6.8 The above principles will again guide us in determining the issues before us in this appeal. We will now proceed to address the grounds of appeal.

6.9 We note from a reading of grounds one, two and three of appeal that they are interlinked. In considering this appeal, we shall therefore, address them together.

6.10 The finding of the lower court as regards these grounds appears at pages 53 to 56 of the record of appeal (Volume 1) where the trial court stated as follows:

**Counsel for the Petitioner did not address the allegations raised in the petition but latched on to the evidence adduced by the 1<sup>st</sup> Respondent on the developmental projects she had done in the constituency during the campaign period. He contended that the developmental activities done by the 1<sup>st</sup> Respondent during the campaign period influenced the people of Mambilima Constituency to vote for her and that they were prevented from voting for the candidate of their choice. Counsel appears to suggest that the developmental projects done by the 1<sup>st</sup> Respondent amounted to bribery as provided for in the Electoral Process Act.**

**Section 81(1) of the Act deals with the offence of bribery and states as follows: .....**

**From the above provision, it is clear that the Petitioner needed to show that the developmental projects done by the 1<sup>st</sup> Respondent were corruptly done in order to induce the voters to vote for her. The Petitioner did not adduce any evidence on**

the circumstance under which the 1<sup>st</sup> Respondent did these works. There was therefore no evidence that the 1<sup>st</sup> Respondent asked for votes in return for building the school, refurbishing the hospitals, attending funerals and providing transport, sinking bore holes, rendering assistance to churches, providing Covid 19 materials and paying school fees for girls. (Emphasis added).

The trial court went further to state as follows:

The question that needs to be answered is whether the 1<sup>st</sup> Respondent's conduct described above constituted bribery as envisaged by the Act. The Halsbury Laws of England Volume 15, 4<sup>th</sup> Edition, provides some useful guidelines on the issue and states as follows:

“The imminence of an election is an important factor to be taken into account in deciding whether a particular act of charity amounts to bribery. A charitable design may be unobjectionable as long as no election is in prospect but if an election becomes imminent, the danger of the gift being regarded as a bribe is increased. It may be said that the charity at election times ought to be kept in the background by Politicians”

The Zambian Courts have on a number of occasions nullified elections where it was proved that a gift had been given to induce voters. In the present case, no evidence was adduced to show that the 1<sup>st</sup> Respondent had asked for votes in exchange for her works. Further, there was evidence that the Petitioner had carried out charitable works during the campaign period although they were not itemized. (Emphasis added).

6.11 It is a settled principle of law that an Appellate court will not lightly interfere with the findings of fact of a trial court unless satisfied that the findings in question are either perverse or were made in the absence of any relevant evidence or upon a misapprehension of facts or the findings, which on a proper view of the evidence, were such that no trial court or tribunal properly directing itself can make. The cases of **Wilson Masautso Zulu v Avondale Housing Properties**<sup>13</sup> and **The Attorney General v Marcus Kampumba Achiume**<sup>14</sup> are instructive on this principle of law.

6.12 That said, we now move to address the three grounds of appeal.

6.13 The evidence regarding the 1<sup>st</sup> Respondent's developmental works came up during the 1<sup>st</sup> Respondent's examination in chief appearing at (pages 528 to 534 of the record of appeal volume II), wherein she highlighted some of her achievements in Mambilima Constituency. These achievements included the building of a school in Michelo Ward, extension of water from Nsumpi to Chansha Ward, revamping bore-holes, roofing of Churches in various wards, painting of schools, maintenance of Mambilima mortuary, refurbishment of local clinics, paying of



school fees for girls in various Wards and offering Covid -19 relief at the peak of the pandemic.

6.14 Upon assessing the 1<sup>st</sup> Respondent's evidence, the trial court addressing her mind to section 81 of the EPA which provides for the offence of bribery, found that the provision required the Appellant to prove that the developmental projects done by the 1<sup>st</sup> Respondent were corruptly done in order to induce the voters to vote for her. That the Appellant adduced no evidence on the circumstances under which the 1<sup>st</sup> Respondent undertook these activities. Further, that there was no evidence that the 1<sup>st</sup> Respondent had asked for votes in exchange for her works.

6.15 Bribery is an offence under section 81(1) of the EPA. Section 81 (1) (a) and (c) are relevant for this case and provide as follows:

**A Person shall not, either directly or indirectly, by oneself or with any other person corruptly-**

**(a) give, lend, procure, offer, promise, or agree to give, lend, procure or offer any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election;**

**(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavor to procure the return of**

any candidate at any election or the vote of any voter at any election.

6.16 A reading of section 81(1) (a) and (c) of the EPA reveals that for an act to be caught under the section, the purpose has to be to induce the voter to vote in a particular way.

6.17 The Appellant thus had the onus of proving to the required standard whether the charitable works which were undertaken by the 1<sup>st</sup> Respondent in Mambilima Constituency constituted bribery. We are fortified in our position by what we held in the **Abuid Kawangu**<sup>1</sup> case in which we distinguished a philanthropic activity from a campaign action by stating that the difference lies in the purpose and timing of the act. The aspect of timing was established by the 1<sup>st</sup> Respondent's own admission.

6.18 The petition filed by the Appellant in the court below as can be seen from the record of appeal, did not raise any allegation in respect to the 1<sup>st</sup> Respondent's engagements in philanthropic works. The Appellant solely relied on the 1<sup>st</sup> Respondent's evidence in her examination in chief.

6.19 It is our considered view that it was not enough for the Appellant to merely argue that the 1<sup>st</sup> Respondent undertook charity works in Mambilima Constituency during the campaign period. The

Appellant needed to prove before the trial court that the said acts by the 1<sup>st</sup> Respondent prevented the majority of the electorate from voting for their preferred candidate.

6.20 From the evidence on record, there was no evidence adduced before the lower court to show that the 1<sup>st</sup> Respondent's activities prevented or may have prevented the majority of the electorate from voting for their preferred candidate in contravention of section 97(2) of the EPA. Indeed, as rightly, argued by the 1<sup>st</sup> Respondent, this cannot be assumed. It remained the Appellant's burden as petitioner to prove the allegation of bribery to the required standard. We are fortified in our position by the Supreme Court case of **Michael Mabenga**<sup>2</sup>, in which the Supreme Court held at page 111 as follows:

An election petition like any other civil claim that depends on the pleadings and the burden of proof is on the challenger to that election to prove, "to a standard higher than on a mere balance of probability. Issues raised are required to be established to a fairly high degree of convincing clarity."

6.21 Further, in the case of **Giles Chomba Yamba Yamba**<sup>4</sup> we held that the onus was on the petitioner in the court below to establish with convincing clarity that the 1<sup>st</sup> Respondent was responsible directly or indirectly, for the corrupt or illegal acts, and that as a



result, the majority of the electorate were or may have been prevented from voting for a candidate they preferred.

6.22 On the basis of the above authorities, we do not find that the offence of bribery under section 81(1) (a) and (c) of the EPA was proved in the court below as required under section 97 (2) (a) of the EPA. The court below was therefore on firm ground when it held that there was no evidence to prove the allegations of bribery. We therefore, find no merit in grounds one, two and three of appeal and dismiss them accordingly.

6.23 As regards ground four of the appeal, it is the Appellant's argument that the trial court erred in condemning the Appellant to pay costs of the proceedings to the Respondents on the ground that election petitions are cases of public interest and costs are rarely awarded.

6.24 The general principle in ordinary civil matters is that costs should follow the event; in other words, a successful party should normally not be deprived of his or her costs unless the successful party did something wrong in the action or in the conduct of it. The case of **YB and F Transport Limited v Supersonic Motors Limited**<sup>8</sup> is instructive on this.

6.25 In dealing with the question of costs in election petitions, a court has to assess whether or not there was a party guilty of vexatious conduct during the course of the trial. Only after such an assessment, can the Court award costs against the erring party. It follows that in an election petition, costs do not necessarily follow the event as in other civil cases.

6.26 In the case of **Kufuka Kufuka v Mundia Ndalamei**<sup>6</sup> we directed that a trial judge must always make a finding as to the erring party before awarding costs. Otherwise, the default position in election petitions is that each party is to bear their own costs.

6.27 The trial judge in the court below did not make a finding as to the erring party before awarding costs and thus, there was no basis for the award of costs against the Appellant. Ground 4 of appeal succeeds.

## 7.0 CONCLUSION

7.1 In sum, only ground (4) four of the appeal on costs has succeeded. As the three substantive grounds of the Appellant's four grounds of appeal have failed, we accordingly dismiss the appeal and uphold the declaration by the lower court that the 1<sup>st</sup> Respondent, Jean Chisenga Ng'andwe was duly elected Member of Parliament for Mambilima Constituency.

7.2 We order each party to bear their own costs both here and in the court below.



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A. M. SITALI  
CONSTITUTIONAL COURT JUDGE



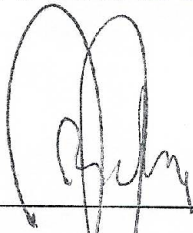
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M.S. MULENGA  
CONSTITUTIONAL COURT JUDGE



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M. M. MUNALULA, JSD  
CONSTITUTIONAL COURT JUDGE



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M. MUSALUKE  
CONSTITUTIONAL COURT JUDGE



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J. Z. MULONGOTI  
CONSTITUTIONAL COURT JUDGE