

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(APPELLATE JURISDICTION)

2021/CCZ/A006

IN THE MATTER OF:

LOCAL GOVERNMENT ELECTION PETITION FOR
THE MKUSHI WARD COUNCILOR, CHALATA WARD
HELD ON THE 12TH AUGUST, 2021.

BETWEEN:

BALM MWENYA

APPELLANT

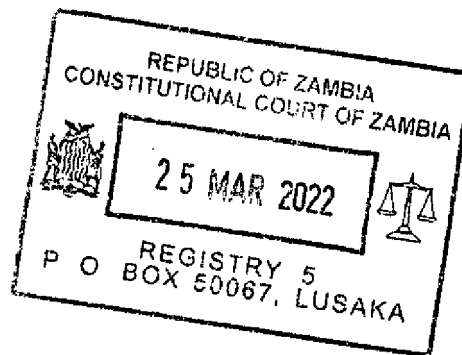
AND

FELIX BEMBA

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT



CORAM: Chibomba, PC, Mulonda, Munalula, Musaluke and Mulongoti, JJC,
On 9th February, 2022 and 25th March, 2022

For the Appellant: Mr. T. S. Ngulube of Tutwa S. Ngulube and Company

For the 1st Respondent: No Appearance

For the 2nd Respondent: Mr. B. M. Musenga and Mr. M. Bwalya both In-house Counsel

JUDGMENT

Mulongoti, JC, delivered the Judgment of the Court

Cases referred to:

1. *Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General* CCZ Selected Judgment No. 51 of 2018
2. *Steven Masumba v Elliot Kamondo* (2017) 3 ZR 130
3. *Austin Liato v Sitwala Sitwala* Selected Judgment No. 23 of 2018
4. *Mubika Mubika v Poniso Njeulu* SCZ Appeal No. 114 of 2007
5. *Jonathan Kapaipi v Newton Samakayi* CCZ Appeal No. 13 of 2017
6. *Brelsford James Gondwe v Catherine Namugala* SCZ Appeal No. 129 of 2012
7. *Akashambatwa Mbikusita Lewanika and others v Frederick Jacob Titus Chiluba* (1998) Z.R 79
8. *Saul Zulu v Victoria Kalima* SCZ Judgment No. 2 of 2014
9. *Nakbukeera Hussein Hanifa v Kibule Ronald and Another* (2011) UGHC64
10. *Abuid Kawangu v Elijah Muchima* CCZ Appeal No. 8 of 2017
11. *Richwell Siamunene v Gift Sialubalo* (2017) 3 ZR 335
12. *Josephat Mlewa v Wightman* (1995/97) Z.R 171
13. *Kufuka Kufuka v Mundia Ndalamei (CCZ)* Appeal No. 15 of 2016
14. *Mubita Mwangala v Inonge Mutukwa Wina* Appeal No. 80 of 2007
15. *Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa* (2005) Z.R 138
16. *Mbololwa Subulwa v Kaliye Mandandi* CCZ Selected Judgment No. 25 of 2018
17. *Sithole v State Lotteries Board* (1975) ZR 140, 151
18. *Chrispin Siingwa v Stanley Kakubo*, Appeal No. 196/2015
19. *Mwiya Mutapwe v Shomeno Dominic* 2016/CC/A008

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*

1.0 **Introduction**

1.1 The appellant, Balm Mwenya, filed this appeal against the decision of the Local Government Elections Tribunal (the Tribunal) which nullified her election as Councilor for Chalata Ward in Mkushi District.

1.2 In nullifying the election, the Tribunal considered as widespread, the distribution of meat by Lawrence Mwansa, whom the Tribunal found to have been the appellant's election or polling agent. The Tribunal held the view that the widespread distribution of meat may have prevented voters in the Ward from choosing a candidate of their choice. Furthermore that, the appellant did not demonstrate that she or her agent Lawrence Mwansa, made any attempt to stop the distribution of meat to voters in Chalata Ward or that they dissociated themselves from the activity.

2.0 **Background**

2.1 The background to this appeal is that, on 12th August, 2021 the appellant, Balm Mwenya, and the 1st respondent, Felix Bemba, were among candidates in the Chalata Ward Councilor elections

which were conducted and managed by the 2nd respondent. The appellant was declared duly elected.

2.2 Aggrieved with the poll result, the 1st respondent who stood on the United Party for National Development (UPND) party ticket, petitioned the Tribunal on grounds that the appellant, who stood on the Patriotic Front (PF) party ticket, had committed some electoral malpractices. These electoral malpractices, as itemized in the Petition consisted of defamatory statements, vote buying, bribery and abuse of government resources.

2.3 It was further alleged that: on 3rd August, 2021, the appellant gave out a K200 at Mr. Moyenda's funeral house, which was meant to mitigate the funeral costs. On 11th August, 2021, a cow was slaughtered to feed the electorate on the polling day, 12th August, 2021. The condition for someone being fed was that they had to vote for the PF.

2.4 In her Answer to the Petition, the appellant denied all the allegations and stated that she would put the 1st respondent to strict proof.

3.0. Evidence Adduced Before the Tribunal

- 3.1 A brief overview of the evidence adduced before the Tribunal, in relation to the allegation of slaughtering a cow and distributing its meat to the electorate upon which the election was nullified, is as follows:
- 3.2 The 1st respondent testified as PW1 in line with the Petition. He reiterated that a cow was slaughtered on 11th August, 2021 and that the meat was shared at bana Malio's house by Lawrence Mwansa the appellant's campaign manager.
- 3.3 In cross-examination, PW1 testified that the cow that was slaughtered was given to the general public and not PF members only. He mentioned several places in Chalata and Malali polling stations where cooking of the meat was done from. Although **PW2, Ebina Changwe**, (UPND polling agent) did not testify about the slaughter or distribution of the cow, the Tribunal relied on her testimony to find that Lawrence Mwansa was the appellant's election or polling agent. PW2 testified that on 12th August, 2021 she was with Lawrence Mwansa, the PF polling agent, when Mwansa's phone rang. That Lawrence

Mwansa was talking about PW1's arrest for being found in possession of pre-marked ballot papers.

3.4 **PW5, Geoffrey Chibuye**, was the only other witness who testified about the slaughter of the cow. He said the cow was slaughtered on 11th August, 2021 around 11:00 hours from his place which was one of the feeding camps. After slaughter the meat was shared and then cooked. Thereafter, people came to eat after voting and their thumbs were checked for the ink to confirm that they had voted. According to PW5, there were lots of people but he saw Mr. Mwansa and Mr. Chibesa Fanwell there.

3.5 In cross-examination, PW5 testified that the PF party was managing the camps and that Mwansa and Chibesa were PF members.

3.6 For her part, the appellant testified that she did not slaughter a cow as alleged. She said the purpose of the feeding camps was to feed people who were going in the field to do door to door campaigns because they had to walk.

4.0 **Consideration and decision of the Court below**

4.1 After analysing the evidence adduced before it, the Tribunal restated the law that applies to election petitions as contained in section 97(2) of the Electoral Process Act 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;

(b) Subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that

such non-compliance affected the result of the election; or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.

4.2 The Tribunal also relied on our decision in the case of **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General**¹ 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 the candidate of their choice.

4.3 The Tribunal warned itself of the danger of relying on the evidence of witnesses from the same political party as the

petitioner or respondent. In support, our decision in the case of **Steven Masumba v Elliot Kamondo**² was relied upon wherein we elucidated that:

Witnesses from a litigant's own political party are partisan witnesses whose evidence should be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood.

4.4 And our decision in **Austin Liato v Sitwala Sitwala**³ that:

We also reiterate that in any election Petition, just as in any civil matter, the burden of proof is on the petitioner to establish the electoral offence complained of. However, the standard of proof in an election petition is higher than that required in an ordinary civil action. A consideration of Zambian jurisprudence reveals that the evidence adduced in support of allegations made in an election petition must establish the issues raised to a fairly high degree of convincing clarity

4.5 Guided by the law in the EPA and the cases above, the Tribunal dismissed the allegations of malpractice relating to donation of K200 at a funeral, ferrying voters to the polling station and the defamatory statement about arrest of the 1st respondent.

4.6 The Tribunal, however, found merit in the allegation that a cow was slaughtered on 11th August, 2021 to feed the electorate who had voted for PF. The Tribunal noted the evidence of PW5 that

he saw a cow being slaughtered at the area and that the meat was shared. And that he (PW5) testified that he saw Lawrence Mwansa on 12th August, 2021 when voters were being fed after they had cast their votes. The Tribunal observed that Lawrence Mwansa was the ward Chairperson for the PF party in Chalata Ward and that he was the appellant's campaign manager and polling agent at Malali polling station as testified by PW2. According to the Tribunal, this evidence was not rebutted by the appellant who only denied Kennedy Malunga as being her election or polling agent. Accordingly, the Tribunal drew an inference that Lawrence Mwansa was the appellant's campaign manager, election and or polling agent.

4.7 The Tribunal concluded therefore, that section 81 of the EPA and Regulation 15(1)(h)(ii) of the Electoral Code of Conduct which proscribes the giving of any inducement, reward or bribe in consideration of a person voting and deems such as a corrupt practice or electoral misconduct was satisfied; as the distribution of meat by Lawrence Mwansa was a corrupt

practice which was committed with the knowledge and approval of the appellant.

4.8 As to whether the distribution of the meat was widespread, the Tribunal observed that the testimony of PW1 was that the meat was distributed to the general public and prepared at various points near Chalata polling station and various points near Malali polling station including the place where the chiefs and traditional leaders meet. The Tribunal reasoned that this evidence went unchallenged and was confirmed by PW5 who told the Tribunal that he was among the groups of people that partook of the meat. According to the Tribunal this was also confirmed by the appellant herself.

4.9 The Tribunal concluded that the distribution of meat in Chalata ward, on 11th and 12th August, 2021 was widespread and was done with the participation, approval and concurrence of Lawrence Mwansa, the appellant's election and polling agent. The Tribunal opined that the widespread distribution of meat to voters in the ward may have prevented voters in that ward from electing a candidate who they preferred. Additionally, that the

appellant and her agent Lawrence Mwansa did not make any attempt to stop the distribution of the meat or dissociate themselves from the activity thus abrogating section 97(3) of the EPA.

4.10 The Tribunal found that the petition was successful and that the election of the appellant as councilor for Chalata ward in Mkushi North was null and void.

5.0. **The Appeal**

5.1 Dissatisfied with the decision of the Tribunal, the appellant appealed to this Court raising four (4) grounds of appeal couched as follows:

1. *The Tribunal erred both in law and fact by finding that the meat was distributed in Chalata and Malali Polling Stations based on the evidence of PW1 and PW2 who were witnesses with interests to serve having been members of the United Party for National Development (UPND), the 1st Respondent's political party.*
2. *The Tribunal erred both in law and fact by finding that the distribution of meat in two polling stations in Chalata Ward was widespread without taking judicial notice that Chalata Ward has seven polling stations.*
3. *The Tribunal erred in law and in fact by nullifying the Appellant's election without evidence showing that the*

alleged distribution of meat prevented the majority from electing the candidate of their choice.

4. Any other ground that may arise.

6.0. The Arguments

6.1 Counsel for the appellant filed his heads of argument on 24th December, 2021.

6.2 Regarding ground one, counsel submitted that the Tribunal relied on the evidence of PW2 who testified that Lawrence Mwansa was the polling agent for the appellant and in arriving at the conclusion that the appellant distributed meat in Chalata Ward. Counsel submitted that section 2 of the Electoral Process Act (EPA) defines an election agent and polling agent as a person appointed by a candidate in respect of a polling station. That the record will show that PW2 did not give any evidence showing that the said Lawrence Mwansa was the appellant's specified election agent in line with section 2 of the EPA and in accordance with the holding in the case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General.**¹

- 6.3 It was counsel's submission that the evidence adduced before the Tribunal in relation to Lawrence Mwansa came from PW2 who was a member of the UPND and the Tribunal should have treated this evidence with caution as she was a witness with an interest to serve. Our decision in the case of **Steven Masumba v Elliot Kamondo**² was relied upon in support of this argument. Therefore, that the Tribunal erred in concluding that Lawrence Mwansa was the appellant's agent based on the evidence of PW2, a witness with an interest to serve and without evidence proving agency as defined by section 2 of the EPA.
- 6.4 As regards grounds two and three counsel submitted that the Tribunal's holding at page J19 of the Judgment that the distribution of meat at Chalata and Malali Polling Stations was widespread was not consistent with the provisions of section 97 (2) of the EPA. It was counsel's submission that the Tribunal should have taken judicial notice of the size of Chalata Ward before concluding that the distribution of meat was widespread. That Chalata Ward had seven polling stations as per the Registered Voters per Polling Station Register of 2021 published

by the Electoral Commission of Zambia. That had the Tribunal taken judicial notice of the same it would not have held that the distribution of meat was widespread or that the majority of voters in the ward were or may have been influenced by the alleged misconduct by the appellant's agent.

6.5 Referencing the cases of **Mubika Mubika v Poniso Njeulu**⁴ which was cited with approval by this Court in **Jonathan Kapaipi v Newton Samakayi**,⁵ and **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke and the Attorney General**¹ in which this Court held that the wrongful conduct by the candidate, should be widespread and the majority of electorate swayed for the election to be nullified. Counsel submitted that in the case before court, the evidence of PW1 and PW5 was to the effect that meat was distributed. However, there was no proof that it was widespread or that it influenced the majority of the electorate. In this regard, counsel submitted that the Tribunal erred in drawing the conclusion that the alleged distribution of meat was widespread without any evidence on record.

- 6.6 On ground four counsel submitted that the Tribunal erred when it failed to uphold the principle that the burden of proof is fixed on the petitioner in election petitions to prove the allegations to a fairly high degree of convincing clarity as held in **Austin Liato v Sitwala Sitwala**³ and **Brelsford James Gondwe v Catherine Namugala**.⁶ It was counsel's submission that at J16 of the judgment, the Tribunal stated that the appellant had denied that Kennedy Malunga was her agent but said nothing about Lawrence Mwansa, and it drew an inference that since the appellant did not say anything about Lawrence Mwansa, then Lawrence Mwansa was the appellant's campaign manager, election and or polling agent.
- 6.7 Counsel concluded by submitting that the Tribunal misdirected itself in nullifying the election without regard to the prevailing electoral laws, and as such, the entire appeal should succeed and the appellant be declared as duly elected Councilor for Chalata Ward and that costs be for the appellant.
- 6.8 The 2nd respondent filed its heads of argument on 18th January, 2022. Citing the cases of **Akashambatwa Mbikusita Lewanika and**

others v Frederick Jacob Titus Chiluba⁷, and **Saul Zulu v Victoria Kalima**,⁸ and the Ugandan case of **Nakbukeera Hussein Hanifa v Kibule Ronald and another**,⁹ it is argued that the standard of proof in election petitions is higher than on a balance of probability and is to a fairly high degree of convincing clarity.

6.9 It was the further submission of counsel that this Court had occasion to pronounce itself in the cases of **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General**¹ **Abuid Kawangu v Elijah Muchima**,¹⁰ and **Austin Liato v Sitwala Sitwala**,³ that an election can be successfully nullified when a petitioner proves to the satisfaction of the Court that a candidate personally or through his appointed election or polling agent committed a corrupt practice or other misconduct in connection with the election or that such malpractice was committed with the candidate's or his agent's knowledge and approval, or consent. Additionally, that a candidate can only be held liable for their own conduct or misconduct or that of their appointed agent as held in **Akashambatwa Mbikusita Lewanika and others v Frederick Jacob Titus Chiluba**.⁷

6.10 Learned counsel further argued that a general allegation that supporters of a particular party were implicated in a misconduct is not enough to attach responsibility to the respondent. The case of **Richwell Siamunene v Sialubalo Gift**¹¹ was cited in support of this submission. Furthermore, that this Court departed from the position taken in **Josephat Mlewa v Wightman**¹² case when it held in **Kufuka Kufuka v Mundia Ndalamei**¹³ that proof of electoral malpractice is not enough but that there must be proof that the act was so widespread that it affected or may have affected the majority of the electorate.

6.11 Learned counsel amplified that the threshold for nullifying a parliamentary or local government election is that stated in **Steven Masumba v Elliot Kamondo**² which approved the cases of **Mubika Mubika v Poniso Njeulu**⁴ and **Mubita Mwangala v Inonge Mutukwa Wina**¹⁴ which are to the effect that the petitioner must prove that the majority of voters were prevented from electing their preferred candidate as a result of the corrupt or illegal practice or other misconduct which has been referred to as the "Majoritarian Principle". It was submitted that in **Anderson**

Kambela Mazoka and others v Levy Patrick Mwanawasa and others,¹⁵
the Supreme Court dismissed the petition on the majoritarian
principle even though 6 out of the 36 allegations had been
proved.

6.12 On the basis of the above cases, it is argued that the Tribunal
should have had the principles enunciated in these cases at the
core of the exercise of its judicial discretion. As no statistics
were given, the 1st respondent did not discharge the burden and
lamentably failed to prove any electoral malpractice.
Furthermore, that the 1st respondent did not adduce any cogent
evidence that the electoral malpractice, if any, was so
widespread that it swayed or may have swayed the majority of
the electorate from electing the candidate of their choice.

6.13 It was counsel's further submission that there was no evidence
that the electorate were prevented from participating in the
election and that none of the witnesses specified any provision
of the law that the 2nd respondent breached. That the 2nd
respondent duly conducted the elections in substantial
conformity with the law and in the premises, the appeal should

be allowed and the election upheld, with costs to the 2nd respondent.

7.0. **The Hearing**

7.1 At the hearing held on 9th February, 2022, Mr. Ngulube for the appellant informed the Court that they would rely on the heads of argument filed on 24th December, 2021. He augmented by submitting that the Tribunal mismanaged the evidence in believing that Lawrence Mwansa was the election agent for the appellant when in fact not. That in relation to grounds two and three, the Tribunal misdirected itself in nullifying the seat based on the allegations of distributing of meat in two out of seven polling stations contrary to the provisions of section 97(2) of the EPA which requires that the alleged electoral malpractice must be widespread. Counsel submitted that in no way could such an allegation have been held to have been widespread. As regards ground four, it is argued that the Tribunal shifted the burden of proof, from the 1st respondent to the appellant which was a serious misdirection.

7.2 Mr. Musenga, who appeared for the 2nd respondent, also relied on their heads of argument filed on 18th January, 2022. He augmented by submitting that the Tribunal based its decision to nullify the election on the ground that the distribution of meat on 11th August 2021 and on the polling day which was on 12th August, 2021 and was done with the participation and approval of Lawrence Mwansa, was widespread. That a perusal of the whole judgment shows that the Tribunal did not address its mind to the majoritarian principle. In addition, that there was no evidence of the number of voters and of the number of people who allegedly received the meat.

8.0. Consideration and decision on appeal

8.1 We have considered the heads of argument and submissions by the respective parties. Before we delve into considering the appeal, we note that ground four which is in the heads of argument is not in the memorandum of appeal. Ground four in the memorandum of appeal simply stated "***Any other ground that may arise***". Then in the heads of argument ground four reads: "***The Tribunal erred in law by failing to uphold the principle that the***

burden of proof is fixed on the petitioner in election petitions." This in essence is tantamount to filing a ground of appeal without leave of the Court contrary to the rules. Ground four in the memorandum of appeal is not a ground at all. Accordingly, we shall consider only grounds one, two and three as stated in the memorandum of appeal. We shall deal with the three grounds of appeal simultaneously as they all speak to the drawing of wrong inferences by the Tribunal. The cardinal issue the appeal raises is, whether the corrupt practice of distributing meat to the voters was proved to the requisite standard to warrant nullification of the appellant's election.

8.2 The appellant contends that the Tribunal's finding that there was widespread distribution of meat which influenced the electorate was based on the wrong inference that Lawrence Mwansa was the appellant's campaign manager, election and or polling agent.

8.3 We perused the judgment of the Tribunal. At J16 of the judgment, which is on page 28 of the record of appeal, lines 11 to 23, and line 1 on page 29 of the record of appeal, the Tribunal stated as follows:

The 1st Respondent denies the allegation of slaughtering and distributing meat in Chalata Ward the day before the polls and on polling day. This Tribunal must then address its mind to the role that Lawrence Mwansa played. The Petitioner gave evidence that Lawrence Mwansa was the Ward Chairperson for Chalata Ward for the PF and that he was the 1st Respondent's campaign manager. PW2 also told the Tribunal that Lawrence Mwansa was also a polling agent for the PF at Malali Polling station. The 1st Respondent did not rebut this evidence. In fact, two persons were named by the Petitioner and his witnesses as carrying out certain activities on behalf of the 1st Respondent, namely the said Lawrence Mwansa and Kennedy Malunga. In her evidence, the 1st Respondent denied that Kennedy Malunga was her election agent but said nothing about Lawrence Mwansa. The Tribunal therefore draws the inference from the evidence on Record that Lawrence Mwansa was in fact the 1st Respondent's campaign manager, election agent and/ or polling agent. It therefore follows that the corrupt practice and electoral misconduct of distribution of meat to voters was committed with the knowledge and approval of the 1st Respondent's election and/or polling agent.

8.4 The question is, did the Tribunal draw a wrong inference that Lawrence Mwansa was the appellant's campaign manager,

election and or polling agent because she did not deny him being such, as she did Kennedy Malunga?

- 8.5 It is trite that an inference is a conclusion made from facts not in dispute or doubt. In order to determine what is not and is in dispute in *casu*, it is imperative for us to review the evidence that was laid before the Tribunal as regards the said Lawrence Mwansa. The evidence was from PW1 (who was the petitioner), PW2 and PW5.
- 8.6 PW1's testimony appears at pages 41-43 of the record of appeal. He testified that Lawrence Mwansa who was the campaign manager for the appellant and a PF polling agent at Malali polling station, shared the meat of the cow that was slaughtered by the PF party on 11th August, 2021. In cross-examination PW1 testified that the cow that was slaughtered was given to the general public as well; not only PF members. That the meat was cooked from various places, including at Chalata polling station at bana Malio's place, bana Potty's house at the councilor's house and where the traditional leader meet from. Cooking was also done at Malali polling station where Lawrence

Mwansa was a polling agent for PF at Mr. Chikuta's house. PW1 further testified in cross-examination that cooking was done at Chibwe Mukanga at bana Chingele's house, in Nambo at Victoria Mukwamba's house and in Kandao at Roma Chibuye's house.

8.7 PW5 testified that the cow was slaughtered at his place which was one of the feeding camps. The meat was shared in the feeding camp. PW5 further testified that he saw Mr. Mwansa and Mr. Chibesa Fanwell at his place. In cross-examination he said the PF party was managing the feeding camps. And that, Mwansa and Chisenga were PF members.

8.8 PW2 the UPND party polling agent for Malali testified that on 12th August, 2021 she was seated outside the polling station with Lawrence Mwansa an agent for PF when Mwansa received a phone call and was talking about the arrest of PW1.

8.9 What came out clearly and not in dispute is that, Lawrence Mwansa is a PF member and was a polling agent for PF at Malali polling station. PW1 is the only one who testified that Lawrence Mwansa was the campaign manager for the appellant. PW2 said

Lawrence Mwansa was the PF polling agent for Malali polling station. PW2 did not state that Lawrence Mwansa was the polling agent for the appellant but for the PF party. PW5 only referred to a Mr. Mwansa who was sharing food at one PF feeding camp. We opine that evidence adduced by PW1 as the petitioner, to prove that Lawrence Mwansa was the campaign manager, election or polling agent for the appellant was insufficient. No evidence was adduced to prove, for instance, that the said Lawrence Mwansa was named in the 1st respondent's nomination papers as her election or polling agent.

8.10 Regarding the finding that the said Lawrence Mwansa distributed meat to the electorate, PW5 only alluded to sharing of meat at one place. Whereas PW1 mentioned several places where cooking was done in Chalata and Malali polling stations, this evidence needed corroboration. It was incumbent upon him (PW1) as the petitioner to have adduced cogent evidence to prove the allegations to a fairly high degree of convincing clarity. Without adequate corroborative evidence to support his evidence these allegations were not proved. The evidence of

people he mentioned at whose houses cooking was done to feed members of the general public should have been corroborated by independent evidence or something more. The evidence PW1 adduced was scanty and unreliable. It does not show whether he was present when the cow was slaughtered, shared or cooked.

8.11 Furthermore, PW1 and PW2 being aligned to the UPND, their evidence required to be viewed with great care, caution, scrutiny and circumspection. We stated in **Mbololwa Subulwa v Kaliye Mandandi**¹⁶ on this aspect that:

As a starting point, we wish to echo here the position we took in Steven Masumba, where we made it clear that in terms of the requirement for corroborating evidence in election petitions, witnesses who belong to a candidate's own political party or who are members of the candidates campaign team must be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood by such witnesses in an effort to tilt the balance of proof in favour of the candidate that they support.

8.12 Bearing in mind that election petitions must be proved to a fairly high degree of convincing clarity by the petitioner, we are of the considered view that the inference and finding that Lawrence

Mwansa was the appellant's election or polling agent because she did not deny it, was not proved to the required standard. The evidence of PW1 needed corroboration by independent evidence or something more to show that the said Lawrence Mwansa was the appellant's election agent or polling agent.

8.13 We are of the considered view that the Tribunal misdirected itself when it drew the inference that Lawrence Mwansa was the campaign manager, election or polling agent for the appellant just because she did not deny that Lawrence Mwansa was her election agent or polling agent. We opine that in the circumstances of this case, this was not a reasonable inference that a Tribunal properly directing itself could make.

8.14 The inference leading to this conclusion or finding was wrongly drawn. Inferences are conclusions drawn from facts which are proved and not in doubt as held in **Sithole v State Lotteries Board**.¹⁷ In that case the Court of Appeal (forerunner to the Supreme Court) further observed that:

We (appellate court) are in as good a position as the trial court to draw the inferences, this court is at liberty to

substitute its own opinion for any opinion which the trial court might have expressed.

8.15 We are therefore, at liberty to interfere with the inference by the Tribunal and substitute with our own. We are of the considered view that the inference that Lawrence Mwansa was the appellant's agent because she did not deny it was not a proper inference that could be made based on the facts presented before the Tribunal and by which it invariably shifted the burden to the appellant. Furthermore, as an appellate court we can reverse findings of fact of a trial court if they are perverse, unsubstantiated by evidence or they were made on a misapprehension or improper view of the evidence as we illuminated in **Richwell Siamunene v Sialubalo Gift**.¹¹ Clearly, the findings that Lawrence Mwansa, the appellant's election or polling agent was guilty of electoral malpractice by distributing meat to the electorate was not supported by evidence nor proved to the requisite standard. We accordingly reverse this finding.

8.16 As aforestated election petitions, must be proved to a fairly high degree of convincing clarity as held in **Mazoka and others v Mwanawasa and others**¹⁵ that:

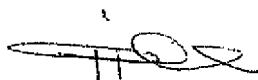
For the petitioners to succeed, it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true choice and free will of the majority of the voters.

8.17 We note that the 2nd respondent supports the appeal. We agree as canvassed by Mr. Musenga, the petitioner failed to prove any electoral malpractice and did not adduce any cogent evidence that the malpractice was so widespread that it swayed the majority. And that, it is settled law that where the trial court finds the petitioner's evidence unconvincing or it does not prove the allegations to the required standard of proof, it matters not the evidence proffered by the other party, the case will fail. The cases of **Chrispin Siingwa v Stanley Kakubo**¹⁸ and **Mwiya Mutapwe v Shomeno Dominic**¹⁹ refer. We, accordingly, reverse the Tribunal's findings of fact as aforestated.

8.18 In light of all the preceding paragraphs we find merit in all the three grounds of appeal, the appeal is allowed. We set aside the

decision of the Tribunal. The net result is that the appellant, Ms. Balm Mwenya, is the duly elected councilor for Chalata ward of Mkushi District.

8.19 Each party to bear own costs.



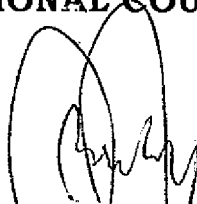
H. CHIBOMBA
PRESIDENT CONSTITUTIONAL COURT



P. MULONDA
CONSTITUTIONAL COURT JUDGE



M. M. MUNALULA, JSD
CONSTITUTIONAL COURT JUDGE



M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE