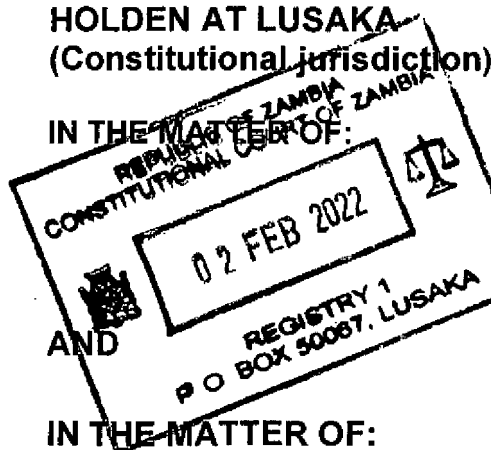


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**IN THE CONSTITUTIONAL COURT OF ZAMBIA APPEAL NO. 2021/CCZ/A0012
HOLDEN AT LUSAKA
(Constitutional jurisdiction)**



**IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTION PETITION FOR
COUNCILLOR IN ITIMPI WARD OF CHIMWEMWE
CONSTITUENCY IN THE KITWE DISTRICT OF THE
COPPERBELT PROVINCE OF THE REPUBLIC OF
ZAMBIA HELD ON THE 12TH DAY OF AUGUST 2021**

IN THE MATTER OF: THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

**IN THE MATTER OF: SECTION 19 OF THE LOCAL GOVERNMENT
ELECTIONS TRIBUNAL RULES 2016**

BETWEEN:

CHARLES NAKASAMU

APPELLANT

AND

SIMON KAKOMA

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

**Coram: Sitali, Mulonda, Munalula, Musaluke and Mulongoti JJC. On 7th
December, 2021 and 23rd February, 2022.**

For the Petitioner:

**Mr. C. Tafeni and Ms. S. Mwelwa of Suba,
Tafeni & Associates**

For the 1st Respondent:

**Mr. D. Mtonga of Paul Norah Advocates –
Agents for Iven Mulenga & Company**

For the 2nd Respondent:

Mr. A. Imonda of A. Imonda & Company

JUDGMENT

MUSALUKE, JC, delivered the Judgment of the Court

Cases referred to:

1. Steven Masumba v Elliot Kamondo (2017) 3 Z.R. 130
2. Nkandu Luo and ECZ v Doreen Sefuke Mwamba and the Attorney General CCZ Selected Judgment No. 51 of 2018
3. Anderson Kambela Mazoka & others v Levy Mwanawasa (2005) Z.R. 138
4. Thorp v Holdsworth (1876) 3 Ch. D 637
5. Gould v Mount Oxide Mines Limited (In Liquidation) (1916) 22 C.L.R 490
6. Kariba North Bank Company Limited v Zambia State Insurance Corporation Limited (1980) Z.R. 94
7. Khalid Mohammed v The Attorney General (1982) Z.R. 49 (S.C.)
8. Abiud Kawangu v Elijah Muchima CCZ Appeal No. 8 Of 2017
9. Austin Liato v Sitwala Sitwala CCZ Selected Judgment No. 23 of 2018
10. Richwell Siamunene v Sialubalo Gift CCZ Selected Judgment No. 58 of 2017

Legislation referred to:

1. The Constitution of Zambia (as amended by Act No. 2 of 2016) Chapter 1 of the Laws of Zambia
2. The Constitutional Court Act No. 8 of 2016
3. The Electoral Process Act No. 35 of 2016
4. The Constitutional Court Rules Statutory Instrument No. 37 of 2016

5. The Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016
6. The Local Government Elections Tribunals Rules, Statutory Instrument No. 60 of 2016

[1] Introduction

[1.1] This is an appeal against the judgment of the Local Government Elections Tribunal (the Tribunal) for Itimpi Ward of Chimwemwe Constituency in Kitwe District of the Republic of Zambia.

[2] Background and proceedings before the Tribunal

[2.1] The brief facts to this matter are that the Appellant and the 1st Respondent were candidates among others in the Local Government Elections held on 12th August, 2021 for Itimpi Ward of Chimwemwe Constituency in Kitwe District of the Republic of Zambia. The appellant stood on the United Party for National Development (UPND) ticket while the 1st Respondent stood on the Patriotic Front (PF) ticket.

[2.2] The 1st Respondent was declared as duly elected Councillor for Itimpi Ward with 1,813 votes. The Appellant polled 1,499 votes.

- [2.3] After the declaration of the election results, the election of the 1st Respondent was challenged by the Appellant before the Local Government Elections Tribunal.
- [2.4] At the trial of the petition, the Appellant (as petitioner) testified in support of his petition and called one (1) witness.
- [2.5] The Appellant asserted before the Tribunal that the campaigns by the 1st Respondent and the manner in which the 2nd Respondent conducted the elections were characterized by and conducted without compliance to the provisions of the Electoral Process Act No. 35 of 2016 (EPA) and the code of conduct set out in the schedule to the Act. That this disregard for the law affected the outcome of the elections to the Appellant's detriment. Particularly, that the voters in Itimpi Ward were prevented from electing the candidate they preferred by reasons of violence, intimidation, threats and undue influence, which were committed in connection with the election by the 1st Respondent and his agents.
- [2.6] That following the violence caused by the 1st Respondent's agents, members of the Appellant's campaign team were injured and did not

exercise their right to vote. That this resulted in giving undue advantage to the 1st Respondent.

[2.7] The Appellant also averred that the alleged violence and intimidation by the 1st Respondent and his agents had widespread effect on the electorate in the said ward and the same prevented the majority of voters from electing the candidate whom they preferred. Further, that the manner in which the 2nd Respondent conducted the election was irregular and contrary to the EPA as the agents of the 2nd Respondent altered the figures of the votes obtained by the candidates on the official election documents contrary to the actual figures obtained by the candidates.

[2.8] After the Tribunal considered the evidence before it, it delivered its judgment on 24th September, 2021. The Tribunal found that there was no evidence to corroborate the allegations of violence as alleged against the Appellant and his party as no witness was called to testify in relation to this particular allegation.

[2.9] Further that even if the violence did occur, there was no evidence to show that a single isolated incident of violence and intimidation was perpetuated by the 1st Respondent and or his agents or that such

violence had widespread effect on the electorate in Itimpi Ward which would have prevented the majority of voters from electing the Appellant as the candidate they preferred.

[2.10] As regards the anomaly of allocating votes to a 5th candidate, the Tribunal agreed with the Appellant and found that form GEN 20 from Hybrid Farm polling station showed that there were five candidates recorded when there were only four candidates officially nominated to stand in the election.

[2.11] The Tribunal also found that 29 votes were allocated to the purported 5th candidate a Thomas Mbewe who did not stand in the said election and found this as a gross anomaly on the part of the 2nd Respondent. The Tribunal however, found that removal of the 5th candidate who was the recipient of these 29 votes from form GEN 20 would not have changed the result of the election even if these votes were to be exclusively allocated to the Appellant.

[2.12] As regards the Appellant's evidence that the 1st Respondent only polled 109 votes at Hybrid Farm polling station but that the figure was altered to read 409 and that even this figure of 409 also looked like it was 2109, the Tribunal disagreed with the Petitioner's assertion stating

that the figure was also stated in words as “four zero nine”, and that looking closely at the figures, it was indeed 409 votes recorded.

[2.13] Taking into account the totality of the evidence brought before it, the Tribunal made a conclusion that there was no evidence that met the standard of proof to invoke the provisions of section 97 of the EPA for an election to be voided.

[2.14] It was the Tribunal’s finding that there was no satisfactory proof to a fairly high degree of clarity regarding the alleged corrupt acts, illegality, misconduct or non-compliance on the part of the 1st and 2nd Respondents or their agents to warrant the nullification of the election.

[2.15] The Tribunal accordingly declined the invitation to nullify the 1st Respondent’s election and dismissed the Appellant’s petition in its entirety and declared the 1st Respondent as duly elected councilor for Itimpi Ward in the Chimwemwe Constituency.

[2.16] Dissatisfied with the judgment of the Tribunal, the Appellant has appealed to this Court advancing three (3) grounds of appeal as follows:

- 1. That the Honourable Members of the Tribunal misdirected themselves both in law and in fact when they held that the evidence presented by the Petitioner did not have sufficient weight on its own to prove that**

the incidents of violence occurred and that even if they did happen, that they had the effect the Petitioner alleged, without corroboration by other independent evidence to convince or sway the Tribunal.

- 2. That the Honourable Members of the Tribunal misdirected themselves both in law and in fact when they held that they did not find that the removal of the fifth candidate, who was the recipient of these 29 votes, from the GEN 20 for Hybrid Farm Polling Station would have changed the result to the extent that if those votes were attributed to the Petitioner, he would have won the election.**
- 3. That the Honourable Members of the Tribunal erred in fact and at law when it found that the anomaly existed but that adding the 29 votes to the Petitioner and subtracting 56 from the Respondent to correct the anomaly, the 1st Respondent would still have polled 229 votes more than the Petitioner.**

[3] Appellant's heads of argument

[3.1] In relation to ground one, the Appellant drew the Court's attention to page 38 of the record of appeal specifically at lines 10-15 in support of the assertion that the Appellant in fact did plead violence in his petition. It was submitted that during trial, counsel for the 1st Respondent objected to PW1's line of testimony that was to prove the allegation of violence. That as such, PW1 did not fully attest to the fateful events nor further bring in witnesses to corroborate the same incidents of violence.

[3.2] It was contended that the Tribunal ought to have heard the evidence and should not have sustained the objection in line with Rule 20 of the Local Government Elections Tribunals Rules which provides inter alia that the Tribunal may receive as evidence, a statement, document, information or other matter that may assist it to deal effectively with an election petition.

[3.3] In light of the foregoing, it was argued that the objection by the 1st Respondent ought to have been overruled to allow PW1 give his evidence in its entirety to further buttress the Appellant's argument stating that an election petition for all intents and purposes falls within the category of civil matters. The Appellant further cited the provisions of Order XVIII rule 1 of the Subordinate Court Rules CAP 28 of the Laws of Zambia which provides that suits will ordinarily be heard and determined in a summary manner without pleadings.

[3.4] It was the Appellant's submission that the Tribunal denied the Appellant the right to present his case on violence but went ahead to make a finding against him on grounds that he failed to adduce sufficient evidence. This finding by the Tribunal should therefore, be quashed and the Appellant be allowed to adduce evidence of electoral

violence either in this Court or before the Tribunal in line with section 25(1)(b)(ii) and (iv) of the Constitutional Court Act No. 8 of 2016.

[3.5] Grounds two and three were argued together. It was the Appellant's submission that from the evidence presented to support his allegations, he had discharged both the burden and the standard of proof to satisfy the requirements set in the **Steven Masumba v Elliot Kamondo**¹ case and that to rule otherwise would be putting the standard of proof on the same footing as the standard of proof required in a criminal case, namely beyond reasonable doubt.

[3.6] The Appellant submitted that the Tribunal did not address the possible alteration of the Appellant's name on form GEN 20 and that the figure was prone to many possible readings as there was no evidence as to when the words were inserted into form GEN 20. In addition, it was the Appellant's submission that the Tribunal found gross anomalies in regard to form GEN 20 at Hybrid Farm polling station as it was established that 5 candidates were recorded instead of 4 who were the officially nominated candidates in the ward election. The Tribunal however, went on to trivialize the anomaly by simply applying mathematics of making assumptions on the figures allocated to the 5th candidate.

[3.7] Further, that as regards the Itimpi 2 polling station, the Tribunal engaged in an exercise of rewriting form GEN 20 without any evidence to back it up from the witnesses of the 2nd Respondent who were the owners and authors of the said official documents. That the Tribunal at page 30 paragraph 1 of the record of appeal adopted the 1st Respondent's line of reasoning in cross – examination as shown on page 107 of the record of appeal.

[3.8] The Appellant thus submitted that the Tribunal exceeded its mandate by rewriting and reallocating votes. That the only logical conclusion of why a 5th candidate's name was added on form GEN 20 for Hybrid Farm polling station and accorded votes is that there was an insidious scheme to manipulate votes and the same can be said of the deprivation of the Appellant's votes.

[3.9] It was submitted that elections are about the integrity of the process and that the Tribunal by trying to correct gross anomalies was being complicit in the manipulations and anomalies and then went ahead to launder the elections as free and fair against the spirit and intent of the Constitution.

[3.10] The Appellant went on to submit that regulation 50(2) of the Electoral Process Regulations, Statutory Instrument No. 63 of 2016 prescribes that in every constituency where a poll in respect of an election to the office of President, mayor or council chairperson has been taken, the returning officer for that constituency shall without delay after the totaling of the votes has been completed, announce the results of each candidate in form GEN 20. It was the Appellant's contention that the information contained on a form GEN 20 form must be accurate and reflect the true poll results.

[3.11] Thus, the Tribunal having found "gross anomalies" in the conduct of the election, its available avenue was to declare the election void and not embark on an exercise of rewriting the official documents.

[3.12] At the hearing of the appeal, Mr. Tafeni counsel for the Appellant relied on the heads of argument and repeated the arguments as outlined therein.

[4] 1st Respondent's heads of argument in response

[4.1] On 22nd November, 2021 the 1st Respondent filed his heads of argument in response.

[4.2] In respect to ground 1, the 1st Respondent contends that the Tribunal was on firm ground when it dismissed the allegation of violence for the reasons that firstly, it is trite that in an election petition, an allegation of violence must be attributed to the Respondent either by direct involvement or by way of consent and secondly, that the Petitioner ought to show that as a result of the violence, the majority of voters were influenced from voting for the candidate of their choice. The case of **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General**² was cited as authority for this argument.

[4.3] It was submitted that in *casu*, the evidence adduced before the Tribunal by the Appellant failed to meet the standard of proof to show that there was violence committed by the 1st Respondent or by his agents with his consent and that the violence swayed the majority of the electorate from electing a candidate of their choice.

[4.4] Furthermore, it was contended that the Tribunal was on firm ground when it refused to receive evidence by the Appellant which was not pleaded in his petition. The 1st Respondent called to his aid various authorities on the importance of placing specific claims in the pleadings. These cases being: **Anderson Kambela Mazoka & others**

v Levy Mwanawasa³, Thorp v Holdsworth⁴, Gould v Mount Oxide Mines Limited⁵ and Kariba North Bank Company Limited v Zambia State Insurance Corporation Limited⁶

- [4.5] It was submitted that the aforementioned authorities guide on what should be contained in the pleadings so as to accord an opportunity to the other parties to prepare the evidence to adduce in defense of their case so as to prevent a party to a suit from being caught by surprise at trial.
- [4.6] That in *casu*, the Appellant pleaded generally stating that the 1st Respondent and his agents used violence without being specific. However, that during trial, the Appellant attempted to adduce evidence with specific detail on facts not pleaded in his petition. That this is the reason the Tribunal sustained the 1st Respondent's objection to the Appellant adducing evidence at trial on facts which were not specifically pleaded.
- [4.7] As regards grounds 2 and 3, it is the 1st Respondent's submission that section 97(4) of the EPA precludes a tribunal from declaring an election void by reason of an act or omission by an election officer in breach of that officer's official duty in connection with an election if, the election

was conducted substantially in accordance with the provisions of the Act, and that the act or omission did not affect the result of the election.

[4.8] The 1st Respondent contends that the onus to prove that the election was not held substantially in accordance with the provisions of the EPA rested on the Appellant. It is evident from the evidence on record that the Appellant failed to prove before the Tribunal that the election was not conducted substantially in accordance with the provisions of the EPA. The evidence adduced before the Tribunal revealed that after the supposed anomalies had been corrected, the 1st Respondent still emerged victorious as per page 107 of the Record of Appeal.

[4.9] It is therefore the 1st Respondent's considered view that the alleged acts or omissions by the elections officers did not affect the outcome of the elections and that the 1st Respondent was duly elected councillor for Itimpi Ward.

[4.10] As regards the 29 votes attributed to Thomas Mbewe who was an independent candidate in the parliamentary election and not in the ward election, it was contended that the said 29 votes were accidentally placed on form GEN 20 for councillors but did not in any way affect the result. That as evidenced by the record of appeal at the

Totaling of the Votes – Councillor Form (Page 88 of the record of appeal refers) the total number of votes were 634 for Hybrid farm polling station which excludes the 29 votes attributed to one Thomas Mbewe who was not a candidate.

[4.11] It was thus contended that the said 29 votes on the form GEN 20 was a mere anomaly by the election officers which did not affect the outcome of the elections.

[4.12] On that basis, the 1st Respondent contends that the Tribunal was on firm ground in dismissing the Appellant's petition and upholding the 2nd Respondent's decision to declare the 1st Respondent as duly elected councilor for Itimpi Ward of Chimwemwe Constituency. The 1st Respondent urged us to dismiss the appeal with costs to the 1st Respondent.

[4.13] At the hearing of the appeal, Mr. Mtonga counsel for the 1st Respondent entirely relied on the filed heads of argument.

[5] 2nd Respondent's heads of argument in response

[5.1] On 23rd November, 2021 the 2nd Respondent filed its heads of argument in response.

[5.2] In response to ground one of appeal, it is the 2nd Respondent's contention that there was a finding by the Tribunal that there was no evidence that the 1st Respondent or his agents were involved in the alleged violence that occurred on 6th August, 2021. That the Appellant failed to prove the allegation to the satisfaction of the Tribunal in terms of section 97 (2) of the EPA.

[5.3] As regards grounds two and three of the appeal, it was the argument of the 2nd Respondent that Article 47 (3) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution) provides for a first-past-the-post electoral system which entails that a candidate with highest votes wins the election. That the 1st Respondent got the highest votes in the Itimpi Ward elections and therefore won the election.

[5.4] That there is no evidence of alteration of the election result figures but that the only anomaly is the transposition errors or misposting of votes on the document appearing on page 88 of the record of appeal. That the votes on the record are supposed to correspond with the announced votes at the polling station as recorded on form Gen 20 appearing on pages 80 – 87 of the record of appeal which in fact shows that the 1st Respondent obtained more votes than the Appellant.

[5.5] It is the 2nd Respondent's submission that grounds two and three should be dismissed in compliance with section 97 (4) of the EPA as the act or omission complained of did not affect the result of the election.

[5.6] Further, that the appeal ought to be dismissed as the Appellant has submitted a record of appeal containing photocopies of documents which are not clear or readable especially from pages 84 – 90 as this renders the record of appeal defective.

[5.7] At the hearing of the appeal, Mr. Imonda, counsel for the 2nd Respondent relied entirely on the filed heads of argument.

[6] Analysis and decision

[6.1] We have considered the grounds of appeal advanced in this appeal, the heads of argument filed for and against the appeal, evidence on record before the Tribunal as well as the judgment of the Tribunal. We shall address the three grounds of appeal in the manner they were argued. We shall start with ground one. Grounds two and three will be addressed together.

[6.2] It is trite that as is the case with all civil cases, the burden of proof in election petitions rests with the petitioner to prove his/her case and a

petitioner, just like a plaintiff, who fails to prove his/her allegations cannot be entitled to judgment, whatever may be said of the opponent's case. The Supreme Court case of **Khalid Mohammed v the Attorney General**⁷ is persuasive on this legal principle.

[6.3] As regards, the standard of proof, this Court held in the case of **Abuid Kawangu v Elijah Muchima**⁸ that the standard in proving election petitions is higher and distinct from that required in an ordinary civil litigation but lower than the standard of proof of beyond reasonable doubt required in criminal matters but requires proof to a fairly high degree of convincing clarity. The standard of proof required to prove an election petition is thus of a much higher degree than that required in an ordinary civil case.

[6.4] We now address the provision relating to nullification of elections. Section 97(2) of the EPA provides that:

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;

(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.

[6.5] It is clear from the foregoing provision that an election petition can only be nullified where the petitioner proves to the satisfaction of the court or a tribunal as the case maybe, that the candidate against whom the petition is filed either personally committed the illegal practice, corrupt practice or misconduct or that the candidate or the candidate's election agent or polling agent had knowledge and consented to or approved of the corrupt practice, illegal practice or misconduct complained of in relation to the election and that the said acts swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

- [6.6] This is the threshold to surmount as provided for under section 97 (2) (a) of the EPA and as held by this Court in the cases of **Austin Liato v Sitwala Sitwala⁹**, **Richwell Siamunene v Sialubalo Giff¹⁰** and **Nkandu Luo & Electoral Commission of Zambia v Doreen Sefuke Mwamba & Attorney General²**.
- [6.7] In *casu*, the Appellant alleged before the Tribunal that the campaigns leading up to the 2021 general elections were characterized by violence and antagonistic confrontations perpetuated against the UPND members by the PF members which led to the UPND members being injured in the process. Further, that the elections were conducted without compliance to the provisions of the EPA and the code of conduct set in the schedule to the Act.
- [6.8] The Appellant particularly cited an incident that took place on 6th August, 2021 during campaigns in Luongo area of Itimpi Ward that the Appellant with his team were confronted by PF members who came in their branded vehicles and party regalia and disrupted his campaigns by being physical and showering the Appellant with verbal insults to which the Appellant and his team did not retaliate but instead moved to another area called Salamano to continue with campaigns.

- [6.9] The question therefore is whether the Appellant proved these alleged acts of violence and intimidation attributed to the 1st Respondent before the Tribunal to a fairly high degree of convincing clarity taking into account the provisions of section 97(2)(a) of the EPA.
- [6.10] We have considered the evidence on record and testimony by the Appellant before the Tribunal. We find that although the Appellant made general allegations of violence against the 1st Respondent, there was no evidence adduced before the Tribunal directly linking the 1st Respondent to the alleged violence or that the same was committed with the 1st Respondent's consent, knowledge or approval or that of the 1st Respondent's election agent or polling agent as required under section 97(2)(a) of the EPA.
- [6.11] The only evidence adduced before the tribunal was that the attackers wore PF party regalia and were in a PF branded vehicle but there was no evidence to show that the 1st Responded perpetuated or sponsored the said violence through his election or polling agents. Apart from the evidence by the Appellant, there was no other evidence adduced to corroborate these assertions by the Appellant.

[6.12] Further, even if the said acts of violence did occur, there was no evidence adduced to sufficiently establish or connect the 1st Respondent or his election agent or polling agent to any violence or regarding its effect on the electorate in Itimpi Ward to prove that the electorate were or may have been prevented from electing a candidate of their choice.

[6.13] We note that the Appellant has advanced an argument to the effect that he was precluded from proving the allegation of violence owing to the objection by counsel for the 1st Respondent to the line of testimony of the Appellant which objection was sustained by the Tribunal. That as such, the Appellant did not fully attest to acts of violence or call witnesses to corroborate the alleged violent acts by the 1st Respondent. We find this argument to be untenable as the objection was properly sustained as the Appellant needed to specifically plead the allegations of violence to enable the Respondents prepare their defence and not to be ambushed at trial.

[6.14] In view of what we have stated above, we agree with the finding of the Tribunal that the evidence presented by the Appellant before the Tribunal did not prove that the alleged incident of violence on 6th August, 2021 did in fact occur and that the 1st Respondent or his

election or polling agents were involved in the said incident. Further, the Appellant did not prove that the incident of violence was widespread and prevented or may have prevented the electorate in the ward from electing a candidate of their choice in line with the dictates of section 97 (2) (a) of the EPA. Ground one of the appeal therefore, fails.

[6.15] As earlier stated, grounds two and three are related and were argued together by the parties to this appeal. We shall also consider them together.

[6.16] In grounds two and three, the Appellant argues that the Tribunal misdirected itself both in law and in fact when it held that it did not find the removal of the 5th candidate, who was the recipient of the 29 votes, from form GEN 20 for Hybrid Farm polling station would have changed the result to the extent that if those votes were added to the Appellant's votes he would have won the election. Further, that the Tribunal erred in fact and in law when it found that an anomaly existed but that adding the 29 votes to the Appellant and subtracting 56 votes from the 1st Respondent to correct the anomaly, the 1st Respondent would still have polled 229 votes more than the Petitioner.

[6.17] In the petition before the Tribunal, the Appellant averred that the manner in which the 2nd Respondent conducted the elections was irregular and contrary to the electoral process as its agents altered the figures of the candidates on the official election documents contrary to the actual figures obtained by the candidates. According to the Appellant, the following anomalies and irregularities were observed and presented at the Tribunal:

- i. That there were four (4) candidates in the ward election but a 5th candidate by the name of Thomas Mbewe was added on to form GEN 20 (appearing at page 80 of the record of appeal) and allocated 29 votes. That the said Thomas Mbewe was known to have stood as an independent candidate in the Parliamentary election.
- ii. The numerical figure appearing in the 1st column of form GEN 20 was written in such a manner that it looked like 2109 and was prone to different views.

[6.18] The Tribunal in its judgment found that form GEN 20 from Hybrid polling station indeed showed that there were five candidates recorded when there were only four candidates officially nominated to stand in the election and that this was on its own a gross anomaly. The Tribunal

also found that the 29 votes given to the 5th candidate Thomas Mbewe who did not stand in the said election was also an anomaly. The Tribunal however, did not find that the removal of the 5th candidate who was the recipient of these 29 votes, would have changed the result to the extent that if those votes were attributed to the Appellant, he would have won the election. The Tribunal formed this opinion based on the margin between the Appellant's final results and those of the 1st Respondent. The Tribunal reasoned that even assuming that the 29 votes in favour of the 5th candidate were exclusively added to the Appellant's votes the 1st Respondent would have still polled 229 votes more than the petitioner.

[6.19] As regards the assertion that the numerical figure appearing in the first column of form GEN 20 (at page 80- of the record of appeal) was written in such a manner that it looked like 2109 and was prone to different views, the Tribunal found that the assertions were not true as the figures were also stated in words as "four zero nine" and that looking closely at the figure, it was indeed 409 that was recorded.

[6.20] We had occasion to look at the record (at page 80 of the record of appeal) and agree with the finding of the Tribunal that the figure was written as "four zero nine" and that it is not prone to be misread as

alleged by the Appellant. The Tribunal was on firm ground to hold as it did.

[6.21] That said, in deed the Tribunal found that there were anomalies recorded by the election officer in this election. The question is, did those anomalies compromise the integrity of the entire election for the Itimpi Ward? The answer lies in section 97(4) of the EPA which provides as follows:

An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the results of that election.

[6.22] 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 brought 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 – Councillor 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.

[6.23] In the case of **Nkandu Luo & Electoral Commission of Zambia v Doreen Sefuke Mwamba & Attorney General**² we guided on the effect of section 97 (4) of the EPA as follows:

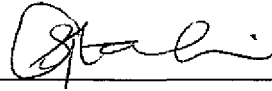
...that where there has been substantial compliance with the provisions of the Act, an election cannot be annulled on the basis of section 97 (2) (b) of the Act.

[6.24] It is therefore our considered view that based on the evidence on record, the anomalies on form GEN 20 for Hybrid Farm polling station by the election officer which was in fact promptly corrected did not affect the results of the election in Itimpi Ward. Grounds two and three also fail.

[6.25] We find that the Tribunal was on firm ground when it held that the 1st Respondent was duly elected councilor for Itimpi Ward of Chimwemwe Constituency. We therefore uphold the decision of the Tribunal and hold that the 1st Respondent was duly elected Ward Councillor for Itimpi Ward of Chimwemwe Constituency of Kitwe District.

[6.26] The appeal is dismissed as it lacks merit.

[6.27] We order that each party bear their own costs.



A.M. Sitali

CONSTITUTIONAL COURT JUDGE



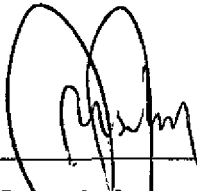
P. Mulonda

CONSTITUTIONAL COURT JUDGE




PROF. M.M. Munalula

CONSTITUTIONAL COURT JUDGE



M. Musaluke

CONSTITUTIONAL COURT JUDGE



J.Z. Mulongoti

CONSTITUTIONAL COURT JUDGE