

(10)

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2002/HP/0007

IN THE MATTER OF :

THE ELECTORAL ACT CAP.13
SECTION 18(c), 19 AND 20 OF THE
LAWS OF ZAMBIA

AND IN THE MATTER OF:

PARLIAMENTARY ELECTION FOR
MALOLE CONSTITUENCY HELD ON THE
27TH DECEMBER, 2001

AND IN THE MATTER OF:

AN ELECTION PETITION BY MATILDAH
MACARIUS MUTALE.

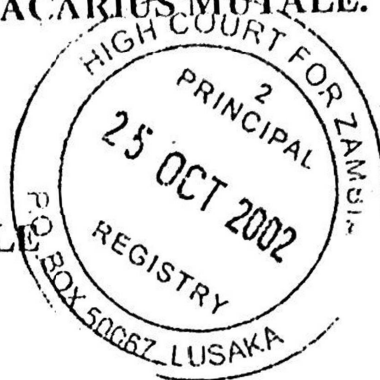
BETWEEN:

MATILDAH MACARIOUS MUTALE

and

SEBIO MUKUKA

ELECTORAL COMMISSION OF ZAMBIA



Petitioner

1st Respondent

2nd Respondent

Before the Hon. Justice Mrs. E.N.C. Muyovwe in Open on the 25th day of October 2002
at 0930 hours.

For the Petitioner: Dr. J.M. Muhvila, Ituna Partners

For the 1st Respondent: Mr. W. Ngwira, Messrs Libertas Chambers

For the 2nd Respondent: Mr. Chirambo, Principal State Advocate

JUDGMENT

The petitioner comes to this court asking that it may determine the following:

- (a) that the 1st respondent was not duly elected or returned and the election was void; and
- (b) a scrutiny to be carried out by the High Court in such manner as the court may determine.

The Petitioner testified that in the 2001 tripartite elections, she was a candidate on the Patriotic Front (PF) ticket in Malole Constituency. There were other candidates including the 1st respondent who emerged as winner under the Movement for Multiparty Democracy (MMD). She explained that she had a campaign manager apart from the fact that she also conducted her own campaign and she said she encountered a number of problems during the campaign. As she went around campaigning, she discovered that the electorate were given roofing sheets, money, food, footballs and other items by other candidates and therefore, the electorate demanded that she also give something. In Chewe village PW1 was told that the 1st respondent had given K800,000 to the school and promised more money should he be elected and it was the same story in Finshe ward where she found a classroom full of roofing sheets given by the 1st respondent. In Makasa area as she addressed a meeting at Kalyafye she was told that the 1st respondent had given K200,000 for Makasa Primary School and the same story applied to Mumba Village where the electorate told her that the 1st respondent had given out fertilizer, maize and that he had also repaired teacher's houses at Mumba Primary School. At Chisangaponde Village, roofing sheets were given out by the 1st respondent and the MMD and in Numbuka Village fertilizer was given out and roofing sheets for the school and also in

Chilombwe village. She said civil servants in the Ministry of Education and Agriculture were being used to distribute these items and these were MMD supporters. She said this was the trend wherever she went for campaign and that the electorate were demanding that she also gives them gifts. She said she saw the items personally and proved what the electorate were telling her. She said she expected that after voting there would be a recount at the council chambers to verify the results from the polling districts. She explained that at Mungwi District council the electoral officers were only announcing the results. The polling agents, she said, waited for ballot boxes to be brought and that in fact on 28th December 2001 results were being announced but that around 0100 hours the electoral officers complained of tiredness and stated that they would continue the following day and the suggestion by the election agents that they sleep in the council chamber to guard the ballot boxes was rejected. In the morning, what followed was the announcement of the 1st respondent as winner of the election. PW1 sought the council secretary to lodge various complaints like the issue of some keys to some ballot boxes having been taken by someone to Kasama and that in fact after the keys were found, no one witnessed the counting. She said that her campaign manager Peter Mwila (PW2) had different figures from those of the Electoral Commission. PW1 said that Mr. Chilekwa, the Council

Secretary said that these were minor errors which did not affect the final results. She said she complained about what she called consistent adjustment of results by the commission which was done under the instruction of Mr. Chilekwa and Mr. Chileshe. She said results were announced without counting. She said results from polling agents would differ with those of the Commission. She also said there were problems of ballot boxes not being sealed.

PW1 questioned the contents of the documents in the notice to produce produced by the 1st respondent. PW1's prayer is that this court should nullify the results and declare that the 1st respondent was not duly elected as MP. Under cross-examination she admitted that she did not see the 1st respondent put the roofing sheets at Finshe Primary school. She said the 1st respondent was involved in giving out items. She explained that she is familiar with the electoral process. According to PW1, at polling districts, the ballot papers are removed, counted and recorded, put back into the ballot boxes, sealed and they are delivered to the main council chamber where the final count is done. She maintained that the 1st respondent was involved in corruption and bribery during the election but that she did not make a report to the police.

PW2, the petitioner's campaign manager and election agent told the court that he accompanied the petitioner during campaign meetings.

PW2's evidence is substantially the same as that of PW1 except that he included the fact that the 1st respondent was usually accompanied by the secretary of Constituency Development Fund and the Chairman of the Constituency Development Fund (CDF) Mr. John Kansema.

According to PW2, during the campaign, wherever they went people demanded to be given something in exchange for a vote because they alleged that this is what the 1st respondent had done. On election day, PW2 said he was an election agent and together with others he went to Mungwi District Council. Information was received that the vehicle carrying ballot boxes had broken down. As they waited for the ballot boxes no one was allowed to come out until they finished verifying the results. After waiting until morning, they were told to go and refresh themselves and come back but by the time they came back they found that one ballot box was open and one black trunk was open. PW2 tried to inquire why those boxes were opened but he was told to keep quiet. He explained that the electoral officers would count and then announce the results but that the results were not tallying and he gave examples of Chitimukulu Ward, Finshe Ward, and

Chilombwe. This exercise continued until 0100 hours when Mr. Chilekwa told everyone to go and sleep and come back around 0500 hours. Everyone left except the officials who remained inside the council chamber. This was now 29th December and when PW2 and his colleagues returned around 0500 hours as advised, they were told to wait for the figures. PW2 observed that the presiding officers from the polling districts would be given a fresh form to fill in changed figures and they threw away the form earlier filled in. The results were announced that day around 1900 hours outside and according to the announcement, the petitioner got 1,755 while the 1st respondent got 5,368 and was declared winner. PW2 produced his own document where he was recording the results.

Under cross-examination PW2 insisted that the 1st respondent gave money to Chewe Primary School, sand and cement to Mumba Village and roofing sheets to Chilombwa Village. PW2 conceded that the 1st respondent got lower votes than the petitioner in those areas where he allegedly bribed and corrupted the electorate.

PW3 Michael Sampa Chemba a peasant farmer told the court that he registered as a voter at Chewe Polling Station which is at Chewe Primary School. He told the court that he is a member of the Parents Teachers

Association (PTA) and he was a member of the buildings committee at the school. He explained that in August 2001 Mr. Kansema, the Chairman of the CDF and Mr. Mumbi, a member of the MMD came to the school to introduce the 1st respondent as the District Administrator (DA). At that meeting, he said people asked for assistance to have some sand transported. The 1st respondent and Mr. Kansema agreed to render assistance through the CDF if money would be available. PW3 said they waited until November when the money was brought in the sum of K1 million and the sand was transported. He said in December, the 1st respondent came with Mr. Kansema and Mr. Mumbi during the campaign period inquiring whether they had received the money. During a meeting they told them that what they had done should be borne in mind during elections because if they do not vote for him, there will be no development in the area. At the meeting, Mr. Kansema is alleged to have said that if they voted for the 1st respondent they would receive a further K3million and money to renovate the school houses.

Under cross-examination PW3 said that he was not aware whether the date for the election had been set by August, 2001 or not. He said in August, 2001 they asked for assistance when the DA was brought to be introduced in their area. He said Mr. Kansema in the presence of the 1st respondent is the

one who said more assistance would be coming to the area if they voted for the 1st respondent. He said the K3 million has not been paid to date.

PW4 Caristo Mutale Mumba a peasant farmer told the court that in January, 2001 he was at Mumba Village when due to floods the school collapsed and most of the crops drowned. This situation was reported to the DA by the Agricultural Officer and the officers from the Ministry of Education and the DA (the 1st respondent) went to the area and received the complaints first hand and left but never returned. In November, 2001 PW4 said that a vehicle belonging to Chinchiwababili brought maize to the Ministry of Agriculture Camp and officers from the Ministry of Health, Education and Agriculture distributed the maize and in fact the witness was a recipient. In early December, maize was brought again by the same organization and the present DA and officers distributed the maize as before. After the DA left another vehicle brought fertilizer which was distributed free of charge. The District Education Officer also arrived and told them to get ready as the materials for renovating the school would be sent. After three days the 1st respondent came with Mr. Kansema, Mr. Mumbi and Mr. Peter Lukonto and addressed a meeting at which he said that people should vote for him because he had done a lot for them. He promised to complete the school after he is elected. According to PW4 the electorate followed the person

who gave them things. However, he said that the school has not yet been renovated and that only the teacher's houses were renovated. The 1st respondent, he said, has never come to the school since.

Under cross-examination he said that government officials were involved during the distribution of fertilizer, maize and cement and that the 1st respondent did not play any role except that when he came on the scene he told the people that it was him who had sent those things and this was six days before the campaign.

On the other hand, the 1st respondent (RW1) testified that in the December tripartite elections he stood on an MMD ticket. The 1st respondent was the District Administrator (DA) for Malole Constituency until the 30th November 2001 when he resigned his position as he was standing as a member of Parliament. He explained that his campaign was based on the MMD manifesto and he said he told the people about the achievements of the MMD government, that is, what they were doing that time and what they would do in future. He said he did not promise them anything but that he would go back after elections. He denied giving out roofing sheets with Mr. Mumbi and Mr. Kansema and also said he did not distribute maize and fertilizer. As regard the issue of Chewe Primary School, he said he did not

personally give out the money but that when he was DA there was a written request for financial assistance through his office which he said he referred to the CDF. He has exhibited the application form and the payment towards Chewe Primary School. He denied promising K3million to the electorate. He explained the issue of the locked boxes stating that the boxes from Numbuka came locked and the person with the keys had gone off with them but that eventually the person came with the keys on 28th December. He said the boxes were opened and the usual procedure was followed thereafter. According to the 1st respondent, his assessment was that the petitioner even did better than himself in areas where she alleged that he corrupted and bribed the electorate. He said that the roofing sheets that were given out were given out by the CDF and not by himself and this was between 20th September and 20th October, 2001. He asked the court to dismiss the petition with costs and that he be declared duly elected as Member of Parliament for Malole Constituency.

Under cross-examination he said roofing sheets were given to Milando School in Chitimukulu area in Chishika Village. He admitted that he knows Mr. Mumbi as a member of the MMD and is the Constituency secretary and also secretary of the CDF. Mr. Kansema is the MMD Constituency Chairman for Malole and the 1st respondent himself is the Provincial

Treasurer in MMD in Northern Province. He admitted that he went for campaign meetings with Mr. Kansema and Mr. Mumbi. He explained that the constituency chairman is the overall boss in the district. He ceased to be DA on 30th November 2001. His campaign started on 8th December because he waited until he filed his nomination papers on 1st December. His duty as DA was to ensure that government projects in the area were carried out and also coordinating the utilization of development funds. He denied that he coordinated the distribution of fertilizer and maize. He confirmed that he went to Mumba village in January, 2001 to assess the damage and later requested for relief food under the Disaster Management Programme. He said that indeed food was delivered under the same programme commencing in October, 2001 to January 2002. He admitted having been to Chewe Primary School for meetings many times but that he did not promise them K3million or that he would repair the school. The request for assistance was addressed to him but he said personally he had no funds and so he referred the request to CDF. He said PW3 was not a member of the PTA of Chewe Primary School. As far as he is concerned he did not reach Finshe ward due to lack of time. He said Nchinchiwababili was contracted to distribute food in the constituency. He admitted having gone for campaign with key members of CDF.

RW2 was Benard Mumbi who testified that he used to be the secretary of CDF. He said on 13th September, 2001 a meeting was held to approve applications for assistance and that the application for Chewe Primary School was one of the applications considered during the meeting. He explained that the figure was reduced from K1million to K800,000. He said during elections, he was involved as a supporter of MMD but that he knew nothing about bribing people by giving them maize. Under cross-examination he admitted knowing Mr. Kansema and the 1st respondent and that he went on campaign meetings with him in places like Chewe Village where he had initially gone to introduce him as the DA. He said the people approached him as CDF secretary for funds but that he told them that the correct procedure was to ask for funds from CDF and Mr. Nsama (RW3) wrote the letter which went through the DA. The letter exhibited in court was addressed to the DA and the witness said that this could have been a mistake. The money was paid through the committee and he explained that when payment is made, the Constituency Development Chairman, the Chairman of the District Development Coordinating Committee signs and at this time, this was the 1st respondent. In this case, an agreement was signed between the Permanent Secretary and Mr. John Nsama representing the

PTA. He said that in CDF their duty is to ensure that the CDF funds are used properly. He said he did not know at which point the sand was delivered to the school but that in January this year they went back to see the job and there is still need for more funds to complete the job. He denied going to Mumba Village with the 1st respondent but that he went there with Mr. Kansema. He admitted that in December 2001 they went to introduce the MMD candidate but that they had no chance of inspecting the school and according to him, the teacher's houses were not repaired. He admitted that people were happy because of what the government had given them. He denied that as a party the MMD participated in distribution of maize.

RW3 Jackson Nsama who is a teacher at Chewe Primary School confirmed that as a school they had a project of extending the school and so they were seeking assistance to transport sand and crushed stones. They sought help from the DA but payment was made through the CDF to the school and RW3 is the one who collected the money and signed for it. He said he signed some forms before the application was submitted to the Committee. He denied that there was any promise by 1st respondent of K3million. Under cross-examination he explained that initially the amount to be disbursed was K1million but that when he went to collect the money he was told that they could only release K800,000 and he collected the cheque in the name of the

school on 17th September 2001. He conceded that he could have mixed up the dates but stated that the headmaster is the one who solicited for help from the DA in writing and he said he personally took the letter to the DA. He said he personally organized transport with a private transporter and paid for it. When asked how he came to sign on the part of the contractor the witness was hesitant to explain why he signed on that part and yet he is not a contractor. He, however, said he paid the contractor in the presence of the PTA chairman. He said he only saw people campaigning around November and December but he got the cheque in October.

RW4 John Kansema told the court that as an MMD supporter he was involved in the campaigns and he was actually the campaign manager as constituency chairman. He said as a party they went around the constituency explaining their manifesto and there was no question of bribing voters. He said they held a meeting at Chewa Primary School and he addressed the gathering there but he never made any promise to give K3million once 1st respondent was elected. Under cross-examination he said when going round the constituency he was with the 1st respondent and Mr. Mumbi (RW2). He said in January 2001 the 1st respondent was the DA and they went visiting the place where they were floods and people had a problem with food as crops were destroyed and they also asked for repairs to the teachers houses.

He said later they found that the Ministry of Education had repaired the houses which they saw during the campaign. He said it was not the 1st respondent who delivered the sand and crushed stones. He stated that interviews for candidates were held between 9th and 14th October 2001 and after this the names were sent to the National Executive Committee. He said they were aware that there was to be an election so they had started preparing themselves. Before December he said they had meetings as constituency officials without the 1st respondent and later they went to introduce him as the DA. He said it was the people who sought assistance and that in fact Mr. Nsama (RW3) was the spokesperson as secretary of the PTA. He said Mr. Nsama talked to the DA, to a number of people as they required assistance to carry sand for their project. He said that in fact at Chewe Primary School the petitioner got more votes than the 1st respondent.

RW4 Samuel Mweemba testified that as Nchinchwababili Rural Development Project, they participated in the distribution of maize and fertilizer in conjunction with Programme Against Malnutrition. He explained that the beneficiaries were the vulnerable in society. Seeds and fertilizers were distributed to various areas. He said no civic leaders were involved in the distribution of maize and fertiliser and that in fact the programme is on going since 2000 and that after three years an evaluation

of the programme will be conducted. The programme he said is non-partisan and non-religious. Under cross-examination he explained that he joined the organization in 1996. He said the District Disaster management committee was responsible for the distribution and it comprised of representatives from government, NGOs and the community. The 1st respondent as the DA was the overall boss of the government departments. The witness said the distribution of food goes beyond political affiliation as everyone is need of food. He, however, said he did not know the criteria used in the distribution of maize. He said his organization was hired to transport the maize but he was not aware of the specific areas where the maize was taken to or where it was dropped.

Due to the issues raised by the petitioner as to handling of the ballot boxes, the court decided to call the returning officer to come and clarify some issues raised by either side. Mr. Peter Mansase Chileshe testified that in Malole constituency there are 66 polling stations. On election day voting started at 0600 hours and ended at 1700 hours. According to Mr. Chileshe at each polling station, counting was done in the presence of all agents and then all materials were put in the ballot boxes and transported to Mungwi district Council. The ballot boxes should be accompanied by police officers and the presiding officer and he said it was not the duty of the Electoral

Commission to provide transport to polling agents. At the council chamber it was a question of consolidating the information from all polling stations and at this time each candidate had a polling agent present. He said he never left the council chamber until the following day in the evening when he announced the results.

At this stage, Mr. Chirambo the learned Principal State Advocate applied to have the matter adjourned so that the state could file their answer on behalf of the Electoral Commission and after hearing both counsels for the petitioner and the 1st respondent the court refused the application by the state for an adjournment because the Electoral Commission had ample time to instruct a state advocate to represent it in these proceedings but failed to do so.

Mr. Chileshe said at all times the police officers were present. Cross-examined by Dr. Mulwila, he said that they waited for all ballot boxes to be brought in before consolidating the results and he said he did not recall a time when he asked the polling agents to go out. He recalled a situation where one presiding officer was not present and they wanted to open the box but that the officer-in-charge refused them to do so. He denied asking the presiding officers to change figures and he said he announced the results on

the 28th December and this was the same day when consolidation started. Cross-examined by Mr. Ngwira he said that results for each polling district had been announced at each polling district and polling agents had obviously taken note of the results. As far as he was concerned, consolidation took place when all the ballot boxes were brought in. Answering a question from the court, he said that the keys to the ballot box is normally supposed to be pasted to the box but they had to use cellotape and so some keys fell off and because of this, the keys were brought by presiding officers in about four cases.

At this stage Dr. Mulwila, applied for the petitioner to be recalled for the purpose of tendering into evidence part of the election results allegedly compiled by the Council Secretary into evidence and this application was refused because the petitioner is not the author of the document.

Due to the issues raised by the petitioner that some ballot boxes were opened in the absence of polling agents, and also that results were altered by the presiding officers at Mungwi District Council, the court found it necessary to order a recount of the results and this was done by the Deputy Registrar of the High Court who tendered his report after completing the recount.

Both counsels have filed written submissions and these are on record.

Dr. Mulwila, Counsel for the petitioner submitted inter alia that the 1st respondent was involved in corrupt and illegal practices as defined under section 18(2)(c) of the Electoral Act, cap 13 and regulation 51(1)(a) of Electoral (General) Regulations 1991 S.I No. 108 of 1991 and that for this is so having regard to the evidence before court. He submitted inter alia that the electorate to vote for 1st respondent, it was because of what he had done for them. He submitted that the disaster management committee distributed fertilizer free of charge to Mumba village and the 1st respondent claimed credit for this. He also pointed out that in fact according to PW4 the 1st respondent told them that the maize, fertilizer and building materials were for campaign purposes.

He submitted that the instances given by the witnesses render the election of the 1st respondent as MP null and void. He referred to *Mlewa vs. Wightman* (1995/97) ZR 171 to support his argument that on the evidence the court should nullify the election of the 1st respondent.

Mr. Ngwira, counsel for the 1st respondent has submitted that and I agree with him that the question which this court has to determine is whether the petitioner's evidence has proved that the 1st respondent was involved in

corrupt and illegal practices during the election to warrant section 18(2)(c) of the Electoral Act, to be invoked.

He submitted, inter alia, that the evidence by the petitioner cannot be a basis on which to render the 1st respondent's election declared null and void and neither can it be a basis to find him guilty of corrupt and illegal practices committed in connection with the elections.

He also cited **Mlewa vs. Wightman** to reinforce his submission that the petitioner has failed to demonstrate that the alleged corrupt and illegal practices were committed by the 1st respondent and his agents.

He urged the court to declare the 1st respondent as having been duly elected.

I have considered the submissions by both counsels and I am grateful to them.

In her petition, the petitioner stated in paragraph 3:

And your petitioner says that Sebiso Mukuka was not duly elected because elections were held in an atmosphere which was not free and fair due to rampant bribes and treating:

- (i) during the campaign the MMD candidate Sebiso Mukuka, Malole constituency Chairman John Kansemu and MMD official answering to the name Mumbi went round the constituency giving out roofing sheets, fertilizer and money to solicit votes:-

- (a) they gave out roofing sheets at Chisanga Ponde, Numbuka, Chishika and Finshe Primary School;
 - (b) they gave out fertilizer at Mumba/Batatu village and
 - (c) they gave out K800,000 at Chewe Primary school and promised that the school would get a further K3,000,000 if the MMD parliamentary and Presidential candidates were voted in;
- (ii) An official from the Electoral Commission who was charged with the security of ballot boxes opened some of them in the absence of polling agents and monitors and took keys to Kasama.

The petitioner requested for a scrutiny to be carried out. After hearing all the evidence I ordered a scrutiny and a recount and I must say that I found nothing particularly irregular in the actual results except a few instances where the recount showed more votes than was indicated by the Electoral Commission of Zambia. Indeed, this aspect has not been touched by both parties in their submissions therefore the court must presume that after the recount, the petitioner found that her fears were unfounded. The petitioner alleged that one ballot box and a trunk were opened in absence of the polling agents and monitors and in fact the presiding officers changed their figures when they reached Mungwi District Council. I have examined the report submitted by the Deputy Registrar and I have not found any irregularities which are note worthy.

I will go through the specific allegations of bribing and corruption as alleged by the petitioner.

The respondent has not denied that he campaigned with people whom he called key members of the MMD and this included Mr. John Kansema (PW4) and Mr. Mumbi (PW2). The two witnesses were important members of MMD in Malole constituency and they were members of the CDF. The 1st respondent himself was the District Administrator in the period preceding the year 2001 elections and only resigned his position in November 2001.

The petitioner has alleged that roofing sheets were given out at Chisenga Ponde, Numbuka, Chishika and Finsha Primary school.

The evidence from the petitioner and her witnesses is that the electorate told them that the 1st respondent had brought roofing sheets and therefore demanded something from the campaigners. I have examined the evidence on this issue. The petitioner and her witnesses were merely told that the 1st respondent and his group had brought the roofing sheets. The petitioner herself said she saw the items in various areas thereby proving that what the electorate told her was true. Indeed, there is no one who was called to come and confirm that the 1st respondent and his agents are the ones who supplied and delivered the roofing sheets to the various areas stated by the petitioner or indeed more importantly no proof has been rendered to show that the

roofing sheets were given out in order to solicit for votes from the electorate. At the same time these items were delivered in November while the 1st respondent was still District Administrator and before he was nominated to stand as MP for Malole constituency. I find that this allegation relating to the roofing sheets is unfounded and has not been proved by the petitioner.

Turning to the issue of the 1st respondent and his campaign team giving out fertilizer at Mumba/Batatu village. No evidence was led about Batatu village, the only evidence the court has is for Mumba village. The evidence is that in January 2001 Mumba village was flooded and there was hunger but that assistance only came in November 2001. Firstly, some maize was brought to the Ministry of Agriculture and distributed by officials from Ministry of Health, Education and Agriculture, some more maize was brought in early December and later fertilizer was distributed free of charge. PW3 said that when the 1st respondent arrived he told the people that they should vote for him because of what he had done. He told them: (and I quote PW3's evidence)

"I started with renovating houses and we confirmed that we were promised cement and all necessary materials and we have not received them and he said he was going to see the people who were supposed to bring these things immediately and indeed the following morning cement was brought and all the necessary materials. After that that is when people congratulated him for what he had done. Later on he said if we were going to vote for him he was going to finish constructing the school and if we did not do that then there will be no development".

Under cross-examination PW3 said that everybody thought the items were from government until the 1st respondent came and said "I brought these things for you". He said the maize was brought during campaign time.

As far as PW3 was concerned the maize and fertilizer were used as campaign materials because they were brought during campaign and six (6) days before the election the 1st respondent told the electorate that he is the one who supplied these items. He said the people who distributed the maize did not say it was for campaign. PW3 who was a PF polling agent also benefited from the distribution of maize and fertilizer. The 1st respondent denied the allegations and explained that the maize distribution was a government exercise. Indeed, the facts show that the problem in Mumba village arose in January 2001 but it was not until November 2001 that the government made efforts to sort it out. Evidence is that the maize and fertilizer was distributed by the government but that the 1st respondent took all the credit for it by telling the people that it was him who organized the items.

I find as a fact that although the food was requested for in January, the government only started distributing maize in Mumba village in November

2001. The exercise of maize and fertilizer distribution was a government programme as stated by PW3 and everyone believed so until the 1st respondent announced that he was the one responsible. Can it therefore be said that this was a corrupt practice or illegal practice on the part of the 1st respondent?

The 1st respondent, I want to observe was in a unique position or in an advantaged position. He was the District Administrator for the area. The distribution was done in November and elections were held in December. I find that the distribution was not done by the 1st respondent and there was an attempt by the 1st respondent to show that this was an ongoing government programme. I have had the opportunity of going through the judgment of my brother Judge Banda in the case of **Peter William Mazyambe Daka vs. Levison Achitenji Mumba 2002/HIP/EP/0003** at page J27. In that case my brother Banda J. found that the respondent who was Minister of Health at the time of elections opened Mwanika Clinic a day or so before elections which had been closed for a very long time. As Minister of Health, the court found that he should have known what was happening. The court found that the opening of the Clinic at the time was aimed at showing the people that the respondent was a working Minister and that this had an effect of wooing and inducing voters in the area to vote for him and that after the purpose was

achieved the Clinic closed and the drugs, the ambulance and staff were all with drawn. Indeed, in that case the court found that this amounted to corrupt and illegal practice and vote buying on the part of the respondent. The court further said that:

"it could not be said in such circumstances that the voters voted for a candidate whom they preferred."

Indeed, I would like to associate myself with these and observations which are equally of value and applicable to this case and I adopt them.

In this case the need for food was identified as far back as January 2001 and yet food was only distributed in November 2001. The 1st respondent is the one who was running the show and knew the needs of the people since the beginning of the year. I believe that the late distribution of maize was meant for campaign purposes – the elections were held in December so it was to the advantage of 1st respondent and his party to distribute the food late in order to influence the electorate. The distribution may not have been done specifically by the 1st respondent but it was definitely done through his knowledge as the District Administrator. The evidence before this court is that he was responsible for the province and such distribution cannot be made without his knowledge because he was even part of the disaster

management team. In *Mlewa vs. Wightman* this is what the Supreme Court observed:

The court (*meaning the High Court*) further found that in plural politics, it is the parties which mount the campaigns for their candidates and that the consequences of any illegal dealings will inevitably affect the candidates so that a defence of not being personally involved would not be upheld if shown that the illegal acts complained of affected the results of elections. The court held that the distribution of the exercise books and the T-shirts had been done on such a large scale that many voters in the constituency were bribed to vote for UNIP and that this had affected the outcome of the election".

In *Mlewa* case, High court went ahead and nullified the election and the decision was upheld by the Supreme court.

In this present case, it is quite clear that the MMD hiding under the guise of government distributed the food to the people of Mumba village at the last minute and indeed it is no wonder that when the 1st respondent went for campaign, he told the people that this was his doing thereby wooing for votes. The 1st respondent having had knowledge of the problem only took action knowing that he would need the people's votes – he laid his ground.

I will now address the issue of the K800,000 given to Chewe Primary School. I have carefully considered this issue and I find that the petitioner's claims are unfounded. The request for assistance was from the people themselves and this was in August 2001 when the 1st respondent was taken

to the area to be introduced. The application, I find was dealt with by the constituency Development Fund (CDF) which comprised of various people including the 1st respondent. At the end of the day it was not the 1st respondent who gave out the money but the CDF as requested. The evidence shows that the CDF sat and approved the application and payment was made in favour of the school. I also find that the issue of the 1st respondent promising a further K3m if voted in has not been proved.

Having found that distribution of maize to Mumba village affected the outcome of the elections in Mumba village the question is, does this render the whole election null and void? I find that the distribution of maize and free fertilizer was restricted to this limited area - Mumba village. It has been, also conceded by both parties that in fact the petitioner did better than the respondent in Mumba village despite the distribution of maize and fertilizer. I find therefore that the distribution of maize and fertilizer having been limited to that area did not have a bearing on the results in the whole of Malole constituency to warrant the rendering of the whole election of the 1st respondent null and void. For a petition to succeed, the petitioner must show that the conduct complained of affected the whole result of the election. From the foregoing, this does not appear to have been so in this election. I find that the actions complained of did not affect the result of the

election in Malole Constituency. I declare that, having regard to all
evidence, the 1st respondent was duly elected. The petition is dismissed.
Each party to bear its own costs.


E.N.C. MUYOVWE
JUDGE.