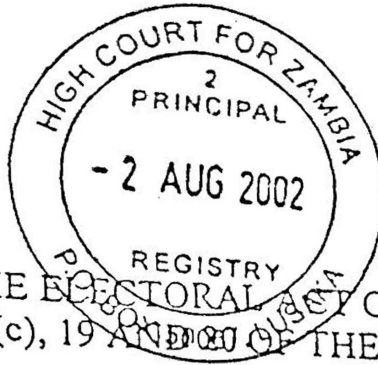


IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
AT LUSAKA



2002/HP/EP/0035

IN THE MATTER OF :

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

AND IN THE MATTER OF :

PARLIAMENTARY ELECTION FOR ISOKA  
EAST CONSTITUENCY HELD ON THE 27<sup>TH</sup>  
DECEMBER, 2001

AND IN THE MATTER OF :

AN ELECTION PETITION BY MIKE KAIRA

BETWEEN:

MIKE KAIRA

\ Petitioner .

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and

CATHERINE NAMUGALA

1<sup>st</sup> Respondent

and

ELECTORAL COMMISSION OF ZAMBIA

2<sup>nd</sup> Respondent

Before the Honourable Mr. Justice C.S. Mushabati in Open Court on the 2<sup>nd</sup> day of August, 2002

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For the Petitioner: J.M. Mulwila (Dr) – Ituna Partners

For the 1<sup>st</sup> Respondent: C. Hakasenke (Mr) – Hakasenke and Company

For the 2<sup>nd</sup> Respondent: M. Haimbe (Mr) – State Advocate

J U D G M E N T

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Cases referred to:

1. Mlewa v Wightman (1995/1997) Z.R. 171

Legislation referred to:

Electoral Act, Cap. 13 – SS. 6(1) and 18(2)

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This is an election petition challenging the election of the first respondent as a Member of Parliament for the Isoka East Constituency.

The basis of this petition are as contained in paragraphs 7 – 10. For ease of reference these paragraphs read as follows:

- 7 - Your Petitioner states that Chatherine Namugala was not duly elected as the election was not fairly conducted and was done in violation of the Electoral (General) Regulations 1991. 5
- 8 - Your Petitioner states that the Returning Officer gave secret briefing to the M.M.D. candidate and her agents.
- 9 - Your Petitioner further states that his supporters were confused because the Returning Officer told them that although Mpungu Ward was designated under Isoka West Constituency, the registered voters in that Ward would be voting for the Parliamentary and Presidential candidates under Isoka East Constituency but for the Councillor under Isoka West Constituency. 10
- 10 - Your Petitioner states that many voters were disenfranchised because voting did not start until after 13.00 hours and closed at 17.00 hours. A lot of people who had been waiting from early in the morning either had left when voting started or were unable to vote by 17.00 hours at time was too short. 15

The petitioner's prayers are that:

1. A declaration prder be made that the elections in relation to Isoka East 20  
Costituency be declared null and void and that a scrutiny of the ballot  
papers be made in such a manner as this court shall determine.
2. It may be determined and declared that the 1<sup>st</sup> respondent Catherine Namugala  
was not duly elected, and
3. It may be determined and declared that new elections be held in relation to 25  
Isoka East Parliamentary Constituency.

An election of a Member of the national Assembly shall be declared void on any of the grounds under Section 18 of the Electoral Act, Cap. 13 of the Laws of Zambia.

This Section reads:

The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say -

- (a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred; or
- (b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;
- (c) that any corrupt or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent or of his polling agents;
- (d) that the candidate was at the time of his election a person not qualified or a person disqualified for election.

Looking at the grounds of this petition I am convinced that the provision of Section 18 of the Electoral Act, Cap. 13 of the Laws of Zambia (hereinafter referred to as the Act) under which this petition is based is 18(2)(b). The petitioner's case was in summary, alleging that there was non-compliance in this case with the provisions of the said Section 18(2)(b) of the Act.

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It is therefore incumbent upon the petitioner to prove his case on a balance of probabilities by proving the allegations he is relying upon.

The summary of the petitioner's case was that the petitioner Mike Kaira was a parliamentary candidate in the last year's parliamentary elections on the ticket of the United National Independence Party (UNIP). He is challenging the respondent's election as a member of parliament for the Isoka East Constituency because of the irregular manner in which the elections were conducted. The returning officer had promised to call for a meeting at which he was going to brief all polling agents but this was not done except that one such meeting was organized for the M.M.D. candidate and her polling agents with the collaboration of some N.G.Os such as FODEP (Forum for Democratic Process) and assisted by the Office of the President. The petitioner came to know of the said meeting by chance when he went to check on rentals from the tenant of his father's house. P.W.3 Wilton Andrew Munthali confirmed that there was a briefing meeting for polling agents at Muyombe Secondary School. He too said he only became aware of the meeting upon going to the school for some other business. He found many people had gathered there and so he joined in the meeting. P.W.3 went on to say U.N.I.P. was not invited to that meeting. On the election day P.W.2 Ruth Nambobe with others visited some polling stations in the Isoka East Parliamentary Constituency. Polling was delayed in a number of polling stations. When they visited Musanta Polling Station at 09.00 hours the election materials were just being delivered. At Kalyamani Polling Station polling had not begun by 12.00 hours. They then went to Muyombe where they arrived

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at 13.00 hours. They waited at Muyombe Polling Station until polling began. The polling at Muyombe ended at 17.00 hours. All the people present had voted.

The other major bone of contention was on Mpungu Ward which is comprised of six polling districts. The six polling stations are Nzoche, Kanyala, Kasoba,

Mwenimpangala, Chuba and Nachisitu. This ward is designated as one of the wards under Isoka West Parliamentary Constituency No. 86. This is as per documents No. 3 and No.

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5 in the second respondent's bundle of documents. These documents are Registered Voters Per Polling District 2001 and List of Polling Districts, Wards, Constituencies,

District And Provinces respectively. These documents were issued by the Electoral

Commission of Zambia. The above districts are reflected on page 85 of 150 in document

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No. 3 and at page 80 of 141 in document No. 5. Depsite that these polling stations fell

under Isoka West parliamentary Constituency candidates were told to campaign in the

said Mpungu Ward. This, according to the petitioner, caused some confusion. The total

number of voters under Mpungu Ward was 1,845 as per document No. 3 in the second

respondent's bundle of documents at page 85 of 150. Isoka East Parliamentary

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Constituency and Isoka West Parliamentary Constituency are designated as 85 and 86

respectively in documents No. 3 and 5 in the second respondent's bundle of documents.

This is also the case with Exhibit R.W.3. However, document No. 1 in the same bundle

of documents shows that Isoka East Parliamentary Constituency is No. 86 and Isoka

West Parliamentary Contituency is No. 85. This document shows that four of the six

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polling districts in Mpungu Ward are in Constituency No. 86. The petitioner however,

said the above numbering was wrong as they should have been the other way round.

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Four polling districts were on the polling day, placed under Isoka East Parliamentary Constituency. These were Polling Districts No. 603040 Kasoba, No. 603041 Mwenimpangala No. 603042 Chuba and No. 604043 Nachisitu. Polling Station No. 603038 Nzoche and No. 603039 Kanyala were placed under Isoka West Parliamentary Constituency. The demarcations were as per document No. 1 a map showing polling districts and constituency boundaries (though the map itself had wrong numbering of the constituencies).

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The above is the summary of the evidence supporting the petitioner's case on the alleged irregularities,

Three witnesses were called on behalf of the 1<sup>st</sup> respondent and the gist of their evidence was to the effect that R.W.1 Royd Munkondya, the M.M.D. District Vice Chairman and at the same time the campaign manager for the 1<sup>st</sup> respondent established campaign camps manned by constituency officials all over the Isoka East Parliamentary Constituency. He denied knowledge of having officers from the Office of the President banding together with his party in the campaigns. Neither were his members told to go and vote in the afternoon, but they were in fact told to go and vote at 06.00 hours. Prior to the elections the Electoral Commission of Zambia organised a briefing for the interested parties at Muyombe though R.W.1 did not attend that meeting himself. R.W.3 Robert Posa Mwenya the Returning Officer for the Isoka East Parliamentary Constituency stated that meetings, where interested parties were briefed about the elections, were held at Kampumbu, Muyombe, Thendere and Mulekatembo. Invitations to these meetings were through some advertisement in form of document No. 6 in the 1<sup>st</sup>

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respondent's bundle of documents. R.W.1 went on to say he knew that four of the six polling stations in Mpungu Ward belonged to Isoka East for the purposes of Presidential and Parliamentary Elections. So campaigns were done in the four polling districts. Those excluded were Nzoche and Kanyala. R.W.3 confirmed that some polling districts were reflected under Isoka West but were voting in Isoka East. The electorate was told of this verbally during the briefings. R.W.3 further said he received no complaints of any polling beginning late in his constituency. All people were allowed to vote. R.W.2 Clifford Sichilima, a member of the Prevention Against Malnutrition Committee (PAM) said his organization existed in Isoka even before the elections. This organisation worked for the up-lifting of the living standards of the people by distributing food stuffs to the needy. The organisation worked independently of the M.M.D.

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This is the brief summary of the 1<sup>st</sup> respondent's case.

I received two written submissions one by the learned counsel for the petitioner and the other by the learned counsel for the 1<sup>st</sup> respondent.

I shall deal with the issues raised therein in the course of this judgment.

15 Findings

I must on the out set state that a number of facts are not in dispute. The undisputed facts are as follows: Facte

1. That both the petitioner and the 1<sup>st</sup> respondent were candidates for the Isoka East Parliamentary Constituency during the elections held on 27<sup>th</sup> December, 2001.
2. That the 1<sup>st</sup> respondent was the declared winner in that poll.
3. That Mpungu Ward comprises of six polling districts, four of which were

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said to belong to Isoka East for the purposes of Parliamentary and Presidential Elections. These are Kasoba, Mwenimpangala, Chuba and Nachisitu. Nzoche and Kanyala were said to belong to Isoka West Constituency. The electorate voted according to the above arrangement.

4. That the said Mpungu Ward (inclusive of all polling districts) is however reflected under Constituency No. 86 – Isoka West. This is as per documents No. 3 and No. 5 in the second respondent's bundle of documents and also as per exhibit R.W.3 produced by the 1<sup>st</sup> respondent's third witness.

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5. That there was no malpractice that was directly attributed to the 1<sup>st</sup> respondent.

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6. That at Kalyamani polling was delayed until 12.20 hours as per presiding officer's report which is document No. 18 in the 1<sup>st</sup> respondent's bundle of documents.

The question yet to be answered is on whether the petitioner has proved his case on a balance of probabilities as to warrant the nullification of the 1<sup>st</sup> respondent's election as a member of parliament for the Isoka <sup>East</sup> West Constituency.

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I shall first deal with the allegation under paragraph 8 of the petition. This reads:

Your petitioner states that the Returning Officer gave secret briefing to the M.M.D. candidate and her agent.

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I have read through the submissions by the counsel for the petitioner. The learned advocate never alluded to this allegation. However the learned counsel for the 1<sup>st</sup>



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respondent argued that the above allegation was not proved and must be disallowed, The counsel argued that no witnesses from other political parties were called to support or substantiate this allegation. Neither did the petitioner call any of his agents to prove that his failure or that of his agent to attend such a meeting was as a result of the alleged secrecy surrounding the holding of that meeting.

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I have read through the evidence on record. The evidence that was adduced by the petitioner was purely of general allegations. There was no proper proof that the M.M.D. candidate and her agents were favoured. Admittently the Returning Officer did not write to the interested parties individually but that did not mean the meetings that were held were secretly convened. I agree that document No. 6 in the 1<sup>st</sup> respondent's bundle of documents proved that the meetings that were organized by the District Electoral Officer were in fact for Presiding Officers and Polling Assistants. Political parties were merely at liberty to attend. Surely anybody reading this document will agree that the meetings called by the electoral officer were not for the candidates and their agents but for electoral officials namely the Presiding Officers and Polling Assistants.

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This document, for case of reference, is couched in the following language:

ISOKA DISTRICT COUNCIL  
CIVIC CENTRE  
P.O. BOX 440010  
ISOKA

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PUBLIC NOTICE

A NOTICE IS HEREBY GIVEN that, in accordance with the Electoral (General) Regulations, 1991. The District Team will conduct Election briefing for Presiding Officers and Polling Assistants from 08.00 hours to 16.00 hours as follows:-

DATE

VENUE

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19/12/2001  
20/12/2001  
21/12/2001  
22/12/2001  
24/12/2001

Kampumbu School  
Muyombe Secondary School  
Thendere/Mulekatembo School  
Mwenimpangala School  
Civic Centre – Council Chamber

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- All those who applied for the post above should check for their names at the Council Notice Board.
- All Political Parties, NGO, Monitors and Church Leaders are free to attend.

Smart Muwowo  
DISTRICT ELECTORAL OFFICER  
ISOKA DISTRICT COUNCIL

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17<sup>th</sup> December, 2001

It is clear from the above that what I said in the previous paragraph is correct.

Be as it may I am not satisfied that this allegation against the 1<sup>st</sup> respondent can be sustained because there is no cogent evidence proving that she conspired with the electoral officers to hold briefing meetings with herself and her agents only. After all the calling of meetings was a responsibility of the electoral officers and not the 1<sup>st</sup> respondent. The Electoral Officer or Returning Officer's failure to call for specific meetings at which the candidates and their agents were to be briefed on the conduct of the elections did not affect the elections in any way. This ground fails.

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*generate meeting failed*

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I now wish to delve into the issue raised in paragraph 10 of the petition before considering paragraphs 7 and 9. The allegation is that many voters were disenfranchised because voting did not take place until 13.00 hours but closed at 17.00 hours and as a result many people were unable to vote.

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It was at least conceded that polling at Kalyamani did not start until 12.20 hours but the closing time was not given in the Presiding Officer's report which is document No. 18 in the 1<sup>st</sup> respondent's bundle of documents. The evidence was adduced through P.W.2 to the effect that polls were delayed also at Musanta and Muyombe Polling Stations. I looked at the statistics of the votes cast vis-à-vis the official registered numbers of each of the three polling stations. The figures are as follows:

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<u>Polling Station</u>	<u>No. of Registered Voters</u>	<u>Votes Cast</u>
1. Muyombe	440	352
2. Kalyamani	245	163
3. Musanta	264	210

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It will be noted from the above that at Muyombe Polling Station only 88 voters did not cast their votes and Kalyamani and Musanta Polling Stations 82 and 54 voters respectively did not cast their votes. It will be noted that the above polling stations recorded more than 50% turn out. I looked at other polling stations on voter turn out. Let me give a few examples:

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Ward 60308 - Mafinga

603048 - Chiyombo had 110 registered voters but 73 voters cast their votes.

603053 - Mabinda had 216 registered voters but 131 voters voted.

Ward 60311 - Thendere

603075 - Thendere had 574 registered voters and 437 voters cast their votes.

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603083 - Kaseya had 239 registered voters out of which 195 votes were cast.

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These figures have been picked at random using documents No. 7 – 16 in the first respondent's bundle of documents and I compared these figures against the total number of voters as reflected in document No. 3 in the second respondent's bundle of documents.

In all cases it is clear that there were no 100% turn-out. There were no allegations that polls began late at those polling stations. So the general trend was that there was no 100% turn-out. I am sure looking at the figures at the disputed polling stations mentioned by P.W.2 as having opened for poll late, I find that they compare favourably to other stations. I am sure the late opening of the stations did not really affect the turn-out of voters at Muyombe, Kalyamani and Musanta – the stations visited by P.W.2 and the only polling stations proved by evidence to have opened late. S

I am not satisfied that the petitioner has proved that the late opening affected voter turn-out at those three polling stations. In any case the majority of voters cast their votes. There was not a single witness called to prove that he/she failed to vote because the station opened late and closed earlier i.e. in that there were few hours of voting. late open  
fail

The petitioner's ground of challenging the poll as contained in paragraph 10 of his 15  
petition also fails.

I will now consider paragraphs 7 and 9 together for they are more or less inter-related. These paragraphs read as follows:

7- Your Petitioner states that Catherine Namugala was not duly elected as the election was not fairly conducted and was done in violation of the Electoral (General) Regulations 1991. 20

9- Your Petitioner further states that his supporters were confused because the Returning Officer told them that although Mpungu Ward was designated

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under Isoka West Constituency, the registered voters in that Ward would be voting for the parliamentary and Presidential candidates under Isoka East Constituency but the Councillor under Isoka West Constituency.

I am sure the allegation of breach of the regulations for non-conformity with the Electoral (General) Regulations is based on the fact that some of the polling districts, in Mpungu Ward which is designated under Isoka West Parliamentary Constituency No. 86, were made part of Isoka East Parliamentary Constituency without proper authority. As I said above this fact is admitted. Did this anomaly amount to violation or breach of the Electoral (General) Regulations? The learned counsel for the petitioner argued that the provisions of Section 18(2)(b) of the Act have been breached, 10

This Section reads as follows:

The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say -

subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election. 20

The learned counsel for the 1<sup>st</sup> respondent argued at length in paragraph two over the allocation of Mpungu Ward under Isoka West Constituency. He argued that the petitioner told the court in his own words that he was told to campaign in Mpungu Ward and so he knew that some polling stations in Mpungu Ward fell under Isoka East Constituency and that he was in fact very much aware that four of the polling districts under dispute have belonged to Isoka East Constituency for a long time as evidenced by 25

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documents No. 1 to 5 in the first respondent's bundle of documents. These documents are a declaration of result of poll (document No. 1) and record of proceedings at the count (documents No. 2 to 5) for Isoka East for the poll (by-election) held on or about 7<sup>th</sup> September, 2001. Chuba, Nachisitu and Kasoba were among the polling districts where the polls were held. He further argued that the petitioner failed to call any registered voter who was confused by the said arrangement. S

First and foremost let me comment on the polls held in September, 2001 in which the petitioner participated and in fact won. The available documents do not categorically prove as shown in documents Nos. 3 and 5 in the second respondent's bundle of documents that the disputed polling stations in Mpungu fell under Isoka West though the poll was held in the Isoka East Constituency bye-election. In the present case it is clear that all the polling districts in Mpungu Ward are designated under Isoka West Constituency. The evidence varying this arrangement is in the main verbal except for the map document No. 1 in the second respondent's bundle of documents which map is also suspect in that the numbering of the constituencies is faulty. If the four polling stations under contention were intended to be under Isoka East Constituency the relevant documents ought to have so reflected. As a general rule parole or extrinsic evidence is not allowed to vary the contents of a written document as is the case here. I do not accept such verbal evidence which tended to vary the contents of written documents. The documents were written by the second respondent and so they are estopped from denying what is stated therein. All the three documents namely documents 3 and 5 in the second respondent's bundle of documents and exhibit R.W.3 produced by the 1<sup>st</sup> respondent's

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witness show that all the polling stations in Mpungu Ward are under Isoka West Parliamentary Constituency No. 86. This means all the voters in Mpungu Ward were registered voters for Isoka West Parliamentary Constituency and so the voters in the four polling stations ought not to have voted under Isoka East Parliamentary Constituency poll. As correctly pointed out by the counsel for the petitioner in his submission I agree that the voters in the four polling districts in Mpungu Ward voted in a different Constituency other than in which they were registered. Section 6 of the Act reads:

Subject to the provisions of this section and of section seven, every person who is registered in a register of voters for a constituency shall be entitled to vote at a direct election held in that constituency.

I am therefore satisfied that the provisions of Section 18(2)(b) of the Act have been proved in that there was a breach in the conduct of the elections by the Electoral Commission of Zambia in that Section 6 of the Act was not complied with because voters registered under Isoka West Constituency were allowed to vote in the Isoka East Parliamentary Constituency at the poll held on 27<sup>th</sup> December, 2001. Whether this fact was known or not known to the voters of the four polling districts is immaterial in that ignorance of the law can never be a defence.

The petitioner stated that he was disadvantaged in that he did not fully campaign in Mpungu Ward because of the wrong information that showed that this ward including all the polling districts therein fell under Isoka West Parliamentary Constituency.

Admittedly the two contesting parties, namely the petitioner and 1<sup>st</sup> respondent, polled as follows in the four polling stations of Kasoba, Mwenimpangala, Chuba and Nachisitu (giving only totals): The petitioner got 240 votes and the 1<sup>st</sup> respondent

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received a total of 360 votes. If I were to disregard these figures from their totals or final figures of 2528 and 3316 respectively the respondent would still have beaten the petitioner by 568 votes. The petitioner would have lost 240 votes from 2528 and the balance would have been 2388. The 1<sup>st</sup> respondent would have lost 360 from 3316 and the balance would have been 2956. The difference between 2956 (for the 1<sup>st</sup> respondent) and 2388 (for the petitioner) is 568:

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How about  
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However, the cardinal point is that the petitioner may not have indeed campaigned fully in Mpungu Ward in that it was designated under Isoka West. This therefore, must have affected the out come or result of the elections in the whole of Isoka East Parliamentary Constituency.

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The information that Mpungu Ward belonged to Isoka West Parliamentary Constituency rendered the elections to have been conducted in non-compliance with the provisions of Section 18(2)(b) of the Act. The allegations under paragraphs 7 and 9 of the petition are indeed within the ambit of the above provisions of the law. I do not therefore, agree with the 1<sup>st</sup> respondent's counsel's submission that the allegations fell under Section 18(2)(c) of the Act which relates to corrupt or illegal practices. This

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Section reads thus:

The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say -

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that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent or of his polling agents.



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Can the 1<sup>st</sup> respondent's election as Member of Parliament for Isoka West Parliamentary Constituency be nullified on this ground? In answer to this question I must seek refuge in the Supreme Court of Zambia decision in the case of Mlewa v Wightman

*Mlewa v Wightman*

(1). The Court said:

The four paragraphs in section 18(2) of the Electoral Act 2 of 1991 are independent and separate paragraphs and an election shall be held void if any of the paragraphs is proved to the satisfaction of the High Court Where it is proved that there is wrongdoing of a scale or type which had adversely affected an election, regardless of who the wrongdoer is and even if the candidates personally were not involved, the election may be declared void in terms of section 18(2)(a).

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It is clear that despite the fact that the 1<sup>st</sup> respondent cannot be faulted in any way in the conduct of the elections in Isoka East parliamentary Constituency, the non-Compliance with the law by the Electoral Commission of Zambia by allowing four of Mpungu Ward polling districts which are under Isoka West Parliamentary Constituency to vote in Isoka East Parliamentary Constituency renders the election null and void under Section 18(2)(b) of the Act. I am therefore, declaring that the respondent was not duly elected as a Member of Parliament for the Isoka East Constituency.

*Non-Compliance*

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I must add here that it is imperative for the Electoral Commission of Zambia to redefine the boundaries of the two constituencies namely Isoka East and Isoka West to avoid unnecessary petitions like this one. It would perhaps be better for the Commission to produce or prepare separate documents, one showing the boundaries of the two constituencies and the other showing those of the wards. I am sure had different books or documents been prepared for the said purposes the problem caused by the over-lapping of

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the boundaries would not have arisen i.e. as to which constituency the four polling districts in Mpungu Ward belonged.

Having annulled the election I must order a fresh poll to be held in Isoka East Parliamentary Constituency.

As the Electoral Commission of Zambia, the second respondent, was to blame in this case I order that they will bear the costs for both the petitioner and the 1<sup>st</sup> respondent. S

In default of agreement they shall be taxed.

DELIVERED IN OPEN COURT AT LUSAKA THIS 2<sup>ND</sup> DAY OF AUGUST, 2002

  
C.S. MUSHABATI  
JUDGE 10