

HIGH COURT

BEFORE HON. MR. JUSTICE PHILIP MUSONDA

2006/HP/EP0017

Flynote

Electoral bribery and malpractice-credibility of mistresses absence of party agents at polling stations-the effect thereof.

Headnote

The petitioner contested the Nalikwanda constituency elections during the 2006 polls and lost to the Respondents. The petitioner alleged that the polls were fraught with bribery and his party agents were denied access to most polling stations.

Held:

1. the testimony of witness such as police officers and monitors during an election is more credible than that of party official and election officers.
2. it is the duty of a candidate to deploy party agents at polling stations. The absence of agents at polling stations does not invalidate the election results.

IN THE MATTER OF: AN ELECTION PETITION BY SIMASIKU KALUMIANA

IN THE MATTER OF: ARTICLE 71 OF THE CONSTITUTION OF ZAMBIA

IN THE MATTER OF: AN APPLICANT UNDER ELECTORAL ACT NO. 12 OF 2006

IN THE MATTER OF:

REGULATION MADE PURSUANT TO THE ELECTORAL ACT NO. 12 OF 2006

IN THE MATTER OF:
SEPTEMBER, 2007.

THE NALIKWANDA PARLIAMENTARY ELECTIONS HELD IN ZAMBIA ON THE 28TH

For the Petitioner:

Mr. S. Sikota of Central Chambers

For the 1st Respondent:

Mr. S. Malama SC. Of Jacques & Partners

For the 2nd Respondent:

Mr. S. Nkonde Solicitor General with him Mr. E. Kamwi –In House Counsel
Electoral Commission

Cases Referred to:

- (1) Simasiku Namakando v Ireen Imbwae 2006/HP/EP/017
- (2) Subramanian v DPP (1956)1 WIR 965
- (3) Jeniffer Mwaba v Frederick Jacob Titus Chiluba SCZ Judgement No.14 of 1998
- (4) Mateo B Mwaba v Anthony Kunda Kasolo Appeal No. 27 of 2003
- (5) Michael Mabenga v Sikota Wina SCZ No. 15 of 2003
- (6) James Chibisa Nyirongo v Mukhondo Lungu 2006/HP/EP/020
- (7) Anderson Mazoka v Levy Patrick Mwanawasa and another SCZ/EP/01/02/03/2002

Legislation Referred to:

- (1) Electoral Act No. 12 of 2006
- (2) Constitution of Zambia Act No.1 of 1991

Works Referred to:

JUDGMENT

This is the Petition by Simasiku Kalumiana pursuant to the Electoral Act No. 12 of 2006. The petition alleged that:

1. The petition stated that the 1st Respondent one LUNGWANGWA GEOFFREY LUNGWANGWA during the election campaign in some parts of the constituency by himself his servants or agents offered inducements or bribes for people to vote for him.
2. The Petition stated that the 1st Respondent and his servants and agents were writing down names of voters promising them that they would be given relief maize upon voting for the 1st Respondent and the MMD at places such as LUKALANYA and others.
3. The Petition stated that the 2nd Respondent through its servants or agents denied the Petitioners election agents the necessary documents that would have allowed them to enter and observe the whole election process and safeguard the interests of the Petitioner.
4. The Petition stated that the agents of the 1st Respondent LUNGWANGWA GEOFFREY LUNGWANGWA on or about the 28th September 2006 did commit acts of corruption and bribery at polling stations such as SIISA and others where they promised maize immediately after the elections if the electorate voted for them.
5. The Petition stated that the campaign agent by the name of LIBUWO SAMAZUKA in the presence of the 1st Respondent LUNGWANGWA GEOFFREY LUNGWANGWA at SIWA, MULWA and NALICHINJI did falsely state of the character of the Petitioner that the Petitioner had misused the rice donated by the Indian Government for distribution through the Members of Parliament.

6. The Petition stated that the 1st Respondent LUNGWANGWA GEOFFERY LUNGWANGWA falsely accused the Petitioner of having stolen part of the money for the NAMENGO, NANJEKO and SIBONGO Health Centres.

7. The Petition stated that on polling day an Electoral Officer by the Lukweta polling station and in Lozi told people in the line to vote "on the watch."

8. The Petition stated that the 2nd Respondent through its servants or agents gave signed forms for election agents to the 1st Respondent servants or agents such as one Mr. MUNDIA KAPANDA at Nakanya polling station who then started to offer them for sale to the Petitioners election agents.

9. The Petition stated that the 2nd Respondent through its servants or agents were marking ballot papers for even voters who did not request or need them to do so in favour of the 1st Respondent at several polling stations such as NAMIANJI, SITUNGA, NALICHINJI, LUKALANYA, NALIKWANDA, NANJEKO and NAKATO amongst others.

10. The Petition stated that the 2nd Respondent through its servants or agents allowed even the Movement for Multi-party Democracy polling agent by the name of a Mr. MUNDIA KAPANDA at NALIKWANDA BASIC SCHOOL to mark ballots for voters who did not request or need that he does so.

11. The Petition stated that the 1st Respondent LUNGWANGWA'S agent on or about the 28th September 2006 did commit several acts of corruption and bribery at polling stations such as SIISA and others.

12. The Petition stated that the 1st Respondent LUNGWANGWA GEOFFERY LUNGWANGWA'S agents on or about 28th September 2006 did campaign at and within the vicinity of various polling stations as at NANSANGE SCHOOL.

13. The Petition stated that some of his agents were initially refused entry into the polling station and at the end of the voting they were asked to come in and forced to sign the Results Announcement Forms with a threat of arrest if they refused to sign.

14. The Petition stated that one FRANK KALENGA issued Voters Certificates which were not stamped to enable people to vote.

15. The Petition stated that the verification exercise of ballot papers (votes) in accordance the Electoral Act and Regulations, in Mongu District was haphazard and started on a rather bad note.

16. The Petition stated that the exercise was supposed to have started on the 5th of October 2006, for the entire constituency up to the 7th of October as per public announcement to all stakeholders on Radio Liseli, however, the Nalikwanda Returning Officer, Alfred Litebele, blocked the exercise, which finally started on 16th October 2006.

17. The Petition stated that the council officials insisted on a half baked verification such as books received from the ECZ polling station by polling station and also not giving us voters registers and rolls. The exercise was resumed today 19th October 2006 but Mr. Litebele for no proper reason decided to move it to 20th October 2006.

18. The Petition stated that many ballot books which were not indicated to have been issued to the various polling stations were the ones which were used without any explanation as to why and where they came from.

19. The Petition stated that the following matter made the verification exercise unattainable and meaningless.

(a) Election Commission of Zambia Delivery Notes to confirm what was collected from Lusaka by the Mongu Municipal Council Official but many of these were not read out or shown.

(b) Mongu Municipal Council Delivery Notes to each and every Polling Station were not prepared or signed for.

(c) Ballot Books Account records to show the used ballots books (used ballots), unused ballots (unused ballots) and the spoiled ballots were not available in many cases.

(d) The Voters Registers, both marked and un-marked were not available in all cases.

(e) The Voters Rolls, both marked and un-marked were not available in all cases.

(f) The used and unused ballot books were not available in some cases.

(g) The used ballot put in sealed envelopes were not shown to the Petitioner or his agents and the Returning Officer refused to just show those envelopes.

(h) The 'results Announcement forms' were not available in some cases.

(i) The sealed envelopes containing used ballots papers (votes cast) for each and every candidate were not available in many cases.

(j) Most ballot boxes had been tampered with and came without seals.

(k) The 'Results Announcement Forms' in some cases did not have signatures of Presiding Officers and at times witnesses.

(l) Some 'Results Announcement Forms' had signatures that were forged.

20. The Petition stated that the stakeholders representing Mongu, Luena and Nalikwanda Constituencies participated in the verification exercise under protest for the reasons and incidences that had taken place before the start of the process such as the case involving the Town Clerk Mr. SAMUTUMWA MWAPELA and Acting Director of Administration Mr. KALIHONGA who on the night of 2nd October admitted that they had instructed four council workers who were caught red-handed,

around 16:45 hours on 2nd October 2006, with four opened ballot boxes in room 11 at the Civic Centre to open the said boxes.

21. The Petition stated that during the verification process ballot boxes for NAMUSHESHE were found open with the envelopes which contained results and others election material unsealed which matter was brought to the attention of the Police Deputy Commanding Officer for the province.

22. The Petition stated that the verification was incomplete as the returning officers wished to give as little information as possible, when the following should have been availed for data at all polling stations from SEALED Ballot boxes.

By reason of the above, the Petitioner prays:-

(a) That it may be determined and declared that the Respondent was 'not duly' elected as a member of parliament for the NALIKWANDA Constituency

(b) That it may be determined and declared that the Electoral Commission wilfully neglected its Statutory Duty to superintend the election process thereby legitimizing a fraudulent exercise favouring the said LUNGWANGWA GEOFFERY LUNGWANGWA

(c) That it may be determined and declared that the electoral process was not free and fair and that the election was rigged and therefore null and void.

(d) That it may be determined that the corrupt practices and electoral regulations breaches so affected the election result that the ought to be annulled.

(e) That it be ordered that a scrutiny, verification and recount be conducted of the parliamentary ballot papers.

(f) That the Petitioner may have such further or other relief as may be just.

(g) That the Respondent be condemned in the costs of occasioned by this petitions.

The evidence as laid by the Petitioner was that he qualified to stand for Nalikwanda constituency as a member of parliament. He alleged that the Respondent offered inducement to the electorate. There were various bribes. He received in Mutondo ward from Gershom Sibanje who received a pair of shoes and a green jacket from Respondent. In Lukalanga he was told MMD agents were going round the area telling people and writing their names and promised to give them maize after voting. He received a report that his agents were not accredited as pleaded in paragraph 10. The agent of the Respondent falsely stated that he had misused rice as pleaded in paragraph 12 donated by the Indian government and that he had stolen money for Namengo, Nanjeko and Sibongo health centre as pleaded in paragraph 13. The polling agent accreditation forms were being sold by Mundia Kapanda an MMD agent who was also allowed by the second Respondent to mark ballot papers as pleaded in paragraph 17.

At Namwinji around 1600 hours on 28th September, 2006 he entered the classroom where the election were being conducted, he saw the presiding officer leading an elderly man near to the polling booth, and telling him who to vote for, he reported to the police officer who walked to the presiding officer. He further received a report that the Respondent's agents were campaigning within the vicinity of the polling station and that voting continued up to 29th September, 2006 as pleaded in paragraph 19. His agents were called in to witness the counting under duress as pleaded in paragraph 20.

He discovered during verification that some certificates were not stamped. There were about 10 certificates from various places and he brought this to the District Conflict Management Committee, which has not responded to date as pleaded in paragraph 21. He was not given the necessary documents at verification by a Mr. Kalenga such as the voters registers, voters rolls, distribution list. There were cases of missing ballot form and there were different serial numbers between the ballot books used and those found in the ballot boxes as opposed to what was written on the ballot account form pleaded in paragraph 25. Some ballot account forms had several cancellations. He also discovered that the results that were announced were different from the figures he was given at the council. There were also variances between presidential, parliamentary and Local Government i.e. at one polling station the presidential had 80 votes less than the parliamentary instead of having the same number of voters. For the constituency the difference was 1,200 votes.

At Sisi polling station documents which were supposed to be sealed envelopes were not sealed and he reported the matter to the police. However, the majority of the station ballot account forms were available except for less than 10. For some stations like Lukalanya the ballot accounts forms were

completed on 26th apt before voting day. In a nutshell the verification revealed that the process was fraught with poor record keeping and forgery.

Pw2 was Patrick Silambwe Silibelo a peasant farmer who testified that he was waiting for the Respondent who eventually arrived in the company of Mumbuna Campaign Manager, Libuwo MMD treasurer and Sililo Sileshebo who is currently a councillor at Nanjeko Primary School. There was also Charles Sitanga. Mumbuna opened the meeting and said they had gone there to introduce Respondent. Mumbuna said people should not vote for those who are not going to work for them, he went on that people of Nanjeko were supposed to have a clinic but petitioner had misused the money, this was in presence of Respondent who was laughing and nodding, Mumbuna called petitioner a thief.

Libuwo also accused petitioner of having the money for the road in Nalikwanda and further petitioners assertion that he had taken the solar energy to the clinic. Later, the petitioner went to Nanjeko and addressed a similar crowd and refuted what Respondents campaign team had said and the witness discarded Respondent's campaign team story.

Pw3 was Muselife Kalaluka, who is unemployed who was United Liberal Party agent at Nanjeko polling station. He testified that he arrived at the polling station at 0530 hours and voting started at 0600 hours. During voting he saw a lady standing at table 4 where the ballot papers were being marked. He said he was in MMD with Muselife Kalaluka.

Pw4 Geoffrey Lyapwaya a peasant farmer who testified that he went to vote at Nanjeko school. While in the voting booth a lady went to him, got a ballot paper from him and she was marking for everybody and she told him if he talked the police officer will arrest him. He heard from others that she also marked for them. He did not know what party she marked on. The lady did not ask him whom he was going to vote for.

Pw5 was Muwelo Mwanga a peasant farmer who testified that on 22nd September 2006 he went to Mongu for a workshop to be sensitized as an agent. While there he raised the issue of documents to allow him to be an agent. He was told the documents will be sent to the polling stations. On voting day he left home at 0500 hours and arrived at the polling station at 0530 hours the boxes arrived at 0630 hours. He was not allowed to enter the polling station as he did not have letters of accreditation as a result he failed to perform his duty as a polling agent.

Pw6 was Sikute Aggrey Lyambai a peasant farmer who said on voting day he went to vote at Nanjeko polling station while there he saw a woman who had attended a workshop in Mongu on 22nd September just as Pw5 did. He also said the Electoral Commission of Zambia officials promised them that documents will be available at the polling station. While he was an agent at Mbekise polling station he heard that some woman wearing a Foundation for Democratic Process (FODEP) T-Shirt was marking ballot papers for some people. When he heard that he went to see the presiding officer a Mr. Akatongokwa Lubinda, that was after 1000 hours. He said he was sorry to mislead the court that the monitor was not a man when it was actually a lady.

Pw9 was Mwenda Kashima a student who testified that on 24th September 2006 at 1400 hours Respondent addressed a meeting at Nalichinji at which meeting he was introduced by Mumbuna. Mumbuna said Respondent was going to brig development not petitioner who was old and a thief. These allegations were confirmed by the petitioner. When the witness asked Respondent whether he had gone there to tell them about development or to discuss the petitioner. Respondent said he was campaigning and Petitioner also says other things when he goes campaigning. Witness stated that he voted for a candidate of his own choice and his mother was United Liberal Party in cross examination.

Pw10 was Mute Mwawandiwa a peasant farmer. He recalled that on 27th September, 2006 there were three Movement for Multi-party Democracy men Mwendabai Mushe, Bornwell Imakando and Chris Mwendabai who asked people to submit their National Registration Card numbers and voters cards and they said that after voting the people will be given some maize and those that did not vote for the Movement for Multi-party Democracy will be discovered as the pictures were on the voters cards. He observed that the presiding officer was voting for the people and he complained, but he was told he had no right to complain.

Pw11 gave similar evidence to that of Pw10. Pw12 was Kwalombota Sililo a peasant farmer, who could not be admitted into the polling station as an agent as he had no credentials but he later signed some documents. Pw13 was Namonda Matomola, a peasant farmer who testified that when she went to vote at Mbekesi polling station she was told that those that had already voted were coming out to ask those on the queue if they can vote on their behalf he was shocked, but was not able to see what was happening inside. He did not say to which party those who were canvassing for votes came from.

Pw14 was Mwimanuenwa Mate a peasant farmer who attended the Electoral Commission of Zambia workshop at Mongu, but could not perform the duties of a polling agent because he had no credentials which documents he was promised would be available at the polling station in this case Silunga polling station. Inside the polling station he observed that those could not write were being told by Election

officers to see the presiding officer and these people went with the presiding officer and he could not see what was happening.

Pw15 was Mubita Mukosiku who was supposed to be a United Liberal Party polling agent at Nakanya, but did not find documents of accreditation at Nakanya but he was told Mundia Kapenda was selling accreditation documents and he bought the documents for K1000 and he was allowed to enter. Mundia was directing people who did not know how to write to the presiding officer to be assisted. The job of the presiding officer was to cast votes for those brought by Mundia, but these people protested that they wanted to be assisted by their relatives. There was no conversation between the presiding officer and the illiterate voters.

Pw16 was Mubita Simwinji, a peasant farmer who went to vote at Sibala polling station accompanied by his son. He told the Election officials that he should be assisted by his son, but some people got his ballot paper and marked it and he was not shown where they marked.

Pw17 was Nalishebo Simwinji, a housewife who testified that she knew Pw16 who was her relative, however, her further evidence was objected to as it was not pleaded by Mr. Malama, which objection was sustained.

Pw18 was Lititiya Sibotwe a peasant farmer who attended a workshop for polling agents in Mongu and was to be United Liberal party agent in Mongu and was to be United Liberal Party agent at Malefu Polling station. He however did not have credentials and was not allowed to perform his duties, despite having been told at Mongu that the documents were going to be delivered to the polling station by election officials.

Pw19 was Sinyambe Siwanya a peasant farmer, who was to be polling agent of United Liberal Party at Sukweta polling station. When he reached the polling station he asked a police officer for documents to allow him enter the polling station, the police officer told him there were no forms for United Liberal Party members and him like Pw18 was not allowed to be polling agent. Pw20 was Ackson Mwanambuyu who went to vote at Lukweta polling station, while in the queue the Headmaster of Lukweta school could show the sign of the clock without saying anything.

Pw21 was Nakena Mwitumwa, who testified that Mundia Kapanda was taking people from front, middle and behind, he took Mate, Mwenda and others. He went in and voted and there was nothing peculiar. He knew Mundia Kapanda as an MMD agent.

Pw22 was Mubita Mubita a sales Representative with the Zambia State Insurance Corporation. According to him he was at Nalikwanda polling Station queue when he saw presiding officer Kwalela pull a lady by the name of Sepiso Mwenda who he gave the ballot and they went together to the polling booth.

Sepiso did not know how to write so the presiding officer marked the ballot papers while on the queue Mundia Kapanda also came and picked his mother and voted for her. He was able to see what was happening inside. In cross-examination he said there ULP agent and two monitors in the polling station.

Pw23 was Nandila Mutoba a peasant farmer she stated that she went to Natonga Polling Station when she wanted to vote someone marked on the paper and she was given the paper to put in the ballot box she had come with her daughter Loveness but the presiding officer refused to be assisted by her daughter.

~~Pw24 was Muiyunda Mayambita unemployed, who went to vote at Nanchinji polling station. When she said she did not know how to vote and she had the intention of calling someone to vote for her she was told the election officials were going to vote on his behalf. In cross-examination she agreed that there were polling agents and monitors in the polling station.~~

Pw25 was Songolo Mulonda who attended an MMD meeting at Nakato ward addressed by the Respondent, Rw11 who was Respondent's campaign manager, Libuwo Samazuka and a Sitanga. Rw11 alleged petitioner was dull and he had squandered money, while Libuwo said petitioner was sick. Respondent informed the meeting that petitioner had stolen rice. The witness tried to ask questions but he was told Respondent and his entourage could not take questions. In cross-examination the witness stated he did not change his mind about the petitioner meaning he was not influence by what was said at that meeting to vote for a candidate of his own choice.

Pw26 was Masowe Moomba a peasant farmer. She testified that on 27th September 2006 a Mr. Silishebo asked her if she had gone to register. She went to Itwi village where she found Mwendabai, Chris Simataa writing down names of ladies imploring the ladies to vote on the clock and thereafter they were going to be given maize if they voted for Respondent. The witness did not register herself. She got Nalishebo Simunji's voters card and National Registration Card who had registered, but was told she

could be arrested for doing so by Sipalo's husband. Upon hearing that she surrendered Nalishebo's voters cards and NRC.

Pw27 was Monda Nalibanga a house wife. She testified that at Nalichinji polling station she was given a pre-marked paper to put in the ballot box. Pw28 was Malan Moonga a police chief inspector at Mongu who testified that petitioner report about 3 unsealed envelopes and a ballot box for Namusheshe polling station.

Pw29 was Teddy Chimipinde a businessman and United Liberal Party publicity secretary who was also petitioner's campaign manager. According to him in most stations their polling agents did not have forms to allow them to enter polling stations. On 27th September 2006 at about 1700 hours petitioner and him went to see the Town Clerk about the forms who referred them to the Returning officer, he however, gave them a form so that they can make photocopies. He was assured the forms could be delivered on polling day.

However on the polling day most of the polling agents could not be allowed as they had no credentials. He went on that there were stories concerning their candidate that he was a thief. They were allegations that he had stolen rice and had misused money for Nalikwanda Namushakende road. The other issue was misuse of money for Nameyo, Sibongo, Nasange and Nanjeko clinics. During verification the electoral officials were uncooperative. He also alluded to unsealed envelopes and a box containing ballot papers for Namusheshe polling stations in cross examination he said he did not know if petitioner satisfactorily explained herself. He never personally heard Respondent accusing the petitioner had misused money nor does he believe everything said at political rallies. That was the petitioner's case.

The Respondent's case was opened by Lubinda Akotondolwa who was Rw1 a teacher at Lundai Basic School. He testified that he was Presiding officer at Mbekise polling station. There were four polling agents of whom two (2) belonged to United Liberal Party petitioner's party one (1) for an independent and one (1) for MMD. There were four observers two from FODEP and two from SACCORD. He saw no monitors mark ballot papers nor did United Liberal Party polling agents bringing that to his attention. He has been presiding officer since 1980 which for 27 years.

Rw2 was Mubukwanu Mubukwanu Crispin a Deputy Head at Mabumbu Basic School who was presiding officer at Mutundo polling station and had four assistants. There was one police officer and one polling agent for Movement for Multi-party Democracy, there was one monitor from SACCORD. The other agents had no papers authorizing them to enter the polling station.

Rw3 was Malenga Telebwe, a headmaster at Middle Basic School who was presiding officer at Situngu polling station. He had three polling assistants. He knew Mate an agent for United Liberal Party, who initially struggled to enter the polling station at the opening of the polling station but did not have credential, but was later admitted after he obtained papers that was at around 1300 hours. He went on that there when were illiterate voters he would alert the polling agent and would announce to the agents who would then allow him to explain to the voters and the voters would show him who he/she wanted to vote for he would then mark and there were only two such voters. No polling agents complained to him in the manner such voters were treated. In cross examination he stated that it was not him to give credentials.

Rw4 was Wamunyuma Sianga unemployed. According to him he voted on 28th September 2006 at Nanjeko Basic School. He voted smoothly though he did not know how to write he voted on his own. He testified that he was briefed 4 days before the elections by the District Coordinator and the Secretary for Mongu District. He arrived at the polling station at 1000 hours and was admitted in the polling station. He observed the process from the time the voter entered until he left the polling station and he was there until 2030 hours when the announcement was made.

There were six polling agents two for petitioner two for Respondent and 2 for an independent candidate. Those voters who were physically challenged and illiterate would stay in the booth for too long and the polling agents would ask the presiding officer to assist and if he was held up he could delegate to the polling assistant. The total number of those assisted could not surpass 15. He said he did not belong to any political party. The elections at Nanjeko were free and fair. In cross-examination he stated that there was a lady at table 4 from Electoral Commission of Zambia, but she never marked any ballot paper, she merely explained symbols and names so that the voter then can vote for a candidate of her/his choice. There was no marking of ballot papers on behalf of the voters nor did the polling agents complain.

Rw6 was Edwin Machona a clerical officer with Agriculture and Cooperatives, who was presiding officer of Sibalabala polling station and had presided over sisala polling station in the previous election. He had four polling assistants, a police officer and four polling agents, of whom two came from the petitioner's party United Liberal Party and two from Movement for Multi-party Democracy and there was a monitor from FODEP. He did not know Pw16 Mubulwa Simunji. There was no incident at the polling station. He did not know Madiya Matobe Pw23. Pw23 came with a daughter to help him vote and other voters came with relatives and he allowed them to be helped. There was no complaint from polling agents or the monitor.

In cross-examination he indicated the symbols which were to be used for votes who needed assistance i.e. 'B' for the blind, 'I' for the illiterate, 'P' for the physically incapacitated, 'BF' for those blind assisted by relatives, 'PIF' physically incapacitated assisted by friends. RW7 was James Masinga a fisheries Technician Ministry of Agriculture and Fisheries who was presiding officer at Nachinji polling station. This was the second time he was presiding over a polling station have presided over Imwiko in Mongu constituency in 2001. He had three polling assistants who came from Mongu, there was one MONITOR FROM SACCORD. There were three polling agents, two for the independent candidate and one from ULP. He assisted voters upon request. He did not take ballots papers from voters and mark them without them indicating to him who they wanted to vote for. There was no complaint. He did not know Mwala Simuyi. He was not asked by anybody that he wanted to be assisted by a relative. The atmosphere during the counting was calm.

Rw8 was Kawalela Mulako a Senior Teacher at Nakanyama Basic School who was presiding officer at Nalikwanda polling station and this was his first time to be presiding officer. He was briefed before he took up his duties. He had eight polling assistants, one monitor for FODEP.

~~He knew Mundia Kapanda who was not present when the voting started and was a polling agent for MMD. He knew Mubita Mukosiku Pw15 who was a ULP agent. It was not true that Mundia Kapanda was getting voters from the queue and bring them to the witness so that he can mark for them nor did he witness Mundia Kapanda selling forms for Oath and Affirmation. He assisted illiterate voters and those who came with relatives were assisted by relatives. He did not know Sepiso Mwenda.~~

He knew Pw22 Mubita Mubita a UPL constituency chairperson. He did not forcibly grab a ballot paper and mark it. He only helped voters who were illiterate when that was brought to his attention by one of his polling assistants, he then marked the ballot after asking the voter whom he wanted to vote for.

Rw9 was Shadrack Namushi Sakanga a Clinical officer, who was Assistant Presiding officer at Nakanga and has been dealing with elections since 1979 while was in Kalabo. In 2001 he was in Sikongo constituency as presiding officer at Namupanda which constituency was won by United Party for National Development (UPND). They were four polling agents from United Democratic Alliance (UDA), Movement for Multi-party Democracy (MMD) and United Liberal Party (ULP), while the other agent was for an independent candidate. Mundia Kapanda was not ushering in voters. In cross-examination he stated that Mundia Kapanda was seated among the panel, he could not remember him going outside. The assisted voters were between 15 – 20.

Rw10 was Crispin Shishanwe a Deputy, director for Administration, who was also Returning Officer for Luena constituency. He testified that he attended the verification exercise part of it as it was for two days but could not initially take off because of the violent conduct of petitioner's supporters Chimbinde and Nyambe demanded copies of the Registers. The verification later took place starting with Situnga, Namiyanji, Nakanya under Nalikwanda polling station Kalonga Namonda. On 21st October, there was verification at Nanjeko, Mukangu Lukulo, Siisa and Mbekise polling station all these were in Mbekise ward.

He could not continue with verification as he was committed. The marked registers could not be available to them as that could only be done by Electoral Commission of Zambia. Petitioner's supporters used abusive language like stupid, corrupt and that they were favouring MMD.

Rw11 was Christopher Makunyango Mumbuna a retired Headmaster. He testified that he has been a member of the MMD since its inception in 1991. In the last elections he was campaign manager for Respondent. He is currently an ordinary member. As campaign manager for the Respondent with three others, he made sure programs succeeded. The major thing was to talk about development in Nalikwanda constituency. They held meetings in all polling stations in Nalikwanda except for Silili, Sibongo and Musalonga where there was a threat of Karavinas in the two Silili and Sibongo, while a meeting in Musalonga coincided with arrival of the President.

He never called petitioner a thief of money for health centers nor did he call him a thief for funds for Nalikwanda road. He did not accuse petitioner to have stolen rice nor did anyone in the campaign team call petitioner a thief. In cross-examination, he stated that he did not tell people that money was released but that it was approved.

Rw12 was Lungwangwa Geoffrey Lungwangwa, who is the Respondent in this petition, who gave his education background in Nalikwanda and how when he left UNZA as Deputy Vice Chancellor decided to stand for parliamentary elections in Nalikwanda Constituency against his brother traditionally and a cousin in English.

His meetings were focused on the development of Nalikwanda Constituency discussing government programs. His campaign team was held by him to the highest level of integrity. There was no finger pointing. They discussed the MMD's poverty reduction strategy which document contained the

construction of schools, clinics, roads, rehabilitation of bridges water supply and several other projects. They discussed the distribution of rice, mosquito nets, fertilizers, and provision of money which had been done by the MMD Government.

He would have not allowed his campaign team to injure petitioner who is his brother because of his family values and he could not allow political relationships to kill the family. He could not accuse the petitioner of stealing the money over which he had no control whatsoever. Nothing happened to Pw9 when he wanted to ask a question. He had been availed information that Pw9 was not a student. He denied allegations that they had called petitioner a thief. In cross-examination he stated that Rw11 was his nephew and he is the nephew to petitioner as well.

At the end of the petitioners and Respondents cases, it became apparent that it is a question of credibility. There is therefore need to put the credibility of witnesses in three categories.

- (i) witnesses who are party members of the Petitioners and Respondents parties.
- (ii) Witness engaged by the Electoral Commission of Zambia which is supposed to be neutral as a conductor of the electoral process.
- (iii) Monitors and police officers who unlike the Electoral Commission of Zambia are not party to these proceedings

The whole petition turns out of the credibility of witnesses as you have most of petitioners witnesses giving evidence to support the allegations contained in the petition, while witnesses for the Respondent dispute those allegations. As I said in the petition of Simasiku Namakando and Ireen Imbwae1, the witnesses have to be subjected to strict scrutiny of their integrities.

The evidence of the petitioner was substantially hearsay as his supporters reported to him what is contained in his testimony, however it is admissible if the purpose was to establish that such statements were made to him *Subramanian v DPP2* following. In cross-examination the petitioner stated that at the time of election there was no maize they had just distributed the maize nor has any maize been distributed after elections. The distribution is done by Nongovernmental Organisation engaged by the disaster Management team and there are committees at ward and constituency level, the request for relief maize is made through the ward councillor or Member of Parliament to the Vice President's Office. This was the process of the distribution of the Indian donated rice. Pw2 testified that Mumbuna Respondents Campaign Manager said at a meeting at Nanjeko that the people there were supposed to

have a clinic but petitioner had misused the money, but later petitioner rebutted the allegation. In cross-examination he stated that he discarded what was stated at the MMD rally and petitioner himself to the same gathering which was addressed by the MMD and people believed him, meaning there voting was not influenced by those allegations.

Rw3 was the petitioner's party's branch chairman who alleged a lady marked all ballot papers for those that voted at Nanjeko, Pw4 gave similar evidence. So was Pw6, Pw7. Pw5's evidence was to the effect that he was to be a polling agent, but did not perform his duties due to the incompetence of the second Respondent the credentials were not given to him. Pw12 had the same problem, but he was not sure who was to give documentation that was the problem with Pw14, Pw15, Pw18 and Pw19. Pw18 testified that a FODEP monitor was marking ballot papers for the voters. Pw9 testified as to allegations by Mumbuna that petitioner was of advanced age and a thief, while Pw10 spoke about the inducement to vote for the Respondent by providing maize Pw11's evidence of an allegation that at Nachinji the presiding officer was marking for the voters Pw20 testified that the headmaster of the School was campaigning at the polling station Pw21 made similar allegations save that he said it was the presiding officer who voted for candidates. So was Pw22.

Pw28, the petitioner's Campaign Manager testified that, the credentials for the polling agents were not given to them in time, this was the supposed to be a star witness but was extremely evasive and was playing 'political theatre' that dramatised the Respondent's campaign message with intention of ascribing petitioner's loss to that message and electoral irregularities.

The entire evidence of the petitioner comes substantially for witnesses in the first category i.e. his party supporters. Who fall in the category of suspect witnesses. Rw1, 2, 3, 6, 7, 8 and 9 were a presiding office engaged by Electoral commission of Zambia, and they fall in the second category, who may be suspect witnesses as they are witnesses for the second Respondent, though they are not party supporters. Rw4 testified she voted at Nanjeko on her own contradicting the petitioner's party's branch chairman who said all voters at Nanjeko had their ballot papers marked by a woman. Rw5 Mumbuwalu Raphael was a monitor engaged by FODEP at Nanjeko who characterised the voting there as free and fair.

Rw11 Mumbuna who was campaign manager is nephew to both petitioner and Respondent. Rw12 the Respondent was cross-examined whether he had not chased Rw11 his campaign manager and the petitioner tried to reconcile them in the night, which suggestion Respondent denied. I find the introduction of such a proposition intriguing, because, if respondent was so cruel to Rw11 and petitioner was so kind and are both uncles, how then can Rw11 in his capacity as campaign manager call petitioner a thief.

It was canvassed by Mr. Malamba for the first Respondent that the candidate was only answerable for those things which he has done or which are done or which are done by his election agent or with his consent. In this regard it was submitted that not everyone in one's party is one's election agent and therefore the allegation by Rw10 Mate Mwanandiwa and Pw2 Monda regarding the threats and the taking down of names of voters threatening not to give those who did not vote for MMD any relief maize.

The tenor of the submissions was that people such as Mundia or Mwendabai were appointees of the MMD over whom Respondent had no control and the case of Jeniffer Mwaba v Frederick Jacob Titus Chiluba³ in which the Supreme Court said:

"We note that no everyone is one's political party is one's election agent since, under Regulation 67 of the electoral (General) Regulation, an election agent has to be specifically appointed."

While the pleading in terms of falsehoods fall within section 83(1)(2) and if proved can nullify an election as was held, bribery if proved can nullify an election pursuant to section 79, but there was no evidence called in aid of that pleading. The allegation that ballot papers were being marked for voters by monitors and electoral officials was too fantastic to be true. The petitioner stood in the same constituency as an opposition candidate some of these officers presided over the election which he won. I cannot believe that an election can be persuaded by such partiality by monitors, electoral officials in the eyes of polling agents, there would have been a riot. I am satisfied that the Electoral official complied with section 60 of electoral Act, when dealing with illiterate and physically challenged voters. There is no credible evidence adduced by the petitioner for court grant an order for scrutiny.

The petitioner and the Respondent were not represented in all the polling stations by polling agents. However, that would not be said to be fatal and section 36(2) which is couched in these terms:

"36(2) The absence of an election or polling agent from a place where any electoral proceeding is being conducted shall not invalidate those proceedings."

I have had the benefit of reading Zikonda J's Judgment on that point in the petition of James Chibisa Nyirongo and Mukhondo Lungu⁴. My learned Judicial brother discussed the failure by petitioner for not

having prepared adequately in terms of agents to man the polling stations and said. It is for the candidate to ensure that his polling agents have taken oath before the respective commissioners. How can the Electoral Commission of Zambia know who the agents are, fill forms and swear them, such reasoning is fundamentally flawed as the Electoral Commission of Zambia could be accused of choosing polling agents for the candidate. *Mateo B Mwaba v Anthony Kunda in Mabenga v Sikota Wina.*

'I would say the commission did not fail to comply with its own self-professed rules of propriety'. The Petitioner's supporters observed the entire electoral process in the constituency as a 'perversion' and yet not. Even if you exclude all the assisted voters in the constituency and regard such ballot papers as spoilt, the Respondent would still have won.

Last not least I observe the demeanour of the Respondent, he was consistent in dispelling the notion that his campaign strategy was anchored on the demonisation of the petitioner, despite being subject to intense and skilful cross-examination.

As Lindberg observes in his paper *Democratization by Elections'*

"free and fair elections create a fundamental distinction between democratically acceptable and unacceptable processes. While there is no such thing as an entirely clean election due to human and technical errors, flaws must not alter or predetermine the outcome."

In *Anderson Mazoka & Others v Levy Patrick Mwanawasa and Another*, it was held that:

"it follows that for the petitioner to succeed in the present petition, he must adduce evidence establishing the issues raised to a fairly high degree of convincing clarity in that proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred, or that the election was so flawed that the defects seriously affected the result which no longer reasonably be said to represent the true and free choice and free will of the majority of voters."

At the end of the day, it is whether cogent evidence has been adduced, that the flaws inherent in the Nalikwanda electoral process were such that the electors were denied the election of a candidate of their own choice. I think not, an example is though bribery was pleaded no iota of evidence was called in support.

I am satisfied that the conduct of the election in Nalikwanda constituency was free and fair. I Hon. Justice Philip Musonda, pursuant to Article 72(1) of the Constitution therefore determine that the election was free and fair and that Lungwangwa Geoffrey Lungwangwa was validly elected as a member of the National Assembly for the Nalikwanda Constituency and it is so ordered. Costs will follow the event to be taxed in default of agreement. Leave to appeal to the Supreme Court granted.

DELIVERED IN OPEN COURT ON 30TH MARCH 2007

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PHILIP MUSONDA

HIGH COURT JUDGE
