

- (20) -

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2010/EP/001

BETWEEN:

MULONDWE MUZUNGU

PETITIONER

AND

ELIOT KAMONDO

RESPONDENT

BEFORE HON. MR. JUSTICE P. MUSONDA

For the Petitioner: *Mr. Eric S. Silwamba, SC of Eric S. Silwamba & Co; with him, Mr. Lubinda Linyama of Eric Silwamba & Co. and Mr. Rudric Mukuka of George Kunda & Co.*

For the Intervenor: *A.J. Shonga, SC - Attorney General with him Mr. Simachela, PSA.*

For the Respondent: *Mr. Bonaventure Mutale, SC - Ellis & Co., with him, Mr. Willie Mubanga - Permanent Chambers, Mr. J. Jack Mwiimbu, D. Tembo - Musa Mwenye Advocates, A.D.M. Mumba - A.D. Mwansa Mumba & Associates and Mr. Kennedy Kaunda - Ellis & Co.*

Cases referred to:

1. *Josephat Mlewa Vs Eric Wightman, SCZ No. 1 of 1996.*
2. *Jere Vs Ngoma (1969) ZR 106.*
3. *Levison Achitenji, Mumba Vs Peter Daka (SCJ No. 39 of 2003).*
4. *Simasiku Namakando Vs Ellen Imbwae (2006/HP/EP/002).*

ZR 138.

6. *Sikota Wina Vs Michael Mabenga, SCJ No. 15 of 2003.*

7. *August Vs Electoral Commission & Another (1999).*

Works referred to:

1. *Bryan A. Garner Black's Law Dictionary Eighth Edition Saint Paul Minn Thomson West, page 268 (2004).*

J U D G M E N T

This was a petition by Mulondwe Muzungu who was a candidate in the Parliamentary By Election for the Mufumbwe Parliamentary Constituency, Number 107 situate in the Mufumbwe District Number 703 of the North-Western Province of the Republic of Zambia having duly filed his nomination on the 29th day of April 2010.

The Petitioner states that the by election was held on 29th day of April 2010 between Mulondwe Muzungu of the Movement for Multi Party Democracy ('MMD'), Eliot Kamondo of the United Party for National Development ('UPND') and Stephen Kamwendo of the United National Independence Party ('UNIP') were candidates and the returning officer returned Eliot Kamondo as being duly elected.

He petitioned on the ground that the campaigns in the said Elections were characterized by undue influence contrary to provisions of section 82 of the Electoral Act No. 12 of 2006 that resulted from threats and violence of life and property and rampant physical attacks on the members of the Movement for Multi Party Democracy and members of the general public resulting in severe injuries to persons and property. The said acts of violence resulted in several people being occasioned with serious injuries and being treated in hospitals and most of the perpetrators of the violence being arrested and charged by the Zambia Police Service.

The evidence as laid for the Petitioner was that PW1 Fabian Katiba who is Commanding Officer in North Western Province played a role in maintaining law and order in the Mufumbwe by-elections. After nominations there were reports of violence from the Officer-in-Charge Chief Inspector Muzeye. He requested the Inspector General of Police for reinforcements. During his stay in Mufumbwe reports of assault and malicious damage to property kept filtering in. He constituted a team of Investigators headed by Superintendent Chibuye. On 16th April while he was with the Vice President he received a report that there was a fight in Matushi area and his Deputy Lackson Sakala phoned him that he needed reinforcements and he informed him that the roads were blocked. On the Solwezi - Chavuma road a stone was thrown at his motor vehicle, he fired in the air to disperse his attackers. He later heard that police officers were stoned and he rushed there to rescue them. Some of the rioters were apprehended and some went into the bush.

iii Chief Mushiima's area people were assaulted. Because of the continued violence a stakeholders meeting was called on 28th April attended by the three participating parties. The Inspector General of Police, the Electoral Commission Chairperson and the witness. The Inspector General suggested that because of the violence the elections be postponed, but the political parties objected as they had spent a lot. The meeting was attended by Mr. Mwiimbu one of the Advocates for the Respondent.

On Election Day he received a report that a police officer had been abducted from Kakikase Polling Station. He took four police officers to man the polling station. He found Constable Chiluba who had been abducted injured and he ordered that he be taken to the hospital. On 30th April he received a report that there was a fatal accident near the Council Chambers and two children had been hurt and one was struggling for life.

PW2 was Lackson Sakala the Deputy Officer Commanding North Western Division. He testified that while at Mufumbwe Police Station, he received a phone call from Chembe Nyangu, Deputy MMD National Secretary, who informed him that the MMD Camp in Matushi was under attack by UPND cadres. He mobilized 15 officers and rushed to Matushi, upon arrival he confirmed the report as he found a group of people in Mutanda - Chavuma road known as M8 road. He identified these people as they wore UPND tee-shirts and there were UPND symbols and the Respondent's portrait. He recognized the presence of the UPND Provincial Youth Chairman Mr. Victor Lumayi who stays in Solwezi whom he knew before the incident. He asked Mr. Victor Lumayi to ask his people to

... camp which was on the left hand side of the Mutanda - Chavuma road as you drive towards Kabompo and was near Matushi School, while the MMD Camp was at Matushi School.

When he arrived, the UPND Cadres were throwing stones at the MMD Cadres and later the UPND Cadres started attacking police officers and three out of fifteen police officers were injured. He therefore called PW1 for reinforcements. The minibus belonging to MMD supporters packed at the school was damaged. This was tendered in evidence. He ordered police officers to fire Teargas to disperse the mob, but the mob advanced, he then ordered officers to fire live bullets in the air. The UPND Cadres withdrew and went to block Mutanda - Chavuma road. While the road remained blocked two police motor vehicles were damaged, but police managed to take reinforcements, one belonged to Mr. Chama Officer Commanding Zambezi District.

With reinforcements they encircled the people who had blocked the road. Using tracer light they apprehended fourteen people who were taken to Mufumbwe Police Station. They rushed the injured officers to Mufumbwe Police thereafter, to Mufumbwe District Hospital. The witness saw the extent of the injuries, one officer had a cut on the head, the other one was hit with a stone on the shoulder, and the third one was hit on the chin.

PW3 was Jamus Kayungulu Chibola, a Superintendent Kamfinsa Mobile Unit. He testified that on the 16th April 2010 late in the afternoon, he was directed by PW2 to mobilize fifteen officers to go to Matushi area in Mufumbwe District, where political violence was reported. The fifteen

they found that the situation was volatile. He found people throwing stones at each other and when he tried to talk to them they could not understand. They continued throwing stones, more Teargas and tracers were fired and one of his officers, Assistant Superintendent Sujanda was injured, though he was not hospitalized. The situation was brought to normal after more reinforcements arrived around 23:00 hours.

PW4 was Edward Gama, Senior Superintendent and Commanding Officer of Zambezi, Chavuma and Mufumbwe. He testified that on 15th April 2010 he was covering the Vice President's campaign rallies. At the end of the Matushi rally he saw that the road was blocked. When they went to the place they found a large portrait of UPND President and some people had gathered chanting slogans. The other officers and himself went to unblock the road and ensured that the people that had gathered nearby did not come to the road; they then escorted the Vice President to Mufumbwe Boma. On the 16th April PW2 rang him and ordered him to organize reinforcements and rush to Matushi East, where there was a violent crowd.

He organized regular and mobile police and rushed to the scene using Mufumbwe Police motor vehicle ZP1924 B. As they reached where the UPND portrait was, stones flew from either side of the road directed at their motor vehicle. In front of them, the road was barricaded with logs and stones, two police officers were injured from stones these were Sergeant Simpasa and Reserve Constable Liamupi of Mufumbwe. The motor vehicle had dents on either side of the body and the windscreen was

officers were rushed to Mufumbwe, where Sergeant Simpasa was admitted while Liamupi was treated and discharged. Later fourteen people were apprehended.

On 20th April 2010 a report was received that violence had broken out in Chief Mushima's area and he found a motor vehicle parked in the middle of the road with flat tyres, including the two spare ones. He discovered that there were two Churches which were burnt down and one house had its window panes broken. While taking stock of what happened, people showed them the wounds which were inflicted on them by the violence. The people mentioned their assailants.

The witness recalled the 24th April 2010 in the morning Hon. Charles Kakoma reported that his guest house room was broken into and he was attacked and some items stolen from him. Later a huge crowd of UPND members including the National Leadership went to the police station and besieged it for three hours. On 28th April 2010 violence erupted in Mufumbwe Central between UPND and MMD Cadres. Hon. Kakoma and other officers rushed to the scene and quelled the violence, but one person lost an eye. A mini bus belonging to a Chingola businessman was extensively damaged.

PW5 was Andrew Banda an Assistant Superintendent who is also Divisional Criminal Investigations Officer. He testified that he was allocated a docket of assault occasioning bodily harm in which Hon. Charles Kakoma was the complainant. He saw the medical report and rang Respondent who promised to give him the phone number of Hon.

Charles Kakoma. He spoke to Hon. Mwiimbu who assisted to trace Hon. Kakoma. He has not effected arrests but the matter is under serious investigation.

PW6 was Elijah Chiluba a Constable in the Zambia Police. He was deployed in Mufumbwe on 29th April 2010 at Kakisa Polling Station. He was there around 05:00 hours and he signed the register. Around 06:00 hours, one of the UPND leaders, whom the witness could not name in these proceedings as these proceedings are ring-fenced from criminal proceedings, went there in a minibus ACC 141. He went into the polling station. After a few minutes, he came out and started accusing the witness of being a MMD Cadre and he pushed him and said he was not a police officer and he would kill him. The Presiding Officer intervened and advised the UPND Party Official to report to the police, so that the position can be verified. After the unnamed UPND Official left the Polling Station a Land cruiser Registration Number AAV 3625 came with ten to fifteen men and they started beating the witness and they took him in the Land Cruiser. They continued beating him at the UPND Camp until he was unconscious and found himself at the Police Station being given a medical report.

PW7 was Leviticus Singini a Para Military Inspector from Lilayi. He recalled that on 29th April he was in Mufumbwe when he was informed that an officer had been abducted from Kakisa Polling Station between 06:00 - 06:30 hours. He informed PW8, who said he had seen a Land cruiser suspected to have abducted the police officer. They followed the

... went to the UPND Camp and when they searched it they found a police officer behind the Land cruiser. He was unconscious and bleeding in the nose and mouth. The witness was instructed to take PW6 in the very Land Cruiser which was used to abduct him.

PW8 was Contriver Sinazonzwe a Chief Inspector who recalled that on 29th April whilst on duty at Kiya Mwina Basic School, he received a phone call from Inspector Mwale, who informed him of an abduction of a police officer at Kakisa Polling Station shortly after 06:00 hours. He mobilized officers and after five minutes he saw a Land Cruiser beige in colour Registration number AAV 3625 passing at high speed heading to the UPND Campaign Camp. It had many people in it. He mobilized six officers and went to cordon the UPND Campaign Camp. They found the Land Cruiser and the engine running, upon searching the vehicle they found a police officer, who was badly injured and was bleeding in the mouth and nose. He instructed PW7 to drive the vehicle and take the victim to Mufumbwe Police Station. The injured police officer was Constable Chiluba, service number 40025, whom he had known for eleven months.

PW9 was Pyton Mushili Chibuye, a Superintendent in the Zambia Police. He remembered PW7 handing a Toyota Land Cruiser, beige in colour Registration Number AAV 3625, the vehicle which was used to abduct PW6. When he searched the vehicle he found the Photostat copy of the white book. On 30th April in the afternoon he was approached by Hon. Jack Mwiimbu who requested that the vehicle be released to him, as it belonged to the UPND and was required for party functions, but the

...to release the vehicle, as the vehicle was needed for the Court proceedings.

PW10 was Aaron Kamalondo, the Council Secretary for Mufumbwe and the District Elections Officer. He testified that after nominations he started receiving reports of violence from several places within the district. He received a report from Kikonge area, where he was told political party supporters were fighting. He reported the matter to the police and one person was arrested. The next report was that of Hon. Kakoma, Zambezi MP, who was actually battered by Political cadres. A stakeholders meeting was held to discuss the beating of Hon. Kakoma and it was resolved that political parties condemn violence.

However, reports of violence kept on coming to him a non-violent undertaking notwithstanding. A report came from Kashima that political supporters were fighting and one supporter had been rushed to hospital (Dan Kawisha). The second report came from Matushi, when Ken Nkazeya rang him that violence had erupted and there was a fight between UPND and MMD supporters, Nakazeya requested the witness to provide transport to officers to go and reinforce other officers in Matushi area and that he did.

The Council motor vehicle had windscreens damaged by stones. The police vehicle had the front screen almost shattered and the mini bus which was being used by MMD had both windscreens shattered. The mini bus was produced in evidence.

On 21st April 2010 he received a report from Mushima 240 Km from the Civic Centre, that violence had erupted in the area. He travelled there

He observed a white Isuzu Pick Up vehicle abandoned at a certain junction all tyres punctured with pangas and sharp instruments and he also observed burnt churches and a third Church, the Catholic Church had window panes broken. He visited the victims of violence in hospital. On 28th April the eve of the Election in Lalafuta 420 Kms from the Civic Centre certain political cadres, chased the presiding officer on ground that he was coming from the National Assembly and was biased that was Johnson Musumba. He had gone there early with twelve policemen and polling assistants.

He replaced the officer with a Mr. Makaunko and sent the returning officer to the area who drove the whole night. On 29th April, he received a call from the Returning Officer informing him that a police officer who was at Kikasa 6 kms from the Civic Centre had been picked up by unknown people. He rushed to the area and found no police officer. The presiding officer confirmed the incident. *The witness received reports of violence on 28th April 2010 at 15:30 hours that there was violence UPND Cadres and MMD Cadres were actually fighting. The police were called in and people were being beaten using short batons. The entire town was in Teargas. He had earlier called a meeting of stakeholders when he realized that violence was escalating. The three participating parties attended, the Inspector General of Police, the Principal Electoral Officer and the Electoral Commission of Zambia Chairperson. The Inspector General of Police suggested that elections be postponed but the participating political parties rejected the suggestion. He submitted a report to the Director of Elections, which was admitted in evidence and the Court shall revert to it later.*

... was Daudy Chitani a Technical Director with MUVI TV. He confirmed that the DVD's which were tendered in Court by the Petitioner and which the Court had opportunity to view. The witness was shooting and operating the signal and satellite equipment. He was with a reporter Bangwe Navile and a cameraman Boyd Kafula. He was in Mufumbwe for five to six days. *He took refuge behind the police station to serve the equipment. There were people fighting and the police were slowly advancing until they reached to stop the fighting. The police were beating people who were fighting.*

PW12 was Amos Malupenga Post Managing Editor. He testified that nobody complained about the Article in his Newspapers, *"UPND takes 16 heads of cattle to Solwezi for victory celebrations"*. He was shown another Sunday Post article dated 2nd May 2010 and nobody complained that he was misquoted.

PW13 was Mwangwa Chiteka Bwalya a driver of Helen Kaunda, Lusaka. He was driver of Toyota Hiace Minibus ABM 8818. He left with his brother-in-law Mr. Masumba who was Campaign Manager in Mufumbwe. He left the MMD Command Centre, to fuel and was assigned to take party officials for MMD. He arrived at Matushi and opposite there was a Campaign Camp for UPND. When he arrived at the MMD Camp he observed people throwing stones at the bus, but the bus was not damaged. *He later saw UPND Cadres following them and started exchanging stones. He took the mini bus behind the school. He ran away from the scene and hid near the bus. The UPND Cadres said the bus belongs to the MMD and should be broken.* The mini bus was damaged the windscreen and side

... the police were called to see what had happened and he gave a report at Mufumbwe Police Station. Later the police came to suppress the confusion but were few, they were later reinforced. The mini bus was produced in evidence.

PW14 was Lupiya Frank Chimena a driver and was MMD Coordinator in Mushima and Kamizekezeke Ward. He testified that on 20th April 2010 he was in Mushima from Kamizekezeke to go and pick polling agents when he saw a crowd in motor vehicles some were walking. He was driving an Isuzu Pickup ABA 3814 white in colour. He was with PW15. The crowd stopped, he too stopped and some members of the crowd went to his vehicle and started punching him, he did not hear what they were saying to PW15. Some of them had their faces covered. He ran into Chief Mushima's Palace. The mob got the car keys and took PW15 out of the vehicle and they beat him too. *When he ran into the Palace, the vehicles whose occupants had earlier assaulted him drove into the Palace and the UPND leader Mr. Hakainde emerged from one of the vehicles. While the UPND leader was in the Palace he saw two people entering the Palace bleeding. When the UPND leader was leaving the Palace the Indunas asked the UPND leader to take the injured to the hospital. When the UPND leader asked the bleeding individuals who had assaulted them one of them pointed at a driver standing next to the UPND leader as the person who had injured him. The person implicated ran to a vehicle and drove off.*

One was bleeding from the forehead above the eye, the chest and shoulders. The other one was bleeding from the abdomen. The witness

was driving and found tyres had been deflated and a phone stolen. He reported the matter to Kasempa Police and produced a medical report.

PW15 was Lampeni Kapaya who is a businessman and was in PW14's company on their way to pick MMD polling agents. On their way they were stopped by people wearing the UPND leader's badges and tee-shirts bearing the Respondent's portrait. They asked them whether they did not know that Mr. Hakainde Hichilema was coming. They started beating PW14 and threw him out of the vehicle. He ran to his home which he was renting from the Catholic Church. A lady by the name of Judy Munwe told UPND Cadres that the shop belonged to PW15, Ms. Judy Munwe and others threw stones at his shop and they broke the door. *They later killed the dog at his home and broke seven window panes from his house. He knew Ms. Judy Munwe as they lived together sometime. He Uncle Perry Munwe when he saw him told his colleagues, he then ran into the bush. The witness was not cross-examined by the Respondent's Advocates.*

PW16 was Stevenson Lubeba Munyumpe a Peasant Farmer who was in the company of PW17. On 20th April 2010 they went visiting his sister with PW17, married to Chief Mushima. *He saw a group of people wearing UPND badges, he advised PW17 that they should divert. He saw one person being chased, later he saw a driver come out of the Surf vehicle and stab PW17 with a knife, when he tried to rescue his cousin he was stabbed above the ear, chest and on the hand.* He showed the Court the scars of the injuries he sustained. He went on that the same person who stabbed his

... and his cousin (PW17) went into the Palace, where they found UPND vehicles and Mr. Hakainde Hichilema was there. When his brother Sota asked him who had stabbed him he pointed at him and his family apprehended him, but he overpowered them and drove away. The two were taken to hospital by a Mr. Songisha who was UPND Campaign Manager. The wounds were stitched and the stitches were removed on 7th May 2010. They were admitted for a day.

PW17 was Jackson Kakoma Mushima, a Peasant Farmer. The witness testified that he went visiting with PW16 his cousin when they met a group of people wearing UPND badges. One person from the group came to where he was and started beating him and when he fell he was stabbed with a knife. The Court was shown where the knife entered and came out, there was a space of about six inches. PW16 tried to rescue him, as he was bleeding and when he tried to run he fell to the ground. They later ran to the Palace where they found many people with UPND Cards and Mr. Hakainde Hichilema was in the Palace. When asked, who the assailants were PW16 identified him and when relatives tried to apprehend him, their assailant overpowered their relatives and fled in a vehicle. Later Songisha who lives in Kasempa and is UPND took them to Mukinge Hospital after reporting the matter to the police.

PW18 was Kawisha Danny a Peasant Farmer. On 13th April he was in the company of Petitioner and they were about ten. When they reached Kashima, they found people waiting for them and Masumba spoke first and later the Petitioner. There was murmuring and 15 people left the meeting heading towards the road with the symbol of the hand. They

... were being given, he was forty five to fifty metres away. After the meeting witness and six others started off, but petitioner remained to greet the people. As they walked to the main road they found a group of people who were showing signs of the hand. The people had stones in their hands and followed them, they decided to run, but the witness was hit with a stone. When he fell to the ground, they kicked him and dragged him in the gravel. He could not identify any one. Later he found himself at Mufumbwe Police Station where Sergeant Tembo gave him a medical report which he identified in court.

PW19 was Richard Katololo a businessman. The witness woke up to go and vote at Munyambala Polling Station and he voted. As he walked he found John Sulako, whom he lived with in Nyambala. He saw another person who wore a UPND badge and was living in UPND Camp in Nyambala. The person from UPND and John Sulako started arguing about voting. John Sulako said, *"Don't make me afraid because you want to stop me from voting, I am going to vote"*. He was surprised that this person from UPND pulled a panga. When the witness saw that he was going to kill John Sulako, he went there to prevent the UPND man from striking Sulako.

He held the UPND man's hand and struggled until he got the panga and ran to the Chief because he was worried that he will be harmed as they were hearing things from the area. He hid in the Chief's Palace. The panga was produced in evidence as P4.

... a Detective Inspector in the Zambia Police. On 24th April 2010 he went to Mufumbwe to reinforce other officers during the by-election. On 29th April, 2010, he received a report of abduction of a police officer at Kakisa Polling Station. He went to the polling station to record statements from eye witnesses. On 30th April 2010, he was assigned to cover a rally which was being addressed by UPND Leader Mr. Hakainde Hichilema. There were a lot of people at the same rally. Mr. Hakainde Hichilema said, "*As I promised earlier during the campaign that I will bring animals, twenty cows will be distributed in all wards including Chizera which was not in support of me*". The witness identified the Post Newspaper article which mirrored the statement.

PW21 was Mr. Muzungu the Petitioner. Apart from narrating the history of contesting the Mufumbwe constituency, he testified that there was unprecedented violence. He went on that after addressing a meeting in Kashima West the UPND supporters launched an attack on his supporters. One of his supporters was injured and admitted in Mufumbwe Hospital for four days. The entire constituency was grieved with fear. The campaigners were wielding pangas, revolvers and armed with catapults, the entire electorate was actually petrified. He prayed that the election be nullified. That was the Petitioner's case.

RW1 was Tereca Chewe a SACCORD Administrative Manager who has monitored elections for the past 11 years and was District Electoral Officer under UN in East Timor. She was a roving monitor in the Mufumbwe by-elections. On her way to Mufumbwe 40 kms before Mufumbwe, she found a road block by the Zambia Police and all occupants

the motor vehicle were searched. When she complained she was told they were searching each motor vehicle to prevent weapons being transferred into Mufumbwe. When they arrived in Mufumbwe there was heavy police presence. They tried to have a meal at Mr. Mushala's restaurant, it was surrounded and the police wanted it closed down as they did not want people to move about. Her and her colleagues could not freely go to the market to buy relish. There was tear gas and broken beer bottles.

The following day there was confrontation between MMD and UPND supporters as they were throwing stones at each other. It was her evidence that the UPND strongholds were heavily policed and there was low votes turn out and she gave Mutoma as such an area. The turn out was over 50 percent which was okay. She also received a report that a police officer had been abducted. She also received a report that newspapers were being freely distributed by the District Commissioner's Office. She produced the SACCORD, CARITAS and AVAP report in evidence.

RW2 was Chileshe Mwandama Nsama, an Assistant Coordinator with CARITAS. He testified that he deployed monitors in 15 polling stations in Mufumbwe. He said one of their vehicles was smashed and one had to be very careful as to whom he associated with. In his evidence he could not say with certainty to which party the cadres that he came across belonged to. He was a recipient of a free copy of the Times of Zambia and Zambia Daily Mail.

... was from CHARLES NAKOUMA MP FOR Zambezi and UPND Spokesman. He testified that while in Mufumbwe he was receiving a lot of reports of violence. He cited a report about violence at Matsishi where MMD Cadres provoked UPND Cadres who were holding a rally and attacked them. On 8th April the MMD occupied the UPND ground which caused tension. He received a report that the MMD had attacked UPND supporters at Kikonge. When he investigated the matter and established that the cause of violence was MMD tribalism, Chief Chizera had told the people not to vote anybody not a Kaonde and that was the genesis of attacks on non Kaondes including a UPND Councilor.

The MMD Cadres had invaded the UPND Campaign Camp Centre in Mufumbwe town and looted foodstuff. On 24th April MMD Cadres hired from Lusaka invaded the Respondent's Guest House. They broke doors and knocked on his door and asked him to open, when he did not open the MMD Cadres broke the door ten of them entered the room wearing MMD T-shirts and shirts. They were armed with pangas and knives and he was assaulted with those weapons. The police watched as he was dragged in front of the Lodge. While at the police MMD Cadres stoned the police building in presence of the Inspector General of Police. He was stunned with police partiality.

RW4 was Hudson Nichola Sakai the Chairman of Culture, who shared the room with PW3 and his evidence was similar to that of PW3.

RW5 was Kayona Jacob who is a PF supporter. He testified that he was approached by a Mr. Chishala to support the MMD. Mr. Chishala told him that the MMD could even upgrade the school. On 8th April he went to

second meeting on 25th April there was Hon. Kalenga, Hon. Taima and Mr. Masumba. They told him the President was coming and he should influence strong UPND members whom they could give gifts and he gave six names. At 22:00 hours Hon. Kalenga and Mr. Chishala went to his home. He was given a bunch of chitenge materials, a Zain phone, a brown suit, a pink shirt which he produced in Court. The other six were given envelopes containing K500,000. The witness resigned at a party addressed by the President and was wrapped in an MMD chitenge. He was also given 2 kg of meat. While he admitted to have resigned from PF to join MMD, he denied that what he received amounted to bribery.

RW6 was Marjorie Chimumba a UPND Constituency Chairlady who testified that he was persuaded to join the MMD and was given a piece of meat on 25th April 2010. Through RW5 she and those that were going to be converted to MMD were to be paid. She later resigned from UPND at an MMD rally and was paid K500,000. Later an MMD Coordinator and a Councilor went to her uncle to buy an animal. The uncle pegged the price at K1.5m but she said they should charge K2m as that was government money.

RW7 was Simon Tameya a Village Headman who used to be a Senior Village Headman, but was demoted on allegations that he was supporting the candidature of the Respondent by the representatives of Chief Chizera.

RW8 was Joseph Zulu, a Village Headman who narrated how RW7 was accused by the Chief retainer of forcing Lunda people to vote for

...when KVV/ tried to defend himself, he was told to shut up
and was told he was no longer Senior Headman.

RW9 Macko Malenga testified that on 16th April 2010 at Mutushi, MMD members attacked the meeting to be addressed by the Respondent between 16:00 - 17:00 hours. Police teargased and dispersed UPND members. The police followed them to the village where they beat two old people and spent a night in the bush. MMD members were showing the police the houses of UPND members. On 18th April, however they returned to the campaign trail.

RW10 was John Kakusa, a Social Worker at Caritas Solwezi and one of the authors of the SACCORD, CARITAS and AVAP Report which was produced in evidence by RW1. He testified that while monitoring the by-election, he was accused by the MMD Campaign Manager of being partial. He said there was violence started by MMD Cadres which led to smashing the windscreen of an Isuzu ABD 7999 white in colour and this violence was recorded on a video which was produced in evidence. They could not hold 'the meet the candidates' event' as anything could have happened. *He said an animal was slaughtered at Miluyi and voters were being enticed to vote for the MMD and get a chitenge. He said in cross-examination that there was intimidation and threats against the Chokwe people or his tribesmen.*

RW11 was Lillian Busakaula a Grade student and a UPND Activist, who went to Kikonge to campaign. She testified how she was assaulted by a youngman, who was in the company of the Kikonge MMD Councilor. The MMD supporters beat the youngman at the UPND Camp and took sugar, mealie meal, rice and cooking oil.

RW12 was Perry Munwe. He testified that when the UPND President Hakainde Hichilema, was going to pay a courtesy call on Chief Mushima, MMD supporters blocked the road to the Palace. Later two people were bleeding who were PW16 and 17 in these proceedings (testified for the petitioner). They were taken to hospital by Songesha UPND Assistant Campaign Manager. Later in the evening an MMD member by the name of Lampeni Kibaya threatened to petrol bomb houses when he was in the company of Geoffrey Munwe the cousin to the witness.

In the night two Churches were burnt at Mushima, the destiny and New Apostolic Church and the Catholic Church was broken into. *Later His Excellency the President promised to provide K10m for each of the burnt church's repair and K5m for the Catholic Church. Lampeni has been arrested. He admitted in cross-examination that an MMD coordinator's vehicle was damaged.*

RW13 was Hon. Gary Nkombo a UPND Member of Parliament for Mazabuka. He testified that while campaigning in Mufumbwe between the 24th - 30th April, he was assigned to campaign in Munyambala ward in the company of Mr. Ben Kangwa and Lubeji. After they finished campaigning in Munyambala on their way back they met a vehicle driven by Chief Munyambala a blue Mitsubishi Pajero which stopped and he stopped to greet the Chief, he was on his knees to greet the Chief.

He saw youths wearing MMD T-shirts in the Chief's vehicle. When he told the Chief his name and that he belonged to UPND, the Chief told him to go away from his territory as that was a MMD ward.

On polling day the Chief despite him parking the vehicle away asked him to remove the vehicle. The Chief was campaigning and he parked the vehicle 50 metres away. He persuaded the Chief through the policeman to go away. The Chief picked a fight with a polling agent who was his wife because he suspected she entertained UPND and the Chief later divorced the woman.

RW14 was Hon. Raphael Muyunda a UPND Member of Parliament. He testified that while heading a campaign for UPND in Milupi, the MMD slaughtered a cow which they were distributing to those producing voter's cards. Deputy Minister Muliata and Ndalamei were in charge of meat distribution. However, there was no violence in Miluji.

RW15 was Masela Sekeseke Chinyama, UPND Chairman of Women Affairs. She testified that she received reports that Chief Chizera and Chief Muyambala had instructed village headmen not to welcome their campaigns. *There were threats of violence and damage to property from Kikonge, Munyambala, Kashima and Matushi, but when she saw Chief Muyambala he denied issuing the threats.*

RW16 was Machona Kapinjimpanga Executive Committee Chairman North Western Province. On 16th April he was to conduct election campaigns in Kashima West, Wishimanga and the meetings were successful. When they arrived at Matushi they found their supporters gathered and MMD supporters started throwing stones and the meeting was abandoned.

Respondent. While at Matushi with Captain Jaimba, MMD supporters with policemen behind them were throwing stones and he knew Isaac Kalonga among them. He facilitated the Respondent's escape.

RW18 was Victor Musumali. He testified to the rundown accident. However, the evidence is subject of proceedings elsewhere and these proceedings are ring-fenced.

RW19 was Moses Mulaisho who was a UPND Polling Station Manager, who merely testified about the peacefulness of the elections in Chilemba. RW20 was Thomas Sambamba who lost an eye when the police apprehended him and beat him with a short button and he was unconscious. This was at Mufumbwe Boma on 28th April 2010.

RW21 was Misheck Kaumbwa who is a Tailor testified that he was at his village when police in riot gear who were 15 started beating them. *They said since the police had come to conduct elections they must knock off. He felt pains in the body that the following day he could not vote.*

RW22 was Justin Sakafenda, who said he did not belong to any political party, but is a Guard at a Guest House. He testified that after knocking off, he joined RW21 who was sewing, when police officers found them and started beating them and later he was taken to hospital.

RW23 was Justin Makayi testified that he was sick and at home when on 28th April 2010 Victor Mayondi and people wearing MMD regalia and T-shirts with the portrait of the petitioner went to his home and said Kachokwes who support Respondent live there. Victor Mayondi went into

his house and locked himself and they beat him and he sustained a swollen thumb. He was unconscious and was admitted to Mufumbwe hospital.

RW24 was Gilton Peche testified that on 11th April 2010 they went to campaign in Kikonge and when they reached a certain village, they were given UPND T-shirts, they were being led by Chikanya. They came across a group playing football still chanting Respondent's name. *They were told that the campaign for Respondent should be carried out in Angola or if they continued they will be beaten.* The following day they could not go for campaigns. Later in the day around 15:00 hours they were attacked by MMD supporters who were wearing blue chitenges and T-shirts with portraits of the Petitioner. He was admitted for a night at Mufumbwe hospital.

RW25 was Jonathan Kapaipi who is UPND Councilor and Chairman of Mwinilunga District Council. He testified that he received reports that the MMD members had attacked the UPND supporters in Kikonge and Matsushi and that on 18th April UPND members were apprehended in Matsushi from their homes and he complained to PW4 Officer Commanding of Zambezi, Chavuma and Mufumbwe that his party members were being ill-treated. *The UPND members later caused a citizen's arrest against Mangisha an MMD Councilor for the violence in Matsushi and he is appearing in Court. On 28th April the Inspector General of Police had proposed that elections be postponed at a stakeholders meeting, but the candidate (petitioner) said they had spent too much and the elections went on.*

11120 was Nathalia Davies a UPND campaigner belonging to PF. His testimony was that there was no violence in Musoneji area.

RW27 was Vincent Kabande whose evidence is similar to that of RW24, that I need not restate it again.

RW28 was Nladimir Chilinda Director Two End Advertising who travelled to Mufumbwe to get footage and the DVD was produced in Court.

RW29 was Mirriam Yamfwa a UPND Chairlady for UPND in Kamayembe branch and like RW6 was given money, in her case K1m, 150 MMD chitenge pieces, 1 case of Geisha and a case of 1kg table salt by Hon. Kalenga for her and other UPND supporters to vote for MMD. However, none of these items were exhibited in Court.

RW30 was Queen Sapato a UPND supporter engaged in the election campaign. He testified that the UPND Councilor Kambwe of Kapupu ward and the MMD Councilor related well.

RW31 was Dan Kalale Director of Elections who produced the election data from 2000 - 2010 for 36 by-elections. The voter turnout in Mufumbwe was consistent with the trend. *In cross-examination he admitted that there was a 60.45 percent turnout in Mwansabombwe and 55.23 percent in Mapatizya. In Lyuwa the turnout was 56.34 per cent. The witness was shown the Electoral Commission's 'Declaration of Protest' and a 'Communique Political Parties signed to avoid violence'. He said, "There was total violence in Mufumbwe and was the worst". He went on that in Mkaika the election was nullified because of the violence.*

UPND Chairman for Mufumbwe. He testified that he picked up injured UPND Cadres 8 of them on 12th April in Kikonge and wrote the conflict management. The MMD Campaign Manager acknowledged his party members' violence at a meeting chaired by a FODEP representative. On 26th April in Lalafuta Ward UPND Cadres were assaulted.

PW33 was Justin Kampilo a UPND member, who testified that Chief Chizera's son brought pressure upon him to join MMD. He was visited at night and threatened with violence, but his brother almost axed those that came with the vehicle threatening him.

RW34 was Joseph Nsama Chipyoka a PF member who was chased from the Palace on 21st May for having voted for Respondent. Chief Chizera said Respondent came from Angola. RW35 was Simeon Chamunyala. He testified that he was approached by Mr. Kayona who is a member of the UPND. He testified that people like Sokola and Wisamba asked people to vote for Petitioner or they will be chased as Respondent was Angolan. He went on that he refused a bribe of K500,000 to recruit 20 UPND members to join the MMD, but his colleagues like RW6 got the money.

RW36 was Mukanda James Kanu, who received a report of stoning at Kashima West after Petitioner addressed a meeting, but he did not witness the incident.

PW37 was Sapasa Kenneth testified that they were attacked by MMD Cadres at Matushi School and their fuel and food were looted.

RW38 Chikwala Timothy testified as to the peacefulness of the vote on

29th April in Kalengwa Ward. RW39 Patson Chipelu, RW40 Adma Kasangili, RW41 Evans Kasoka, RW42 Benard Mulomba and RW43 Emmanuel Kazesa said they were recipients of a suit each intended to induce them to vote for the Petitioner and not for the Respondent who was a Kachokwe.

RW44 was Hon. Request Muntanga. He testified that despite hearing about the violence i.e. burnt churches, on polling day, the elections were peaceful. PW45 was Winston Chibwe the UPND Secretary General who was campaigning in Lalafuta from 11th April 2010 until polling day. He said they rejected the Presiding Officer as he was an MMD sympathizer and an employee of the National Assembly. Otherwise the elections were peaceful. RW46 Smart Kahoro's evidence was similar, save and except that it was in respect of Matushi, Kashima and Chivundu.

RW47 was Alex Ifwaha. He testified that on 24th April 2010 MMD Cadres surrounded his restaurant next to Lusho Guest House. He jumped through the window to go and report to the police station. On 28th April a mini bus that parked in front of his restaurant had blankets, food etc taken and tyres were cut.

RW48 was Dominic Mumba an Administrative Officer, who was involved in Training Monitors in this by-election. He got a report on 28th April 2010 that there was a group of MMD Cadres armed with sticks and were harassing passersby. He witnessed the putting of the UPND President under house arrest and the removing of tyres from the UPND 4 X 4 vehicle. He said there was no violence on polling day.

RW49 was Musole Mulesu a Guard at First in Lodge said he saw people who came in a bus who were MMD supporters. They arrived at 03:00 hours and at 06:00 hours they attacked the UPND members who were meeting at Respondent's Guest House, some of them came out naked. On 28th April this group beat his brother Musana.

RW50 was Josephine Kamwanga a Caretaker at the Respondent's Guest House who narrated how UPND occupants of Respondent's Guest House were attacked which evidence is substantially the same as that of RW3 and RW4.

RW51 testified that on 28th April at 10:00 hours he had gone to pick a phone at the shop when MMD supporters beat up Susan. When he ran three policemen apprehended him and insulted him. He freed himself and ran to the UPND Camp. The police and MMD Cadres went there and started beating everyone at the camp and fired teargas. They beat one person who lost the eye.

RW52 was Georgina Sabita who testified that while taking six women who had come from Solwezi to the river to bath, they met Geoffrey and Kampasa who asked the women to undress. They threatened violence to them. On 15th July the Petitioner said Respondent had been chased from Parliament. Petitioner gave blankets, salaula to Chifitumba and others.

RW53 was Richard Masauti Kapita, the UPND Vice President. He testified that he reported to the police that MMD supporters had camped in polling stations. On 22nd April they had a meeting with campaign managers for UPND, MMD and Inspector General of Police. His testimony

was an overview of the testimony already given i.e. the looting of UPND rations, the confinement of the UPND president by the police.

RW54 was Hon. Douglas Syakalima, who is Political Advisor to UPND President who was campaigning in Miluyi Ward. He testified that they had complained to the Officer-in-Charge about the MMD occupation of the polling stations, but Deputy Ministers Ndalemei and Mulyata refused to vacate. These Ministers later bought a cow which was distributed. However voting went on well. He said where there was no violence in Mapatizya his party did not do well.

RW55 was Chazangwe George, a retired teacher who testified that in Kabipupu Polling District where there are few polling stations the voting campaign was peaceful and the voter turn-out was normal.

RW56 was Owen Idia a Shopowner. He testified that his shop windows were shattered on 13th April 2010, by people wearing MMD attire. PW57 was Isaac Banda, a Subscriber Information Executive who produced a call record card, which indicated that a message was sent from 0977-429110 on 10th March 2010 to 0977-858950. He said they do not have a record of short messages due to system restrictions and capacity.

PW58 was Finete Kasamwa a Senior Headman of Samapumbi. He testified that in Kashima East the campaigns went on well, MMD and UPND were interacting. PW59 was Misheck Shikoyo a Peasant Farmer, who is also a Priest in New Apostolic Church. He visited the shops on 20th April 2010, he heard Lampeni Kabaya while passing saying, "today there will be ZESCO, and in the morning he found his Church burnt and he

reported to the police. On 27th April 2010 when His Excellency visited the area, he promised that he was going to give K10m to New Apostolic and K10m to New Destiny Church.

RW60 was Frank Lanshi who has been a Pastor for 7 years. He was told by Vincent that there was a youngman by the name of Lampeni who was going to burn the Church. The following day it was discovered that the Church was burnt.

RW61 was the Respondent. He testified that after nomination, he held a rally at Mufumbwe and there was no incident. On 11th April 2010 he sent youths to campaign in Kikonge after which he received reports that Mangisha an MMD Councilor had assaulted UPND supporters. He never campaigned in Kikonge. In Kashima East he could not have a meeting on 16th April 2010 as the school was occupied by MMD supporters. He held successful meetings at Matushi and Wishimanga. *In Matushi his supporters were stoned. On 24th April 2010 MMD supporters who once worked for him attacked his Guest House. He had to hide in the ceiling board. He rang a policeman. He said it was difficult for the police to curb violence when MMD supporters started throwing stones at the police. This was after Hon. Kakoma and other injured UPND supporters went to report to the police. He commended the police for having maintained peace on 24th April. He said though a policeman was abducted at Kakisa the voter turn-out was alright. There were wards which were no go areas for him.*

It was submitted for the Petitioner, citing Josephat Mlewa Vs Eric Wightman⁽¹⁾ that the evidence of undue influence, threats and violence to

... was properly during campaigns was overwhelming in Mkaika constituency and the election was nullified. The question of personal knowledge is quite irrelevant and inapplicable under paragraph (a) it does not matter who the wrong doer is and the philosophy underlying the law appears designed to protect the electorate and the electoral system itself, by providing for nullification whenever there is wrong doing which the Court feels satisfied that because of the scale or type of wrong doing, has adversely affected the election.

The case of Jere Vs Ngoma⁽²⁾, in that case the evidence established a "tense-like" situation between the ANC and UNIP supporters from filing nomination papers on nomination day. In the circumstances the election was nullified. Despite the *ring-fencing* of these proceedings from the criminal proceedings in Mufumbwe, this Court was asked to take judicial notice of those proceedings. It was argued that it would be folly for the Court, in appropriate cases, to keep aloof as facts of common knowledge.

For the petitioner it was argued that Mr. Hakainde Hichilema's the President of United Party for National Development (UPND), in presence of the Respondent Elliot Kamondo, expressly offered and promised to deliver 20 herds of cattle to the voters in the Mufumbwe Parliamentary Constituency as a fulfillment of an earlier promise, he had made to the electorate during the campaign prior to the polling day, that he would deliver the said animals if they voted for the Respondent.

It was valiantly argued that Mr. Hichilema's conduct fell within the provisions of Section 81 of the Electoral Act No. 12 of 2006 and that such conduct has the potentiality of nullifying an election, the case of Levison.

Simasiku Namakando Vs Peter Duku is the case in point. Section 100 is
framed in these terms:

"Any person who corruptly by oneself or by any person either before, during or after an election directly or indirectly, gives or provides or pays wholly or in part, the expenses of any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving that person's vote at an election shall be guilty of an offence of treating"

The section presupposes that for the offence of treating to be complete there should have been provision and payment wholly or in part any expense.

For the Respondent, it was submitted that there was overwhelming evidence that the limited violence occurred in very few areas of Mufumbwe constituency which was instigated and perpetrated by the MMD and to some extent the police. It was argued citing my decision in Simasiku Namakando Vs Elleen Imbwae⁽⁴⁾ where I said:

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

The dictum was uplifted from Mazoka and Others Vs Levy Patrick Mwanawasa and Another⁽⁵⁾.

It was the Respondents' contention that the violence was not widespread. Violence was only in five polling stations.

Regarding treating it was submitted that there was no evidence of delivery of the 20 animals.

It was canvassed that there was evidence of bribery, given by RW5 Jacob Kayona and RW6 Majorie Chimwimbi against the Petitioner that Hon. Kalenga gave money, amongst others, to the two for organizing UPND members to attend the Republican President's rally and for them to vote for the Petitioner. Even the President (MMD) himself promised to give K10m each to the New Apostolic and Destiny Churches and K5m to the Catholic Church at Mushima. These acts fell within the above provision.

The submission for the Respondent went further regarding illegal practice, it was stated in Sikota Wina Vs Michael Mabenga⁽⁶⁾ that the use of government facilities as the petitioner did in this case can nullify an election as was decided by the Supreme Court in Sikota Wina's case supra.

Iosephat Mlewa Vs Eric Wightman supra, the Supreme Court stated:

"The question of personal knowledge is quite irrelevant and inapplicable under paragraph (a) where it does not matter who the wrongdoer is, and the provision of the law appears designed to protect the electorate and the system itself by providing for nullification whenever there is wrong doing

which the Court feels satisfied, perhaps because of the scale or type of wrong doing probably adversely affected the elections"

It was argued that the Petitioner should not be allowed to benefit from his wrongs. It was submitted for the Second Respondent that the police were only involved in the conflict by way of trying to resolve the said conflict and did not cause violence. Reliance was placed on PW10's evidence. When analyzing and drawing conclusions from the evidence I characterize witnesses in the following order:

- (i) Witnesses who are supporters of the petitioner or respondent;*
- (ii) Witnesses who are independent like police officers, electoral officials, monitors, journalists etc; and*
- (iii) Witnesses who are supporters of the candidate, but give evidence which is not supportive to that candidate.*

The first category may have their interest to serve as they are partisan. The second category are professionals who may not be non partisan. The third category, if they are truthful their testimony could be more cogent.

For the Petitioner there was testimony that a police officer was kidnapped by supporters of the Respondent, was brutally assaulted and left in the Land cruiser, which was UPND property and this evidence was uncontroverted. PW13 testified that UPND cadres said the mini bus he was driving from Lusaka belonged to MMD and should be broken and it was damaged and was exhibited in this Court, PW 14 an MMD Coordinator in

Mushima and Kamizekezeke Ward was assaulted by a group which later drove into the Palace in the company of the UPND leader Mr. Hakainde Hichilema. His Isuzu Pickup was immobilized and remained in that position for a month. He ran into Chief Mushima's Palace. PW15 was a businessman who was assaulted, the UPND cadres led by Judith Munwe threw stones at his shop and broke the door, later they killed his dog. PW16 and PW17 were assaulted by a group wearing UPND badges. There was evidence of injured police officers, damaged police and council vehicles. The damage of RW14's vehicle was confirmed by RW12 who was a witness for the Respondent.

For the Respondent RW1 testified that there was heavy police presence in Mufumbwe and the following day after arrival UPND and MMD supporters were throwing stones at each other. PW3 was Hon. Charles Kakoma MP for Zambezi and UPND Spokesman and also Mr. Sakai Chairman of Culture who were brutally assaulted or was a victim of remorseless violence by MMD cadres. PW6 gave evidence of being given a piece of meat and K500,000 which were not exhibited. PW15 testified that there were threats of violence and damage to property. RW22 testified how policemen were beating them, RW23, 24 and 25 gave evidence of beatings and intimidation. RW32 testified that he picked 8 UPND cadres injured by MMD cadres.

A classical statement about the violence came from the Respondent's witness who is Director of Elections, Mr. Dan Kalale and I quote:

"There was total violence in Mufumbwe and was the worst. In Mkaika the election was nullified because of violence"

... was an independent witness and called by the Respondent. RW32 also testified about the violence. RW39, RW40, RW41, RW42 and RW43 said they were recipients of a suit each intended to induce them to vote for the petitioner and not the respondent who was a Kachokwe. PW49 was Mulose Mulesu a guard at First In Lodge who said he saw people who came in a bus who were MMD supporters. They arrived at 03:00 hours and 06:00 hours attacked UPND members, who were meeting at respondent's Guest House, some of them came out naked. RW56 testified that his shop windows were broken by people wearing the MMD attire. RW60 gave evidence of the burning of the Churches. *RW61 was the Respondent who testified that his supporters were stoned on 24th April 2010 and his Guest House was stoned and he had to hide in the ceiling board. He went on that some wards were no go areas for him.*

It was canvassed for the Respondent that the President by donating for the repairing of the burnt Churches his conduct amounted to treating. A distinction should be drawn between actions of the Head of State as the first citizen and as President of MMD, which is a club like PF and UPND. The burnt churches belonged to bi-partisan communities and no individual derived personal benefit from restoration of those "houses of God" to induce them to vote for MMD. The President had expressed his outrage of violence that was perpetrated, which was statesmanlike. His deputy threatened those perpetrating political violence that they could face international justice. These were statements coming from the father of the nation and his deputy in their capacity as head of state and Government and deputy respectively and not from a partisan or MMD standpoint. To politicize such statements is to trivialize the national outrage against the

... that gripped or afflicted the people of Mufumbwe in this peaceful nation. This submission on behalf of the Respondent is untenable because no individual or group of voters benefited, as I have said earlier, so how can they be influenced. The funds were for restoration of the houses of God, and the churches are politically blind.

On the totality of the evidence from both sides I find the following facts:

- (i) *The UPND cadres abducted a policeman and brutally assaulted him. They attacked Petitioner's supporters camped at a school and destroyed the mini bus. They attacked policemen who sustained injuries and damaged police and council vehicles. PW14, 16 and 17 were brutally attacked;*
- (ii) *Mr. Hakainde Hichilema had promised 20 herds of cattle if the electorate voted for the respondent, which promise was published in the Post and was not denied;*
- (iii) *The Petitioner's supporters brutally attacked Hon. Kakoma and Mr. Sakai, UPND members of the Central Committee. The MMD cadres besieged the Mufumbwe Police Station. There was rampant violence. You had hate-filled and violence-filled extremists from both sides;*
- (iv) *The police were victims of violence and were overwhelmed, which resulted in the use of force to suppress the rioters' conduct of the supporters of both candidates. There was collateral damage i.e. the loss of the eye by RW20;*

- (v) *The Inspector General had asked the postponement of the election due to the volatile situation. It could therefore not be said that the police caused the violence, such a proposition is not viable. This was unanticipated as tribal divisions partly generated the violence and intimidation;*
- (vi) *Both petitioner and respondent laid independent evidence of the violence in Mufumbwe through PW10 and RW31 said that there was intense violence and intimidation among other independent witnesses;*
- (vii) *There were voters who stayed away because of the violence, see evidence of RW21;*
- (viii) *The Electoral Commission sent a protest vote, see evidence of RW 31; and*
- (ix) *The SACCORD Report, I must say was unreliable as one of the architects Mr. John Kakusa, admitted in cross-examination that there was intimidation and threats against the Chokwe people or his tribesmen. He should have declared interest as he had his interest to serve.*

The seminal question is, could it be said that the voters of Mufumbwe exercised their democratic right to elect a candidate of their choice or their will was thwarted by intimidation, violence, corruption, other illegal practices and election offences?.

The Petitioner sharply focused on the violence in Mufumbwe as having been so intense, that the environment of conducting free and fair

elections did not exist and that the offer of cattle by the UPND President amounted to treating under Section 81, but as I said earlier that could not, the appropriate Section for "promises", as was this case, the appropriate Section is 79 of Act No. 12 of 1996, which is very broad and includes promises. In a nation afflicted by abject poverty to promise 20 herds of cattle if the electorate voted for a candidate has the potential of undermining the electors will.

The Respondent focused on the violence perpetrated by the Petitioner's supporters and alleged gifts of suits given by the Petitioner's election manager. The Petitioner's agents may have given money and suits to the supporters of Respondent, the difficulty is money was not produced, it had been spent, in terms of suits in some cases only the trousers was produced. While the evidence of the Respondent in that regard could have reached the civil standard, due to suspect witnesses, it could not be said to have reached the above the balance of probability and below beyond all reasonable doubt standard, set out in Sikota Wina Vs Mabenga supra. Why do I say that, all those who gave evidence were Respondent's supporters, who did not produce any money allegedly given, nor the full set of clothes given in some cases they are suspect witnesses. The point I make is that it is democratically incorrect for campaign agents of both candidates to make promises of material things if their candidates were elected.

It was argued that the Petitioner's supporters having perpetrated violence, he cannot profit from his wrong doing. The Court has firstly to be concerned, whether the electors who hold sovereign power to elect or

usurp their leaders, had their "will" thwarted by violence and other illegal practices. This is a "higher constitutional principle" and a matter of public interest in consolidating constitutional democracy. Free and fair elections is the epitome of democracy, this Court is a guardian of the right of enfranchisement which right is so critical in an emerging democracy thirsty to consolidate constitutional democracy. The sovereignty of the people must be pre-eminent, because the governed are antecedent to their governors and the constitution which regulate the conduct of the governors.

To understand the importance of the "vote" as a human right, the European Court of Human Rights, ruled in 2004 that the United Kingdom's 140 years old blanket ban on letting sentenced prisoners vote was illegal see Internal Express African Edition 9 -15 November 2010.

In a ground breaking judgment, in August Vs Electoral Commission and Others⁽⁷⁾ Sachs J delivering the judgment of the South African Constitutional Court said:

"Universal adult suffrage on a common voter's roll is one other foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of every citizen is a badge of dignity and personhood. Quite literally, it says that

everybody counts in a country of great disparities of wealth and power, whoever we are, we all belong to the same democratic South African nation, that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement".

What Sachs J, was saying is that democracy is not for the chosen, it is for all. Susan Thomson a US Academic who has been researching state society relations in Rwanda since 1996 said:

"Democracy would be okay if ordinary people like me could participate rather than being told who to vote for. Violence, intimidation and corruption is telling the voter who to vote for".

Democracy involves three central rights: the right to take part in government, the right to vote and be elected, and the right to equal access to public service.

The Universal Declaration of Human Rights states that the will of the people shall be the basis for the authority of government. Those who seek the validation of their empowerment must patently govern with the consent of the governed that is the core value of "Constitutional Democracy". *The Respondent testified that there were wards which were no go areas for him. One fundamental flaw, I do see here is the thought that there was violence and then find who caused that violence and if it is the Petitioner, the Court should not put premium on his supporters'*

...evidence by annulling the election. I have made a finding of facts from the evidence of both parties that there was extreme violence and intimidation and destruction of property. It stands to reason that in such an environment where voters were intimidated and brutalized to the scale amounting to an 'insurrection'. The 'will' of the people was thwarted. Nobody with an ounce of human feeling could trivialize such violence which has been starkly illustrated by witnesses of the Petitioner and the Respondent and the parties themselves and is unprecedented in Zambia's political history. One may interpret and re-interpret this sad episode, but one cannot repeal it, it shall remain a scar in our political history. Whoever candidate and for whichever party would have won the Mufumbwe by election, I would have nullified it, so as I said earlier it is not about Mr. Mulondwe Muzungu or Honourable Elliot Kamondo, but about "constitutional democracy" and a "sovereign people" being responsible for the leaders they put in office. Enfranchisement therefore is a mark of liberation.

The Court would be interpreting the Electoral Law in favour of disenfranchisement and negating the central rights of democracy, if it kept its back turned on such grand-scale violence. Democracy is a battle of ideas not hacking each other, violence denaturalizes politics.

In any event this Court is bound by the Supreme Court decision in Mlewa Vs Eric Wightman supra. Where the election was nullified due to threats and violence to life and property, that scale of violence according to Respondent's witness PW31 Mr. Dan Kalale who is Director of Elections was far much less than Mufumbwe. *The Respondent cannot in one breath*

say the violence was minimal and yet lead evidence that the violence in Mufumbwe is worse than in Mkaika Constituency where the election was nullified and the Supreme Court affirmed the nullification, which decision binds me.

In this election supporters of both candidates were engaged in remorseless violence which intimidated voters. It is not by chance that most work done by most Courts with constitutional jurisdiction in the world is concerned with conducting balancing exercises conducted in the context of constitutionally dictated values. The constitutionally dictated value we are dealing with is that, *the people must elect and deselect their leaders in a free and fair election and must be responsible for the leader they elect.* They should not be brutalized or intimidated. In this election the Petitioner and the Respondent are not the victors, but the people of Mufumbwe, who were denied a free and fair election, by the violence of supporters of both candidates. The Petitioner or the Respondent never showed me any scars in this Court that they were victims of the violence, it is the innocent voters on which this violence was exacted. This was record breaking violence. The vote is a constitutionally protected value. The election cannot stand the test of free and fair elections and is hereby nullified. I am satisfied that Pursuant to Section 93 (a) and (b) of Act No. 12 of 2006, which is similar to Section 18 of the Electoral Act Chapter 13, that the violence in Mufumbwe affected the result of the election in that Constituency.

I implore the Attorney General to use his powers to compensate RW20 for the loss of his eye, I cannot order as the matter was not before

... OF THE CONSCIENCE. AS LEADER OF THE BAR AND
custodian of fundamental rights and freedoms he will exercise
magnanimity and pragmatism to avoid or obviate unnecessary litigation. I
send a sense of deep outrage against such political violence where
supporters attacked innocent people and burnt Churches which was not
only an act of evil but ingratitude to our creator who has blessed this land
with numerous resources.

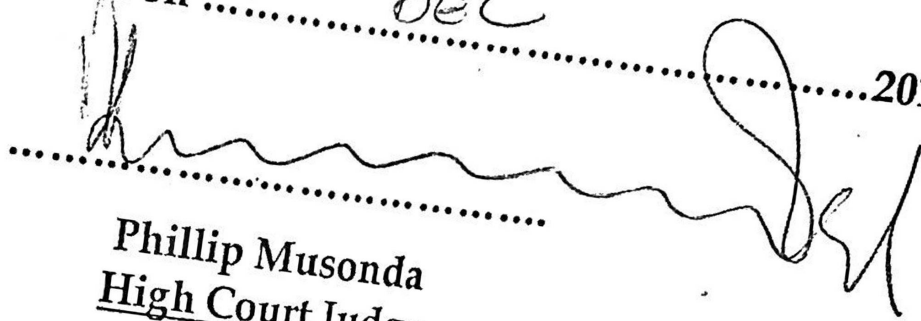
My counsel to the 'Police Command' is that they must have learnt a
lesson in Mufumbwe, that anybody including themselves can be victims of
violence, they were assaulted in Mufumbwe, they were kidnapped, *it is
therefore of critical necessity that regardless of political affiliation
whether MMD or any political party, anybody who threatens violence
must be arrested, because violence undermines the scale of our civilization
and heightens political risk to would be investors, when the country is
laboring to attract investment. It was trembling to hear accounts of violent-
filled and hate-filled extremism. I hope the police will never condone party
cadres preaching violence against any citizen in this Republic regardless of
his political beliefs and affiliation. Tolerance and broadmindedness should
be the values of our democratic politics.*

To validate this election would be crippling for democracy which is
anchored on free and fair elections which is necessary to the democratic
enterprise. This Court as a guardian, protector and enforcer of human
rights would be countenancing the walking to Manda Hill through a pool
of blood and disenfranchisement. If this Court has to err let it err on the
side of freedom not tyranny. I have deliberately been long-winded in

order for any person of average comprehension to understand the tenor of this judgment. I have deliberately used strong language in order to send a message to political parties, the police, civil society and churches the traditional leaders, that it is incumbent for them to ensure we have peaceful elections next year (2011) and that tribalism has destructive impact on civilized politics and the choice of quality leaders.

Each party will bear its own costs as a reflection of a sense of outrage.

Delivered in Open Court on 15th Dec 2010



Phillip Musonda
High Court Judge