

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

2011/HP/EP/42

(Civil Jurisdiction)

**IN THE MATTER OF: ARTICLE 72 (1) OF THE CONSTITUTION OF THE
REPUBLIC OF ZAMBIA**

AND

**IN THE MATTER OF: SECTION 93 (1) OF THE ELECTORAL ACT NO. 12 OF
2006**

AND

**IN THE MATTER OF: RUFUNSA PARLIAMENTARY CONSTITUENCY
ELECTIONS HELD IN ZAMBIA ON 20th SEPTEMBER,
2011**

B E T W E E N:

**PHILLIP MUTANTIKA
MULYATA SHEAL S.**

**1st PETITIONER
2nd PETITIONER**

AND

**KENNETH CHIPUNGU
ELECTORAL COMMISSION OF ZAMBIA**

**1st RESPONDENT
2nd RESPONDENT**

**BEFORE THE HON. JUSTICE NIGEL K. MUTUNA, ON 15th DAY OF FEBRUARY,
2012.**

For the Petitioners : Mr. Zulu of Messrs Fred Jere & Company
For the First Respondent : Mr. Besa of Messrs Douglas & Partners
For the Second Respondent: Mrs. Chomba of Attorney-Generals Chambers.

JUDGMENT

Cases referred to:

1. ***Mabenga -VS- Wina & Others (2003) ZR page 110.***
2. ***Mlewa -VS- Wightman (1995/1997) ZR page 171.***
3. ***Lusaka -VS- Cheelo (1979) ZR page 99.***
4. ***Mazoka & others -VS- Mwanawasa & another (2005) ZR page 138.***
5. ***Lewanika & others -VS- Chiluba (1998) ZR page 98.***

Other authorities referred to:

1. ***Electoral Act No. 12 of 2006.***
2. ***The Constitution, Chapter 1 of the Laws of Zambia.***
3. ***The Electoral (Code of Conduct) Regulations, 2011 Statutory Instrument No. 52 of 2011.***
4. ***Halbury's Law of England, 4th edition volume 15.***

This petition is presented by Phillip Mutantika (First Petitioner) and Sheal S. Mulyata (Second Petitioner) against Kenneth Chipungu and the Electoral Commission of Zambia (First and Second Respondents, respectively). It is made pursuant to Article 72(1)(a) of the ***Constitution*** as read with Section 93(1) of the ***Electoral Act No. 12 of 2006***.

The petition seeks to nullify the election of the First Respondent as member of parliament for Rufunsa Parliamentary Constituency. It is alleged that in view of certain illegal practices committed by the First Respondent or his agents which affected the election result to the effect that the majority of the voters in the affected areas and polling stations in the constituency, were prevented from electing the candidate whom they preferred.

The First and Second Respondents filed their answers on 10th November, 2011 and 16th November, 2011, respectively, in which they denied the allegations.

The facts as revealed by the petition are that the First and Second Petitioners were candidates in the Rufunsa parliamentary elections of 20th September, 2011 held by the Second Respondent. The two contested the elections on the Patriotic Front (PF) and United Party for National Development (UPND) tickets, respectively. The other candidates were the First Respondent on the Movement for Multiparty Democracy (MMD) party ticket and Nelson Mumba on the Forum for Democracy and Development (FDD) party ticket.

Following the elections, the Returning Officer by the name of Lungu, announced the results of the elections as follows; First Respondent, 4,754 votes; Second Petitioner, 3, 374 votes; First Petitioner 1,180 votes; and Nelson Mumba 310 votes. He proceed to declare, the First Respondent as duly elected member of parliament for Rufunsa constituency. The petition went on to reveal that the First Respondent was not validly elected because he and his agents were involved in illegal practices prior to the election, which prevented the electorate from electing their preferred candidate. These illegal practices ranged from donation of maize, chitenge material, hammer mills, sewing machines and money and transporting the electorate to the polling station. It was also alleged that the First Respondent was involved in threats or intimidation to the electorate. These acts were designed at procuring votes from the electorate.

The detailed allegations as they appear in the petition are that the First Respondent and or his agents did offer and made donations of maize, chitenge and other materials in September, 2011 to the electorate in Kazemba, Kabulanshinshi, Mwachilele, Chitemalesa and in Bunda Bunda

ward's, Ndubulula, Nyangwenya, Chiyota, Chipeketi and Shimunguwo. During the distribution of the purported relief maize and chitenge material in Chitemalesa area, the distribution was done in exchange for voters cards and national registration cards whose details were entered into the Respondent's books.

It was alleged further that, the First Respondent between 1st August and 20th September, 2011 did purchase and donate hammermills and made cash and cheque donations and sewing machines to women's clubs. These donations were made in Mwachilele, Nangwenya, Rufunsa, Shumunguwo, Lisongwe and at Mulamba Basic School. The Petitioners alleged further that whilst making the said donations, the First Respondent and his agents intimidated and threatened the electorate. It was also alleged that on 20th September, 2011, after the close of the campaign, the First Respondent ferried the electorate to polling stations and gave them money as a way of inducing them to vote for him.

The hearing of the petition commenced on 13th January, 2012 and ended on 20th January, 2012. The Petitioners paraded eighteen witnesses, while the First Respondent paraded seven witnesses. During the trial and by consent of the parties, the Petitioners discontinued their claim against the Second Respondent.

PW1 was the First Petitioner. He began his testimony by confirming that he contested the election for the Rufunsa parliamentary seat and the ticket he contested on. He proceeded to highlight who the other candidates were, the parties they belonged to and the number of votes each one polled. Further that, the First Respondent was declared as duly elected member of parliament for Rufunsa constituency. He went on to testify that contrary to the declaration by the Returning Officer the First Respondent was not validly

elected because of certain illegal acts he engaged in during the campaign period.

PW1 proceeded to highlight the illegal acts that the First Respondent and his agents were reportedly and allegedly engaged in as detailed in paragraph 5 of the petition. These ranged from the donation of maize and chitenge materials in certain areas of the constituency. The said donations were made in exchange of details of the electorates' voters' and registration cards to ensure that they voted for the First Respondent. The other donations made were of hammer mills, cheques and cash. The electorate were also threatened with eviction from the game management areas (GMA) if they did not vote for the First Respondent. Further that, the donations made would be taken away from the electorate; they would not access subsidized fertilizer; and that Food Reserve Agency (FRA) would not pay them for maize supplied if they did not vote for the First Respondent.

PW1 also testified that he received reports that on polling day the First Respondent and his agents were ferrying the electorate from Kambulu area to Sinjela polling station in a motor vehicle and he gave them money and urged them to vote for him. He ended his testimony by stating that as a result of the said acts by the First Respondent and his agents, the majority of the voters in the affected areas were prevented from electing their preferred candidate.

In cross examination, as regards the allegation that the First Respondent and his agents distributed chitenge material and maize in Kazemba, Kabulanshinshi and Mwachilele, PW1 stated thus; the donation of maize was by government's office of the Vice President through an Non Government Organisation (NGO) known as Child Fund and that the maize was taken to the schools; the First Respondent did not work for Child Fund or government and neither was he Vice President at the time of distribution of the maize;

the chitenge material distributed by the First Respondent bore MMD campaign messages; it was wrong for the First Respondent to distribute chitenge material because all candidates were banned from giving out gifts during the campaign period; and the PF party also gave out chitenge material outside the campaign period.

As regards the second allegation that the First Respondent distributed relief maize and chitenges in Chitemalesa area in Bunda Bunda ward, PW1 stated thus; the maize was distributed for purposes of buying votes; it came from government through an NGO known as Child Fund; he did not personally see the First Respondent or his agents distributing the maize or solicity for votes; he did not see or witness the donation of relief maize and chitenge to electorate in exchange for particulars of the electorate in their national registration cards and voters cards; and he did not see the First Respondent or his agents engage in the said illegal acts.

As regards the allegation that relief maize and chitenge material were distributed by the First Respondent at Ndubulula, Nyangwenya, Chiyoto, Chipekete and Shimunguwo, PW1 testified thus; the maize in issue was from the office of the Vice President through an NGO known as Child Fund; at the time that the maize was distributed, the First Respondent was not working for Child Fund, nor was he Vice President or indeed working in the Vice President's office; the First Respondent was also not working for government; and he was just an MMD candidate.

As regards the allegation that the First Respondent donated a hammer mill to Mwachilele ward, PW1 testified that the hammer mill was not purchased by the First Respondent but it came from Ministry of Community Development and Social Services. He stated further that it was the First Respondent who delivered the hammer mill to the ward hence his initial impression that it was he who purchased it. He went on to state that at the

time of delivery of the hammermill the First Respondent was not Minister of Community Development and Social Services but rather Minister of Youth and Sport and that he was performing a government function as area member of parliament when he donated the hammer mill. Further that he was not sure what date the First Respondent made the donation and it could have been before or after the campaign period.

PW1 went on to testify in respect of the hammer mill donated to Nangwenya ward and stated that he did not know if it was sourced through the Ministry of Community Development and Social Services. He however, conceded that the hammer mill was not purchased by the First Respondent.

Regarding the allegation that the First Respondent donated cheques, PW1 testified that he did not personally see the cheques but that they came from government. He stated further that he did not know if the cheques were cashed except that the one for K10,000,000.00 was reportedly stolen. He ended by stating that the First Respondent was acting on behalf of government when he made the cheque donations.

As regards the cheque for K4,000,000.00 allegedly donated to Kabasaya women's club in Shimunguwo, PW1 testified that, the First Respondent only paid K2,000,000.00 and promised to pay the balance after he was re-elected. He went on to testify that the cheque came from the Ministry of Community Development and Social Services and that at the time the First Respondent made the donation he was not a Minister or employee of government. Further that the cheque for K5,000,000.00 allegedly donated to Makobala women's club in Lisongwe came from government as well.

As regards the donation of a cheque for K500,000.00 to Mulamba Basic School, PW1 clarified that it was actually cash which the First Respondent donated and not a cheque. He stated further that he did not know where the

cash came from and that the donation was made during the campaign period.

As regards the allegation that the First Respondent issued threats whilst making the donations, PW1 testified that he did not actually hear the First Respondent make the threats and that he merely received reports from his agents to that effect. Further that, he did not read about the said threats in the media. He also conceded that the First Respondent was not involved in the distribution of subsidized fertilizer nor was he the one who bought the hammer mills which it is alleged he threatened to repossess. He also testified that, the First Respondent was not working for FRA during the period the donations were made nor was he involved in the exercise of paying farmers for maize delivered.

As regards the allegation that the First Respondent ferried the electorate on polling day and paid them money, PW1 testified thus; he did not know who drove the vehicles that allegedly ferried the electorate; nor did he know who owned the vehicles and did not see the First Respondent or his agents lure the electorate; and he did not see the First Respondent or his agents distribute money.

In re-examination PW1 testified thus; that the maize distribution was done by MMD officials; that it was the First Respondent who distributed the cheques to women's clubs; and that the First Respondent issued the threats as alleged in the petition.

PW2 was the Second Petitioner. She testified that she was a candidate in the elections held on 20th September, 2011 under the UPND ticket. She went on to state that she received disturbing reports through the UPND party structure of what was going on in the MMD camp involving the First Respondent. The activities she testified, comprised the obtaining of

particulars of the electorate from their voters cards and national registration cards in exchange for maize, chitenge material and money. These allegations were confirmed by UPND agents she sent to Bunda Bunda ward to investigate. These investigations revealed that the maize distribution at Chitemalesa was being done by MMD officials at Bunda Bunda basic school. In pursuit of the said distribution RW6 who was an MMD councillor sent out people to collect voters and national registration cards in exchange for maize and chitenge. She testified further that a similar pattern occurred in Chitemalesa and Kazemba and all polling stations in Mwachilele. Further that in the case of Mwachilele she received another report of the donation of a hammer mill as well.

PW2 testified further that the donations of maize and chitenge were also done in Ndubulula, Nyangwenya, Chiyota, Chipeketi and Shimunguwo. She also testified that she received reports that cheques were paid to women's clubs in Makobala and Kabasaya in exchange for promises by the electorate to vote for the First Respondent. She ended her testimony by stating that she received reports that on 20th September, 2011 the First Respondent ferried the electorate to the polling station. She was aware of this because after voting, the particular electorate had requested her to ferry them back.

Under cross examination PW2 began by testifying that the chitenge material distributed by the First Respondent bore portraits of the then Republican President Rupiah Banda. Further that UPND also distributed chitenge material but that it is the manner of distribution by MMD which was wrong as it was excessive.

As regards the allegations contained in the petition she testified as follows; she did not see the First Respondent or MMD official donate maize and chitenge material to the electorate in Kazemba; she did not see the First Respondent or his agents collecting voters and national registration cards

from the electorate but that it was MMD officials who distributed the maize at Kazemba; the source of the maize was the Vice President's office; she was not aware of the Child Fund; she did not see the First Respondent or his agents distribute maize to the electorate in Ndubulula, Nyangwenya, Chiyota, Chipekete and Shimunguwo and that she was told by her agents that the distribution was done by MMD officials; she was not present when the First Respondent is alleged to have distributed hammer mills. Further that, she did not know the source of the hammer mills but that she was informed they were purchased by the First Respondent; she did not witness the donation of the cheques but was informed by UPND officials from the areas; she did not witness the intimidation by the First Respondent when he was making the donations and was told about it by villagers; and she did not witness the First Respondent or his agents ferrying the electorate or pay them money on polling day.

In re-examination PW2 restated her evidence-in-chief.

PW3 was Wiseman Tayali a PF district secretary for Chongwe and a member of the District Conflict Management Committee. He testified that he had received reports of their political opponent's donations of maize, money, sawing machines and hammer mills. The reports were discussed in the District Conflict Management Committee at which it was resolved that he should contact the Second Respondent requesting it to put a stop to the activities. He testified that the Second Respondent did not take any action which prompted him to write to the District Election Officer as per the letter at page 13 of the Petitioners' bundle of documents.

Under cross examination PW3 testified that he did not personally witness any of the donations taking place but that he just received reports on them. He also stated that he did not know the exact dates the donations were made nor did he know where the hammer mills came from.

In re-examination PW3 stated that the distribution was made in the latter part of August and September and up to election day.

PW4 was Kelvin Chandalala Banda a farmer of Nyambandu village in Chipeketi. His testimony was that some time in September, 2011 the First Respondent went to his village to address the residents. In his address he promised to deliver maize to them and did subsequently deliver maize to the village in the same month. When he delivered the maize, the First Respondent urged the residents to vote for MMD to ensure that more maize was delivered. Further that, if they voted for PF they would be killed and those suffering from HIV would be thrown in the river.

PW4 went on to testify that at the same rally the MMD ward Chairman RW4 was present and he told them that if they did not vote for the First Respondent they would not get fertilizer inputs. Further that, they would not be paid for any maize they would deliver to FRA. He ended by testifying that RW4 was the polling agent for MMD.

In cross examination PW4 stated thus; the maize was not distributed in Chipeketi area it was distributed at Lukwipa which is where they all went to collect it; the First Respondent was not involved in the distribution of the maize as the same was done by a committee constituted by MMD; and that he did not know where the maize came from.

In re-examination he stated that the maize came from MMD and it was distributed for purposes of luring the electorate to vote for MMD.

PW5 was Chrispin Mainza a farmer of Kazemba in Mwachilele ward. He began his testimony by stating that Mwachilele ward comprises Chamulimba, Chibengelele, Kabulashishi, Mwachilele and Kazemba villages. He testified

that between 1st August, 2011 and 20th September, 2011, as he was standing with his mother and two friends, they were approached by RW5 a publicity secretary for MMD Kazemba branch, who enquired from his mother if she had a voter's card and national registration card. The reason for the enquiring was that the First Respondent had allegedly requested her to register persons with voters and national registration cards for purposes of distributing maize to them on a subsequent day. He testified further that his mother refused to give RW5 the details of her voters card and national registration card.

PW5 went on to testify that on 1st September, 2011 maize was delivered to Kazemba basic school and it was received by PW16 who informed him that it was delivered by the First Respondent having received it from government. On 2nd September, 2011, PW16 started distributing the maize to people with voter's cards and national registration cards. Later on 12th September, 2011 another consignment of maize was delivered and PW16 distributed it once again in the same manner as he did with the initial consignment. The First Respondent then travelled to Kazemba and held a meeting at which he urge the people present to vote for him. He assured the people that he would continue delivering maize and other food stuff to them such as rice and cooking oil.

In cross examination PW5 testified that when RW5 approached them she did not ask him or the other two persons he was with for their voter's card or registration cards. He stated further that he did not see anyone give RW5 their voter's card or registration card. He went on to state that when the maize was delivered on 1st September, 2011 he was not present and that it was received by PW16 who is a senior teacher at Kazemba basic school. He stated further that PW16 was not part of the First Respondent's campaign team.

PW5 went on to testify that at the time PW16 was distributing the maize, he was checking their particulars on voters cards and national registration cards against a list of names he had in his possession. He testified further that, he and the other villagers had earlier given their details to the Headman. He ended by stating that the First Respondent was not present during the distribution of the maize.

In re-examination PW5 testified that PW16 told them that the maize was donated by the First Respondent from government.

PW6 was Emiwa Mwachiwewe a business woman of Kazemba in the Mwachilele ward. She testified that on 20th August, 2011 a gentlemen by the name of Enock Makina an MMD official went to her house to get her particulars from her voter's card and national registration card. Further that, he indicated to her that all those people who would submit their details would benefit from what was due to come.

PW6 went on to testify that on 1st September, 2011 maize was delivered and on 2nd September, 2011 it was distributed to them. She testified further that on 11th September, 2011 another consignment of maize was delivered to Kazemba basic school and they were summoned to the school by PW16. The maize was subsequently given to the Headman from whom they received it. She also testified that, the Headman indicated that only registered voters would receive the maize. Subsequently on 16th September, 2011 the First Respondent arrived in their area to hold a rally. He began by enquiring if the maize had been delivered.

In cross examination PW6 testified thus; the maize came from government and it was the First Respondent who brought it; PW16 is a teacher at the school where the maize was delivered and he is not a campaign agent for

the First Respondent; and the First Respondent was not in government at the time of delivery of the maize.

PW7 was Milton Simaphande a bricklayer of Chinyunyu in Bunda Bunda north. He testified that in the month of August he arrived home and noticed his voter's card and national registration card and those of his two wives and three children on the table. Along with the cards there were some chitenge material bearing MMD symbols. Upon enquiring from his wives they explained that a lady by the name of Ireen Chikoloma had come to get their details. He confronted Ireen Chikoloma who laughed, so he was concerned and was prompted to report the matter to his Headman who advised him to lodge a complaint with the police. He went to the police and reported the matter and the police summoned Ireen Chikoloma and recorded a statement from her.

In cross examination PW7 testified that Ireen Chikoloma did not give him an explanation as to why she registered their particulars.

PW8 was Constable Lewis Nalikena of Chinyunyu police post. He testified that on 31st August, 2011, he received a report from PW7 on the visit to the latter's house by Ireen Chikoloma and that she was going around the community getting particulars of the people's voters cards and national registration cards. He went on to testify that PW7's fear was that someone would vote on his behalf. Further that, he summoned Ireen Chikoloma to the police station and she explained that she had been directed by the MMD area councilor, RW6 to collect the details. Upon enquiring from Ireen Chikoloma for the details, he was informed that she had already surrendered them to RW6.

In cross examination PW8 stated that after interviewing Ireen Chikoloma he had consulted his superiors who advised him that no offence had been

committed by Ireen Chikoloma. Further that he did not follow up the issue with RW6 nor did he see the list with the particulars of the residents.

PW9 was Christopher Zulu a Headman of Mabula village, ward 4 Bunda Bunda. He testified that in September 2011 he was visited by a gentleman called Simfukwe who is an MMD official and was a polling agent. The gentleman brought with him three gallons of maize which he said came from the Boma. Simfukwe then took down PW9's particulars as contained in his national registration card, following which he left the three gallons of maize with him.

PW9 testified further that whenever government donates relief food it informs Headmen because they are the ones who know the vulnerable groups such as widows and those needing help in their society. He stated further that since he has been Headman they have received relief maize twice before. In these previous cases the Headmen would meet with councillors and ascertain the numbers of persons in each village based upon which each Headman would be given maize. He ended by stating that he understood the distribution of the maize in September, 2011 to be for campaign purposes.

Under cross examination PW9 stated that he did not know where the maize came from and that Headmen were not involved in the distribution of the maize.

PW10 was Lukas Mavula Njovu of Bunda Bunda north, in Chinyunyu, a farmer and Headman. He testified that between 2nd August and 20th September, 2011 he was told that there was distribution of maize. He went to investigate at Chinyunyu basic school where he found MMD officials distributing maize. The MMD officials were RW3, Loveness Malaya and William Tembo. The former two were polling agents in the election.

PW10 testified further that in the past whenever there is distribution of maize he and other Headmen are informed because they are the ones who know the number of people in the villages. Further that, they would constitute a committee to distribute the maize.

In cross examination PW10 testified that he did not know where the maize came from.

PW11 was Romario Emargo Chapanda a peasant farmer of Shikabeta's Chiefdom. He testified that in the month of September, 2011 the First Respondent and the councillors organized maize which was brought to Shikabeta. He was made to understand that the maize was relief maize but the Headmen in the area were not informed of its delivery. Further that the councillors distributed the maize only to Shikabeta central and did not extend the distribution to the other two areas namely Lubalashi and Chomba. After the elections, there was another distribution of maize in Shikabeta central which surprised PW11 because his expectation was that it would be distributed to Chomba where there was extreme hunger. This made him conclude that the maize was not relief maize.

As regards the persons who were involved in the distribution of the maize, PW11 testified that it was Simon Chalwe, Ephraim Mumba, Victoria Lungu, Nicolas Mumba, Felix Nyenduma, Christa Bwalya and Lontia Ngulube. These were all MMD officials while, Ephraim Mumba and Victoria Lungu were also polling agents. At the time of the distribution, the MMD officials warned the people that they would starve if they did not vote for MMD. Further that the First Respondent also urged them to vote for him at a meeting he held at a guest house at Shikabeta.

In cross examination PW11 stated that he did not know the source of the maize but that he was informed it was relief maize. Further that the First Respondent did not take part in the distribution of the maize. He stated further that the First Respondent was not working in government during the period of the distribution of the maize.

PW12 was Timothy Maoma, Headman Mwamamonga of Shikabeta. He testified that some time in August or September 2011 maize was delivered by MMD to the area councillor. The councillor and his group appointed a committee to distribute the maize which committee comprised MMD officials by the names of Ephraim Mumba, Felix Nyenduma, Victoria Lungu and Nicolas Mumba. Ephraim Mumba was also a polling agent, while Victoria Lungu a polling assistant. The distribution of the maize was done in September and October, 2011.

When the maize was being distributed, the councillor informed PW12 and the others that if they vote MMD out of office there would be no more food delivered to their area.

In cross examination PW12 testified that he is non partizan. He also clarified that the maize they received in October, 2011 was from the same batch as the maize distributed in September except that it was distributed at different times.

In re-examination PW12 clarified that the maize distributed in October was meant for Chomba ward.

PW13 was Kelly's Wasamunu Muhau a farmer of Chipungu village in Namanongo ward. He began by stating the areas in Namanongo ward as being Namanongo, Tengama and Ndubulula. He went on to testify that between the 1st and 10th September, 2011 a former MMD councillor by the

name of Christopher Nyamucanu held a meeting at which he promised that maize, rice and cooking oil would be distributed if they voted for MMD. Along with this promise Christopher Nyamacau threatened them that if they voted for other mad people the maize would not be delivered and they would not receive fertilizer. When the meeting ended, he was approached by Christopher Nyamacau who offered him K600,000.00 in return for his joining the First Respondent's campaign team but he declined the offer.

PW13 went on to testify that later in the month, the First Respondent held a meeting at Tengama basic school at which he promised to supply maize and other food stuff if he was re-elected as member of parliament. At the end of the meeting the First Respondent asked him if he was willing to join his campaigning team but he declined.

Subsequently, on 10th September, 2011 a truck arrived at Tengama basic school laden with maize. The occupants of the truck were Christopher Nyamacau, the ward chairman of MMD for Namanonga and Alex Banda. After the maize was delivered at Tengama basic school the truck proceeded to Ndubulula basic school. The maize was later distributed from these two schools by MMD officials.

At Tengama basic school the distribution of the maize was done by the Branch Chairperson, Absolom Mwale, Vice Chairperson Charles Mbaluwa and Mavis Tembo. Whilst at Ndubulula, the distribution was done by Alex Banda, James Ngandu and Watson Chenda. The latter was also a polling agent.

PW13 testified further that, during the distribution, the MMD officials promised more food stuff if MMD was re-elected.

Under cross examination PW13 stated that he did not know where the maize came from and that the First Respondent was not involved in the distribution of the maize.

PW14 was Vinesse Tembo a business woman of Nyangu village at Rufunsa. She testified that towards the end of August, 2011, the First Respondent came to her village to hold a meeting. Prior to the meeting he bought beer for a number of unemployed youths popularly known as Kaponyas. He then addressed the gathering and promised to bring them something good. Subsequently on 2nd September, 2011 one hundred bags of maize were delivered in a canter truck. The delivery was made by Andrew Tembo an MMD Councillor along with other persons she did not know. Later, the First Respondent arrived at the scene and promised to deliver more maize if the villagers voted for MMD. He also stated that the distribution of the maize would begin with those with national registration cards and voter's cards.

PW14 testified further that, on 11th September, 2011, another four hundred bags of maize were delivered. These bags were distributed to Shimunguwo and Nyangu village on an equal basis. When the distribution began the villagers were asked to produce their national registration cards and voters cards and were given a bag of maize each. During the distribution the MMD officials promised to deliver rice, cooking oil, beans and kapenta in the next consignment. They also told them that if they voted for the then Presidential candidate Michael Sata, they would be thrown in the water.

In cross examination, PW14 testified that the First Respondent urged them to vote for him. She also testified thus; she witnessed the purchase of beer by the First Respondent for the Kaponyas and infact he gave her the money to purchase the beer; the maize was from the First Respondent but she did not know if he purchased it; she was amongst the people who distributed the

maize as member of the village committee; and the village committee was not an MMD committee and it comprised four members.

In re-examination PW14 restated that the maize was brought by Andrew Tembo and other MMD officials. Further that, there is no MMD branch at Nyangu, that is why the village committee distributed the maize.

PW15 was Afalila Zulu a farmer of Shimunguwo and chairperson of Kabasaya women's club. Her testimony was that the First Respondent presented two cheques to her club for K4,000,000.00 and K2,000,000.00. The first cheque was presented in August 2011 whilst the second was presented in October, 2011. After the First Respondent presented the first cheque he urged them to vote for him and promised them that they would eat well if they voted for him. She ended by stating that she did not know why the First Respondent gave them the cheques as they did not request for them. Further that they cashed the cheque for K4,000,000.00 at Chongwe.

In cross examination PW15 stated that her club was a farming club. She stated further that the cheque was presented by the First Respondent some time in August and that they cashed it on 18th August 2011. At the time of presenting the cheque the First Respondent told them that he was assisting them so that their club would progress. Further that, she did not know where the cheque came from.

PW16 was Mordecai Chabinga a teacher at Kazemba Basic School. He testified that on 1st September, 2011 a canter truck arrived at the school laden with forty bags of maize from Chongwe. Two weeks later another consignment of maize was received from Mwachilele. The first consignment was delivered by a gentleman from Chongwe, who requested for storage

space at the school. He dealt with PW16 because the Headmaster of the school was away at the time.

PW16 testified further that prior to distribution of the bags of maize he requested the persons who were distributing to keep five bags to be used as payment to the parents who were doing work at the school. The rest of the bags were distributed under the supervision of Mr. A. Stando and N. Nyirongo who are MMD officials and were polling agents. He clarified further that, the schools in the constituency received maize on behalf of the community on account of storage space available in the schools. The maize would normally be delivered through an NGO which would meet with the village Headmen and designate the task of distribution to the village committees.

Under cross examination PW16 testified that he was involved in the distribution of the maize and that he gave each village seven bags of maize. The bags were given to the Headmen and village committee members of each village who came and collected the maize and took them back to their villages. His instructions on the distribution were given by Mr. A. Stando and not the First Respondent. He also testified that he was not requesting for registration cards or voters cards before distributing the maize. Further that, he was not campaigning for any political party during the distribution and neither was he involved in any campaign.

In re-examination he clarified that the maize was given to village Headmen and the village committees who took it back to their villages on ox carts. The village committees distributed the maize thereafter.

PW17 was Dennis Raphale Mupwaya a farmer of Steven village, Chief Mumpanshya's village. He testified that he was the polling agent for MMD and is employed by an NGO known as Child Fund on a part time basis. He testified further that Child Fund has a branch called Rufunsa Child Domestic

Work Project for which he is the Vice Chairperson. The project is involved in empowering youths by teaching them tailoring skills.

Sometime in May, 2010, the project, through PW17, prepared a project proposal pursuant to which it requested for financial support from the Ministry of Youth and Sport. The proposal was delivered to the constituency office occupied by the First Respondent for onward transmission to the Ministry. In the proposal the project did not specify the exact amount of money sought but highlighted the material that was required for the project. Subsequently, the project received two cheques for K10,000,000.00 and K2,000,000.00. These cheques were presented by the First Respondent at a meeting at which they were being sensitized on how to vote and addressed by the MMD branch Chairperson and other party officials. This was on or about 27th July, 2011.

In cross examination, PW17 testified that the cheques came from the Ministry where the proposal was addressed. Further that, these were funds that his project requested for before the campaign period and that the presentation was made not at a rally but rather at a meeting held at the home of a party official.

In re-examination, PW17 clarified that at the meeting where the First Respondent presented the cheques there were party officials in attendance and a few villagers.

PW18 was Kennedy Choonga of Shikamuna village. His testimony was that the First Respondent attended a meeting they held and told them that if they did not vote for him they would be chased from the GMA they lived in. He testified further that on polling day they were transported to and from the polling station by a FUSO truck.

Under cross examination PW18 testified that when the First Respondent made the threat at the meeting, he meant that Zambia Wildlife Authority (ZAWA) would chase them out of the GMA. Further that, he would support them to ensure that they were not chased. As regards transportation to the polling station, he testified that it was not the First Respondent who was driving the truck they were in. Further that, they were not given any money by anybody whilst they were in the truck.

In re-examination PW18 restated the threat allegedly made by the First Respondent.

At the end of PW18's testimony the Petitioners closed their case.

The First Respondent opened his defence, testifying as RW1. He testified that he has been member of parliament for six years and was currently serving his second term. Prior to this, he was District Commissioner for Chongwe district under which his constituency, Rufunsa falls. After serving as District Commissioner for Chongwe, he served in the same capacity at Luangwa in the year 2006. When he first won the Rufunsa seat he was appointed provincial Minister for North-Western Province.

RW1 then proceeded to respond to the allegations made against him as follows. Regarding the allegation that he donated chitenge material, maize and other material to the electorate in order to solicit and procure votes, he testified that he did not donate or distribution any maize or chitenge material in any of the villages in his constituency. The only chitenge material he distributed were MMD chitenge material and T Shirts printed with MMD slogans or pictures depicting himself and the then Republican President Rupiah Banda. He stated further that, government had in the past distributed maize in the poor areas of his constituency where farming was unsuccessful. This was a gesture of good governance on the part of

government, and the gesture was extended to areas where they had been disasters. He testified further that, there is a programme under the Ministry of Community Development and Social Services to assist the vulnerable in society such as the widows, widowers, orphans and handicapped. This programme is conducted every year regardless of whether it was an election year or not.

As regards the allegation that he purchased and donated hammermills to Mwachilele ward and women's club in Nangwenya west, RW1 denied the allegation. He testified that there is no hammermill at Mwachilele ward and neither did he donate one to that ward. He also denied donating a hammermill to a women's club in Nangwenya west and stated that all he did was to ferry it on behalf of the Ministry of Community Development and Social Services. He testified that in the said Ministry, there were funds earmarked for empowering of women and youths financially or materially. As a result of this, each Ministry was allocated funds to procure hammermills for distribution in all the constituencies throughout the country. The beneficiaries were women's clubs in various wards which had applied for assistance and the condition for accessing the funds was that they had to have certificates of registration and bank accounts for their clubs. RW1 went on to testify that officials of Nangwenya women's club informed him that the Ministry offered the club a hammer mill and requested him to transport it to them on their behalf. He therefore delivered it to them on 13th June, 2011, whilst he was still member of parliament in the area. The delivery was not during the campaign period and by delivering the hammermill to the women's club he was fulfilling his obligation to ensure that his constituency receives its fair share of development.

As regards the allegation that he donated cheques for K12,000,000.00, K4,000,000.00 and K5,000,000.00, RW1 denied the allegation. He testified that the funds came from another government programme for women

empowerment by the Ministry of Community Development and Social Services. The procedure in accessing these fund was that the women's clubs applied for assistance to the Ministry and once approval was given the cheques were delivered to RW1 as area member of parliament who in turn presented the cheques to the women's clubs. He went on to testify that the presentation was made on 20th and 21st July, 2011, before the campaign period. Further that the funds did not come from his pocket and neither was he involved in the approval process of the funds at the Ministry because he was not an employee of the Ministry.

As regards the allegation that he donated the sum of K500,000.00 to Malumba basic school, RW1 admitted that he donated the cash to the school. The donation was made on 21st July, 2011 at a time he was area member of parliament and prior to the campaign period. It followed a request from the community for assistance to undertake a project at the school. He testified further that he made the donation at a meeting at which he did not make a speech.

As regard the allegation that he made threats and intimidated the electorate at the time he made the donations, he denied the allegation. He testified that he had assisted rather than threatened the residents of Kambulu in the GMA. Further that, he could not have threatened the electorate in respect of fertilizer subsidizes, payment for maize delivered and repossession of the hammermill, because he was not involved in distribution of fertilizer, nor was he in the employ of FRA which paid farmers for maize delivered. He was also not the owner of the hammermill he delivered to Nangwenya to grant him the right to repossess it.

As regards the allegation that he hired vehicles to ferry the electorate on polling day and paid them money, RW1 denied hiring any trucks for that purpose or indeed ferrying the electorate. He also denied paying the

electorate money. RW1 also denied offering PW13 the sum of K600,000.00 as alleged.

In cross examination RW1 began by restating the evidence given in chief with respect to the allegation on the hammermills. He clarified, in this respect, that the Ministry of Community Development and Social Services indicated to him that they had difficulties transporting the hammermill so they requested him to transport it.

As regards presentation of the cheques, he testified that the cheque for K10,000,000.00 was left at his constituency office at Rufunsa. At that time his term as member of parliament had expired as such the constituency office was not his office, per se. He went on to state that he presented the cheque to the women's club Chairperson at an MMD indoor meeting at which some villagers were present. The said meeting was not a rally. Further that, it was not he who collected the cheques from the Ministry of Community Development and Social Services. He ended by clarifying that the K500,000.00 cash he donated to Mulamba basic school was from the Ministry of Youth and Sport.

In re-examination RW1 restated the evidence tendered in chief as regards the cheques and the hammermill.

RW2 was Christin Adan Mambwe of Chimusanya basic school and a chairperson of the area development committee (ADC). She began by stating that her committee is charged with the responsibility of ensuring that there is development in Rufunsa constituency. The committee has therefore been involve in the construction of bus shelters and distributing of maize. She went on to highlight the various food relief programmes that had taken place in the constituency and the groups in the community to whom assistance was extended.

RW2 testified further that she was involved in the distribution of maize in her area in August, 2011. The maize came from office of the Vice President under the disaster management unit and was delivered at district level to Chongwe from where it was sent to Rufunsa. Upon arrival at Rufunsa the committee summoned the Headmen who met the committee and collected the maize. She stated that her committee is not involved in the actual distribution of the maize because it is done by the Headmen. These Headmen have registers of the people in their areas and are able to identify the vulnerable and those needing help. The committee has an identical register which was provided by the disaster management committee and contains the details of member of the community such as their names, national registration card numbers, sexes and the numbers in the households. This register is used for purposes of confirming the manner of distribution of relief food whenever officials from disaster management committee conduct door to door checks. She stated further that, the register is not used for campaign purposes by the committee and neither did the committee request for national registration cards prior to distributing the maize to the Headmen. The MMD officials and the First Respondent were not involved in the distribution of the maize.

In terms of composition of the committee, RW2 testified that the ADC members are non partizan and are elected into office through elections conducted by the District Council's District Planning Officer.

In cross examination RW2 stated thus; she was not a polling agent and is not a member of the MMD; Richard Ngulube is the Secretary in the ADC that she chairs, and that she does not know what party he belongs to; she did not know what happened in other areas in terms of distribution of maize; and that government distributes maize through NGO's but that the maize in issue came from Chongwe.

RW3 was Charles Shangimba a farmer of Shalumbi village and a member and chairperson of the ADC. He testified that he was involved in the distribution of maize in his area in July or August 2011. The maize that they distributed came from government's department of disaster management and it was delivered to Chinyunyu basic school. He testified further that, the maize was for the poor and handicapped and that when it arrived his committee summoned the Headmen in the area and requested them to appoint representations to take part in distributing the maize. The Headmen were also given the task of identifying the persons in their community to benefit from the maize. He went on to testify that the MMD and the First Respondent were not involved in the distribution of the maize. Further that, the ADC was not requesting the beneficiaries of the maize to produce voters' cards prior to receiving the maize but rather national registration cards. This was to ensure that the beneficiaries did not benefit twice from the distribution. He ended by stating the composition of the ADC and that its members are appointed by the Chongwe Council and not MMD.

In cross examination RW3 testified that he was a member of MMD and had been a polling agent for MMD. Further that, the various members of the ADC belong to various parties but that in the execution of their functions they have been told not to be partizan. He went on to state that he did not campaign for the First Respondent.

As regards the source of the maize he testified that it came from government and was delivered to his area through an NGO called Child Fund.

RW4 was Shadereck Mwanza a Senior Headman of Chipekete village. In his testimony he denied the allegations made against him by PW4 that he had threatened the electorate at a rally that if they did not vote for the First Respondent they would not get fertilizer in put and would not be paid for

maize they delivered to FRA. He stated further that he does not take part in politics and that he did not campaign or hold any political rally. He ended by stating that he is not familiar with the process of distribution of maize because it is done through the committees appointed by Headmen.

In cross examination he denied being involved in politics and that he is not a ward chairman. Further that, he did not know who the polling agents for MMD were during the elections.

RW5 was Joyce Stando a farmer and branch chairperson of the MMD. In her testimony she denied the allegation leveled against her that during the distribution of maize in her area she was getting details of the recipients' voter's cards and national registration cards. She testified further that she did not know anything about the distribution of the maize.

In cross examinations she restated her testimony that she did not know anything about the distribution of the maize.

RW6 was Grace Phiri of Bunda Bunda north, village and a councillor. Her testimony was a rebuttal of PW7's allegation against her. She testified, in this respect, that the exercise mounted by the women of collecting details of the villagers' registration cards was for purposes of establishing an MMD branch in the area.

RW7 was Yvonne Nswana a business lady and farmer of Nswana village in Mwachilele ward. She testified that no hammermill was delivered to Mwachilele ward.

In cross examination she stated that she knew nothing about a hammer mill being donated to her constituency and that the Headman did not receive the hammermill.

Following the testimony of RW7, the First Respondent proceed to close his case.

At the close of the hearing I directed the parties to file their closing submissions by 23rd January, 2012. The Petitioners filed their submissions on 31st January, 2012 while the First Respondent filed his submissions on 23rd January, 2012.

In the Petitioners' submissions counsel for the Petitioners Mr. Zulu began by stating that the petition was properly presented to the Court by virtue of Article 72(1)(a) of the **Constitution** which clothes this Court with jurisdiction to entertain an election petition. He proceeded to highlight the grounds upon which this Court can render the election of a candidate as member of the National Assembly void, by reference to Section 93 of the **Electoral Act**. He went on to set out the principle laid down in the case of **Mabenga -VS- Wina & others (1)** to the effect that where a Petitioner proves any one act of corruption, misconduct or illegality, in an election petition, it is sufficient to nullify any election. Counsel proceeded to argue that the First Respondent and his agents coerced the people of Rufunsa to vote for him through their donations. It was also argued that although the First Respondent denied the allegations that he donated maize he did not challenge the allegations that he issued threats. It was argued that a threat should be judged by its effect on the person threatened as per **Halsbury's Laws of England Volume 15**. I was therefore urged to consider the remoteness of Rufunsa constituency and standard of education of the villagers and find that the threats had an effect on the electorate.

As regards the donation of maize, it was argued that the First Respondent distributed the maize through his agents. Further that, the fact that he may

not have known that his agents were distributing the maize is immaterial in accordance with the case of **Mlewa -VS- Wightman (2)**.

As regards allegations of bribery counsel argued that in accordance with the case of **Lusaka -VS- Cheelo (3)** the Court may render an election of a member of parliament void if bribery is proved. It was argued that the allegations made against the First Respondent that he had donated cash and cheques had been proved.

In the First Respondent's arguments Mr. Besa began by arguing that the Petitioners had failed to make a case warranting the nullification of the election of the First Respondent as member of parliament. It was argued that the bulk of the evidence of the two Petitioners was hearsay and contradicted the evidence of their witnesses. He went on to review the evidence of some of the Petitioners' witnesses and argued that the witnesses who testified on the distribution of maize all confirmed that it was donated by government and failed to prove that it came from the First Respondent. It was argued further that, the First Respondent rebutted all the allegations leveled against him save for the one on the distribution of chitenge material. It was argued, in this respect, that there is nothing illegal about donating chitenge material. Counsel went on to state the standard of proof that the Petitioners are required to prove in order to succeed in their claim. He did this with reference to the case of **Mazoka & Others -VS- Mwanawasa & Another (4)**. It was argued that the Petitioners had failed to prove any of the malpractices or illegal activities to the fairly high degree prescribed by the **Mazoka (4)** case. It was also argued that the activities as alleged were not proved as per the definition of bribery and undue influence as provided by Sections 79 and 89 of the **Electoral Act**. Further that, the Petitioners and their witnesses failed to show how such activities affected the out come of the election.

Counsel ended by arguing that the use of government facilities can only nullify the election if it falls within the ambit of the principle laid down in the **Mabenga (1)** case. That is to say, where the government facilities are used to the benefit of the candidate. In this case he argued that the distribution of the hammermills which were government property did not benefit the First Respondent to enable the Court arrive at a finding that it fell in the ambit of the principal in the **Mabenga (1)** case.

I have considered the Petition, Answers and the evidence tendered in this matter. I have also considered the submissions by counsel. By this petition, the Petitioners seek to nullify the election of the First Respondent as member of parliament for Rufunsa constituency. The nullification is sought on the ground that the illegal practices committed by the First Respondent and or his agents affected the election results. This, it is alleged, is to the extent that the majority of the voters in the affected areas or polling stations were prevented from electing the candidate whom they preferred.

Before I determine the matter, it is important that I state the law that governs the nullification of a candidate as member of parliament. The starting point in this respect is Section 93(2) of the **Electoral Act**. The section states in part as follows;

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

(a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred;

(b) ...

(c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of that candidates election agent or polling agent;
...”

(The underlining is the Court’s for emphasis only).

The acts that it is alleged the First Respondent committed are not specifically stated to be illegal acts, bribery or undue influence. But it is clear from the nature of the allegations that they fall under these heads. Therefore, the Petitioners in accordance with section 93 (2)(a) of the **Electoral Act** quoted above are required to prove that as a consequence of the said acts, the majority of the electorate in the constituency did not vote for the candidate they preferred. This is as prayed in paragraph 7 of the Petition.

As regards the standard of proof required to prove the allegations in an election petition, it is a standard higher than the usual balance of probabilities applicable in other civil matters. This is as per the case of **Lewanika and others -VS- Chiluba (6)** in which the Supreme Court stated at page 80 thus;

“Parliamentary election petitions are required to be proven to a standard higher than on a mere balance of probabilities.”

The foregoing is the standard of proof that the Petitioners are expected to attain if this petition is to succeed and as is argued by counsel for the First Respondent this is the same standard set in the **Mazoka & others -VS- Mwanawasa (4)** case which state at page 140 as follows;

“As regards burden of proof, the evidence adduced must establish

the issues raised to a fairly high degree of convincing clarity.”

I now turn to the determination of this action in the light of the legal principles I have highlighted above.

The allegations leveled against the First Respondent are that he was not validly elected because he engaged in illegal practices, bribery and undue influence during the elections. These practices ranged from offering and donating maize, chitenges and other materials in order to solicit and procure votes from the electorate. Further that, he purchased and donated hammer mills and offered and made cash and cheque donations and a sewing machine to women's clubs. It is also alleged that whilst making the donations the First Respondent and his agents took down the particulars of the villagers' voter cards and national registration cards for purposes of checking how they would vote. Further that, he threatened and intimidated the electorate. Lastly that, on polling day he ferried the electorate to the polling station and gave them money in order to induce them to vote for him.

Apart from the two Petitioners' testimony, sixteen other witnesses testified on behalf of the Petitioners. These witnesses testified on the various aspects of the allegations leveled against the First Respondent.

What is clear from the evidence of all of these eighteen witnesses is that they have not stated what impact the alleged illegal practices, bribery or undue influence had on them or indeed the other members of the community. They have not in this respect stated that the acts allegedly perpetrated by the First Respondent swayed them to vote for him instead of other candidates they may have preferred to vote for prior to the acts. The witnesses do not even state who they voted for or if indeed they even voted. There was also no evidence led by the Petitioners to demonstrate the impact the acts had on the electorate in the affected areas.

Further, with respect to the allegation that particulars of the electorate were taken from their voters and registration cards, no evidence was led to prove that indeed the First Respondent or his agents did indeed use the said details on polling day to influence the outcome of the election. The evidence of PW5 was that RW5 requested for the particulars in his mother's voter's card and registration card but she declined to give him. Whilst PW6's testimony on the issue was that on 20th August, 2011 she was approached by an MMD official who took her particulars from the voter's and registration card and subsequently distributed maize to her and other villagers. Further that, subsequently the First Respondent arrived in the village and enquired if the maize had been delivered. On the other hand the evidence of PW7 on this issue was merely that when he arrived home he was informed that some people came to get details of the voters and national registration cards of the house hold and left chitenga material which had MMD symbols. Lastly the evidence of PW9 was that he was visited by an MMD official who was a polling agent. The gentleman brought him three gallons of maize and when he delivered the maize he got down his details from his voter's and national registration card. This evidence was rebutted by RW6 who stated that the reason why the women from MMD were obtaining the particulars of the villagers voters and registration cards in her area was for purposes of forming a branch of the MMD in the area. This evidence was not challenged at all.

RW3 on the other hand stated that the registration cards were being requested for in the distribution of the maize to ensure that non of the beneficiaries benefited twice from receipt of maize. This evidence was also not challenged in cross examination.

In my considered view, the evidence led by the Petitioners as tabulated in the preceding paragraphs does not arm me sufficiently to make a determination that the acts by the First Respondent resulted in the majority

of the electorate being prevented from electing a candidate whom they preferred as per Section 93(2)(a) of the **Electoral Act**. Further, in my considered view, the evidence led by the two Petitioners did not meet the required standard of proof as per the **Mabenga (1)** and **Lewanika (2)** cases to enable me make a determination that the allegations were proved. The Petitioners have also failed to demonstrate that whatever illegal acts may have been committed were done with the consent knowledge and or approval of the First Respondent in accordance with Section 93(2) (c). In arriving at the said finding I have considered the evidence by the Petitioners and their witnesses which demonstrates that most if not all acts complained of were not committed by the First Respondent but rather MMD officials. Further, no evidence was led to prove that the MMD officials were the First Respondent's agents.

Notwithstanding my finding in the preceding paragraph I feel compelled to determine the allegations levelled against the First Respondent and or his agents. The allegation that he distributed sewing machines is not proved because no evidence was led on the issue. I therefore dismiss it.

I have also considered the evidence of PW14 alleging that towards the end of August 2011, the First Respondent prior to holding a meeting bought beer for Kaponyas. This allegation amounts to treating and I have considered it although it was not pleaded in the Petition because the First Respondent did not raise objection when the evidence was led.

Before determining this allegation it is important that I define treating as per Section 81 of the **Electoral Act** which states as follows;

“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 food, drink, entertainment, lodging or provisions to, or for, 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 the offence of treating."

It is evident from the foregoing section that for a person to be guilty of the offence of treating he must have the intent to corruptly give, among other things, food or drink, for purposes of luring a person to vote for him. The evidence as led by PW14 is merely that the First Respondent prior to holding a meeting provided beer to Kaponyas. Further that, she is the one that purchased the beer. The evidence does not, in my considered view, show any corrupt motive on the part of the First Respondent or indeed that his actions were intended at enticing the Kaponyas to vote for him in accordance with Section 81 of the ***Electoral Act***. My finding is fortified further by the fact that the evidence does not meet the higher standard of proof required in election petitions which I have stated in the earlier part of this judgment. I therefore dismiss this allegation.

As regards the allegation that the First Respondent distributed chitenge and other material, the First Respondent conceded and stated that the said chitenge material and T-Shirts had MMD campaign images and were therefore campaign material. This evidence was confirmed by PW7's testimony. On the other hand, PW2 alleged that although UPND also distributed chitenge material, it was the manner in which the MMD distributed their campaign material that was illegal. She gave no specifics as to how much material was distributed and the range of the distribution.

The provision of the law that governs distribution of election material is ***The Electoral (Code of Conduct) Regulations, 2011***. Regulation 5(1) of the said regulations stipulates as follows;

"A person has subject to regulation 21, the right to -

(a) ...

(b) ...

(c) ...

(d) *distribute election literature and campaign materials...*

As I have stated earlier, the chitenge material and T-Shirts that the First Respondent is alleged to have distributed bore MMD symbols and slogans. These, in my considered view, were campaign material as provided for under regulation 5(1) quoted above. There was therefore nothing wrong in the First Respondent distributing the said material. Consequently, I find that the Petitioners have failed to prove this allegation.

I now turn to consider the other allegations. To begin with the allegation that the First Respondent offered and made donations of maize, chitenge and other materials, the evidence that was led on this was of PW1, PW2, PW3, PW5, PW6, PW10, PW11, PW12, PW14 and PW16. I found the evidence of PW1 and PW2, the two petitioners, to be insignificant in proving their claim because clearly they did not witness the events. These two witnesses both testified that they received reports of the MMD and not the First Respondent distributing maize. They both conceded that they did not personally see the First Respondent distributing the maize or engage in any of the illegal acts. It was therefore hearsay evidence as counsel for the First Respondent argued. The evidence of PW3 was also hearsay as he did not personally witness the distribution. On the other hand PW5, PW6, PW10, PW11, PW12, PW14 and PW16 though stating that they were present when the maize was distributed stated that they did not see the First Respondent and or his agents involved in the distribution of the maize. There was conflicting evidence on this issue by the witnesses, because the testimony varied from the distribution being conducted by MMD officials, to Headmen and various village committees.

The ill fate of the allegation was further compounded by the fact that non of the Petitioners witnesses testified that the maize was donated by the First Respondent as pleaded in paragraph 5(i) of the Petition. PW1 stated in this respect that the maize came from government office of the Vice President through an NGO called Child Fund. On the other hand PW2 also stated under cross examination that the source of the maize was office of the Vice President. The other witnesses who testified on the maize either stated that they did not know the source of the maize or that it came from government. Non of them stated that its source was the First Respondent.

I therefore find that the Petitioners have failed to prove this allegation.

As regards the allegation that the First Respondent purchased and donated hammermills at Mwachilele ward and Nangwenya west ward, the relevant evidence was that of PW1 and PW2. These witnesses however, did not produce proof to show that the hammermills were actually purchased by the First Respondent as pleaded in paragraph 5(ii) of the Petition or that they witnessed him making the presentation. Their evidence merely highlighted the presentation of the hammermills by the First Respondent to the womens clubs. PW1 did infact state under cross examination that the First Respondent did not purchase the hammermill donated to Mwachilele but that it came from Ministry of Community Development and Social Service. He also acknowledged the fact that the First Respondent was merely performing a government function as area member of parliament when he presented the hammermill. He also conceded that the hammermill presented to Nangwenge was not purchased by the First Respondent. PW2 also concede that she did not know the source of the hammermills.

The First Respondent, though not obliged at law to disprove the claim against him, offered a very plausible explanation for the source of the hammermill he admitted he presented to a women's club. He stated that it

was given to him by the Ministry of Community Development and Social Services to deliver to the women's clubs in his constituency which had applied for the hammermill. His testimony demonstrated further that the donation by the Ministry was not unique to his constituency alone but was in pursuit of government policy of empowering women. The hammermill was therefore government property, and as counsel for the First Respondent has argued, the First Respondent can not be faulted for delivering the hammermill to his constituency. This allegation therefore fails.

The next allegation that I will consider is the one that alleges that the First Respondent donated cheques and cash to women's clubs and a school in order to lure voters. The evidence on this allegation was led by PW1, PW2, PW15 and PW17. I have already stated the fate that the evidence of PW1 and PW2 has suffered. Infact PW1 did concede that the cheques, were actually not issued by the First Respondent and that they came from government. On the other hand PW15, merely stated that the First Respondent donated the cheque to their women's club. She did not lead any evidence to the effect that the said cheques were issued by the First Respondent nor have the paid cheques been produced in the Petitioners' bundle of documents to prove that they were issued by the First Respondent. PW17 on the other hand, acknowledged that the cheques came from Ministry of Youth and Sport following application by the women's club. He did not say that the cheques were issued by the First Respondent.

The First Respondent has given a very plausible explanation as to the source of the cheques and the cash. He did testify that the cheques were actually issued by government after the recipient women's clubs applied for assistance from government. These cheques he stated, were left at his constituency office for him to deliver to the womens clubs. Whilst the cash donated to the school also came from the Ministry of Youth and Sport following a request for financial support by the community. The evidence by

the Petitioners and their witnesses as I have highlighted in respect of this issue does not prove the allegation made by the Petitioners. My finding is based on the fact that the allegation as it is endorsed in the petition suggests that these moneys in cheque and cash form came from the First Respondent's pocket and he made the payments in order to buy votes. The suggestion being that he bribed the electorate. This, in my considered view, has not been proved because clearly the First Respondent was merely presenting the cheques and cash on behalf of the government. The fact that he may have urged the electorate to vote for him as he presented the cheques does not, in my considered, view prove the allegation of bribery because by definition bribery is committed by any person who, and quoting from Section 79(1)(b) of the **Electorate Act**;

“... corruptly either directly or indirectly, by oneself or any other person -

- (a) gives, lends, or procures, or offers, promises or agrees to give, lend or procure any money to or for any person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting or who corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at any election;***
- (b) gives, lends or procures, or offers, promises or agrees to give, lend, or procure, any money to or for any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;***
- (c) makes any gift, loan, offer, promise, procurement or agreement to or for any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;***

- (d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the return of any candidate at any election or the vote of any voter at any election;**
- (e) advances or pays or causes to be advanced or paid any money to or for the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election;**
- (f) before or during any election, receives or contracts for any money or loan for oneself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting any election;**
- (g) after any election, receives any money on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any election; or**
- (h) conveys or transfers or is concerned with the conveyance or transfer of any property, or pays or is concerned with the payment of any money, to any person for the purposes of enabling that person to be registered as a voter, thereby to influence that person's vote at any future election, or pays to or is concerned with the payment of any money on account of any voter for the purpose of inducing that person to vote or refrain from voting;**

shall be guilty of the offence of bribery.”

From the facts I have highlighted above and the findings I have made, it is clear that the First Respondent's actions in respect of the cheques and cash fall far short of the foregoing definition.

I therefore find that the Petitioners have failed to prove this allegation.

The next allegation, was that whilst the First Respondent made the donations of the maize, chitenge, hammermills, cheques and cash, he and his agent engaged in threats. These threats were to the effect that; the electorate would not access subsidized fertilizer; the hammermills would be repossessed from them; the people in Kambulu in Bunda Bunda would be evicted from the GMA; and FRA would not pay those that had supplied maize to it. This allegation is of undue influence as defined by Section 82(1) of the ***Electoral Act*** which states as follows;

“(1) No person shall directly or indirectly, by oneself or by any other person -

(a) make use of or threaten to make use of any force, violence or restraint upon any other person;

(b) inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means, or pretended supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person; and

(c) do or threaten to do any thing to the disadvantage of any person;

in order to induce or compel any person -

(i) to register or not to register as a voter;

(ii) to vote or not to vote;

(iii) to vote or not to vote for any registered party or candidate;

(iv) to support or not to support any registered party or candidate; or

(v) to attend and participate in, or not to attend and participate in, any political meeting, march, demonstration or other political event.”

The evidence of PW1 and PW2 was that they did not witness the alleged threats or intimidation perpetrated by the First Respondent or his agents, as such it does not support the allegation. The other key witnesses presented on this allegation were PW18 and PW4. The former's evidence was merely that the First Respondent at a campaign rally threatened him and other residents of the GMA with eviction from the area if they did not vote for him. He did not state what effect the said threat had on him and the other residents in the GMA and clarified under cross examination that what the First Respondent meant by the threat was that he would prevent ZAWA from evicting them from the GMA. Whilst the latter testified that when the First Respondent delivered maize to his village at Chipeketi he urged the villagers to vote for MMD to ensure that more maize was delivered. Further that, if they voted for PF they would be killed and those suffering from HIV would be thrown in the river. He also testified that RW4 stated that if they do not vote for the First Respondent they would not get fertilizer input and would not be paid by FRA for the maize they delivered.

Halbury's Laws of England, 4th edition volume 15 in defining what constitutes threat states at page 429 paragraph 784 as follows;

“In order to constitute undue influence a threat must be serious and intended to influence the voter, but it must appear that the threat should be judged by its effect on the person threatened and not by the intention of the person using the threat.”

PW18 has clarified the effect that the threat by the First Respondent had on him, which he stated was that he would prevent ZAWA from evicting them from the GMA. This, in my considered view, demonstrates that the threat had a positive rather than negative effect on PW18. On the other hand PW4’s testimony does not with clarity state what effect the threat had on him.

From the foregoing analysis of the evidence of the two witnesses, I find that the evidence does not arm me sufficiently to make a finding that the threats were sufficient to constitute an offence as per Section 82(1) of the ***Electoral Act***.

The other evidence on threats was by PW11 and PW12. Both witnesses alluded to threats made by third parties and not the First Respondent or his agents.

PW13 also testified on the issue of threats to the effect that Christopher Nyamacau a former MMD councilor stated at a meeting that if they voted for mad people maize would not be delivered and they would not receive fertilizer. Whilst PW14 testified that MMD officials threatened that the electorate would be thrown in the water if voted for the then Presidential candidate Michael Sata.

The threats as they relate to the evidence of PW11, PW12, PW13 and PW14 were clearly made by persons other than the First Respondent or his agents.

Further, there was no evidence led by these witnesses to demonstrate that the said threats were made with the knowledge and consent of the First Respondent. He cannot therefore, in my considered view, be held liable.

In view of my findings in the preceding paragraph I find that the Petitioners have failed to prove the allegation of undue influence.

The last allegation was that First Respondent ferried the electorate from Kambulu area to Sinjela polling stations in a canter truck and gave them money as an inducement to vote for him. The witnesses who testified on this allegation were PW2 and PW18. The former testified that she was aware of this activity because she met the electorate stranded after they had cast their vote. She stated further that they requested her to ferry them back because the First Respondent had abandoned them. On the other hand, PW18 who was one such person allegedly ferried, testified that on polling day he went to the polling station in a FUSA truck and not canter truck as alleged. He also testified that the truck was not being driven by the First Respondent and that the First Respondent did not offer them any money. This evidence clearly contradicts the evidence of PW2 and the allegation as endorsed in the petition. Further, since it was given by someone who was at the scene of the alleged event I am inclined to accept his evidence and dismiss the contradictory evidence of PW2. I therefore find that the Petitioners have failed to prove this allegation.

It is clear from the foregoing that the Petitioners have failed to prove the allegations made in the Petition against the First Respondent to the required standard of proof. The net effect of this and my earlier findings is that the Petitioners' claim fails and I accordingly dismiss it with costs. The same are to be agreed, in default taxed.

Leave to appeal is granted.

J47

Delivered on the 15th day of February, 2012.

Nigel K. Mutuna
HIGH COURT JUDGE