

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

2011/HP/EP/017

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

and

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

and

**IN THE MATTER OF : THE KAOMA CENTRAL
PARLIAMENTARY ELECTIONS HELD
IN ZAMBIA ON 20TH SEPTEMBER,
2011**

BETWEEN :

ENOCK MASEKA KALEKA

Petitioner

and

CARLOS JOSE ANTONIO

1st

Respondent

ELECTORAL COMMISSION OF

2nd

Respondent

ZAMBIA

**Before the Honourable Madam Justice F. M. Lengalenga
this 20th day of April, 2012 in open court at Lusaka**

For the petitioner : Mr. B. C. Siame - Messrs M. Z. Mwandenga & Company

For the 1st respondent : Mr. M. J. Katolo - Messrs Milner Katolo & Associates

For the 2nd respondent : Mr. Paul Mulenga - Messrs A M Wood & Company

J U D G M E N T

Cases cited:

- 1. MLEWA v WIGHTMAN (1995/97) ZR 171**
- 2. ANDERSON MAZOKA & OTHERS v LEVY P. MWANAWASA & OTHERS (2005) ZR 138**
- 3. MACHOBANE v THE PEOPLE (1935) 3 EACA 110**
- 4. LEWANIKA & OTHERS v FTJ CHILUBA (1998) ZR 79**
- 5. SUBRAMANIAN v PUBLIC PROSECUTOR (1956) 1 WLR 965**
- 6. MUVUMA SITUNA KAMBANJA v THE PEOPLE (1982) ZR 115 (SC)**
- 7. ASSOCIATED CHEMEICALS LTD v HILL AND DELAMIN & ELLIS AND COMPANY - SCZ JUDGMENT NO. 2 OF 1998**
- 8. JYOTI BASU v DEBI GHOSAL, AIR 1982 Sc 983**
- 9. MICHAEL MABENGA v SIKOTA WINA & OTHERS (2003) ZR 110 (SC)**

On the 17th day of October, 2011, the petitioner, Enock Maseka Kaleka who was an unsuccessful Parliamentary candidate in the Kaoma Central Constituency, having been adopted as a candidate by his political party, the Patriotic Front, filed a petition challenging the election of the 1st respondent Carlos Jose Antonio as Member of Parliament for Kaoma Central Constituency in the Western Province of Zambia on the ground that the 1st respondent was not duly elected for reasons that the petitioner stated or outlined in paragraph 3 (i) to (vii) of his petition. For ease of reference paragraphs 3 (i) to (vii) and 4 of the said petition are reproduced hereunder as follows:

“3. Your Petitioner states that contrary to the declaration by the Returning Officer that the Respondent was duly elected, the Respondent was not validly elected for the following reasons:-

- i) Between the 25th and 28th August, 2011 with his knowledge the 1st respondent’s agents were seen distributing iron roofing sheets in Nkeyema Ward of Kaoma Central Constituency**
- ii) On the 26th August, 2011, the 1st Respondent through his agents did deliver and distribute pockets of cement in Litoya Ward of Kaoma Central Constituency**

- iii) On the 26th August, 2011, the 2nd Respondent did cause to be published in the Daily Mail newspaper and the Post newspaper wrong names of the Petitioner as a Parliamentary candidate being KALEKA MAKASA instead of Kaleka E. Maseka**
- iv) On the 10th September, 2011, Austin Liato of the MMD through his agents did deliver or distribute four hammer-mills and in Lalafuta, Nkeyema and Chitwa Wards of Kaoma Central Constituency. The said hammer-mills were brought using Constituency Development Fund by the MMD controlled Kaoma District Council where six out of the seven Councillors belonged to the MMD Party.**
- v) On the 15th August, 2011 the 1st Respondent and the former Member of Parliament of the MMD through their respective agents did distribute bicycles in Nkeyema Ward of the Kaoma Central Constituency.**
- vi) On the 20th September, 2011, the Respondent through his agents did ferry registered voters to and from the polling stations from a place called Farm No. 10 within Litoya Ward.**

vii) Prior to the election, between 15th August, and 20th September, 2011, the Respondent by himself and or by his agents did base his campaigns on peddling malice and falsehood that the petitioner's presidential candidate if elected into presidency would legalise and promote homosexuality and lesbianism in Zambia. The Respondent also falsely and maliciously did tell the electorate that the Petitioner and the Petitioner's presidential candidate if elected into office would deport all Luvale speaking people to Angola.

(4) Your petitioner states that as a consequence of the aforesaid illegal practices committed by the said respondent or with his knowledge and his agents, the majority of the voters at the affected areas and/or polling stations were prevented or enticed to avoid electing the candidate in the constituency whom they preferred.

BY REASON OF THE FOREGOING YOUR PETITIONER HUMBLY PRAYS FOR:

- i) A declaration that the election of the 1st respondent as a member of the National Assembly for Kaoma Central Parliamentary Constituency is void.**

- ii) **A declaration that the illegal practices committed by the respondent and or his agents so affected the election result that the same ought to be nullified.**
- iii) **An order that the costs occasioned by this petitioner be borne by the respondent”.**

On 24th November, 2011, the 2nd respondent, the Electoral Commission of Zambia filed an Answer whose contents are reproduced in part for ease of reference as follows:

“1. The Kaoma Central Parliamentary elections held on 20th September 2011 were contested by the candidates here below indicated:

<u>NAME</u>	<u>POLITICAL PARTY</u>	<u>VOTES</u>
a) Antonio Carlos 7 485	UPND	
b) Austin Liato	MMD	4 987
c) Kaleka Maseka	PF	3 175
d) Mushumba Namushi 585	ADD	
e) Nyambe Godfrey	FDD	69

2. The Returning Officer declared Antonio Carlos, as the duly elected Member of Parliament for Kaoma

Constituency, having received the highest number of votes cast.

3. The 2nd Respondent admits the contents of paragraphs 1 and 2 of the petition. Paragraph 4 (iii) is admitted in so far as it alludes to clerical errors on the names of the Petitioner which were published as Kaleka Makasa by the 2nd Respondent in the daily newspapers instead of Kaleka Maseka. The 2nd Respondent shall aver that the clerical errors had no influence on the voters as the voters were capable of identifying the Petitioner. The rest of the allegations in paragraph 4 are within the Petitioner's knowledge.

4. The Petitioner is not entitled to the relief claimed or at all.

SAVE as herein expressly admitted the 2nd Respondent denies each

and every allegation contained in the Petition as if the same was

separately traversed *seriatim*"

The Petitioner filed a Reply to the Respondents' Answers on 16th December, 2011 in which he joined issues with the Respondents save in so far as the same consisted of admissions and he responded as follows:

- “1. The malpractices committed in the Constituency, be it the 1st Respondent, his agents or whomsoever, with or without the knowledge of the Respondents made the electoral environment to be unsuitable for free and fair elections to be conducted.**
- 2. The election results therefore do not reflect the free will of the electorate in the Constituency, thereby rendering the 1st Respondent not duly elected”.**

At the hearing of the petition, the petitioner, PW1, Enock Maseka Kaleka testified and called seven witnesses to testify on his behalf. The petitioner’s evidence was to the effect that he was a candidate in the 20th September, 2011 Parliamentary elections for Kaoma Central Constituency and that prior to the elections, he campaigned in all the seven wards of Kaoma Central Constituency. During the said campaign he visited Shambelamena Basic School in Nkeyema Ward where one Joseph Mbangu stood up during his address and asked him what he would do for the electorate since Carlos Jose Antonio had given them twenty (20) iron roofing sheets so that they could vote for him and he added that afterwards he was taken to a house by the said Joseph Mbangu and others and shown the said iron sheets. The petitioner further testified that the iron roofing sheets were given to the community members of the school so that they could

use them to roof the community teacher's house. He testified further that in the same Nkeyema Ward during his address rally, Joseph Mbangu informed him that Carlos Antonio had been there earlier and told them that the petitioner was a killer and that his presidential candidate, Michael Sata would introduce law to support homosexuality, deport all Luvale speaking people to Angola and bring war into Zambia if he was elected President and that they should not vote for him and his PF president.

Enock Maseka Kaleka further testified that when he visited Litoya Ward, at Nalumino Mundia Basic School, he was subjected to similar treatment when one Nyambe Lubasi stood up and confronted him with the same allegations and then asked him what he would do for the community so that they could vote for him since Carlos Antonio had given them ten (10) pockets of cement so that they could vote for him.

In Lalafuta Ward in Kalumwange Central the petitioner alluded to having been informed about the distribution of hammer-mills and cash money by the Movement for Multiparty Democracy (hereinafter referred to as MMD) when a Mr. Pumulo asked him what he would give them so that they could vote for him. The petitioner's evidence was to the effect that Mr. Pumulo specifically told him that the hammer-mills were given to two clubs, Kalumwange Women's Club and Scheme Club so that they could vote for the MMD. The said Pumulo also told him that

Carlos Antonio had been there and warned them against voting for the petitioner and his presidential candidate Sata citing allegations of the petitioner being a serial killer and introduction of legalisation of homosexuality, deportation of Luvale speaking people to Angola and bringing of war into Zambia by the PF president. PW1 also informed the court that Pumulo alleged that Carlos Antonio had distributed some K5,000=00 notes and that he had spent his.

It was also the petitioner's evidence that on 20th September, 2011 during the election, he visited all the polling stations and that when he reached No. 10 polling station before 06:00 hours, he saw a white Canter truck registration number ABT 809 which was about 150 metres from the polling station and it was dropping people. He identified the driver of the Canter as Ackim Munsaka who drove away when he saw the petitioner. He said that upon enquiry from the people who were dropped he learnt that they wanted to go and vote for the UPND candidate, Carlos Antonio, he named one of those people as Machayi who informed him that they came from Kaposhi and that the vehicle was hired by Carlos Antonio.

In relation to the petitioner's allegations against the 2nd respondent, the petitioner in his testimony referred the court to page 2 of his bundle of documents on which the published notice bearing his wrong names appeared as Kaleka Makasa - PF instead

of Enock Maseka Kaleka as they appear on his national registration card. He accordingly referred the court to page 7 of his bundle of documents which exhibited a copy of his national registration card in the names Enock Maseka Kaleka. His grievance was that the publication in the Daily Mail newspaper of 26th August, 2011 which he said was on Sunday but later stated that it was on Sunday 28th August, 2011.

In cross-examination by Counsel for the 2nd respondent, the petitioner, Enock Maseka Kaleka conceded that prior to the 20th September, 2011 tripartite elections, he had contested in elections for Kaoma Central Constituency in 2001 and 2006 and that he contested as Enock Kaleka Maseka. He also admitted that he was the only candidate for the Kaoma Central Constituency Parliamentary elections under the Patriotic Front and that prior to the publication in the notice in the Daily Mail by the 2nd respondent, the petitioner was campaigning as Enock Kaleka Maseka and that as a well-known and well-established businessman in Kaoma, he is known by the majority of the people in Kaoma.

In cross-examination, PW1, Enock Maseka Kaleka stated that he did not know the date when the roofing sheets were delivered to Shambelamena School but that it was the first week of September, 2011. He further stated that he was convinced that they were given as a bribe. However, in relation to the ten (10)

bags of cement delivered to Nalumino Mundia School, he said that he found out that they were delivered on 25th August, 2011. When the petitioner was asked whether he saw the 1st respondent, Carlos Antonio taking iron roofing sheets or bags of cement to the places he mentioned in the Constituency, he stated that he did not see him doing so. He also admitted that what he was telling the court about the roofing sheets, bags of cement and ferrying of voters was purely based on what other people told him and he admitted that he had no way of knowing whether what the people told him was the truth or not. When he was asked how many times he had stood as a candidate in Kaoma Central Constituency, the petitioner stated that it was his third time and that his first attempt was in 2001 and his second attempt was in 2006. Although he denied that he was rejected by the people of Kaoma Central, he admitted that even as far back as 2001 when he made his first attempt that allegation of him being a serial killer was there and that even in 2006 it affected his chances of winning the election. He also stated that the 1st respondent, Carlos Antonio was not a candidate in 2001 and 2006 and that in 2011, it was his first time to stand as a candidate. The petitioner told the court that he was very surprised that Carlos Antonio was declared the winner and he could not understand how a first timer could be declared winner and that although he was present when the 1st respondent was declared the winner, he did not congratulate him. When he was further asked whether he knew how each voter voted during the elections, Enock Maseka

Kaleka answered that since the vote is secret, he was not able to know how each person voted. He also told the court that he reported the alleged electoral malpractices to the Conflict Resolution Committee but he stated that he did not bring any evidence to that effect or call any witnesses to prove that he made any complaint to the said Committee.

With respect to the petitioner's allegation against Ackim Munsaka of ferrying voters to the polling station in a Canter, the petitioner stated that he knows him and had known him for about ten years but that he did not follow him to get the information from him as opposed to asking Machayi because he did not want to destroy the evidence by Ackim Munsaka telling Carlos Antonio. PW1 also stated that Carlos Antonio was not in the Canter.

PW2, Joseph Mbangu Mbangu, Head Teacher of Shambelamena Community School in Nkeyema Ward testified to the effect that on 9th August, 2011, he received a letter from Mr. Kent Shaviwangu Mukonda UPND Chairman which stated that Carlos Antonio would visit the school on 19th August, 2011 and that the teachers should ask the pupils to inform their parents to attend the meeting. On 19th August, Carlos Antonio arrived at the school around 15:00 hours and he introduced himself as Carlos Antonio, the UPND candidate for Kaoma Central and he asked them to vote for him and his presidential candidate Hakainde Hichilema. PW2 further testified that the 1st respondent called the

petitioner Maseka a criminal and told them that if they voted for Sata, his government would allow homosexuality and lesbianism and deport Luvaes to Angola. PW2 further testified that Carlos Antonio promised to give them twenty (20) iron sheets so that they could vote for him and he told them that they would be given to Mr. Kent Mukonda, the Councillor for Nkeyema Ward. This witness testified further that on 24th August, 2011 he went to Mr. Kent Mukonda who told him that Antonio had delivered their iron roofing sheets and that he had taken them to Nakuyuwa Basic School which was also known as number 16 and that that is where they could collect them from and on 25th August, 2011 they collected them. PW2 stated that the said roofing sheets were used for roofing his house.

In cross-examination, PW2 Joseph Mbangu Mbangu stated that he did not know the date when the roofing sheets were delivered but he said that it was Carlos Antonio who delivered them because he was told by the Councillor Kent Mukonda that it was Carlos who delivered the iron sheets. He also denied talking to Carlos Antonio in January, 2012 in the presence of Kent Mukonda. When PW2 was asked whether he saw Carlos Antonio delivering the iron roofing sheets in Nkeyema Ward, he answered that he did not see him delivering them.

PW3, Nyambe Shomeno's evidence was to the effect that on 4th August, 2011 he learnt about a meeting that was to be held on

26th August, 2011 at Nalumino Mundia School through a notice that was stuck on a tree along the road. On 26th August, 2011 he attended the meeting that was held under a tree on the other side of the school as meetings were not allowed to be held at the school. When Mr. Antonio arrived he addressed the meeting and asked for their votes for himself and his party president and he promised to help them in many ways such as building them a one by three classroom, and some more houses for teachers. PW3 informed the court that he told them that Maseka was just cheating them and that Sata and Maseka's symbol was a raised hand and that they might bring war. He added that as they were dispersing after the meeting, Antonio told them to proceed to the classroom where there was cement and when they went there, they found ten (10) bags of cement that were given to them.

In cross-examination, PW3 stated that it was the same day which was 26th August, 2011 when the cement was delivered to the classroom and they took it to the classroom. He also stated that because of the shrubs where he was, he was not able to see clearly when Mr. Antonio arrived and he stated further that he did not know how the cement found itself there but he was asked by Mr. Carlos Antonio to go and see the cement he had brought for them so that they could vote for him. He further stated that he was not alone but in a group of a lot of people and he insisted that it was Mr. Antonio who personally said that he was going to take them pockets of cement by using his money.

PW4, Davis Likando testified that in early August, 2011, people from the MMD promised them hammer-mills so that they could vote for them and they told them not to vote for Mr. Maseka. He stated that they received the three hammer-mills on 10th August, 2011 and that only one hammer-mill was for their area, Popopo area in Lalafuta Ward in Kaoma.

PW5, Fackson Pumulo Mponyela also testified about the MMD's campaign on 10th September, 2011 in Lalafuta Ward and the distribution of a hammer-mill which he received on 15th September, 2011 from the MMD's Joseph Mkwanga.

PW6, Detective Constable Gibbs Mulusa, No. 33409 of Kaoma Police Station (CID), testified about confiscating two hammer-mills on 29th October, 2011 from Josephine Simangolwa and Davis Likando in Lalafuta Ward as they were bought from Constituency Development Funds (CDF) and delivered during the campaign period.

PW7, Roy Machayi testified that on the morning of 20th September, 2011 around 06:30 hours, he was approached by a man known as Mushe the UPND Chairman for Kaposhi in Mangongi in Litoya Ward and he was asked to go to his house where they had booked a Canter registration number ABT 809 to ferry people who were going to vote for them (UPND) and their

candidate Carlos Antonio. He stated further that when they were about sixty people they started off for the polling station along Number 10 road and that they were dropped off about 160 metres from the polling station. He further testified that after casting their votes, they were invited to Mr. Joseph Kayombe's Farm where they were "enticed" with cups of Maheu and nshima and thereafter they were taken back in the same Canter to Kaposhi. The same witness, PW7, testified further that on 19th August, 2011 at around 14:30 hours Mr. Carlos Antonio addressed a rally at Mangongi clinic where he asked the people to vote for him and not for Mr. Maseka and his presidential candidate, Mr. Michael Sata. He stated that the reasons that Mr. Carlos Antonio gave were that if they voted for them (PF) they would introduce homosexuality and lesbianism and that they would deport all Luvale speaking people to Angola.

In cross-examination, PW7, Roy Machayi expressed ignorance of any knowledge of Shambelamena School and Nkeyema ward in Kaoma Central and he said that he had lived in Kaoma Constituency for a period of two years. He also informed the court that the rally addressed by Mr. Carlos Antonio was very brief but it was difficult for him to estimate how long it took because he did not have a watch. He also stated that he knew the time when he addressed the rally because of the time that was indicated on the poster. He, however, stated that he did not have a copy of the poster. When PW7 was asked in cross-

examination whether he had made up his mind about who to vote for but he added that they did change his mind. When he was further asked if he was forced to jump in the Canter he answered that he was not dragged by force into the Canter but he stated that it was just a polite request that was made to him to use the transport rather than walking. He added that it was a better option so he accepted but it was a way of enticing him. PW7 further stated that there was a polite request to have some Maheu and nshima and he could not have politely turned it down. He stated further that he was forced by the same UPND Chairman that if he took the Maheu it was a form of appreciation of the voting. He, however, stated that he was not a man who agrees to everything. Roy Machayi also admitted that he was a former police officer who had served for twenty-six (26) years and reached the rank of Senior Superintendant. When PW7 was asked if he reported to the police regarding the alleged ferrying of voters, he said that he did but later in re-examination he contradicted himself by stating that he realized that he made a mistake by not reporting the ferrying of voters to the police officer on duty at the polling station and to other relevant authorities.

PW8, Kebby Poto was the petitioner's last witness and he testified that he and other voters were ferried by Ackim Munsaka who was using a truck, registration number ABT 809 from Mr. Mushe's court yard on 20th September, 2011 to the polling station in Mangongi South in Litoya Ward. He testified further that the

said vehicle made three trips to and from the polling station and that he was in the second trip which had about seventy people in the vehicle. PW8 further stated that the people who were getting on the truck were told by the UPND Chairman, Mr. Mushe to go and vote for Carlos Antonio and the UPND candidate for councilor and that around 17:00 hours they were picked and taken to their destinations.

In cross-examination, PW8 Kebby Poto was asked if he knew the names of all the candidates for Kaoma Central and he agreed. He proceeded to name them as Mr. Carlos Antonio Jose for the UPND, Mr. Enock Kaleka Maseka for the PF and Mr. Austin C. Liato for the MMD and he added that those are the only ones he knew well. He also informed the court that Carlos Antonio was the only one of the three candidates who went to the polling stations and that he did not see Enock Kaleka, the petitioner go to the polling station. When this witness was asked if he saw what happened to the driver of the Canter truck at the polling station during the three trips, he said that nothing happened to him and he denied that the driver ran away as was alleged by the petitioner. He was further asked if anything took place after they had been transported back and he answered that nothing took place and he also said that he did not recall drinking or eating anything after they returned from the polling station. PW8 also said that he did not know Roy Machayi and he had never heard of him. When he was asked if he had a person in mind that he wanted to vote for,

he answered that he had already made up his mind who he would vote for when he woke up on the morning of 20th September, 2011 and he kept it to himself as a secret and that is the person he voted for. He, however, stated further that he changed the person he hoped to vote for on that day. He admitted that he went alone in the polling booth and that there was no-one who forced him how to vote. Still in cross-examination by Mr. Katolo, Counsel for the 1st respondent, PW8 stated that he did not know anything about the driver of the Canter running away when Mr. Kaleka approached him and further that he did not know anything about voters drinking Maheu and eating nshima afterwards.

In cross-examination by Mr. Paul Mulenga, Counsel for the 2nd respondent, PW8, Kebby Poto stated that on 20th September, 2011 he woke up after sunrise even though he could not remember the exact time and he only joined the group at Mr. Mushe's court yard at midday when the first trip was made. He, however, stated that he could not say how long it took for the driver to transport people to the polling station and back. He also confirmed that he got in the vehicle in the second trip where he claimed that there were about seventy (70) people. PW8 when challenged about the capacity of the truck answered that he would not know that the truck could not carry more than seventy (70) people.

In re-examination by Mr. Siame, Counsel for the petitioner, PW8 clarified why he got into the truck in the second trip and he said that when he wanted to get into the vehicle, it was full to capacity because there were a lot of people so that it could not make only one trip. He stated further that it was in the afternoon when he saw Honourable Antonio. Kebby Poto also explained that what made him change who to vote for from the person he had in mind was that he thought of voting for the person who gave them transport because he thought that he may be the one who would bring development to Litoya Ward. This witness stated he did not know the results of the election at the time he was testifying as he is illiterate. He also stated that he did not know why Enock Maseka was before the court as he was just called to testify on what transpired and what he witnessed on that date. He, however, concluded by stating that he was told that Honourable Antonio Jose had won.

After the close of the petitioner's case, RW1, the 1st respondent, Honourable Carlos Jose Antonio opened his defence case and he called three (3) witnesses to testify on his behalf. The 1st respondent Carlos Jose Antonio testified to the effect that he was the UPND Parliamentary candidate in the September, 2011 elections. He expressed shock at the allegations levelled against him and he started off by denying the said allegations. He stated that he never distributed any iron roofing sheets in Nkeyema Ward since as an aspiring Member of Parliament he was

very familiar with the provisions of the Electoral Code of Conduct which prohibits the distribution of donations and gifts during the campaign time. He refuted the allegations by PW2, Joseph Mbangu Mbangu that during his visit to Shambelamena Community School he asked the people to vote for him on the basis that RW1 would supply them with iron roofing sheets. He dismissed the allegation as totally false and he testified that what he mentioned at that meeting were his political party, UPND's policies on agriculture, education and health. The 1st respondent explained that the truth was that in early June, 2011 one of his brothers, Vasco Antonio, who is one of the directors and a shareholder in a family company known as Antonio Empire Transport Limited whilst he was on a business trip to Nkeyema Ward, was approached by a Mr. Madichi who on behalf of the community, asked for iron roofing sheets but he was asked to wait for a feedback. He further stated that after Vasco Antonio got the Board of Director's approval, the community school at Shambelamena was also considered for the donation of iron sheets and Vasco Antonio was mandated to carry out the transaction on behalf of the company. RW1 stated further that the community Mr. Madichi was referring to was Nakuyuwa within Nkeyema Ward.

The 1st respondent testified further that he recalled going to Nalumino Mundia School for a campaign rally on 4th August, 2011 using his vehicle, a green Isuzu Wizard, registration number ADL

2098 with four other people on board. He stated that at that rally, he spelt out his political party's policies on health, education and agriculture and that at no time did he talk about homosexuality or deportation of Luvale speaking people to Angola. He said that he was therefore, shocked at the allegation by Mr. Nyambe Shomeno (PW3) and that he delivered ten (10) pockets or bags of cement when his car has no capacity to load ten (10) bags of cement. Honourable Carlos Jose Antonio further testified that regarding the date of 26th August, 2011 when PW3 Nyambe Shomeno alleged that he addressed a rally at Nalumino Mundia Basic School, he was infact in Lamatila Ward and not in Litoya Ward as alleged.

RW1 testified further that he or his team never bought even a single bicycle for anyone in Nkeyema Ward and he dismissed the story of bicycles as yet another serious lie and he expressed shock that the petitioner could go to such extremes to fabricate lies and he wondered what the petitioner was thinking.

On the issue of the Canter allegedly hired by himself, the 1st respondent expressed ignorance of the Canter and he denied talking to Mr. Mushe in Litoya Ward about the same. He testified that on 20th September, 2011, he went and cast his vote at Namalatila Basic School and that from there he went straight home in Kaoma and spent the whole day at home until later around 16:00 hours when he went straight to the totaling centre where he spent the rest of the day and the whole night and he

left the following day after they announced and declared him the winner around 22:00 hours on 21st September, 2011.

The 1st respondent also took a swipe at the petitioner on what he told the court about the number of times that he had contested Parliamentary Constituency elections. He stated that the petitioner lied to the court and that the correct position was that the petitioner had contested four times and not three times as stated by the petitioner. Honourable Carlos Jose Antonio testified that the first time was in 2011, the second time was in 2003 in a by-election when Liato defected from the UPND to the MMD, the third time was in 2006 and the fourth time was in 2011.

RW1 testified further that about two weeks before the hearing of this petition, he received a phone call from Nkeyema Ward Councillor, Mr. Kent Mukonda who told him that he with someone who wanted to talk to him on the phone and he allowed him to pass over the phone. He added that the person introduced himself as Joseph, the teacher at Shambelamena Community School and he informed him that the petitioner had promised to give him K50million if he testified in his favour. The said Joseph asked him how much he would offer him if he decided to testify as his witness and RW1 testified that he told him that he was very foolish and that he would report the matter to the court.

In cross-examination, Counsel for the petitioner subjected the 1st respondent to intense and lengthy cross-examination, most of which related to irrelevant personal issues which I need not restate and I will concentrate on the issues that are relevant to these proceedings.

The 1st respondent, Honourable Carlos Jose Antonio informed the court that his late father, Mr. Antonio Zuze was Mbundu from Kaoma in the Western Province of Zambia and that he was a transporter just like the 1st respondent. He confirmed that he was once a member of the MMD and he resigned. He also agreed that he has a cement retail outlet company in Kaoma. Honourable Carlos Jose Antonio admitted that he knows one Prince Chimbinde, a transporter who they had used in the past as a transporter in their cement business. He also admitted being a member of the Board of Directors of the Antonio Empire Transport Limited but he stated that he was not present at the meeting where the donation of roofing sheets was approved and he was just told by Vasco Antonio who chaired the meeting. He further stated that he was told that fifty (50) roofing sheets were dropped at Mr. Mukonda's place on 1st July, 2011. RW1 confirmed that he visited Shambelamena Community School in Nkeyema Ward. Honourable Carlos Jose Antonio agreed that the Antonio Empire Transport Limited company delivered iron sheets to Nkeyema Ward. With respect to the transporting of cement from their cement shop, he explained that the cement sold to customers

may be transported by any transport but it is delivered to their shop using the Antonio family transport. He denied holding a rally at Namalatila School and he explained that he was at home in Namalatila Ward on 26th August, 2011 even if he had no proof that he did not leave home on that day. On the issue of the Canter, RW1 reiterated what he said in his evidence-in-chief that he did not talk to anyone with a Canter in Litoya Ward. He said that he knew the UPND party structures in Litoya Ward quite well and he added that the UPND Chairman's name is Moyela and not Mushe as alleged. He conceded that any leader of the party was campaigning for him and he added that it was their duty to do anything in their power to ensure that he was elected. He however, clarified that the Party leadership were not actually his agents but he said that they were working for the UPND party and were, therefore, agents of the party.

The 1st respondent also confirmed that he cast his vote on 20th September, 2011 just after 06:00 hours and at precisely 06:10 hours. He said that it was not wrong for a candidate who casts his vote early to go round the polling stations. He also stated that it was public knowledge that the petitioner had contested in four elections and he added that public knowledge should be believed. He stated that he was not aware that one of their truck drivers was caught stealing diesel. The 1st respondent denied being related to Mr. Kent Mukonda Kababu but he confirmed that he is the UPND Area Councillor for Nkeyema Ward.

He stated that although he knew Nkeyema ward quite well, he did not know Joseph Mundia Sipalo or Joseph Akayombo who is a member of UPND. In relation to the telephone conversation that RW1 had with Joseph on Mr. Kent Mukonda Kababu's phone, he stated that it was on Kent's number that he could not recite but he had it in his phone. He, however, stated that he did not remember the date of that telephone conversation but he said that it took about fifteen (15) minutes. He stated further that the best way was to use the cell phone service provider to verify when the call was made. The 1st respondent insisted that he was not a liar and that he regarded the proposition by Joseph as being unlawful even though he did not report it to the police.

In re-examination, Honourable Carlos Jose Antonio maintained that he was not a liar in the sense that on the material day, the telephone conversation that he had with Joseph was within the hearing of Kent Mukonda Kababu whose phone was put on loudspeaker. On the issue of his movements on 26th August, 2011, he stated that he did not move on 26th August, 2011 as he had no transport to enable him move to any distant place. He explained that the Antonio family company vehicles are assigned to specific people and he is assigned one green Isuzu Wizard registration number ALD 2098.

RW2, Ackim Munsaka, a transporter of Kaoma, testified that he had four vehicles that he named as a Fuso Fighter, registration

number ABP 7242, Canter registration number ABC 4326, another Canter registration number ABT 809 and a Prado Landcruiser registration number ADH 885. He testified further that on 20th September, 2011 at about 06:00 hours he went to the Council to vote and that he was at the Council up to about 08:00 hours and thereafter, he went to his plot which is along Lusaka road within Kaoma and he remained there until 12:00 hours when he went back home. He further testified that he was at his home until 16:00 hours when he went to town and he was there until 19:00 hours before going back home. He said that he was shocked to hear that the Canter was seen ferrying voters to the polling station in Litoya Ward and he stated further that he could not believe it because he had spent the whole day within the township and no-one hired him. He also denied knowing Roy Machai or Poto and even Mr. Mushe and he said that he never met Mr. Maseka Kaleka in Litoya Ward as alleged. He denied loading people in the Canter in Litoya Ward.

In cross-examination by Mr. Siame Counsel for the petitioner, he stated that he did not belong to UPND and that he was non-partisan. RW2 confirmed that he is a good businessman and that he keeps his documents and vehicles in good order. He also admitted knowing Honourable Carlos Jose Antonio as they both lived in Kaoma and are both transporters. This witness stated that whilst he would not want the 1st respondent to lose his seat in Parliament, he had not been called to give evidence so that

Honourable Antonio should not lose his seat. Further in re-examination he stated that he wanted to give the true evidence and nothing else but the truth.

RW3, Julius Solochi Mupika Madichi's testimony was to the effect that he is a member of MMD and that he had lived in Nakuyuwa in Nkeyema Ward in Kaoma for sixteen (16) years. He was the chairman of the Nakuyuwa Basic School Parent Teachers Association (PTA) and was responsible for the welfare of the school and he had initiated a number of projects and been involved in their completion. Examples of such projects were given as the digging of a well at Nakuyuwa Basic School and construction of pole and mud houses for the teachers and RW3 testified further that they have Project Management Committees which deals with the aspect of welfare of teachers and the building of houses with resources sourced from either parents or sympathisers. Mr. Madichi testified that there are plenty sympathisers, some of them business houses and individuals. He testified that in June, 2011 they approached Mr. Lyandenga, Marco, Antonio Empire Transport Limited and Zambia Tobacco Leaf Company and requested for some iron sheets to roof one of the school teachers' houses because of the problems of teachers' house that they were faced with as a result that most of the teachers' houses were too old. RW3 further testified that they also approached M and M Club and from Zambia Tobacco Leaf Company they went to the Shed in Number One and that is when

he spotted a vehicle with the name Antonio Empire Transport Limited and approached the person who was driving and presented the request. Mr. Madichi stated that that person could not commit himself since it was a company and he promised to revert to them. RW3 informed the court that on 5th July, 2011 the request was honoured when they were asked to go and collect the iron roofing sheets from Antonio Empire Transport Limited. He stated further that they organised transport to collect the roofing sheets that were at Mr. Mukonda's house. He explained that of the fifty (50) roofing sheets thirty (30) were for Nakuyuwa Basic School and twenty (20) were for Shambelamena Community School. This witness also testified that the collection of these roofing sheets was made by ox-cart from Number One (at Tobacco Board of Zambia) to Nakuyuwa Basic School.

In cross-examination by Mr. Siame Counsel for the petitioner, RW3, Solochi Madichi explained that he is just an ordinary member of MMD and a retired Zambia Wildlife Authority (ZAWA) officer. He admitted to being a very strong member of MMD but he denied that he was the Ward MMD Chairman and he stated that it was Danny Mukwazo Likokoto. RW3 also admitted that hammer-mills were distributed by his party, MMD and he stated that he had one hammer-mill at his house for storage. He explained that the hammer-mills were received through the Council and a hammer-mill was bought for Nakuyuwa Women's Club. He stated further that the hammer-mills were distributed

between 18th and 19th September, 2011. RW3 explained that he made the requests to companies as Chairman of the PTA on behalf of Nakuyuwa Basic School. Mr. Solochi Madichi informed the court that he made a verbal request for building materials from Antonio Empire Transport Limited which he said was a well known company which distributes fertilizers but he was not aware that Hon. Antonio is a Director and Shareholder of that company. He also stated that he did not know Hon. Antonio's business but he knew one Vasco Antonio who was driving the truck. He stated further that he only became aware that Antonio was a candidate in the elections after 20th August, 2011 when he went around campaigning. RW3 further stated that he did not know that Vasco and Antonio could be related.

RW4, Kent Kababu Mukonda testified that he had lived in Nkeyema in Kaoma for thirteen (13) years. He stated further that he was not related either Enock Maseka or Hon. Antonio. This witness further testified that on 1st July, 2011 Vasco Antonio delivered roofing sheets to his house and he asked him to inform Mr. Madichi and Mr. Ishabiwangu that the roofing sheets had been delivered to his house and that they should collect them. He testified further that on 5th July, 2011, Mr. Ishabiwangu arrived at his house with an ox-cart and he took the roofing sheets and RW4 told him that thirty (30) were for Mr. Madichi and that twenty (20) were for him. When asked about Joseph Mbangu, Kent Mukonda explained that he had only known him in the month of January,

2012. He testified that on 19th January, 2012 the said Joseph Mbangi approached him and told him that he had come from Mr. Maseka in Kaoma and that he had promised him K50 million if he testified for him concerning roofing sheets. RW4 testified further that Joseph Mbangi asked him if he could assist him to talk to Hon. Carlos Antonio, the MP for Kaoma to find out if he was willing to give him more than K50 million for him to testify for him. Mr. Kent Mukonda informed the court that he dialed the number 0977 110517 and when Hon. Antonio answered he told him that Joseph wanted to speak to him and he then put the phone on loud speaker so that he was able to hear what was being said. He narrated what was said between the parties and that Hon. Antonio was very annoyed and rejected the offer and switched off the phone.

In cross-examination, RW4, Kent Mukonda stated that he stays in Nkeyema Ward in an area called TBZ at Mukonda Farm Number 1, in Kaoma. He confirmed that he is also a businessman who sells food and drinks and also runs M and M Club. He also confirmed that the fifty (50) roofing sheets were delivered to his house by Vasco Antonio in a Benz which was connected to a trailer with supporters on the side. He stated further that Antonio Empire Company are the owner of the vehicle. When he was asked about Ishabiwangu RW4 explained that he did not know him very well until the day he arrived to collect the roofing sheets and he introduced himself. He further stated that Mr.

Ishabiwangu collected the roofing sheets on an ox-cart. He also stated that he did not know Mr. Madichi well and that he did not even see him in order to ask him why the iron sheets were given to him. Concerning Joseph Mbangi, Kent Mukonda explained that before the incident of the telephone conversation, he did not know him and he added that he does not know him well. He said that the telephone conversation between Joseph Mbangi and Hon. Antonio took fifteen (15) minutes as he saw the time indicated in the phone. Kent Mukonda agreed that he was a Ward Councillor in Nkeyema ward. He also admitted that he did not report Joseph Mbangi to the police. When he was asked about Hon. Antonio he stated that he did not know him quite well but he agreed that he would not be happy to see him lose his Parliamentary seat.

At the close of the 1st respondent's case, Counsel for the 2nd respondent, Mr. Paul Mulenga informed the court that they would not call any witnesses and that he would just file into court written submissions. Thereafter, Counsel representing the parties to the petition filed into court their written submissions and I am grateful for their efforts and for lightening the burden of the court and I have taken the submissions into consideration in my analysis and evaluation of the evidence before the court.

In the submissions by the petitioner, Counsel for the petitioner Mr. Siame alluded to the fact that the petitioner Enock

Maseka Kaleka had petitioned the 1st respondent Carlos Jose Antonio seeking a declaration from the court that the 1st respondent was not duly elected as the Parliamentary candidate for Kaoma Central Constituency in the 20th September, 2011 elections on the ground that there were election malpractices conducted by the 1st respondent and/or his agents and that the said acts made the electoral environment unsuitable for free and fair elections to be held. He referred to the allegations contained in paragraph 3 (i) to (viii) of the petition which I need not restate as the same has already been reproduced for ease of reference.

The petition was brought pursuant to Article 72(1)(a) of the Constitution of Zambia and section 93 of the Electoral Act of 2006 of the Laws of Zambia. Section 93 (2)(c) of the said Act provides that:

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

- (a)**
- (b)**
- (c) That any corrupt practice or illegal practice was committed in connecting with the election by or**

with the knowledge and consent or approval of the candidate or of that candidate’s election agent or polling agent.”

Counsel for the petitioner submitted that what constitutes and amounts to corrupt and illegal practices is provided under the Electoral (General) Regulations 1991 (Statutory Instrument No. 108 of 1991) and in particular Regulation 51 (1)(c) and (d) which states that :

“51 (1) Any person who directly or indirectly, by himself or any other person -

(a)

(b)

(c) Makes any such gift, loan, offer, promise procurement or agreement to or for any person in order to induce such person to procure or 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 an such 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

.....

Shall be guilty of the offence of bribery.”

Counsel for the petitioner submitted further that from the evidence before the court it is not disputed by the 1st respondent and witness called that the 1st respondent through his agents distributed iron roofing sheets to the community at Shambelamena Community School in Nkeyema Ward. He argued that the roofing sheets donated by the 1st respondent’s company, Antonio Empire Transport Limited were distributed by Vasco Antonio the 1st respondent’s young brother. Mr. Siame submitted further that the 1st respondent’s act of distributing the iron roofing sheets during the campaign period is prohibited and it is contrary to the provisions of the Electoral (General) Regulations, 1991.

He also submitted that PW3, Nyambe Shomeno testified that the 1st respondent addressed a campaign meeting at Nalumino Mundia Basic School and after which he proceeded to distribute bags of cement alluded to the fact that the 1st respondent in his testimony admitted holding a meeting at Nalumino Mundia Basic School but he did not call any witnesses to refute the allegations of distribution of cement and which bags of cement the petitioner claims to have been shown when he visited the school in Litoya Ward. Counsel for the petitioner submitted that considering the evidence before the court, it is logically indisputable that the 1st respondent donated the bags of cement to Nalumino Mundia Basic School after the meeting.

Mr. Siame submitted further that there was evidence before this court by PW4, Davies Likando, PW5, Fackson Pumulo Mponyela, PW6, Detective Constable Gibbs Mulusa and RW3, Julius Solochi Mupika Madichi that hammer-mills were distributed during the campaign period by one of the candidates and his political party in three of the seven wards of the Constituency contrary to the electoral law and Regulations. He further submitted that the 1st respondent did not even by way of cross-examination or otherwise dispute this grave misconduct which he stated undoubtedly greatly contributed to the unfair elections in the Constituency generally and in particular in the affected three wards.

With respect to the allegation of ferrying of voters by the 1st respondent's agents by PW1, the petitioner herein, PW7, Roy Machai and PW8, Kebby Poto, Counsel for the petitioner submitted that PW7 and PW8 were part of the people who were ferried at different times of the day on 20th September, 2011.

Mr. Siame also referred to PW1, PW2 and PW7's evidence that the 1st respondent engaged in a campaign of falsehood and character assassination of the petitioner and his presidential candidate, Mr. Michael Chilufya Sata. He submitted that the instances referred to rendered the election of the 1st respondent as Member of Parliament for Kaoma Central Constituency null and void. He cited the case of **MLEWA v WIGHTMAN**¹ which he

considered to be very instructive on the issues raised and he referred to the observations by Hon. Mr. Justice E. L. Sakala, JS (as he then was) that section 18(2)(c) of the Electoral Act, Cap 13 of the Laws of Zambia, which is exactly the same as section 93(2)(c) of the Electoral Act, 2006 is intended to penalise the candidate. He stated that in order to nullify the election:

“Even one or two person instances are enough and even if they could not conceivably have prevented the electorate from choosing their preferred candidate.”

Counsel for the petitioner submitted that from the evidence before the court, the petitioner had proved various instances in which it is clear the 1st respondent through his agents engaged in electoral malpractices. He further relied on the court’s decision in the cited case of **MLEWA v WIGHTMAN** where it was held that:

“Where it is proved that there is wrong doing of a scale or type which has adversely affected an election regardless of who the wrongdoer is and even if the candidates personally were not involved, the election may be declared void in terms of (18)(2)(a).”

Counsel for the petitioner pointed out that that provision is a replica of the current section 93(2) (a) of the Electoral Act of 2006. He also fortified his argument by referring to the court’s further observation that:

“In plural politics, it is the parties which mount the campaign for their candidates and that the consequences of any illegal dealings will inevitably affect the candidates so that a defence of not being personally involved would not be upheld if shown that the illegal acts complained of affected the outcome of the election.”

Mr. Siame argued that the illegal acts perpetuated by the 1st respondent's political party, the Nkeyema Ward Chairman's acts of ferrying voters to and from the polling station and the distribution of hammer-mills by the MMD are such allegations which cannot be said not to have affected the outcome of the election. He submitted further that Kaoma Central Constituency being mainly a rural constituency, it cannot be denied that the ferrying of voters cannot be said not to have had an effect on the way voters would have cast their votes. He added that similarly the distribution of hammer-mills to three out of the seven wards in the Constituency of Kaoma Central which is basically rural where the people heavily depend on hammer-mills to grind their mealie meal cannot be said not to have influenced the outcome of the elections. Counsel for the petitioner further submitted that the majority of the voters in the wards of Kaoma Central Constituency in which the alleged issues of malpractice were carried out were unable, prevented or influenced from electing the candidate of their choice as the malpractices were widely

undertaken and widespread in the affected wards of Nkeyema, Litoya, Lalafuta and Chitwa.

In trying to fortify his arguments and applying the standard of proof to the facts and evidence on record as was stated in the case of **ANDERSON K. MAZOKA & OTHERS v LEVY PATRICK MWANAWASA & OTHERS**², Counsel for the petitioner herein submitted that the petitioner had attained the required standard of proof for this court to find that the 1st respondent and/or his agents engaged in illegal and corrupt practices.

With respect to RW2, Ackim Munsaka, Counsel for the petitioner submitted that he should be treated as a witness with an interest to serve in accordance with the guidance of the court in the case of **MACHOBANE v THE PEOPLE**³, that witnesses with a possible interest of their own to serve should be treated with due care and caution by the court, due to the danger of the likelihood of false implication. Mr. Siame submitted further that RW4, Kent Kababu Mukonda, UPND Councillor for Nkeyema Ward should also be treated in the same way as a witness with an interest to serve based on the fact that he is a member of the UPND, the 1st respondent's political party and as he confirmed in his testimony that he would not want the 1st respondent to lose his Parliamentary seat.

In conclusion, Counsel for the petitioner submitted that the issues raised in the petition have been established to a *“fairly high degree of convincing clarity,”* and he accordingly urged the court to declare that the 1st respondent was not duly elected as Member of Parliament for Kaoma Central Constituency and that costs be for the petitioner.

Mr. Milner Katolo, Counsel for the 1st respondent in his submissions to the court restated the election law as contained in the provisions of the Electoral Act, No. 12 of 2006 of the Laws of Zambia and particularly section 93 which states:

“93 (1) No election of a candidate as a member of the National Assembly shall be questioned except by an election petition presented under this part.

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

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

that constituency whom they preferred.....

(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 candidate’s election agent or polling agent.....”

Counsel for the 1st respondent submitted that section 93(2) makes it very clear that the allegations of electoral malpractice must be proved to the satisfaction of the High Court and the petitioner must also prove that any illegal practice was committed with the knowledge and consent of the 1st respondent. He also alluded to the fact that in the trial of an election petition, the standard of proof is higher than the ordinary standard of proof in civil matters, which is based on a balance of probabilities as was stated in the case of **LEWANIKA & OTHERS v CHILUBA**⁴, where it was held that:

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

Counsel for the 1st respondent proceeded to summarise and analyze the evidence of the petitioner and his seven witnesses.

With respect to the petitioner, PW1, Enock Maseka Kaleka's evidence that Nyambe Lubasi had told him that Carlos Antonio had given them ten (10) pockets of cement so that they could vote for him, Mr. Katolo submitted that his evidence was clearly hearsay evidence because it referred to an out of court statement made by someone who was not called as a witness and whose statement was being presented in court as the truth. He referred the court to the case of **SUBRAMANIAN v PUBLIC PROSECUTOR**⁵ where the Privy Council stated that:

“Evidence of a statement made to a witness by a person who is not a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement.”_

Counsel for the 1st respondent also referred to PW1's evidence regarding his visit to Lalafuta Ward in Kalumwange Central where he was allegedly told about the distribution of hammer-mills by the MMD and he submitted that the issue of hammer-mills has nothing to do with his client, the 1st respondent.

With reference to the allegation of ferrying of voters in Litoya Ward to Number 10 polling station by one Ackim Munsaka (RW2), Mr. Katolo's observation was that not only was he called as a witness by the 1st respondent but he denied going to Litoya Ward

on 20th September, 2011 and he accounted for his whereabouts and how he spent his time from 05:30 hours up to 19:00 hours. RW2 also denied ever being a member of UPND or running away from the petitioner as alleged and Counsel for the 1st respondent submitted that his evidence remained unshaken in cross-examination and that from his evidence it became apparent that the allegation against him was a mere fabrication by the petitioner.

On the issue of the iron roofing sheets allegedly delivered to Shambelamena Basic School Mr. Katolo pointed out that the petitioner stated that he did not know when the roofing sheets were delivered to the school and which meant that he was not in a position to tell the court whether the roofing sheets were delivered within or outside the campaign period.

He also submitted on the issue of the petitioner's participation in three elections in which he was not elected by the people of Kaoma Central as Member of Parliament whilst the 1st respondent participated for the first time and to the petitioner's surprise he was declared winner after the counting of votes.

When the petitioner was asked if he reported any of the alleged electoral malpractices to the Conflict Resolution Committee (CRC), he answered that he did but he did not produce any evidence to that effect or call any witnesses to prove that

Counsel for the 1st respondent submitted that concerning the allegations of delivery of roofing sheets, bags of cement and ferrying of voters, the petitioner admitted that what he told the court was based on what he was told by other people and that he did not personally verify the information he received and he also agreed that he had no way of knowing whether what the people told him was the truth or not. Mr. Katolo further submitted on the issue of the alleged character assassination of the petitioner by the 1st respondent that from the petitioner's evidence it was apparent that from as far back as 2006, people were referring to the petitioner as a serial killer and he submitted that even in 2011 elections people in Litoya and Nkeyema Wards were merely asking the same questions

With regard to PW2 Joseph Mbangu's evidence that he received a letter from Mr. Kent Mukonda that the 1st respondent would visit Shambelamena Community School on 19th August, 2011, Counsel for the 1st respondent's observation was that he failed to produce the letter and claimed that it was lost. He also submitted that this witness also stated that he did not see the 1st respondent delivering the iron roofing sheets in Nkeyema Ward. Further in relation to PW3, Nyambe Shomeno's allegation that the 1st respondent promised to give the school ten (10) pockets of cement and that the group of people proceeded to view the bags of cement in a classroom. Counsel for the 1st respondent pointed

out that PW3 informed the court that he did not know how the cement was brought to the school.

Mr. Katolo also dismissed the evidence of PW4 Davies Likando and PW5, Fackson Pumulo Mponyela, as being irrelevant to his client's case as the same referred to distribution of hammer-mills by the MMD. He, however, submitted that PW6, Detective Constable Gibbs Mulusa's evidence clearly shows that the hammer-mills were procured under the Constituency Development Fund and not by any political party as alleged. Counsel for the 1st respondent submitted further that PW7, Roy Machai gave contradicting evidence which was disputed by PW8 Kebby Poto who denied any knowledge of being feted with Maheu and nshima at Mr. Mushe's residence after the voting exercise.

Counsel for the 1st respondent identified the issues arising from the evidence as follows:

- “(i) Has the petitioner adduced sufficient evidence of electoral malpractice to warrant nullifying the election of the 1st respondent?”**
- (ii) Has the petitioner proved his cases to the required standard?**
- (iii) What is the effect of the many contradictions in the evidence of the petitioners' witnesses?**

(iv) Does the giving of the roofing sheets to two schools in Nkeyema Ward amount to bribery within the meaning of the Electoral Act No. 12 of 2006?”

He then proceeded to apply the law to the issues raised. With respect to issue of whether the petitioner has adduced sufficient evidence of electoral malpractice to warrant nullifying the election of the 1st respondent, Mr. Katolo submitted that the petitioner has lamentably failed to prove his case to the required standard in election petitions. He submitted further that PW1's evidence was largely hearsay and that PW1 confirmed this in cross-examination when he stated that what he testified in court was based on what other people told him. Counsel for the 1st respondent relied on the case of **MUVUMA SITUNA KAMBANJA v THE PEOPLE**⁶ in which it was held that:

“Hearsay evidence which does not fall within the exceptions of the rule and which does not come within section 4 of the Evidence Act is inadmissible as evidence of the truth of what is alleged.” _

Mr. Katolo submitted that, therefore the petitioner, PW1's evidence about the distribution of cement and ferrying of voters is inadmissible and is at best a fabrication. He also urged the court to treat PW1's evidence with extreme caution and as a witness with an interest to serve and also for the court to be cautious about the likelihood of false implication of the 1st respondent by

the petitioner who did not expect the 1st respondent who stood for the first time to succeed where he, himself, had been unsuccessful on three other occasions, Counsel for the 1st respondent contended further that the petitioner failed to produce evidence to show that the majority of the voters in Kaoma Central Constituency were prevented from electing the candidate of their choice in terms of section 93 (2) (a) of the Electoral Act No. 12 of 2006. He added that the petitioner also did not produce any evidence to show that he was the preferred candidate whom people in the Constituency were prevented from voting for.

With respect to the issue of the iron roofing sheets, Counsel for the 1st respondent submitted that the same falls within philanthropic services and cannot constitute bribery as RW3, Julius Solochi Madichi's evidence was very clear that the iron sheets were requested for by the community to be used at Shambelamena Community School. Mr. Katolo argued that there was clearly no connection between the donation of iron roofing sheets and the election and he submitted that the company, Antonio Empire Transport Limited that donated the roofing sheets, is separate and distinct from the 1st respondent as was stated in the case of **ASSOCIATED CHEMICALS LTD v HILL AND DELAMIN & ELLIS AND COMPANY**⁷ where it was held that:

“A principle of the law which is now entrenched is that a company is a distinct legal person different from its members or shareholders.”

Counsel for the 1st respondent submitted that the philanthropic services offered by the Antonio Empire Transport Limited company to the community cannot be attributed to the 1st respondent as a basis to seek nullification of the 1st respondent's election. He further submitted that the onus rests on the petitioner to prove his claim and the standard of proof is higher than a mere balance of probabilities. It is Counsel for the 1st respondent's contention is that the petitioner has lamentably failed to prove his case as he premised his allegations on unsubstantiated third party reports which he admitted in cross-examination he had no way of knowing whether the reports were true or not. Mr. Katolo contented further that the petitioner's evidence was so discredited in cross-examination in respect of the allegations that this court cannot find that any claim was proved by the petitioner. He submitted that the petitioner's evidence is a mere fabrication and full of unsubstantiated evidence and he argued that even assuming but without admitting, that the iron sheets were donated by the 1st respondent it is the 1st respondent's submission that the evidence of RW3 and RW4 was clearly that the iron roofing sheets were delivered on 1st July, 2011 which was outside the campaign period. He submitted that the campaign period is determined by the Electoral Commission

according to the definition in section 2 of the Electoral (Code of Conduct) Regulations 2011 under regulations 8 which states that:

“The campaign period shall commence and close on such date as the Commission may determine.”

Mr. Katolo pointed out that in the instant case, the campaign period was from 12th August to 18th September, 2011 but the petitioner did not know when the iron roofing sheets were delivered to Nkeyema Ward. He referred the court to the case of **LEWANIKA AND OTHERS v FTJ CHILUBA** in which the Supreme Court held that:

“During election period, there should be a closed season for any activity suggestive of vote-buying, including any public and official charitable activity.....”

He submitted, therefore, that the closed period in the circumstances of this case was the period between 12th August and 18th September, 2011 and Counsel for the 1st respondent argued that the petitioner did not adduce any evidence or at all to show that the 1st respondent engaged in any activity of distribution of any gifts or vote-buying during the campaign period. He reiterated his earlier submission that the donations by Antonio Empire Transport Limited of iron roofing sheets to the two community schools of Nakuyuwa and Shambelamena were a public philanthropic activity which was outside the campaign window or closed season and is not prohibited by the Electoral Act

Regulations made thereunder. He relied on the **LEWANIKA v CHILUBA** case where the Supreme Court also held that:

“(viii) Public philanthropic activity during election is not prohibited by the Electoral Act or Regulation thereunder.”

Mr. Katolo further referred to the **HALSBURY’S LAWS OF ENGLAND**, Fourth Edition Re-issue, Volume 15, paragraph 689 where the learned authors clearly state the law on distribution of charitable gifts as follows:

“ The distribution of genuine charitable gifts to voters has always been allowed. If a gift is charitable, it will not become bribery because of the use made out of the gift, it is not possible by any subsequent act to make that which was legal at the time illegal and criminal.”

In the light of the cited authority Counsel for the 1st respondent submitted that the donation of roofing sheets by Antonio Empire Transport Limited, an entity that is not part of these proceedings cannot by any stretch of imagination be constructed to constitute bribery.

Turning to the second issue of the marked contradictions in the evidence of the petitioners’ witnesses and its effect, he submitted that the various contradictions and inherent

improbabilities are such that no reasonable court would have accepted it. He contended that the inconsistencies are of such significance that the court should treat all the petitioner's evidence with suspicion. Counsel for the 1st respondent further submitted in their humble view, their, the contradictions in the petitioner's and his witnesses evidence take the case within that "*no man's land*" of fact and degree such that it falls short of the standard expected in an election petition. He relied on the decision in the Indian case of **JYOTI BASU v DEBI GHOSAL**⁸ reported in the Election Petition No. 9 of 2009 and Allahabad dated 14th, where the Apex Court observed that:

".....An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutory embodied, in the trial of election dispute the court is put in a straight jacket. Therefore, an election petition, which does not conform to the statutory requirements, is dead petition and must be dismissed outrightly."

It was submitted on behalf of the 1st respondent in the present case, that in view of the evidence adduced by the petitioner. This

election petition has suffered from material infirmities as it does not fulfil the statutory requirements of section 93 of the Electoral Act No. 12 of 2006 and the Election Petition Rules, Statutory Instrument No. 426 of 1968 and the Electoral Code of Conduct, Statutory Instrument No. 52 of 2011 and that the petitioner has failed to prove his case within the ambit of the special jurisdiction of election petitions created by the Electoral Act, No. 12 of 2006 for the following reasons:

” (i) There was no evidence produced to show that either the 1st respondent or any of his agents with the 1st respondent’s consent were involved in electoral malpractices or acts of bribery

(ii)The alleged illegal practice of distribution of hammer-mills, if any at all, which we doubt they were, were made by MMD which is not a party to this petition and made outside the jacket or closed season or period of election campaigns and before the respondent subscribed to the Electoral Code of Conduct as a candidate in the 20th September, 2011 election

(iii)The alleged distribution of cement in Litoya Ward has not been proved to the required standard

(iv)The alleged distribution of roofing sheets has not been proved with respect to the when the donation took place, who donated and what effect

if any the said donation had on the voters in Nkeyema Ward”.

In conclusion, Counsel for the 1st respondent submitted that the petitioner had failed to prove the allegations outlined in his petition on a standard higher than the mere balance of probability and he prayed that therefore, the entire petition should be dismissed with costs.

Counsel for the 2nd respondent, Mr. Paul Mulenga submitted that from the outset the petitioner had no case against the 2nd respondent as the 2nd respondent had conducted the Parliamentary elections for the Kaoma Central Constituency in accordance with the established laws and procedures. He submitted further that section 93 of the Electoral Act, No. 12 of 2006 sets out grounds upon which an election of a candidate as a member of the National Assembly may be declared void in subsection (2) (b) and subsection (4). Section 93 (2) (b) provides that:

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

and that such non-compliance affected the result of the election.”

Section 93(4) provides that:

“(4) No election shall be declared void by reason of any act or omission by an election officer in breach of that officer’s official duty in connection with an election if it appears to the High Court that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.”

Mr. Paul Mulenga submitted that it therefore follows that for an election to be declared void, the petitioner must demonstrate and prove that in respect to the 2nd respondent:

- (i) There has been a non-compliance with the provision of the Act and that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election.**
- (ii) An officer of the 2nd respondent had breached his or her duty and that such an act or**

omission by the officer affected the result of that election.

Counsel for the 2nd respondent submitted that the petitioner had brought or raised one allegation against the 2nd respondent according to paragraph 3 (iii) of his petition in the following terms:

“(iii) On the 26th August, 2011, the 2nd respondent did cause to be published in the Daily Mail paper and the Post Newspaper wrong names of the petitioner as Parliamentary candidate being KALEKA E. MAKASA instead of Kaleka E. Maseka.”

Mr. Paul Mulenga submitted further that the 2nd respondent responded to the allegation in paragraph 3 (iii) of the petition in paragraph 3 of the 2nd respondent’s Answer. He observed that at trial no evidence was led or placed on record to show that there were any malpractice or non-compliance with the laws and procedures by the 2nd respondent or its officers or agents contrary to the provisions of the Electoral Act, No. 12 of 2006 and the Electoral Code of Conduct, Statutory Instrument No. 52 of 2011.

Counsel for the 2nd respondent contended that there is no evidence on record to show that the mis-spelling of the petitioner’s name influenced the voters to vote for another

candidate instead of the petitioners on account of mistaken identity. He submitted further that according to the evidence, despite the clerical errors, the voters were able to identify the petitioner throughout the campaign period including the polling day itself. He further submitted that the petitioner in his testimony referred the court to page 2 of his bundle of documents on which the published notice bearing his wrong names appears. Counsel for the 2nd respondent observed that in cross-examination the petitioner admitted that the year 2011 was not the first time the petitioner had contested as a Parliamentary candidate for the Kaoma Central Constituency as he had contested in 2001 and 2006 as Enock Kaleka Maseka. He further pointed out that during the 2011 tripartite elections, the petitioner was the only person who stood as a candidate for the Kaoma Central Constituency Parliamentary election on the Patriotic Front (PF) ticket and he added that the petitioner was campaigning as Enock Kaleka Maseka even prior to and after the publication of the notice in the Daily Mail by the 2nd respondent. He submitted further that the petitioner had also admitted in cross-examination that he is a well established businessman and is well known by the majority of the people in Kaoma. Mr. Paul Mulenga further submitted that it was the name ENOCK KALEKA MASEKA and his portrait (picture) that appeared on the ballot papers thereby clearly showing and identifying the petitioner as the PF candidate and he added that he had no trouble in identifying himself as a candidate and casting his vote.

Counsel for the 2nd respondent submitted that the foregoing evidence confirms that the clerical errors did not negatively influence the voters as they were capable of identifying the petitioner and he urged the court to so find.

With respect to the other allegations raised at trial by PW7 Roy Machayi and PW8, Kebby Poto that Mr. Mushe, the alleged agent of the 1st respondent caused voters to be ferried to and from the polling station, Mr. Paul Mulenga observed that although PW7 admitted that he was aware that being ferried to a polling station was an offence, he had no tangible proof to show that he reported the incident to the police officer on duty at the polling station as claimed. Counsel for the 2nd respondent submitted that PW7 also admitted that given the huge difference in the votes cast between the petitioner and the 1st respondent, the sixty (60) voters or three truck loads could not influence or affect the outcome of the election results. He further observed that even assuming (which was strongly denied) that on that day, the truck made four trips and ferried approximately 270 people, that number could not have influenced or affected the outcome of the election results given the huge difference in votes between the 1st respondent and the petitioner.

In view of the foregoing, Counsel for the 2nd respondent submitted that the petitioner has failed to establish or prove his case against the 2nd respondent and is, therefore, not entitled to

any of the reliefs he claims. In conclusion, he prayed that the election petition presented to this court by the petitioner be dismissed with costs to the 2nd respondent for being misconceived and for want of merit.

I have carefully considered the evidence before this court in its entirety, the submissions and authorities cited. Evidence before this court on which there was common ground was that on 20th September, 2011, tripartite elections, that is, Presidential, Parliamentary and Local Government elections were held throughout Zambia. It is also not disputed that on 17th October, 2011, the petitioner, Enock Maseka Kaleka, as an unsuccessful candidate in the said tripartite elections as the Patriotic Front (PF) Parliamentary candidate in the Kaoma Central Constituency of Western Province, filed this election petition challenging the election of the 1st respondent, one Carlos Jose Antonio as member of Parliament for Kaoma Central Constituency. By the petition, the petitioner advanced a number of prayers arising from the several allegations and averments in the petition. The petition's allegations are contained in paragraph 3 (i) to (vii) of the petition and since they have already been reproduced for ease of reference I will not endeavour to restate them for fear of being repetitive as the same have also been referred to by Counsel in their submissions. I will, therefore, proceed to analyze and evaluate them in relation to the evidence before the court and the applicable law, being the electoral laws of Zambia which have

also been extensively referred to by Counsel. Suffice to state that the allegations levelled at the 1st respondent are those of corrupt and illegal practices.

With respect to the first allegation that between 25th and 28th August, 2011, the 1st respondent's agents, with his knowledge were seen distributing iron roofing sheets in Nkeyema Ward of Kaoma Central Constituency, according to the petitioner's evidence and that of his witness, PW2 Joseph Mbangu, as rightly observed by this court and Counsel for the 1st respondent, the petitioner and his witness never witnessed the alleged distribution of iron roofing sheets. Consequently, PW1 and PW7 were unable to state who donated the said roofing sheets, to who they were delivered and when they were donated. To the contrary, there was evidence by the 1st respondent's witness, RW3, Julius Solochi Mupika Madichi that he as the Parent Teachers Association Chairman of Nakuyuwa Basic School approached one Vasco Antonio in June, 2011 for assistance of roofing sheets for use of building of teachers' houses. This witness also testified before the court that the solicited roofing sheets were delivered in July, 2011. This evidence of delivery of iron roofing sheets on 1st July, 2011 by Vasco Antonio a Director and shareholder of Antonio Empire Transport Limited was confirmed by RW4, Kent Kababu Mukonda. Counsel for the petitioner had urged the court to treat these witnesses as suspect witnesses who may have an interest of their own to serve namely to ensure that the 1st respondent

Hon. Carlos Jose Antonio retains his Parliamentary seat. I have cautioned myself but I find that the danger has been removed as the two witnesses evidence was subjected to cross-examination and tested to rule out the danger and in the absence of any tangible evidence from the petitioner and his witness, this court cannot be expected to rely on hearsay evidence. I accept the argument by Counsel for 1st respondent that the petitioner did not substantiate this allegation of distribution of iron roofing sheets by the 1st respondent's agents with the 1st respondent's knowledge. The petitioner admitted that his evidence was based on what he was told and which amounts to hearsay as he did not make an independent investigation to verify the allegations. In the circumstances, I am satisfied that the allegation of the 1st respondent's distribution of iron roofing sheets through his agents with his knowledge is unsubstantiated, especially since the petitioner was not present to witness the said distribution or delivery.

Furthermore, from the evidence before this court, that the iron roofing sheets were donated on 1st July, 2011 by Antonio Empire Transport Limited upon request by RW3, Julius Solochi Madichi on behalf of the community in Nakuyuwa Ward and that the same were also donated to Shambelamena Community School in Nkeyema Ward, I am satisfied that the said donation was a mere public philanthropic activity which was not even done during the campaign period and which is not prohibited by the

Electoral Act or Regulation thereunder as held by the Supreme Court in cited case of **LEWANIKA v CHILUBA** and as stated by the learned authors of **HALSBURY'S LAWS OF ENGLAND.**

The petitioner's second allegation against the 1st respondent relates to distribution and delivery of pockets of cements in Litoya ward and namely, to Nalumino Mundia Basic School on 26th August, 2011. It was based on information from PW3, Nyambe Shomeno and this witness in his evidence was even unable to tell the court how the said cement was taken to the school and he admitted that he did not witness the 1st respondent delivering the said cement.

Clearly, from the evidence by the petitioner and his witnesses the allegations of distribution and delivery of iron roofing sheets and pockets of cements was based on hearsay. In the absence of evidence to substantiate these allegations, I find the said evidence to be inadmissible as it would be dangerous and unsafe to nullify the 1st respondent election on hearsay evidence.

The petitioner's third allegation in the petition was levelled against the 2nd respondent that they caused to be published in the Daily Mail newspaper wrong names of the petitioner as Parliamentary candidate as being KALEKA MAKASA instead of Kaleka E Maseka. From the evidence before this court, it was

established by Counsel for the 2nd respondent through cross-examination of the petitioner that it was not his first time to contest as a Parliamentary candidate in Kaoma Central and that the last election in September, 2011 was the petitioner's third time. The petitioner also confirmed that he was a well established businessman who was well-known in Kaoma and as such a mere clerical error could not have affected his election. I am satisfied that the petitioner campaigned using his correct names before and after the publication and as Counsel for the 2nd respondent rightly observed the portrait or photograph of the petitioner reflected his correct names and particulars so that he was clearly identified and he was the only Patriotic Front candidate. In the circumstances from all this evidence and revelations it is clear that the clerical errors had not negatively influenced the voters as they were capable of identifying the petitioner.

Furthermore, PW7, Roy Machayi's evidence that he reported the ferrying of himself and other voters to the polling station to the police officer on duty, I accept should be treated with caution as it is contradictory with that of PW8 Kebby Poto, especially in as it related to being feted by Mr. Mushe with Maheu and nshima after the voting. As Counsel for the 2nd respondent properly observed even assuming the court was to accept that such ferrying of voters took place (which was denied) the total number of the voters in the truckloads in the three trips allegedly made

could not have significantly influenced the outcome of the election results considering the huge difference in votes between the petitioner who got 3 175 votes and the 1st respondent who got 7 485 votes.

I, accordingly, find no merit in this allegation which is contained in paragraph 3 (vi) of the petition and I dismiss it for lacking merit.

The petitioner's allegations in paragraph 3(iv) of the petition relate to distribution of hammer-mills in Lalafuta, Nkeyema and Chitwa Wards of Kaoma Central Constituency by the District Council officials who the petitioner alleged to be agents of the MMD Party, and I agree with Counsel for the 1st respondent that these allegations do not concern the 1st respondent. In the same vein I find no reason why the 1st respondent should have challenged PW4, Davies Likando and PW5, Fackson Pumulo Mponyela on the alleged distribution of hammer-mills by the MMD when this petition is directed at the 1st respondent Hon. Carlos Jose Antonio, the UPND Member of Parliament for Kaoma Central Constituency.

In paragraph 3 (v) of the petition there was also the allegation of distribution of bicycles in Nkeyema Ward, on 15th August, 2011 by the 1st respondent and the former Member of Parliament of the MMD through their respective agents and I find

that the allegation is irrelevant to this petition for the reasons stated earlier.

The petitioner's last allegation contained in paragraph 3 (vii) of the petition relates to allegations of 1st respondent's falsehoods and character assassination of the petitioner and his Presidential candidate, Mr. Michael Chilufya Sata. This court observed and even Counsel for the 1st respondent pointed out that the petitioner admitted in cross-examination that allegations of him being a serial killer were there even in 2001 and 2006 when he stood and lost as a Parliamentary candidate in Kaoma Central Constituency and, therefore, I am of the considered view that this trend has merely continued from the past when the 1st respondent was not even a candidate. Further, the petitioner failed to adduce evidence relating to these allegations of character assassination. Surely if the alleged utterances were being made at campaign rallies and meeting he would have produced proper evidence other than that of PW2 and PW3 who I find to be unreliable because of their inconsistent evidence.

I now turn to the 1st respondent's evidence and that of his witnesses. The 1st respondent denied being involved in any distribution or delivery of items or gifts to the electorate as he said that he was well aware of the electoral law and regulations. He also remained calm and was unshaken in cross-examination. I must also make an observation that Counsel for the petitioner,

Mr. Siame concentrated on a lot of irrelevant personal issues which were not useful to his client's case. A typical example is when the 1st respondent was challenged on the issue of one the drivers of Antonio Empire Transport Limited having been caught stealing petrol at one of the filling stations in Kaoma. I did not find any relevance that had in relation to the pleaded alleged malpractices or corrupt and/or illegal practices in the petition.

With reference to the rest of the respondent witnesses, RW2 Ackim Munsaka, denied any involvement in ferrying of voters in Litoya Ward and he clearly accounted for his whereabouts and movements on 20th September, 2011 up to the evening, while RW3 Julius Solochi Mupiku Madichi confirmed that he solicited the iron roofing sheets as earlier stated. RW4, Kent Kababu Mukonda testified about his involvement with PW2 Joseph Mbangu when PW2 approached him that he wanted to speak to Hon. Antonio on the phone and he narrated what transpired and PW2's reason for wishing to speak to Hon. Antonio. PW4 remained stable and unshaken in cross-examination. I found these witnesses to be stable and quite reliable as they were consistent in their evidence unlike the witnesses for the petitioner.

After analyzing and evaluating the evidence in its totality, I considered the issues raised by Counsel for the 1st respondent by considering the weight of the evidence and therefore, at this juncture I must deal with the issue of the standard of proof. As

submitted by Counsel for the 1st respondent, Mr. Milner Katolo, in the trial of an election petition, the standard of proof is higher than the ordinary standard of proof in civil matters so that the court has to subject the evidence before it to the required standard. In the celebrated case of **AKASHAMBATWA M. LEWANIKA v FTJ CHILUBA** (also known as “the AKA case”) which has been cited by Counsel in the present petition, the Supreme Court held *inter alia* that allegations of impropriety attributed to a respondent in a Parliamentary election petition before a High Court Judge requires to be proved to standard higher than a mere balance of probability, and this was re-stated in the case of **MICHAEL MABENGA v SIKOTA WINA & OTHERS**⁹ where the Supreme Court reiterated its earlier decision in the “AKA case” as follows:

“An election petition is like any civil claim that depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a balance of probability; issues raised are required to be established to a fairly higher degree of convincing clarity.”_

Therefore, from the foregoing and considering the evidence before this court, where the petitioner relied on hearsay evidence of allegations that were not properly substantiated or even independently investigated by himself, especially considering the inconsistencies and contradictions in the evidence of the petitioner’s witnesses and the 1st respondent’s witnesses, I am

not satisfied that the petitioner has established or proved the allegations to the required standard or at all, as the petitioner even admitted in cross-examination that he had no way of knowing whether what he was told was the truth or not. Further, even the only witness, RW2 Ackim Munsaka that he claimed he saw driving a Canter ferrying voters to the polling station, denied being in that locality and he accounted for his whereabouts and movements on that day. It is also interesting to note that the petitioner's own witness, PW8, Kebby Poto who allegedly got into the Canter denied that the driver ran away as alleged by PW1, the petitioner.

Furthermore, the 1st respondent's evidence and that of RW4, Kent Kababu Mukonda concerning PW2, Joseph Mbang'u's attempt to solicit more money from the 1st respondent so that he could testify for him instead of the petitioner who he claimed had offered him K50 million to testify against the 1st respondent concerning iron roofing sheets somewhat put the petitioner's allegations against the 1st respondent in a totally different light by compounding the fact that the evidence relied on by the petitioner was not verified. It became very apparent to this court that there was the danger of false implication which the court needed to guard itself against in considering the allegations as the petitioner was in the category of witnesses with a possible interest to serve, and that being to ensure that the election of the 1st respondent as Member of Parliament for Kaoma Central

Constituency is nullified. At this juncture I must state that this recent development of witnesses trying to commercialize the giving of evidence so that they can benefit as matter as possible is very unfortunate as it becomes very difficult for the court to know when to believe the witnesses. In the circumstances, I accept Counsel for the 1st respondent's submission that no reasonable court can accept the evidence that was before this court and base nullification of the 1st respondent's election on such evidence.

In conclusion, on the totality of the evidence before this court and based on the analysis and evaluation of the said evidence in relation to the existing electoral laws and further considering the huge difference in the votes obtained by the 1st respondent, Carlos Jose Antonio and the petitioner, Enock Maseka Kaleka and the same being 7 485 and 3 175 respectively, I am not satisfied that whatever was alleged even in the ferrying of voters would have influenced the outcome of the election results. I, therefore, find that the petitioner has failed to prove his case against the 1st and 2nd respondents in accordance with the required standard of proof and that his election petition lacks merit in many respects and I find that it would be unsafe for this court to rely on it and its allegations.

I, accordingly, declare the 1st respondent, Carlos Jose Antonio the incumbent UPND Member of Parliament for Kaoma Central

Constituency in the Western Province of Zambia as having been duly elected on the 20th September, 2011 Parliamentary elections and I dismiss this petition with costs for the 1st and 2nd respondents.

DATED thisday of.....2012 at Lusaka.

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F. M. Lengalenga

JUDGE

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