

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Civil Jurisdiction)

2011/HP/EP/65

**IN THE MATTER OF LOCAL GOVERNMENT ELECTION PETITION FOR MUTENDA
WARD 26 SITUATED IN CHINGOLA CONSTITUENCY COPPERBELT PROVINCE
OF THE REPUBLIC OF ZAMBIA HELD ON THE 20TH DAY OF SEPTEMBER 2011**

AND

**IN THE MATTER OF SECTION 19 OF THE LOCAL GOVERNMENT ELECTIONS ACT
CAP 282 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF SECTION 20 OF THE LOCAL GOVERNMENT ELECTION ACT
CAP 282 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF SECTION 54-59 OF THE LOCAL GOVERNMENT ELECTION
ACT CAP 282 OF THE LAWS OF ZAMBIA**

BETWEEN:

PENIAS TEMBO

PETITIONER

AND

EMMANUEL KABWE

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

3RD RESPONDENT

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court on this 20th day of February, 2012

For the Petitioner: Mr. J. Mwiimbu – Mwiimbu & Company

For the 1st Respondent: N/A

For the 2nd and 3rd Respondents: Mrs. T. Lungu – Legal Officer – ECZ

J U D G M E N T

Legislation referred to:

1. Local Government Election Act, Chapter 282, sections 18 (2) (b), 19 and 20, 29 (1) and (3), and 30
2. Local Government Electoral Petition Rules, rule 14
3. Electoral Act, section 105

This is an election petition filed on 21st October, 2011 by Penias Tembo who was a candidate in the Local Government elections for Mutenda Ward No. 26 in Chingola Constituency under the United Party for National Development (UPND). The petitioner is challenging the election of the first respondent, Emmanuel Kabwe of the Movement for Multi-Party Democracy (MMD) who was declared by the 3rd respondent as having been duly elected councillor for Mutenda Ward on 21st September, 2011 in the elections held on 20th September, 2011. The petition is brought in terms of sections 19 and 20 of the Local Government Election Act, Chapter 282 of the Laws of Zambia.

The main allegation made by the petitioner is contained in paragraph 5 of the petition. This is that the Returning Officer unlawfully and irregularly returned Emmanuel Kabwe as having been duly elected. The allegation is expanded in paragraph 6.4 sub-paragraphs (a) to (d) which read as follows:

“6.4 The Assistant Returning Officer Information Technology a servant or agent of the 2nd and 3rd Respondent inadvertently swapped the results for Mutenda Primary School Polling Station No. 2020112 by misposting them at the Totalling Centre at Civic Centre.

PARTICULARS OF THE IRREGULARITY AND ELECTION OF THE PETITIONER UNDER THE PROVISIONS OF SECTION 20 OF THE LOCAL GOVERNMENT ELECTION ACT, CAP. 282.

- a. The said Assistant Returning Officer Information Technology a servant inadvertently misposted results at the totalling centre and as such proceeded to print the record of proceedings and the declaration of results which indicated that the 1st respondent Kabwe Emmanuel had won the elections.
- b. On the 27th of September 2011 the petitioner lodged a complaint to the Returning Officer a servant or agent of the 2nd and 3rd respondent that he had in fact won the elections and not the 1st respondent whereupon the returning officer a servant or agent of 2nd and 3rd respondent conducted some investigations and discovered that the said Assistant Returning Officer Charles Kalokoni Information Technology has in fact misposted the results for the Mutenda Ward 26 as follows:-

- | | |
|-------------------------|----------------------------------|
| a. Kabwe Emmanuel (MMD) | - 296 votes instead of 190 votes |
| b. Kachimba Davy (PF) | - 190 votes instead of 97 votes |
| c. Tembo Penias (UPND) | - 97 votes instead of 296 |

- c. The above irregularity resulted in the 1st respondent Kabwe Emmanuel (MMD) accumulating a total of 387 votes, Penias Tembo (UPND) 334 votes and Kachimba Davy (PF) 254 votes.
- d. On the 29th of September, 2011 the 1st respondent Kabwe Emmanuel acknowledged the anomaly and wrote to the Town Clerk a servant or agent of the 2nd and 3rd respondent advising him to rectify the error.”

It is stated in para 8 of the petition that the purported results of Mutenda Ward 26 were as follows:

- a. Penias Tembo (UPND) - 533 Votes
- b. Emmanuel Kabwe (MMD) - 281 votes
- c. Davy Kachimba (PF) -161 votes

The petitioner prays that it be determined that the said Emmanuel Kabwe was not duly elected and or in the alternative that the election was null and void ab initio due to the above stated irregularity. He therefore prays that he be granted the following reliefs:

- a. A declaration that the 1st respondent was not duly elected
- b. A declaration that the petitioner was the duly elected councillor for Mutenda Ward 26
- c. In the alternative that the election was Null and Void ab initio
- d. Costs of and incidental to this petition
- e. Such declaration and orders as this Honourable Court may deem fit

There is an affidavit verifying the election petition sworn by the petitioner. The 1st respondent has not filed an answer. On the other hand the 2nd and 3rd respondents have filed a joint answer in which they admit the contents of paragraphs 1, 3, 4, 6.3, 6.4(a), 6.4(b), 6.4(c) and para 7 of the petition. In paragraph 3 of their answer they state that the results for Mutenda polling station were as follows:

- | | |
|-------------------|-----|
| a. Kabwe Emmanuel | 296 |
| b. Kachimba Davy | 190 |
| c. Tembo Penias | 97 |

However, in paragraph 4 they deny the contents of paragraphs 2 and 5 of the petition and aver that the error in posting the results was due to an honest mistake.

In paragraph 6 the two respondents aver that the Mutenda Ward Local Government election was held in conformity with the law and regulations as stipulated in election statutes, save for the swapping of the results between the two candidates, which matter could be resolved by recounting.

When the matter came up for trial on 1st February, 2012, Mrs. Lungu, counsel for the 2nd and 3rd respondents applied for an order for a recount. Mr. Mwiimbu, counsel for the petitioner agreed and raised no objection to the application. I ought to add that the 1st respondent did not attend the proceedings. On the pleadings and the submissions by Mrs. Lungu, I was satisfied that there was evidence that justified a recount and I ordered accordingly. The recount was done by the learned Deputy Registrar for Kitwe High Court, Mr. Charles Zulu on 7th February, 2012 and a report was submitted to the Court on 8th February, 2012. Both Mr. Mwiimbu and Mrs. Lungu agreed with the outcome of the recount and the report produced by the Deputy Registrar marked Exhibit P1.

Following the submission of the Report, both counsel opted to proceed by making oral submissions. It is Mr. Mwiimbu's submission that the petitioner has proved the allegations that were made in the petition as regards the irregularity by the Returning Officer in declaring Kabwe Emmanuel of MMD as duly elected councillor of Mutenda Ward No. 26. Counsel submitted that the main evidence in this petition is the recount that was done by the Deputy Registrar and his staff and which report has been produced in court indicating that the petitioner, Penias Tembo polled 533 votes and the 1st respondent polled 281 votes.

He submitted that taking into account that the report on the recount is not contested by any of the parties, the court should uphold the prayers of the petitioner that the 1st respondent was not duly elected and that the petitioner as per evidence adduced in this court is the duly elected councillor for Mutenda Ward No. 26. Finally counsel urged this Court to order costs and any other relief as the court may deem fit.

Mrs. Lungu has relied on the 2nd and 3rd respondent's answer and the Report by the learned Deputy Registrar. She reiterated their admission that the results for one polling station were misposted due to an honest mistake and submitted that the Report has determined who was duly elected in the Mutenda Ward Local Government election. With regard to the issue of costs, she submitted that these are in the discretion of the Court and urged that the Court orders each party to bear own costs. She added that the 2nd and 3rd respondents have already incurred costs in conducting the recount to ascertain who was duly elected in the Mutenda Ward elections and cited section 105 of the Electoral Act on the treatment of costs in such circumstances.

In his reply Mr. Mwiimbu also referred to and read section 105 of the Electoral Act and in particular subsection 2. He contended that it is the 3rd respondent that occasioned the irregularities that occurred in the Mutenda Ward election through their officer as by their own documents filed in court; and that the Returning Officer was negligent. Counsel urged that the 1st respondent be exonerated in meeting the costs and that the 3rd respondent be made to bear the costs. He conceded that the 3rd respondent has incurred costs in the recount, but stated that it is also true that the petitioner has incurred costs in engaging counsel and arranging for witnesses as well as lodging for himself and the witnesses. He reiterated that the costs be awarded to the petitioner as a winning party who has not offended the proceedings must be awarded costs.

From the pleadings and submissions by both sides I find that a number of facts are not in dispute:

1. That the petitioner and the 1st respondent were candidates for Mutenda Ward No. 26 during the Local Government Elections held on 20th September, 2011
2. That on 21st September, 2011 the 1st respondent was declared as the duly elected councillor for Mutenda Ward No. 26.
3. That the Assistant Returning Officer Information Technology, a servant or agent of the 2nd and 3rd respondents swapped the results for Mutenda Primary School Polling Station No. 202112 by misposting the results at the totalling centre at Civic Centre.

4. That the Announcement of the Result of the Poll-Local Government, for Mutenda Primary School polling station exhibit "PT1" attached to the affidavit verifying the election petition, prepared by the Presiding officer Jescar Chingungu gave the votes as follows:
 1. Tembo Penias – UPND – 296
 2. Kabwe Emmanuel – MMD – 190
 3. Kachimba Davy – PF – 97
5. That the Record of Proceedings at the Totalling of the Votes-Local Government, for that polling station, exhibit "PT2" attached to the said affidavit gave the votes to the three candidates as follows:
 1. Kabwe Emmanuel B. – MMD – 296
 2. Kachimba Davy – PF – 190
 3. Tembo Penias – UPND – 97
6. That the purported overall results from the 7 polling stations for the three candidates were as follows:
 1. Kabwe Emmanuel – MMD – 387
 2. Kachimba Davy – PF – 254
 3. Tembo Penias – UPND – 334
7. That the misposting of the results of the poll for Mutenda Primary school polling station as tabulated in 5 above resulted in Kabwe Emmanuel – MMD being declared as winner with 387 votes.
8. That the recount of the votes by the learned Deputy Registrar has confirmed the misposting of the Results for Mutenda Primary School. The recount recorded the following:
 1. Tembo Penias – UPND – 296
 2. Kachimba Davy – PF – 96
 3. Kabwe Emmanuel – MMD – 190
9. That the total results of the recount are as follows:
 1. Tembo Penias – UPND – 533
 2. Emmanuel Kabwe – MMD – 281
 3. Kachimba Davy – PF – 160

10. That from the pleadings and the results of the recount Tembo Penias – UPND with 533 votes should have been declared duly elected councillor for Mutenda Ward No. 26.

11. That there is no wrong doing or misconduct attributed personally to the 1st respondent in the election or totalling of results.

In my view the only question is whether the petitioner has proved his case on the required standard to warrant a declaration that the 1st respondent was not duly elected. I am satisfied that he has. My finding is supported by the answer by the 2nd and 3rd respondents, the evidence of the recount and the submissions by counsel on both sides. This is further fortified by the important factor that the 1st respondent has not contested the petition or the results of the recount, having been present at the recount.

Mr. Mwiimbu contended that the Assistant Returning Officer Information Technology was negligent in misposting the results. On the other hand the 2nd and 3rd respondents state that the error in posting the results was due to an honest mistake. It is clearly stated in paragraph 6.4 (a) of the petition that the swapping of the results for Mutenda Primary School polling station by misposting at the totalling centre was inadvertent, that is to say, not resulting from or achieved through deliberate planning.

However, though it may appear generally that the election in Mutenda Ward was held in conformity with the law and regulations, and it seems to me, that there is no clear evidence to establish negligence, I am persuaded that the misposting of results, termed an honest mistake by the 2nd and 3rd respondents, was due to improper performance of function by the Assistant Returning Officer Information Technology, was unlawful and irregular and thus a non-compliance with the provisions of the Local Government Elections Act relating to the conduct of elections as provided in section 18 (2) (b).

The 3rd respondent by its servants or agents ought to have exercised more care in the totalling of results, as the error in posting the results affected the elections and led to a wrong person being declared as winner of the poll.

In my judgment, I find and hold that the petitioner has proved the major allegation made under paragraphs 2, and 6.4(a) – (d) of the petition. Consequently, in accordance with section 29 (1) and (3) of the Local Government Elections Act, I declare that the 1st respondent, Emmanuel Kabwe was not duly elected, but that the petitioner Penias Tembo was the one duly elected as councillor for Mutenda Ward No. 26 and he is deemed to have been so elected.

With regard to the issue of costs, I have considered section 105 of the Electoral Act to which my attention has been drawn by both counsel. I ought to add that the provisions of this section are identical to section 30 of the Local Government Elections Act, which is supplemented by rule 14 of the Local Government Electoral Petition Rules, which states that the court may make an order for costs as it may deem necessary. Of course as submitted by Mrs. Lungu, costs are in the discretion of the court.

In this case I accept that the 3rd respondent has incurred costs in the recount of the votes. But this should not bar the petitioner from getting costs to which he may be entitled as the order for a recount was requested by the 2nd and 3rd respondents. I have already made the point that the 1st respondent is not guilty of any wrong doing or misconduct in the election or totalling of results. In fact it is clear from para 6.4 (d) of the petition that the 1st respondent acknowledged the anomaly in the results, eight days after his declaration as the winner and wrote to the Town Clerk advising him to rectify the error. Of course the results could only be challenged by an election petition as provided under the law. I agree entirely with the submission by Mr. Mwiimbu that the 1st respondent should be exonerated from paying costs. On the whole of the matter I award costs to the petitioner as against the 3rd respondent which was responsible for the misposting of the results, such costs to be taxed if not agreed.

Delivered in Open Court at Kitwe this 20th day of February, 2012

.....
R.M.C. Kaoma
JUDGE