

**IN THE HIGH COURT FOR ZAMBIA**

**2011/HP/EP/41**

**HOLDEN AT LUSAKA**

(Constitutional Jurisdiction)

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

**and**

IN THE MATTER OF : SECTION 93(1) OF THE  
ELECTORAL ACT No 12 OF 2006

**and**

IN THE MATTER OF : CHADIZA PARLIAMENTARY  
CONSTITUENCY  
ELECTIONS HELD IN ZAMBIA ON 20<sup>TH</sup>  
SEPTEMBER 2011

BETWEEN :

**SALATIEL M. TEMBO**

**Petitioner**

**and**

**ALLAN MBEWE**

**1<sup>st</sup>**

**Respondent**

**ELECTORAL COMMISSION**

**2<sup>nd</sup>**

**Respondent**

**OF ZAMBIA**

Before the Honourable Madam Justice F. M. Lengalenga this 29<sup>th</sup> day of June, 2012 in open court at Lusaka

**For the petitioner : Mr. K. M. G. Chisanga - Messrs  
KMG**

**Chisanga Advocates, Mr. M.  
Zulu - Messrs Ferd Jere &  
Company**

**For the 1<sup>st</sup> respondent : Mr. S. Sikota, SC - Messrs  
Central**

**Chambers**

**For the 2<sup>nd</sup> respondent: Nil**

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## **J U D G M E N T**

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### **Cases cited:**

- 1. LUSAKA v CHEELO (1979) ZR 99**
- 2. WISAMBA v MAKAI (1979) ZR 295**
- 3. MLEWA v WIGHTMAN (1995/97)ZR 171**
- 4. BATUKE IMENDA v ALEX CADMAN LUHILA - SCZ  
APPEAL NO. 5 OF 2002**
- 5. LEVISON MUMBA v PETER DAKA - SCZ APPEAL NO. 38  
OF 2003**
- 6. LEWANIKA & OTHERS v FREDRICK TJ CHILUBA (1998)  
ZR 79**

**7. MICHAEL MABENGA v SIKOTA WINA & ORS (2003) ZR 110 (SC)**

**8. WEBSTER CHIPILI v DAVID NYIRENDA - SCZ APPEAL NO. 35 OF 2003**

**9. SUBRAMANIAN v PUBLIC PROSECUTOR (1956) 1 WLR 965**

After the tripartite elections of the 20<sup>th</sup> September, 2011, the petitioner, Salatiel M. Tembo who was an unsuccessful Parliamentary candidate in the Chadiza Constituency of the Eastern Province of the Republic of Zambia, filed an election petition challenging the election of the 1<sup>st</sup> respondent, Allan Mbewe, as Member of Parliament for the Chadiza Constituency. The election petition that was filed on 20<sup>th</sup> October, 2011 was made pursuant to the provisions of Article 72(1) (a) of the Constitution of the Republic of Zambia and section 93 (1) of the Electoral Act, No. 12 of 2006.

In the subsequent amended election petition filed on 6<sup>th</sup> December, 2011, the petitioner stated, among other things that he stood as a candidate on the United Party for National Development (hereinafter referred to as the "UPND") ticket while the respondent stood as a candidate on the Movement for Multi-party Democracy (hereinafter referred as the "MMD") ticket. The petitioner stated that the Returning Officer, one Patrick Mwenda who declared the 1<sup>st</sup> respondent as having been duly elected as a

Member of Parliament for the Chadiza Constituency, also declared the results of the Parliamentary elections as follows:

<b>“Allan Mbewe</b>	<b>-</b>	<b>MMD</b>	<b>-</b>	<b>6 464 votes</b>
<b>Salatiel M. Tembo</b>	<b>-</b>	<b>UPND</b>	<b>-</b>	<b>2 492 votes</b>
<b>Phiri Nickson</b>	<b>-</b>	<b>PF</b>	<b>-</b>	<b>952 votes</b>
<b>Banda Ben</b>	<b>-</b>	<b>UNIP</b>	<b>-</b>	<b>577 votes”</b>

The petitioner contended that contrary to the declaration by the Returning Officer that the 1<sup>st</sup> respondent was duly elected, the 1<sup>st</sup> respondent was not validly elected for the reasons stated in paragraph 5 (i) to (vi) of the said amended petition and set out as follows:

**“ (i) During the registration of voters exercise conducted by**

**the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent and his agents including the 1<sup>st</sup> respondent’s relations Derrick using motor vehicle registration N<sup>o</sup> ABJ 4301 and another relation driving motor vehicle registration number ALC 4302 ferried people from Katete and Mambwe district in Msoro to Mangwe and Naviruli wards. This was done with the intention of procuring votes for the respondent.**

**(ii) Between 1<sup>st</sup> August, 2011 and 20<sup>th</sup> September, 2011, in**

**the course of his campaigns, the 1<sup>st</sup> respondent and his agent Robert Phiri, Jane Phiri, Alick K. Phiri, Simon Mbewe, Mateyo Mbewe in all the wards in the constituency namely Kapachi, Kandabwako, Chanjowe, Mangwe did with malice convey false information and engaged in character assassination at public rallies and meetings against the petitioner and his party the United Party for National Development and its president Hakainde Hichilema to the effect that;**

- a. That the petitioner is not from Chadiza**
- b. That the president of the said party is a tribalist.**

**This was meant to cause apprehension in the electorate and procure votes for the 1<sup>st</sup> respondent.**

**(iii) Between the 1<sup>st</sup> August, 2011 and 20<sup>th</sup> September, 2011**

**the 1<sup>st</sup> respondent and his agents Elias Phiri, Jason Banda and Mateyo Mbewe in Chadiza, Kapachi wards intimidated the electoral by collecting details of their National Registration Card and voters cards from Thom Banda and other electorates purporting that the details could be used on the computer to establish the candidate each particular voter had voted for.**

**The electorate were warned that those that would be established to have voted for the opposition candidates would be punished by;**

- a. Ensuring that those that had supplied maize to Food Reserve Agency would not be paid.**
- b. Such persons will no longer benefit from government fertilizer support programme.**

**The threats were intended to coerce the electorate to vote for the respondent, especially so as the majority of the electorate are peasant farmers.**

**(iv) Between 1<sup>st</sup> August, 2011 and 20<sup>th</sup> September, 2011, in course of his campaigns, the 1<sup>st</sup> Respondent and his agents offered and did distribute bicycles, food stuff and other gifts to the following:**

- a. 7 bicycles were distributed to Azibusa (catechists) including Lawrence Phiri, Emmanuel Phiri, Blackson Mbewe, Acksensio Zulu, Alfred Banda, Phonius Mvula and Leonard Phiri in Chamandala ward, Kampini ward, Naviruli ward, Tafelansoni ward, Chadiza and Manje wards.**
- b. Mealie meal, salt, cooking oil, kapenta was distributed to the electorate through all the MMD candidates for ward elections to distribute to the electorate in Chanjowe, Mangwe Naviruli and other wards. The beneficiaries include Kennedy Banda, Charles Phiri, Batulumeyo Lungu**

- c. Bicycles were given to the electorate including some chief's Indunas to campaign for MMD and the 1<sup>st</sup> respondent. The people who benefited included Davison Phiri, Sefanie Nkhoma, Legson Mbewe, Gayson Banda, Infaiwawa Lungu.**
- (v) On the 19<sup>th</sup> and 20<sup>th</sup> day of September, 2011, the period in which campaigns had closed, the 1<sup>st</sup> respondent and his agents continued campaigning and did ferry electorates to polling stations and offered accommodation to the electorate to Mangwe ward, Chamandala ward, Kampini ward, Naviruli ward and Tafelansoni wards. The 1<sup>st</sup> respondent's agents included Alick Phiri, Mateyo Mbewe, Dave Phiri. The electorates were ferried by Chakufa Mtonga driving vehicle registration number ABL 2606 from Chimphelela village to Chanjowe polling station, Jonas Nyirenda driving motor vehicle ABJ 9791 ferried voters from Chimphelela and Kanseche villages to Chanjowe, Tresford Banda ferried the electorates from Chipata District to Mangwe ward in Chadiza district.**
- (vi) On the 20<sup>th</sup> September, 2011, the 1<sup>st</sup> respondent and his agents ferried the electorate from Msoro, Mphomwa, Mbenjere, Katete, Mpangwe. The 1<sup>st</sup> respondent's agent included Innocent Mutemwa**

**who was driving motor vehicle registration number ABX 3248 to ferry the electorates from Chadiza boma to Mwala and Chanjowe polling stations, and Dokotala Zulu who drove motor vehicle registration number ABA 4089 to ferry the electorates from Katete to Chadiza. Further, the electorates were accommodated at the 1<sup>st</sup> respondent's agents Andyford Mvula and Dokotala Zulus farms where food was provided. The electorates were presented with money and other donations and urged them to vote for the respondent. This was done to procure votes for the respondent.**

- 6. Your petitioner states that as a consequence of aforesaid illegal practices committed by the said Respondents and his elections agents, the majority of the voters in the affected areas and/or polling stations were prevented from electing the candidate in the constituency whom they prefer."**

In response to the petition, the 1<sup>st</sup> respondent filed an Answer in which he asserted, among other things that he was validly and duly elected as a Member of Parliament for the Chadiza constituency. He denied paragraph 5 (i) of the petition and averred that he would put the petitioner to strict proof thereof. In denying paragraph 5 (ii) of the petition, the 1<sup>st</sup> respondent averred



that neither he nor his agents conveyed any false information, or engaged in any character assassination. He also denied that Mr. Robert Phiri and Ms. Jane Phiri ever campaigned in the constituency. He stated further that his campaign team comprised of Mr. Simon Mbewe as Campaign Manager, himself as Assistant Campaign Manager, Mr. Kellas Alick Phiri as Treasurer, Mr. Mateyo Mbewe as Publicity Manager and Mr. Grayson Ziwa as an election agent. He further averred that it was in fact the petitioner who spread false information alleging that the 1<sup>st</sup> respondent had no house in Chadiza and that he was staying in a guesthouse as his house was in Katete. He added that those words were aired on Radio Mphangwe and that was meant to mislead the electorate into believing that the 1<sup>st</sup> respondent was an alien in the constituency.

The 1<sup>st</sup> respondent denied paragraph 5 (iii) of the petition and averred that he would put the petitioner to strict proof thereof and he further averred that he does not know the said Elias Phiri and Jason Banda for them to have been his agents and he also denied knowing any Thom Banda.

The 1<sup>st</sup> respondent's answer to the allegations in paragraph 5 (iv) of the petition was that the only bicycles donated in May, 2011 were to Father Mushanga of Chadiza Parish for catechists to spread the word of God in the 1<sup>st</sup> respondent's church and he averred that that was long before he was adopted as a candidate

by his party. He further averred that the only foodstuffs distributed were those to the 1<sup>st</sup> respondent's campaign team for their sustenance during the campaign period.

With respect to the allegations in paragraphs 5 (v) and (vi) of the petition, he averred that the only persons who were ferried to the polling station in the 1<sup>st</sup> respondent's car and ABA 4089 were the his relatives and he denied ever having provided food and accommodation to any voters.

The 1<sup>st</sup> respondent stated that contrary to the petitioner's assertions in paragraph 6, there were no illegal practices committed by the 1<sup>st</sup> respondent and/or his agents and that the final results of the election were a true and accurate reflection of the votes cast and that the electorate elected a candidate of their choice.

The 2<sup>nd</sup> respondent herein, the Election Commission of Zambia filed an Answer to the petition wherein they confirmed that the Parliamentary elections for the Chadiza Constituency were held on 20<sup>th</sup> September, 2011 and they confirmed the votes polled by each of the four candidates. They further confirmed that the Returning Officer, Patrick Mwenda declared Allan Mbewe as the duly elected Member of Parliament for Chadiza constituency. Further, whilst the 2<sup>nd</sup> respondent admitted paragraphs 1 to 4 of the petition, they averred that the allegations in paragraph 5 were

within the petitioner's exclusive knowledge and that the same did not relate to the 2<sup>nd</sup> respondent.

The 2<sup>nd</sup> respondent further averred that it conducted the Parliamentary elections in Chadiza in accordance with the established laws and procedures and that therefore, the petitioner is not entitled to the reliefs claimed.

In the petitioner's Reply filed on 17<sup>th</sup> January, 2012, the petitioner stated that save in so far as the same consists of admissions, the petitioner joined issue with the 1<sup>st</sup> and 2<sup>nd</sup> respondent's respective Answers.

At the trial of the petition thirteen (13) witnesses testified for the petitioner while (9) witnesses testified for the respondent. With respect to the first allegation of ferrying voters from Katete and Mambwe district in Msoro to Mangwe and Naviruli wards PW1 the petitioner, Salatiel Tembo testified that on the eve of the election on 19<sup>th</sup> September, 2011, after he received information that trucks or motor vehicles were ferrying voters into the constituency to the named wards, he personally travelled to Tikondane Polling Station at Tikondane Basic School with a member of his campaign team, namely, Postani Mwanza and they found a lot of people there. The petitioner testified further he and his team interviewed some of those people and they told him that they had been ferried from Msoro and Katete by Mr. Allan Mbewe

using the transport that was hired so that they could go and vote for him. He pointed out that Chadiza Central Constituency is in Chadiza District. PW1, further testified that the following morning after casting his vote, he was going around monitoring how the voting exercise was going when he received information from one Kennedy Banda that there was a problem at Chadiza market and he rushed there. On arrival at the market he found a Fuso truck, registration number ABF 1378 leaving the scene and he learnt that it was from Katete Boma and some members of his team went and reported the matter to the police. He claimed to have seen a Mr. Spade Tembo and Mr. Grayson Ziwa who was the election agent for Mr. Allan Mbewe, the 1<sup>st</sup> respondent, from a distance. Mr. Salatiel Tembo testified further that as he proceeded to Mwala Polling Station to go and monitor the voting, he found a taxi registration number ABX 3248, that was full of voters and some of who he knew from Katete and he claimed to have greeted them and talked to them. He named the driver as Innocent Mutemwa from Chadiza, Israel Banda and Matildah Mbewe as both being from Katete. PW1 further testified to the effect that when he went back to Tikondane Basic School Polling Station he saw vehicle registration number ABA 4089 ferrying people from Katete to the Mangwe area to the polling station and when it became dark he went back to Chadiza Boma to wait for the results. Then later that same evening he learnt that Mr. Allan Mbewe the 1<sup>st</sup> respondent had won the elections by obtaining 6 464 votes while he followed with 2 492 votes.

The petitioner had also testified with respect to the allegation in paragraph 5 (ii) that the 1<sup>st</sup> respondent and his agents, Robert Phiri, Jane Phiri, Alick K. Phiri, Simon Mbewe and Mateyo Mbewe in the Kapachi, Kandabwako, Chanjowe and Mangwe wards maliciously conveyed false information and engaged in character assassination of the petitioner, Salatiel Tembo, his party UPND and its president Hakainde Hichilema to the effect that (a) the petitioner was not from Chadiza but from Malawi and (b) the UPND president was a tribalist.

In his evidence, the petitioner also made reference to the allegation in paragraph 5 (iii) of the petition, that between 1<sup>st</sup> August and 20<sup>th</sup> September, 2011, the 1<sup>st</sup> respondent and his agents Elias Phiri, Jason Banda and Mateyo Mbewe in the Kapachi ward in Chadiza engaged in intimidation of the electorate by collecting details of their national registration cards and voters' cards purporting that the details would be used to establish the candidate each voter had voted for. The petitioner testified that the electorate were being threatened that if they did not give them those details, they would not be allowed to sell their maize or get paid for the maize they had sold and that they would also not be supported in the Government fertilizer support programme. He explained that he was being told that information by those people who attended their campaign meetings.

With respect to the allegation in paragraph 5 (iv) of the amended petition that in the course of the 1<sup>st</sup> respondent's campaign, between 1<sup>st</sup> August and 20<sup>th</sup> September, 2011, he and his agents offered and distributed bicycles, foodstuffs and gifts, the petitioner testified that he learnt of it while he was on his campaigns when he was asked why he was not distributing gifts like his colleague Allan Mbewe. He stated that he was told that Mr. Allan Mbewe had given bicycles to the Catholic Church, the traditional chiefs, other prominent leaders in the communities and the party cadres, and that he had also provided mealie-meal, salt, sugar, kapenta and beans to the electorate. He claimed that the bicycles and foodstuffs were given to the electorate so that they could help campaign for the 1<sup>st</sup> respondent, Allan Mbewe, Mr. Rupiah Bwezani Banda and the MMD Councillors.

In relation to the allegations in paragraph 5 (v) and (vi) of the petition the petitioner testified that apart from ferrying of voters from various places to the polling stations at Chanjowe, Mangwe and Mwala wards in Chadiza, they were accommodated at the 1<sup>st</sup> respondent's agents, namely Andyford Mvula and Dokotala Zulu's farms where food was provided. Mr. Salatiel Tembo informed the court that he petitioned the court over the results because he was more confident that the electorate were corrupted hence they did not vote according to their wishes and that there was a deliberate ploy to take people from different districts to vote in the Chadiza District. He asked the court to

nullify the elections of the 1<sup>st</sup> respondent as the duly elected Member of Parliament for Chadiza Constituency on the basis of the allegations contained in paragraph 5 of the petition and his testimony to the court.

In cross-examination by learned State Counsel, Mr. Sakwiba Sikota, the petitioner, Salatiel Tembo informed the court that it was not the first time he had stood as a candidate and he said that it was the second time he had lost to Mr. Allan Mbewe. He also agreed that the allegations levelled against the 1<sup>st</sup> respondent, Allan Mbewe were all based on hearsay except for what he saw on 20<sup>th</sup> September, 2011. He said that reports were made to him so that he could do something about the allegations. PW1 also confirmed that he was aware of the District Conflict Management Committee and the Electorate Code of Conduct but he did not make a single complaint to them. He explained that he and his team were sure that the electorate would not be prevented from electing a candidate of their choice because of the manner in which they campaigned and the response they had received from the electorate which made them sure that they were not ready to vote Allan Mbewe back into office as their Member of Parliament despite all the malpractices. The petitioner also informed the court that he was ordinarily resident in Chadiza as he had spent most of his fifty seven (57) years there and that as such he was well-known in Chadiza. He, however, stated that he was not born and raised in Chadiza and that there were people who were

alleging that he was not from Chadiza and that he was a Malawian. The petitioner acknowledged that in Zambia, it is permissible for a candidate to stand for elections in a district they do not originate from. He disagreed that he lost the elections because he had ranked the people of Chadiza's literacy levels to be quite low in comparison to the rest of the other Zambians in other districts. He also acknowledged that there had been many elections in Chadiza and Zambia in which people had not been identified in terms of the manner in which they voted. When the petitioner was asked whether he had seen anyone taking people's registration card and voter's card numbers he answered that he did not and he also said that from his own personal knowledge he was not able to tell the court where these incidents took place. Mr. Salatiel Tembo informed the court that he never made any report to either the Dispute Conflict Management Committee (DCMC) or police concerning the allegations of the national registration card and voters card numbers but that his campaigners, particularly Mrs. Elizabeth Phiri made a report to the police, even though no arrests were made.

When cross-examined by learned State Counsel in relation to the bicycles the petitioner stated that he was not aware that it was in May 2011 that the bicycles were given to the catechists. He, however, stated that he was aware that it was on 21<sup>st</sup> August, 2011 that the bicycles were given even though he was personally not present on 21<sup>st</sup> August, 2011 but his agents who attended the



farewell church service told him that that is when the whole church congregation were informed that they had been given seven (7) bicycles. He named one of his informant agents as Mr. Kennedy Banda. However, even after saying that, the petitioner acknowledged that it was not when the bicycles were received but when the congregation was informed about the receipt of the bicycles. He further stated that he had no serious reason to dispute that the bicycles were given in May 2011. Mr. Salatiel Tembo also said that he was not aware that after the census the Government had directed that the bicycles be distributed to certain individuals even though he was aware that there were bicycles left over from the census. He stated further that he mentioned only names of five beneficiaries of the bicycles at the time of filing the petition because those were the ones he was aware of as having received or benefited. He added that one of the beneficiaries Mr. Davison Phiri returned the bicycle to Chief Mulolo while Mr. Infaiwawa Lungu received the bicycle bought by the respondent, Mr. Allan Mbewe. He also stated that at the time of filing the petition he knew more than those five names but he could not list all those that he knew. He said that he knew that all the four chiefs, namely Chief Zingalume, Chief Mulolo, Chief Mwangala and Chief Pembamoyo had received bicycles but he did not mention that they were chiefs as at the time he did not see the need to mention them in the petition as beneficiaries of the bicycles. He added that it was only that day in court that he found it necessary to mention the chiefs because of the number of

bicycles they received. He thereafter said that he only found out that the previous week about the chiefs. He, however, insisted that he had said that the chiefs, indunas and others received bicycles and later he conceded that the wording in the petition referred to chief's indunas and that it was not shown in the petition that the chiefs were given bicycles. The petitioner said that the distribution of bicycles was not reported to the DCMC or the police because he did not think of reporting as he was busy campaigning. He said that he did not consider it significant to report and later he changed that he considered it significant to report but that he did not have anyone he could send to report. He was challenged on how he had enough time to go to the District Commissioner's office and to the District Administrative Officer Mr. Malama and to go looking for Mr. Juzio Banda within the Council grounds and yet he had no time to go and report.

The petitioner's attention was later drawn to the allegation of distribution of foodstuffs, namely mealie-meal, salt, cooking oil and kapenta in the last week of the campaign. He informed the court that he was not aware of the dates when this alleged distribution took place and also that he personally never saw it happening but he said that he was told by his election agents and one of who he named as Mr. Charles Phiri. He said that he did not report to the DCMC or police because at the time he did not think the acts would affect the results. Mr. Salatiel Tembo stated further that at the time when he saw the large quantities that were being

given out they were in the last week of the campaign and then he changed that he first got the report in the last week of the campaign. He said that he was told when he saw the large quantities being brought but he said that he had no names of the people he saw. He conceded that he was aware that the 1<sup>st</sup> respondent had asked for further and better particulars and he stated that among the further and better particulars provided were the details of the people distributing cooking oil and other foodstuffs and he believed that his witness would testify to that effect. The petitioner eventually conceded that he did not see people distributing.

With respect to the incident at Tikondane Basic School polling station, the petitioner stated that the school is along the road and there is a market and at the roadside where he and Mr. Postani Mwanza were standing at Mr. Scaliot Banda's residence when they saw a lot of people returning from a drinking place and they interviewed them. He said that he took down one name only of Mr. Bartholomew Lungu who he knew before as a person from Msoro. The petitioner stated further that thereafter he rang Mr. Kingstone Banda in Chadiza Boma to inform the police that there were a lot of people from different parts at Tikondane. He stated, however that it is not illegal for a person to vote where that person is registered as a voter. He further confirmed that the nearest police station to Tikondane is Zimba Police Station but he explained that he felt more comfortable to phone people in

Chadiza than to drive to Zimba Police Station to report the incident. He said that he had not thought of reporting at Tikondane Basic School polling station where there were police officers. When asked about the taxi that he claimed was carrying voters, Mr. Salatiel Tembo informed the court that it was a Chadiza based taxi. He named the vehicles that he claimed to have been ferrying voters as a Mitsubishi Canter registration number ABL 2606, a Fuso Fighter registration number ABX 3248 and a twin-cab registration number ABA 4089.

Turning to the issue of votes, the petitioner stated that there was a difference of about 4 000 votes between his voters of 2 492 and those of the 1<sup>st</sup> respondent of 6 464. He confirmed that his votes were about a third of the winning votes and that the election result was not even close. He also confirmed that the figures show or indicate that the electorate voted for a candidate of their choice. In re-examination, the petitioner explained that the reason why he petitioned was so that the people of Chadiza Central Constituency would know that he is the rightful candidate to contest as their Member of Parliament. He stated that this was based on the work that he and the community had been engaged in and he felt that he should be the one to go and represent them in Parliament.

PW2, Stephen Phiri's testimony was to the effect that before the elections, one Israel Banda went to his house in Katete and

told him that Mr. Allan Mbewe wanted them to go to his house on Saturday and he did. When they met Mr. Allan Mbewe he told them that he wanted them to go and register as voters in Chadiza where they originated from and he later arranged transport for them to be taken to Chanjowe at Chadiza to register as voters. PW2 testified further that they were about seventeen (17) in number and that they were transported in a Cruiser registration number ABJ 4301 which belonged to the respondent, Mr. Allan Mbewe and which was driven by his driver whose name he did not know. Then on 20<sup>th</sup> September, 2011 PW2 and other registered voters who were over seventy were transported to Chadiza in Fuso Fighter truck and left at El Shaddai shop and from where they used a taxi to go to Chanjowe to vote. Stephen Phiri further testified that the taxi was organized by the chairman and he did not know who paid for it. In cross-examination this witness informed the court that Mr. Allan Mbewe's house is in Katete Boma. PW2 also confirmed that he originates from Chadiza and he said that he was not present when Israel Banda spoke with Hon. Allan Mbewe. It was PW2's evidence that after voting he and the ones at Chanjowe walked from Chanjowe to Chadiza.

PW3, Innocent Mutemwa, a taxi driver from Chadiza, testified to the effect that on 20<sup>th</sup> September, 2011 between 10:00 and 11:00 hours he met Israel Banda at the market at El Shaddai shop in Chadiza, and he hired his taxi to take him and the other people he was with to four polling stations, namely Chanjowe, John Farms,

Mwala and Kapachi. After asking him how much it would cost and upon being told that it was K2 million, Israel Banda phoned Hon. Allan Mbewe but PW3 did not hear what he said and then Israel Banda gave him the phone so that he could talk to him. PW3 negotiated the fare with Hon. Allan Mbewe and he reduced it by K200,000=00 so that it came to K1.8 million. Innocent Mutemwa testified to having transported seven people in his car from Chadiza to Chanjowe, John Farms, Mwala and Kapachi and then back to Chadiza. PW3 informed the court that after taking the others voters back to Chadiza, he went back to pick the ones he had left at Chanjowe and he found them and went back with them to Chadiza and that is when Israel Banda gave him Hon. Allan Mbewe's phone number so that they could discuss the payment. Innocent Mutemwa testified further that after a week he phoned the respondent when he was in Chipata and they met at Spur where Hon. Allan Mbewe gave him K1.8 million.

In cross-examination, PW3 informed the court that the taxi was not his and that it is for Mr. Michael Daka. He also stated he confirmed that it was Hon. Allan Mbewe that he talked to on the phone because he knew his voice as he had stayed with him for a long time and he gave the number 0977-458516 as the number he had called him on. He stated that the trip to the four polling stations is the only trip he made on behalf of Israel Banda. PW3 agreed that he was stopped by Mr. Salatiel Tembo between Mwala and Kapachi polling stations and he said that he greeted everyone

who was in the taxi and afterwards they all proceeded on their way. He denied that Mr. Salatiel Tembo met him at El Shaddai and he clearly stated that the person who found him there is Israel Banda who booked him.

PW4, Spade Tembo testified to the effect that on 20<sup>th</sup> September, 2011 he went and voted at Mukoma polling station in Chadiza and that after voting he proceeded to Chadiza Boma. As he was going when he reached Chadiza District Hospital he saw a Fuso Fighter truck that was coming from Yobe Road and entering the Boma and it was loaded with people and it by-passed him. He later found it parked at El Shaddai shop around 09:00 hours. PW4 exchanged greetings with the driver and as they chatted, he asked him who had hired him and the driver told him that he was hired by Hon. Allan Mbewe and that he was waiting for money from a Mr. Ziba. Whilst they were still chatting Mr. Ziba arrived and gave him the money. Spade Tembo explained that Mr. Ziba was the election agent for the MMD. After he learnt from the driver that the people he had carried in the Fuso Fighter truck were voters, he followed Mr. Ziba who was going to the Government Rest House and confronted him over the ferrying of voters. PW4 testified further that when the driver saw Mr. Salatiel Tembo and others approaching, he drove off in the Fuso Fighter registration ABF 1378.

In cross-examination by learned State Counsel, Mr. Sakwiba Sikota the witness told the court that he was one of the petitioner's officials and that he had phoned Mr. Salatiel Tembo. He also confirmed that he had an argument with Mr. Ziba at the market and that many people gathered around but they left after the truck left. PW4 stated that he did not report the matter to the police and that he was not aware if anyone reported it. He also conceded that he was not happy that Mr. Salatiel Tembo lost the elections. He also insisted that he personally saw the truck and wrote down the registration number and later tore the paper after he memorised the number. He denied that he was lying and he said that he said what he saw.

PW5, Benjamin Banda's evidence was that on election day he woke up early in the morning and walked to the Katete-Kazumila road where he got a lift in a vehicle that was driven by his friend Whyson Zulu (alias Dokotala Zulu). When he got into the vehicle which was an open van there were about twelve or thirteen people and they drove to Tikondane School where about eight people dropped off and then they proceeded to Zemba and went to the shops where the rest of the people dropped off. After they disembarked from the vehicle they said that they were going to vote and they asked Dokotala if he would go back to pick them and then PW5 and his friend, Dokotala went back to Tikondane School to vote, later they picked the eight people who remained at Tikondane. Thereafter they drove to the farm for Andyford



Nkhoma who is a member of MMD, and a neighbour to PW5 in the Tikondane area and there they found some food that was prepared and about hundred or more people Benjamin Banda claimed to have known only three people, namely Daniel, Josias Daka and Misheck Phiri and he had seen Josias in the vehicle and he is the one who had said that some of them were from Msoro. After eating the food and chatting with Josias Daka, PW5 left that place. In cross-examination, PW5 said that he did not tell anyone that he was given a lift but he later admitted telling Mr. Salatiel Tembo when he was approached three weeks before the trial.

PW6, Paul Phiri a farmer and businessman, testified that on 20<sup>th</sup> September, 2011 he was approached by one Alick Phiri, the MMD polling agent for Chanjowe ward, who was in the company of Mateyo and the MMD Chairman, Misho Kamanga and asked if they could book his motor bike to go into the villages to tell the people that a vehicle would go and pick them up to take them to go and vote at the polling station. After he told the trio that there was no petrol in his motor bike, Alick Phiri gave him K30,000=00 and from there PW6 went to Jekabu, Kaleni Chiwulunga and Sadeni villages where he delivered the message and also informed them that after voting they would be picked up from PW6's shop. Paul Phiri stated further that after voting, they were picked up in a Fuso Fighter, registration number ABJ 9791 by Jonas Nyirenda.

In cross-examination, PW6 informed the court that he voted at Chanjowe polling station in Chadiza around 11:30 hours and he

said that it was around 09:00 30 hours when Alick Phiri had gone to see him. He explained that when he reached Jekabu village, he found a group of MMD members at Ndikuleka's house which he knew from before and he delivered the message to the MMD Chairman, Mr. Rogers Phiri, who in turn informed the people. From Jekabu village, PW6 proceeded to Kaleni village where he did not go round informing people because as he was moving he would meet people on the way and inform them of the transport arrangement. Paul Phiri told the court that although he was initially afraid of delivering the message, to those villages, he stopped being afraid when he realised that the group of people he met on the way were from Makaleni which was hundred percent (100%) MMD and he said that is why Mr. Mbewe won in that area. He said that he did not find anyone in Kabeni village and Chiwulunga village which is nearby he found only one group of people but he did not count them and he also did not talk to them as he did not know whether the village was hundred percent (100%) MMD. He stated further that he went and spoke to a person called Winnie Zulu who told him that the people had already gone to vote and from there he went back to his shop. Later according to PW6, the driver of the Fuso Fighter, registration number ABJ 9791 approached him and asked him if he was Sata Paul Phiri and when he agreed, he told him that he was the driver who had gone there to pick up the people. Paul Phiri stated further that he knew the owner of the Fuso Fighter truck as Gobert Banda of Chadiza.

PW7, Sefani Nkhoma, farmer and headman of Tibule village in Chief Mulolo's area in Chadiza, testified that in the month of August, 2011, he was called to Chief Mulolo's palace where he was given one bicycle and told to help the Government with a vote and he agreed. He testified further that he was asked to vote for Rupiah Banda, Councillor Achoke and the MP Mr. Allan Mbewe and he in turn told the villagers that they should not miss the vote for the Government of MMD. He further testified that there were seventeen (17) bicycles and that even though he did not know where they came from, the Chief told him that they came from the Government.

In cross-examination, Sefani Nkhoma informed the court that Mr. Allan Mbewe was not there when he was given the bicycle and that at the time he received the bicycle he was alone. He was emphatic that he was not given the bicycle at the beginning of the year but in August because when he receives a good gift he was bound to remember when he received it. He, however, said that he would not know when the Chief received the bicycles because there was a distance from the palace to his village at the Chamida border. PW7 also confirmed that Mr. Achoke and Mr. Rupiah Banda were not present when he was given the bicycle. He also informed the court that the Chief was happy with the MMD Government.

PW8, Guyson Banda, farmer and village headman of Mulolo village in Chief Mulolo's area testified to the effect that he was called to Chief Mulolo's palace to choose a bicycle from the seventeen (17) bicycles that the Chief had been given by the Government. After he chose one, he was told by the Chief to go and vote for MMD namely, President Rupiah Bwezani Banda, Mr. Allan Mbewe, the MP and Councillor Achoke Banda. He was also told to tell the people in the village to vote for the people from MMD. He said that this happened in August 2011.

In cross-examination, PW8 agreed that at the time of receiving the bicycle from the Chief, Mr. Allan Mbewe, Mr. Achoke and Mr. Rupiah Banda were not present. He confirmed that there were seventeen bicycles and that sixteen remained after he took one. He also said that he was not present when the Chief received the bicycles. Headman Guyson Banda attested that he went to try and convince the people to vote for Mr. Rupiah Banda and the other MMD officials because of the good things the MMD Government had done and not because he had been given a bicycle. He also stated that he did not lie to them, beat or threaten them and that in his view the people of Chadiza chose the candidate of their choice.

In cross-examination, PW8 said that before he was given the bicycle he was not campaigning for Mr. Allan Mbewe but when he

was given the bicycle he saw something he had never seen before in his life.

PW9, Davison Phiri, headman of Mkumba village in Chief Mulolo's area testified that he recalled that in August 2011, Chief Mulolo called him to his palace and told him about the bicycles and then he gave him one. He said that at that time he did not say anything to him. However, later he was called a second time and that is when the Chief told him that as the headman he wanted to tell him that the bicycle were for the MMD and that, therefore, he was told to go and campaign for them and tell the villagers to vote for Mr. Rupiah Banda, Mr. Allan Mbewe and Councillor Achoke Banda. After hearing what the Chief told him, PW9 told him that he could not manage and he took back the bicycle.

In cross-examination, Davison Phiri agreed that at the time he was given the bicycle, Mr. Rupiah Banda, Mr. Allan Mbewe and Mr. Achoke Banda were not present and there was no-one else there, no even other headman. He explained that there were eighteen bicycles and when he took one, there were seventeen left. On the number of bicycles, PW9 said that he was told by the Chief about the eighteen bicycles which were kept in the bedroom. He further stated that there was no MMD written on the bicycles.

In re-examination, Davison Phiri was emphatic that there was no-one else when he was summoned to the palace and that there were just the two of them when the Chief told him about the number of bicycles.

PW10, Charles Phiri, Farmer and businessman testified that at the beginning of September 2011 whilst he was at home, he received two friends, namely Anelo Phiri and Amon who asked him to join them in the campaign, with a view of benefitting from the same. He told them that he did not want but they told him that he should join the team that was likely to win and they were referring to the MMD. He testified further that they invited him to join them at Richard's shop Ebenezer the following day and he went there at 14:00 hours and he found Richard and Royd at the shop. He stated that after chatting with them, they took him behind the shop and opened the store-room which was full of things and foodstuffs. Richard Zimba who he identified as the MMD Councillor for Chadiza, and the owner of the shop gave a bag of mealie-meal and advised him to think about what they had discussed and pass through the shop the following day. Charles Phiri, however, later told them that since the vote is a secret, he would know what to do.

In cross-examination, PW10 confirmed that Richard's brother Royd was a very good friend of his. He also agreed that when Richard was very busy, especially during the campaign, Royd

would manage the shop. Charles Phiri also confirmed that he was an agent for the petitioner, Mr. Salatiel Tembo and that he was very active and both Richard and Royd were aware of that even when they were trying to persuade him to join their camp. He admitted informing the petitioner about the bag of mealie-meal he was given by Richard before he was given the mealie-meal. Later PW10 changed and said that he did not inform the petitioner at the time he was given the mealie-meal but that he told him after he was given. After he was challenged by learned State Counsel about his story being a fabrication, he denied it. He, however, admitted that he knew as an agent that it was wrong to receive gifts during the campaign but he did not report the matter to the police or the DCMC as he did not consider it to be a conflict.

PW11, Yona Phiri a driver and bricklayer from Mulolo Compound in Chadiza, testified that he recalled that on an unknown date in September 2011 before the election day, he was seated at home when he was approached by Aaron Phiri with a proposal to form a football team which PW11 would lead. Aaron Phiri told him that he had been sent by the Hon. Allan Mbewe and he accepted as he thought it was good to keep fit. PW11 testified further that after that Aaron Phiri asked him for his national registration card (NRC) number so that he could give it to Hon. Allan Mbewe and he in turn gave PW11 Hon. Allan Mbewe's phone number. He said that he did not phone Hon. Allan Mbewe but he went to his place and told him to find him at Aaron Phiri's house.

Yona Phiri informed the court that Hon. Allan Mbewe phoned him and when he met him at Aaron Phiri's house, he asked him if he had organized the football team. He further testified that he also asked him what he did for a living and he asked him if he had a driving licence after PW11 told him that he was a driver and bricklayer (builder). He stated further that Hon. Allan Mbewe told him that he had his national registration card and voter's card numbers and he would try to see how he would send them so that he could get him a driving licence. Yona testified that Hon. Allan Mbewe thereafter told him that he should vote for Rupiah Banda, himself and that he should not vote for Salatiel Tembo because he was selfish and could not look after people. He further told him that if UPND or PF won, then they would not get the fertilizer and that the money for the maize they had sold to the Food Reserve Agency (FRA) would not be paid in time. PW11 said that he agreed and bade farewell to Hon. Allan Mbewe who thanked him and told him that he had nothing to give him but he told him to see Aaron Phiri later in the evening. Later in the evening, he went back to Aaron Phiri's house where he was told that Hon. Allan Mbewe had left him a blanket and a bag of salt and he said that they should continue campaigning for them and PW11 agreed and thanked Aaron Phiri and took the blanket and salt. He also stated that he knew that Aaron Phiri was a member of MMD.

In cross-examination by learned State Counsel, Mr. Sakwiba Sikota PW11 informed the court that the only work he does is that



of a driver and a bricklayer and he said that he drives Mr. Munyenyema's Canter. He also first told the court that he taught himself how to drive using Mr. Sakala's vehicle but soon after that he denied saying that he had taught himself. Yona Phiri also said that he did not tell Hon. Mbewe that he was a farmer and he agreed that since he did not tell him that he was a farmer he would not have told him that they would not be paid in time for the maize they sold to the Food Reserve Agency. He later informed the court that Hon. Allan Mbewe did not talk to him about maize and fertilizer. He stated further that there were only three of them at Aaron Phiri's house and then in the next breath he said that there were farmers there and that Hon. Allan Mbewe was talking to them but later on he said that he was talking to him about the maize and fertilizer that he did not hear the question properly. PW11 told the court that he did not sell maize to the Food Reserve Agency but he admitted having taken fertilizer from the Food Reserve Agency in January 2012. He also agreed that, therefore, in September 2011 it would not have affected him. With respect to the blanket and salt he said that he had used it even though there were still some left over and he also had the blanket. Yona Phiri said that he only told Janet Soko, Joseph Phiri and Mwanida Soko about the salt and blanket and he added that it was after they had voted that he told Salatiel Tembo in mid December 2011 that he still had the salt and blanket.

In re- examination, PW11 informed the court that he was taught how to drive by Mr. Sakala. He also reiterated what he was allegedly told by Hon. Allan Mbewe about receiving fertilizer and money in time if they did not vote for MMD.

PW12, Kennedy Banda testified to the effect that he stood as candidate for Councillor under the UPND in the last elections in the Chadiza Central Constituency and he informed the court that he had two testimonies. He said that on 21<sup>st</sup> August, 2011 they had a farewell mass for Father Abraham Mushanga at Chadiza Catholic Parish and that prior to that, he was called to a meeting by the Parish Chairperson, Mr. Joseph Miti. At the meeting he was told about the people who would speak at the end of the mass and the order in which they would speak and he said that they were Mr. Allan Mbewe, Mr. Joseph Miti, the chairperson and Father Mushanga. Kennedy Banda claimed to have differed with the Parish Chairperson over the issue of inviting Mr. Allan Mbewe to speak at the farewell mass because it would have appeared as if they were campaigning for him since it was during the campaign period. He stated that since the Parish Chairperson did not agree with him, when the mass ended, Mr. Allan Mbewe was called to address the church congregation. PW12 stated further that the 1<sup>st</sup> respondent knelt down, asked for forgiveness if he had wronged anyone and he said that he got married in the church and he asked the people not to forget him and to vote for him.

Kennedy Banda testified further that afterwards Mr. Joseph Miti informed the congregation that Mr. Allan Mbewe had done some good things for the church and that he had bought seven bicycles which had been given to the catechists who he named as Lawrence Phiri, Absentio Zulu, Emmanuel Mabvuto Phiri, Leonard Phiri, Phonius Mvula, Blackson Kizito Mbewe and Alfred Banda. He also asked if the church could forget such a person who had done a good thing and he urged the congregation to vote for him.

PW12 then testified with respect to the issue of sharing food which took place on 18<sup>th</sup> September, 2011 and he told the court that he saw Mateyo Mbewe, Garius Alick Phiri and Grayson Ziba packing foodstuffs namely, beans, kapenta and rice in plastics at Mr. Chakunda Phiri's shop in Chadiza old market. He said that Mateyo Mbewe told him that they would take the food to the polling stations and when he enquired if it was not an offence, he answered that it was not an offence. PW12 testified further that he was given a packet of about four (4) kilograms of beans by Mateyo Mbewe who told him that they knew that he could not vote for them since he was also standing as a Councillor but he asked him to vote for Mr. Rupiah Banda as President and for Mr. Allan Mbewe as Member of Parliament (MP). He merely thanked them because he wanted evidence and he took the beans home.

In cross-examination, he reiterated that he had a position in the church but he said that he did not know that it was the church

that asked Mr. Allan Mbewe for the bicycles and he also did not know that the bicycles were given to the church in May 2011. He said that he knew when the bicycles were given and that it was on 21<sup>st</sup> August, 2011 even though he did not see the bicycles being given to the church and to the catechists he mentioned. He, however, agreed that when a person does a good deed it is not normal for them to tell the church members. Kennedy Banda confirmed that the people who gave him the packet of beans knew that he was a candidate for the UPND in the elections. He also agreed that they were packing the foodstuffs in the open even though he disagreed that they were not behaving as people who were doing something wrong. He added that if a person is used to stealing, even in front of people, that person can steal from them. He admitted that he did not report the matter of distribution of bicycles and foodstuffs to either the police or the DCMC because whenever they complained to the DCMC or the police, there was nothing that was being done and that that is why in the end they just left things like that. PW12 stated that they had a problem in Chanjowe ward and he complained to the DCMC but nothing was done. He informed the court that he put the complaint in writing and kept a copy of the same and he said that he had not brought it to court because he did not think the issue would arise and that the document was important.

With respect to the distribution of blankets in Chanjowe ward, PW12 said that it was not as serious as giving out bicycles

and that the issue of blankets was not his business but that of the party whilst his problem was that of bicycles and beans. Kennedy Banda later changed his earlier statement and told the court that he was not the one who took the complaint to the DCMC but the party representative, Mr. Lameck Phiri. He said that he reported to the petitioner about the bicycles on 21<sup>st</sup> August, 2011 and about the foodstuff on 18<sup>th</sup> September, 2011. He also said that he did not take the beans to him since they had eaten it even though he had said that he took the beans because he wanted evidence. PW12 further stated that he did not know that the matter would end up in court and he conceded that when they ate the beans the evidence of the beans was lost and destroyed.

In re-examination, Kennedy Banda's explanation on why he thought that the bicycles were given to the church on 21<sup>st</sup> August, 2011 was that because that is when the announcement was made. He added that it was because of the campaign time they were in that they were opposed to the donation at that time as it appeared that the priest was also campaigning for the donor.

PW13, Simasiku Apezeka Siyuni Phiri alias Chief Mulolo testified that in August 2011 he received seventeen (17) bicycles at his palace and that they were taken there by Harrison, a member and the chairman of the MMD. He said that when he was given the bicycles which his messenger received on his behalf, they were told that the Government had sent the bicycles so that

they could be distributed to the people and he said that the Chadiza Council Secretary told him that. Chief Mulolo further testified that he was given two (2) out of the seventeen (17) bicycles and that out of the remaining fifteen, he distributed to various people that he named and some of who were headmen. He also explained that he had fifteen headmen but he did not give all of them because when he was given the bicycles he was told to give to those who did not have bicycles and that Harrison Phiri had been chairman of MMD for three years. He also said that he had said he did not know his surname since he stays far from where he stayed. After being asked, he hesistantly said that the one he knew very well was Harrison Banda. PW13 however conceded that there were two different people Harrison Banda and the Harrison whose name he did not know very well. He also explained that he assumed that his surname was Phiri because most of the people in his area are Phiris. Chief Mulolo informed the court that the Harrison Phiri he had referred to lives in Chief Zingalume's area while he himself lives in Mulolo village and he said that Harrison Phiri used to go and organize MMD meetings in his area. He also asked the court to forgive him if his evidence appeared to be confusing. PW13 confirmed that he received the bicycles and that Harrison Phiri knew the MMD members better than he did but that he had taken the bicycles to him in his capacity as the Chief. He said that he met with five headmen namely Dilila, Chimsoro, Sefani Sakala and Moyo after he received the bicycles and they helped him to choose the beneficiaries of the bicycles. He further

informed the court that the headmen who were given bicycles were not MMD members but that they were given bicycles as the Chief's headmen. However, with respect to his nephew, Siyuni he said that he was given a bicycle because he is a member of MMD and he named some other MMD members such as Cryson Phiri, Dumasi Soko, Fred Zulu, and Mulumbenji who were given bicycles. When Chief Mulolo was challenged about lying to the court, he said that he was a person who would not lie to the court and he said that he had never lied to the court. He explained that the testimony he gave the first day was incomplete but the testimony he gave on the subsequent days concerning the bicycles was complete. He was emphatic that when the Council Secretary and District Administrative Officer went to his palace, Mr. Juzel Banda was not there. PW13 confirmed that he had said that the Council Secretary told him to give the bicycles to people who had no bicycles. Chief Mulolo also told the court that although he spoke the truth in relation to how the bicycles were taken to him, he however, did not speak the whole truth when he informed the court that he had finished giving evidence when he had not and that was not right. With respect to the bicycle that was given to Davison Phiri and who he said is Headman Kumba, PW13's evidence was that he was asked to return the bicycle because he learnt that he belonged to the UPND. In conclusion, PW13 stated that he could not remember the actual month when the bicycles were delivered to his palace and he even phoned the Council Secretary to try and get him to refresh his memory but he was told

that the Council Secretary was in Vubwi and he did not call him back. He also disagreed that what he had told the court was lies because he testified about what happened with the bicycles.

PW14, Apton Philip Kalemba's evidence was to the effect that he recalled that between 1<sup>st</sup> and 20<sup>th</sup> September, 2011, he was at his market stand at Chadiza New Call Market when he saw Robert Phiri going around the benches in the market. When he reached PW14's bench he asked him how long they as UNIP had put up Ben Banda as a candidate when he was from Ndola which was far and left a local person, Allan Mbewe. He said that the UNIP were like the UPND who had fielded someone from Malawi as a candidate for the Chadiza Central Constituency. Upon PW14 asking him how he knew that he was from Malawi, Robert Phiri asked him if he was not aware that he had gone to Malawi for the burial of his relative. Thereafter, PW14 informed him that Salatiel Tembo actually originated from Njoka village in Chief Mulolo's area in Chadiza. Later, Apton Philip Kalemba went to Salatiel Tembo and asked him if he was Malawian and had travelled to Malawi for burial of his relative. He confirmed that he was from Njoka village and he told PW14 that he had gone to Malawi so that he could accompany his relative's body back to Zambia for burial. PW14 also told Ben Banda, the UNIP candidate what Robert Phiri had told him. Apton Philip Kalemba stated that he knew Robert Phiri as the UNIP District Party Chairman who in 2001 wanted to stand as the MMD candidate. He said that Robert Phiri was campaigning for



Rupiah Banda, Allan Mbewe, Richard Zulu as Councillor and that he was the chairman for the Veterans' Committee and the MMD representative. PW14 also stated that he was personally invited to join the Committee and he told them that he would never join MMD till his death. He said that he was born in UNIP and that he would die as UNIP.

In cross-examination, PW14 agreed that he was aware of the DCMC and why it was constituted since he was also a member of the same for a short while and he was dropped as there were excess representatives. He explained that the incident was not reported because they discussed it as UNIP and decided that the issue of the alleged character assassination was for UPND and he only reported to the UNIP Provincial Office. PW14 said that he had only known Robert Phiri for a short period, from 2007 to 2011. He also admitted that he initially did not know that Salatiel Tembo was from Njoka village until he told him. Apton Philip Kalemba however departed from his earlier evidence about what Robert Phiri actually told him regarding Salatiel Tembo's origins by saying that when Robert Phiri went to his bench, he told him that even though Salatiel Tembo claimed that he came from Njoka village, he did not come from there. When he was reminded of what he had told the court earlier, he answered that his memory was not so good because he suffered from TB and he was put on medication and he tended to forget things. He further asked the court to accept his evidence irrespective of his medical condition.

PW10 also told the court that he was told about Salatiel Tembo's origins by a friend before Robert Phiri went to his bench at the market and before he went to tell Salatiel Tembo what Robert Phiri had told him. Apton Philip Kalemba agreed that he knew that forgetfulness and lying were two different things. He insisted that he did not lie to the court but merely forgot his earlier statement and that he would leave it to the court to decide whether he forgot or lied and he sought the court's forgiveness on the part that he had forgotten.

In re-examination, PW14 said that he recalled what Robert Phiri said to him when he went to his bench at the market and he restated the same.

PW15, Elizabeth Phiri, a businesswoman of Kamwala Compound in Chief Zingalume's area in Chadiza, testified that she recalled what happened prior to 20<sup>th</sup> September, 2011 on 17<sup>th</sup> September, 2011 when she met two women named Agnes Phiri and Atiness Mbewe. She said that they told her that they were going to Mukoma village because they had been told to take their voters' registration and national registration cards to Anell Phiri but before they reached Mukoma village they met him and he told them that he could register them as he was still on the programme and he took the documents and recorded the numbers. When PW15 asked him what was the purpose of the numbers, he told her that he was only sent to record the numbers on the voters cards and national registration cards by the MP. Mr.

Allan Mbewe. She testified further that they needed the names and numbers so that they could send them to Lusaka to make other votes because they wanted Mr. Rupiah Banda and MP, Allan Mbewe to win. She added that Annel Phiri also told her that with the computer they would be able to see how many people voted for the opposition and that there would be no development for whoever voted for the opposition. Elizabeth Phiri testified further that after hearing that she proceeded to the PF office where she found Mr. Salatiel Tembo, Mr. Nickson Phiri and Mr. Kalemba and she told them what she had heard. They advised her to report the incident to the police and she said that she did but the police dismissed her and allegedly told her that the opposition were difficult. PW15 informed the court that she was the vice-chairlady for Chadiza and that she was a very good campaigner who had even campaigned to Annel Phiri who knew that she was a staunch PF campaigner and supplier and that he knew that he had to keep the MMD dirty tricks to himself even though he told her. She also said that she did not pursue the issue of the voters and registration cards because she was discouraged by the way the police officer responded to her complaint. PW15 at one time said that Atiness and Agness were coming from their village Mukoma and then she said that they were going to Mukoma village from their village Tiyimbe and that she was going to her farm. She also confirmed that that Agnes and Atiness were still living in the same village at the time she came to testify.

In cross-examination by learned State Counsel, PW15 confirmed that on 17<sup>th</sup> September, 2011 she was going to her field to till the land and that she had even carried a hoe. She also agreed that the PF office was located at her shop and she said that she was campaigning for the PF candidate, Nickson Phiri. She denied that she was campaigning for Mr. Salatiel Tembo and she said that she campaigned for him before the elections before they voted. She explained that she stopped campaigning for Mr. Salatiel Tembo when she joined the PF in August 2011 and she said that from the second week of August 2011 to the end of the campaign period she campaigned for Mr. Nickson Phiri. Elizabeth Phiri stated further that she campaigned for Mr. Nickson Phiri on a daily basis and week after week. She told the court that her son Sailas was born on 18<sup>th</sup> August, 2011 and she disagreed with State Counsel about her pregnancy having been a difficult one and she also said that she did not recall being admitted to St. Francis Hospital with respect to the pregnancy. PW15, however, later admitted she stayed for five days at St. Francis Hospital because it was a difficult pregnancy and delivery which resulted in the baby being delivered by caesarian section and that she was told to rest for one week. She denied experiencing any problems after the operations or going back to the hospital before the 20<sup>th</sup> September, 2011 elections and she also said that she never went back to St. Francis Hospital in December 2011. Elizabeth Phiri, however, admitted that there was a time that she was in hospital and on bed rest so that she did not campaign for Nicholas Phiri

from the second week of August, 2011 to end of the campaign period contrary to what she had stated earlier. She asked the court to forgive her for where she had made mistakes and she said that she could not lie to God. She also told the court that she gave the names of Artiness Mbewe, Agness Phiri and Annel Phiri to the petitioner and she confirmed that those three people were still alive and round in Chadiza.

In re-examination, PW15 confirmed that on 17<sup>th</sup> September, 2011 she met the two women when she was on her way to her field and they told her that they were going to Mukoma village to take their voters' and registration cards to Annel Phiri but later they met him on the way. Finally, PW15 reiterated that she did not lie to the court.

RW1, Emmanuel Mabvuto Phiri, a farmer and Roman Catholic Catechist at Naviruli Outstation in Chadiza opened the 1<sup>st</sup> respondent's defence with his testimony which was to the effect that it was true that they as catechists of Chadiza Parish received seven bicycles from Hon. Allan Mbewe and he said that the first two bicycles were received in April, 2011 whilst the other five bicycles were received in May, 2011. RW1 stated further they as catechists gathered and shared the bicycles on 29<sup>th</sup> June, 2011 and he explained that they were given the bicycles because of the difficulties they experienced when they were moving round preaching the word of God. He also recalled that on 21<sup>st</sup> August,

2011 there was a farewell mass for their priest, Father Abraham Mushanga who was transferred to Kalichelo Parish and he attested that prior to the event, the priests, catechists and sisters met to choose the speakers for the occasion and the Master of Ceremony was Mr. Jones Daka, Hon. Allan Mbewe, MP, the Parish Chairman, Mr. Joseph Miti and lastly Father Abraham Mushanga. At the farewell mass, the Master of Ceremony spoke about the letters whilst Hon. Allan Mbewe gave thanks for the relationship between him and Father Mushanga and the Parish Chairman thanked Father Mushanga for many of the good things he had done for the parish. He also thanked Hon. Allan Mbewe for giving bicycles to the catechists and Father Mushanga thanked the Christians of Chadiza Parish for the good relationship he had with them and he also thanked Hon. Allan Mbewe for fulfilling his promise.

In cross-examination, RW1 confirmed that the Parish leadership requested for the bicycles and he said that he was part of the group that made the request. He also said that there was no-one else they asked apart from Hon. Allan Mbewe because he was one of the Roman Catholics and also due to his position as a Member of Parliament. He also stated that the bicycles were delivered between April and May, 2011 and that even though he was not there when they were delivered, he was told by Father Mushanga on 10<sup>th</sup> April, 2011 that the first two bicycles were received on 2<sup>nd</sup> April, 2011. Emmanuel Mabvuto Phiri informed the court that the other five bicycles were delivered on 9<sup>th</sup> May, 2011

and that the announcement was only made by the Parish Chairman, Mr. John Daka that Hon. Allan Mbewe had donated seven bicycles when the other five bicycles were delivered. He also confirmed that although Hon. Allan Mbewe attended the farewell mass as an ordinary church member, the church leadership had thought of calling him to speak because he and Father Abraham Mushanga shared a very good relationship. He reiterated that Hon. Allan Mbewe knelt down at the altar and gave thanks for the relationship he shared with Father Mushanga and RW1 did not hear him say anything else. Emmanuel Mabvuto Phiri confirmed that Hon. Allan Mbewe stays in Katete and that he is a member of Chadiza Parish and he said that he did not know that he was not a member of Chadiza but Katete Parish. He denied that the church bought bicycles for all the catechists and he also said that the Catholic Commission for Justice Development and Peace had never given them bicycles contrary to the suggestion made by Counsel for the petitioner. He further confirmed that the bicycles were only shared on 29<sup>th</sup> June, 2011 because the catechists stay in different centres.

In re-examination, RW1 stated that what he knew was that Hon. Allan Mbewe congregates at Chadiza parish with the Catholics. He further confirmed that two bicycles were received on 2<sup>nd</sup> April, 2011 and that the other five were received on 9<sup>th</sup> May, 2011.

RW2, Robert Phiri, a farmer of Kamwala Compound in Chadiza testified that on 12<sup>th</sup> August, 2011 he was taken together with Miss Jane Phiri to Vubwi constituency by Kennedy Zulu, the MMD Provincial Chairman and they proceeded to Ndongela where they were handed over to the MMD Councillor, Mr. White Phiri who showed them where to sleep. He said that they stayed there for two weeks and they left Ndongela on 17<sup>th</sup> September, 2011 at the end of the campaign. He denied knowing Kalemba and ever meeting him or going from stall to stall at the market as alleged.

In cross-examination, Robert Phiri explained that although he had given his address as Kamwala Compound in Chadiza, in August 2011 Vubwi was in Chadiza District and he confirmed that he lives in Chadiza Central Constituency where Hon. Allan Mbewe stood as a candidate but he denied that he was campaigning for Hon. Allan Mbewe. He instead informed the court that he used to be a member of UNIP until 2001 when he moved to MMD and he also confirmed that in 2006 he was a member of MMD but he said that there was no-one that he campaigned for and he said that he knew that Mr. Allan Mbewe stood as a candidate in 2006. He further stated that he went to Vubwi to campaign for Dr. Kazonga who was the candidate for Vubwi and PW2 denied ever going to Chadiza market during the campaign period. He stated that he had been in politics for fifty-three (53) years and that he was so experienced and that is why they took him to go and campaign in Vubwi and he said that the campaign was successful. Mr. Robert



Phiri admitted that at one time he had stood as a candidate because he wanted to represent the people of Chadiza as their Member of Parliament.

In re-examination, RW2 reiterated that they left Vubwi on 17<sup>th</sup> September, 2011.

RW3, Grayson Ziwa, a retired head-teacher and farmer of Mwala Basic School in Chadiza, testified to the effect that he was an election agent for Hon. Allan Mbewe of the MMD although he himself does not hold any position in the MMD. He said that he recalled 18<sup>th</sup> September, 2011 and that on 17<sup>th</sup> September, 2011, he, Mr. Simon Mbewe and Mr. Mateyo Mbewe were at Mr. Chakunda Phiri's shop at Chadiza market where they were parking beans into smaller plastic bags of about two (2) kilograms each when they saw Mr. Kennedy Banda, the UPND Councillor candidate and also a campaigner for the petitioner. He explained that the beans was to be given to people who were assigned to perform duties for the MMD, that is, he and the other two people he mentioned. He informed the court that food was for them to eat during the performance of their duties since they were election agents in all the twenty-nine (29) polling stations in the Chadiza constituency. He explained that they were packing the beans in an open place when Kennedy Banda went to where they were and picked one of the plastic bags without their permission and walked away and told them that he had taken it as evidence to be used in future and that they should not be surprised. RW3 said that he

jokingly responded that he was naughty and he joked about it because Kennedy Banda is his brother-in-law who he often joked with. Grayson Ziwa however denied that they gave him the beans and told him to remember the MMD at the time of voting but he admitted knowing Spade Tembo as a resident of Chadiza and also as the petitioner's campaigner even though he denied making payment to anybody for a truck as alleged.

In cross-examination, RW3 stated that he had been a member of the MMD for four years and that before joining the MMD he was not in any political party. Grayson Ziwa stated further that as an agent for Mr. Mbewe, he knew the elections regulations and conduct and that he was fully involved in the campaign for Mr. Mbewe. He insisted that the food was prepared and distributed at the polling stations and not at the command centres. He also clarified that it was not only bags of beans but kapenta, mealie-meal and cooking oil and he said that they only had one 60 kilogram bag of beans, twelve 25 kilograms bags of mealie-meal and twenty nine small bottles of about 300 millilitres of cooking oil that they had. RW3 told the court that at the time of packaging the foodstuffs they had an MMD party open van which could have been a Canter but he said that he was not very conversant about the type of vehicles. He also said it was where they had stored the foodstuffs. Grayson Ziwa denied meeting Spade Tembo on election day or having anything to do with the mobilization of voters to go and vote. He said that his dual role

was that of an agent and monitor. He named himself, Mr. Mateyo Mbewe, Mr. Simon Mbewe, Mr. Kelias Alick Phiri and Hon. Allan Mbewe as having been part of the campaign team and he said that the campaign team was self sustaining. RW3 also agreed that the 1<sup>st</sup> respondent had so much confidence in him to make him his election agent and he admitted that he would not divulge any of his secrets or betray him. He also stated that moving from one polling station to another to ensure that things were going smoothly, was one of his duties but he said that he did not go to Chanjowe.

In re-examination, RW3 clarified that he did not visit every polling station. He also informed the court that he would tell the truth at all times and that he would not betray Hon. Allan Mbewe.

RW4, Harrison Banda, a carpenter of Kamwala Compound in Chadiza, testified to the effect that he holds the position of District Chairman of the MMD and that he had been District Chairman for ten years. He recalled leaving his home on 23<sup>rd</sup> June, 2011 with an intention of going on a trip to Chanida and he went to the market to look for transport but he failed and then he decided to go and borrow a motor bike from Chadiza District Council but he found that the motor bikes were damaged. However the transport Officer, Ms Adrophina Zulu told him that there was a vehicle that was going to Chief Mulolo's palace and he later got a lift in the Council vehicle which was also loaded with bicycles. According to

RW4, the Council Secretary told the driver of the truck to go ahead of the other vehicle that carried senior Government officials. Upon arrival at the Chief's palace, the Chief's retainers approached the vehicle and the driver asked whether the Chief was there and one of the retainers went and called him and when he came out, the driver asked RW4 to tell him that the Government officials who were on their way to the palace would explain about the bicycles and RW4 explained to the Chief. Harrison testified further that they off-loaded seventeen (17) bicycles and thereafter he asked the driver to take him to the Chanida village before driving back to Chadiza Boma. On the way between Kangulu and Kanwanya villages they saw the vehicle that was carrying the senior Government officials and the driver of the truck stopped and he informed them that the bicycles had been delivered to the Chief's palace. Harrison Banda named the occupants of the other vehicle as the Council Secretary, the Deputy District Intelligence Officer, the District Administrative Officer and the Chiefs Representative, Mr. Juzel Banda.

RW4 informed the court that he does not know any Harrison Phiri and that Mr. John Banda is the MMD Chairman in Chief Mulolo's area. He also denied telling the Chief to give the bicycles to MMD members. He also recalled that on 20<sup>th</sup> September, 2011 he was an election monitor and that in the morning on that day he went to Beleko Phiri and borrowed his vehicle, Toyota salon car registration number ABJ 7265 and he was going round the polling

stations. Then around 16:30 hours he received a phone call that his niece, Judith Phiri who was admitted at Chadiza Clinic was referred to St Francis Hospital in Katete and he went back home around 17:00 hours and parked the vehicle. He said that after he made preparation to travel to Katete around 18:00 hours, two young men arrived at his house and told him that they were stranded after voting at Chanjowe ward and they asked him if he could provide a place for them to sleep or assist them with transport to Katete. He informed them that he was going to Katete and gave them a lift and after visiting the sick child at St Francis Hospital he returned to Chadiza. RW4 further stated that he knows where Hon. Allan Mbewe lives in Naviruli ward in Chadiza and he denied taking anyone there.

In cross-examination, Harrison Banda confirmed that he was the MMD District Chairman but he denied that he is the one who took the bicycles to Chief Mulolo and he said that he was merely a passenger in the vehicle that took the bicycles to Chief Mulolo's palace. He also said that maybe the Chief did not know his surname when he referred to him as Harrison Phiri. RW4 explained why the driver asked him to give the Chief the message and he said that it was because he knows how to approach the Chief traditionally. He further clarified that he went to Chanida village and not Chanida border, to deliver money for a tombstone. Harrison Banda insisted that the bicycles were delivered on 23<sup>rd</sup> June, 2011 because he noted the date when he took money for the

tombstone. He informed the court that during the last election he was in Vubwi where he was campaigning but he had two meetings in Chadiza. He further stated that he had been District Chairman for ten years and that he had known the 1<sup>st</sup> respondent, Mr. Allan Mbewe since 2006. He also told the court that he was aware that if Mr. Allan Mbewe was found to have delivered bicycles to Chief Mulolo through the Council, he could be removed as a Member of Parliament and he said that he would not like that to happen. RW4 agreed that he was well-known in Chadiza because of politics and how he helps people in the community. He also said that it is true that as a result he had developed a good relationship with Government officials. He named the driver of the Council truck as Sam Mtonga.

In re-examination, Harrison Banda maintained his earlier statement that it was in June 2011 when he went with the Council driver to Chief Mulolo's palace because that was when he took money for his late wife's tombstone in preparation for the memorial. He said that during the campaign he never heard people saying that Hon. Allan Mbewe stays in Katete and he reiterated that Hon. Allan Mbewe's house is in Naviruli ward in Chadiza District.

RW5, Juziel Thomas Banda a contractor of Farm Chabwazi in Chadiza testified that he was a Council Representative for the Chiefs in Chadiza District. He informed the court that the bicycles

were taken to Chief Mulolo on 23<sup>rd</sup> June, 2011 according to his recollection as that was the date on which the District Commissioner told him to take the bicycles to him in his capacity as the chiefs' representative. He testified that he collected eighty-one (81) bicycles from Chadiza Boarding High School from one Mr. L. M. Mbewe and he took them to Chadiza District Council and then later he delivered seventeen (17) bicycles to Chief Mulolo and nineteen to Chief Zingalume. He, however, clarified that when the bicycles were being delivered to Chief Mulolo he was not in the vehicle where the bicycles were but in the vehicle that carried the Council Secretary and the District Administrative Officer as he was asked to travel with them. He testified that the driver who delivered the bicycles was accompanied by Mr. Harrison Banda and they drove ahead of them. He testified further that earlier before the driver of the truck started off, he explained to him that Mr. Harrison Banda needed a lift as he was taking money for a tombstone. RW5 said that they delayed in starting off because they were waiting for an officer from the Office of the President and that later when they started off, after they passed Kanwayi village they met the driver and Mr. Banda returning to Chadiza and they confirmed that they had delivered the bicycles. Juziel Thomas Banda further testified that when they arrived at Chief Mulolo's palace they found the Chief and he performed the customs and thereafter the Council Secretary told the Chief why he was given the bicycles. He said that he was told to give the fifteen headmen who were under him so that they could use them

when they were moving around and two bicycles were given to the Chief and his wife.

RW5 also produced a document on Ministry of Education headed paper as the original collection note for the bicycles and it was dated 23<sup>rd</sup> June, 2011 and exhibited as "R1" and it also showed collection of sixty three bicycles on 24<sup>th</sup> June, 2011 by Juziel Banda from L. M. Mbewe. He also informed the court that Mr. L. M. Mbewe is deceased but he could not recall the date when he died but he said that it could have been in January, 2012.

In cross-examination, RW5 told the court that although he was a member of MMD and he was a Vice Treasurer in 2007, he currently did not belong to any political party. He admitted that he was the Chiefs' Representative and he said that he was chosen by Chief Zingalume. He explained that he was the Chief's Representative at the Council and his duties involved taking complaints from the chiefs to the Council and whatever arose from the Council to the Chiefs. RW5 informed the court that he was not told why the Intelligence Officer was in the Council Secretary's entourage to Chief Mulolo's palace. He, however, said that he was told by the Chadiza District Council Administrative Officer that there was a directive from Government to the Council to give bicycles to the Chiefs so that they could give them to the headmen. Juziel Banda informed the court that in addition to distributing bicycles to Chief Mulolo and Chief Zingalume, he also



delivered eighteen (18) bicycles to Chief Mwangala and another eighteen (18) to Chief Pembamoyo. He conceded that Chief Mwangala and Chief Pembamoyo had their own representative who was Dave Mbewe but he still insisted that when he delivered the bicycles to them he did so as the Chiefs' Representative.

RW7 Richard Zimba testified to the effect that he is the MMD Area Councillor for Chadiza Central and that from August to 15<sup>th</sup> September, 2011 he was campaigning for himself and Mr. Allan Mbewe as Member of Parliament. He said that he is a businessman who sells different types of groceries under the trade name of Ebenezer Groceries and he added that during the campaign, his brother Royd Musoni was the one who was handling the business as he could not trade and campaign at the same time. He agreed that he knows Charles Phiri as his brother's friend and also as a member of the UPND and he was also aware that he was an election agent who was part of the petitioner, Salatiel Tembo's campaign team. RW6 denied giving Charles Phiri a bag of mealie-meal to entice him to join the MMD or even meeting him at the shop as alleged.

In cross-examination, Richard Zimba informed the court that he had been in politics for nine (9) years as a member of the MMD and he was still in MMD. He also admitted that he was an ardent supporter of their party MMD and of Mr. Allan Mbewe. He also admitted that he had sat in court during the proceedings of the

petitioner and his witnesses evidence. RW6 agreed that it was not permitted to give mealie-meal or any other gift and that if he was found doing so he was supposed to be reported to the police or the DCMC but he said that he was not aware that Mr. Allan Mbewe could lose his seat as a Member of Parliament if it was discovered that he gave mealie-meal whilst campaigning for him. He vehemently denied giving a bag of mealie-meal to Charles Phiri as an inducement for him to move to the MMD. He said that although he used to pass through the shop sometimes during the campaign period, he never did any stock-taking because the time for stock-taking had not come. RW6 admitted that he knew Kennedy Banda but he denied knowing anyone by the names of Annel and Amon.

RW7, Wilson Malaila, Road Transport and Safety Officer at the Road Transport and Safety Agency (RTSA) informed the court that his duties include registering motor vehicles and trailers in accordance with the Road Traffic Act, examining drivers, motor vehicles and maintaining records of motor vehicles and trailers. He confirmed that RTSA has records pertaining to motor vehicles registration numbers ABJ 2606, ABJ 4301 and ABJ 9791. He produced physical documentation that indicated that the previous owner of Toyota Hiace registration number ABJ 2602 was Alifat Phiri whilst the current owner is John Njobvu. The second set of documents produced by RW7 related to Mitsubishi Canter, registration ABJ 4301 and they indicated that the registered owner is Mushani Popo Kamwela and that it had not changed ownership.

The third set of documents were for Mitsubishi Fuso Fighter, registration number ABJ 9791 whose registered owner is Govert Banda and that the ownership had not changed.

In cross-examination, RW7 admitted that he would not know where the vehicles were but he said that they were within the Republic of Zambia. He also agreed that he would not be in a position to know about two of the vehicles ferrying voters between Katete and Chadiza and that he would only be able to confirm what type of vehicles they are. Wilson Malaila stated that he was not aware of any law that restricts the driving of a motor vehicle only to the registered owner and he agreed that RTSA does not keep any records of any vehicles that are hired for any purpose. RW7 also agreed that he was aware of cases where people exchanged vehicles without following the proper procedure and he said that it is an offence. He confirmed that there are also cases of people who claim ownership of some motor vehicles but they are not registered with RTSA. Wilson Malaila further confirmed that both Mitsubishi Canter registration number ABJ 4301 and Mitsubishi Fuso Fighter, registration number ABJ 9791 are three (3) tones light trucks.

In re-examination, RW7 stated that he was not in a position to know which vehicles were in Chadiza on 20<sup>th</sup> September, 2011. He gave an approximate ratio of one out of fifty as the number of people who exchanged vehicles without registering with RTSA.

RW8, Allan Divide Mbewe, the 1<sup>st</sup> respondent herein testified to the effect that he lives at Divide Farm in Chief Mulolo's area in the Chadiza District and that he is an agriculturist and politician and also the current Member of Parliament for Chadiza Central Constituency. He informed the court that he was born in Chadiza and has been living at Divide Farm since May 2009. He started off by denying that he got 6 028 votes while the petitioner, Salatiel Tembo got 2 695 votes. He clarified that he got 6 464 votes whilst the petitioner got 2 492 votes and he also clarified the impression created by the petitioner that he was an independent candidate when he stood on the UPND ticket. The 1<sup>st</sup> respondent proceeded to deny the allegations that he ferried voters from any place and he denied any knowledge of vehicles mentioned, particularly motor vehicles registration numbers ABJ 2606, ABL 2606 and ABJ 9791. He also denied that Mr. Robert Phiri and Jane Phiri were part of his campaign team and he named his campaign team members as Mr. Mateyo Mbewe, Mr. Simon Mbewe, Mr. Kerias Alick Phiri and Mr. Grayson Ziwa. In relation to the allegation in paragraph 5 (ii) of the amended petition filed on 6<sup>th</sup> December, 2011 that between 1<sup>st</sup> August and 20<sup>th</sup> September, 2011, in the course of his campaigns, the 1<sup>st</sup> respondent and his agent Robert Phiri, Jane Phiri, Alick K. Phiri, Simon Mbewe and Mateyo Mbewe in all the wards namely Kapachi, Kandabwako, Chanjowe and Mangwe, did with malice convey false information and engaged in character assassination at public rallies and meetings, of the petitioner, RW8

denied that any such words or utterances were made. He further stated that the only agent was Mr. Mateyo Mbewe and that he does not know the rest of the people mentioned in relation to paragraph 5 (iii) of the amended petition where it is alleged that his agents intimidated the electorate by collecting details of their national registration cards and voters' cards from Thom Banda and the other electorates purporting that the details could be used on the computer to establish the candidate each particular voter had voted for. The 1<sup>st</sup> respondent informed the court that he does not know Thom Banda and he outrightly denied the allegations in paragraph 5 (iii) (a) and (b) that he warned the electorate that those who would be found to have voted for the opposition candidate would (a) not be paid for their maize sold to the Food Reserve Agency and (b) that they would no longer benefit from the Government Fertilizer support programme. He denied calling anybody including the person mentioned, Yona Phiri and he said that he does not know Yona Phiri and he also denied meeting him alone during the campaign period at someone's house. RW8 stated that that was a lie as there was not time when he moved alone during the campaign period.

The 1<sup>st</sup> respondent also denied giving bicycles to the mentioned people during the stated period and he clarified that he referred to the stated period because as was mentioned in court, he gave bicycles to the catechists. He confirmed donating two bicycles in April, 2011 and five bicycles in May, 2011, after he had

received a request in 2010 from the catechists through the priest. He also explained that they had actually requested for fifteen (15) bicycles but he told them that he was unable to give them that number and that he could only manage seven (7).

RW8 confirmed that he attended the farewell mass and that while he was there he was asked as a former MP to say a few words and he was asked to go in front and he knelt before the priest and gave him words of encouragement to continue the good work where he was going. He, however, denied that he also donated seven bicycles on that day to Chadiza Parish. Mr. Allan Mbewe told the court that Father Mushanga was not a close friend of his but someone he worked with very well during the period he was at Chadiza Parish and that he knew him just like any other Head of Department.

With respect to the allegation of distribution of foodstuffs, the 1<sup>st</sup> respondent denied that any foodstuffs were distributed in any single ward and he said that he does not know Charles Phiri and Kennedy Banda. He, however, admitted knowing Bartholomew Lungu who is his brother-in-law and he said that he is married to his elder sister and that they brought him up.

RW8 also denied that he and his campaign team gave bicycles to Chiefs headmen as part of their campaign and he said that he was not connected to those bicycles referred to in

paragraph 5 (iv) (c) of the petition. Further, concerning the allegation in paragraph 5 (v) that on 19<sup>th</sup> and 20<sup>th</sup> September, 2011 during the period in which campaign had closed, the 1<sup>st</sup> respondent and his agents continued campaigning and ferried electorates to polling stations and offered accommodation and food to the electorate in Naviruli, Mangwe and Chadiza wards, RW8 denied the same and he said that it is a lie. He denied booking or hiring any vehicle during that period and he said that he had no business transaction with Mr. Mutemwa or that he later met him in Chipata. He said that on 23<sup>rd</sup> September, 2011 he travelled to Lusaka. Mr. Allan Mbewe said that he does not know Chafuta Mtonga and he said that if he was ferrying people that was his business and he was not aware of it. He also denied having any business transactions with Jonas Nyirenda and he said that he does not know him.

The 1<sup>st</sup> respondent denied the allegation that he and his agents ferried the electorate from the villages mentioned in paragraph 5 (vi) of the petition, to and from the polling stations and that they gave them money, food, accommodation and other donations at Dokotala Zulu's farm and urged them to vote for him. He insisted that no illegal activities took place and that the electorate or people of Chadiza Constituency chose a candidate of their choice. He, therefore, prayed that the petition be dismissed with costs.

RW8 testified that he owns three motor vehicles, namely, Toyota Prado registration number ALD 699, Toyota Mark II, registration number ABL 856 and Toyota Landcruiser registration number, ABJ 4376.

In cross-examination, the 1<sup>st</sup> respondent said that he would like the court to believe that between 23<sup>rd</sup> and 30<sup>th</sup> September, 2011, he was in Lusaka. When he was referred to the MTN call records he said that he was unable to interpret the records and he admitted that they were incomplete. Mr. Allan Mbewe agreed that the document could not show that Mutemwa did not call him and he conceded that it does not disprove that on 29<sup>th</sup> September, 2011, he could have received a call from Mutemwa and met him. He, however, said that it does show that he could have been in Lusaka.

The 1<sup>st</sup> respondent in cross-examination stated that he was a Roman Catholic and that when he was appointed Deputy Minister, in 2009 he moved to Lusaka and he used to attend church services at Mary Immaculate in Woodlands. RW8 informed the court that he was baptized at Chadiza Parish and that whenever he was on constituency visits, he used to attend church at Chadiza Parish. He confirmed that he was invited to go and attend Father Abraham Mushanga's farewell mass at Chadiza Parish and he said that he received the invitation in writing even though he had not brought it to court. With respect to the bicycles he donated to the



catechists at Chadiza Parish, the 1<sup>st</sup> respondent informed the court that he bought the first two bicycles at Mushi's shop and the other bicycles in Lusaka. He further stated that he never campaigned in Chadiza ward including in Chief Mulolo's compound and that the Councillor and his team could have been the ones who were campaigning in that area and he named the Councillor as Richard Zimba. In relation to the allegation that he met Yona Phiri at Aaron Phiri's house, RW8 first said that he does not know Aaron Phiri and he said that during the campaign, the only house he visited was the petitioner, Salatiel Tembo's house when he had a bereavement.

Further on the issue of ferrying voters, RW8 denied driving motor vehicle registration number ABA 4089 and he said that his vehicle is a Toyota Landcruiser registration number ABJ 4376 and he said that the Toyota Hilux, pick-up registration number ABA 4089 is not his vehicle. He, however, admitted that he was the one driving the Toyota Landcruiser whilst Mr. Dokotala Zulu the owner of Toyota Hilux pick-up truck, registration number ABA 4089 was driving his vehicle. He also stated that he did not give any instructions for Dokotala Zulu to ferry people to the polling station and he was not aware of what he was doing and he said that he only became aware of it after he received the petition. RW8 informed the court that Dokotala is a close friend of his young brother.

On the issue of residence, the 1<sup>st</sup> respondent informed the court that when he was working for the Government he used to live at House Number 15, Chadiza Road, Katete. He also stated that he had spent most of his adult life in Katete. In re-examination, PW8 stated that he is a resident of Chadiza and that he lives at Divide Farm to which he moved in 2009 when he completed building the house. He also informed the court that on election day on 20<sup>th</sup> September, 2011, he drove his Landcruiser and carried his wife, mother and children to the polling station to go and vote. He also denied travelling to Chipata on 29<sup>th</sup> September, 2011 to meet Innocent Mutemwa.

RW9, Komba Malukutilla, a Telecommunications Engineer testified that he is the Applications Manager for MTN Zambia that they were directed to generate call records for the month of September, 2011 on the mobile phone designated cellular number 0968 552816. His evidence which was mostly technical and was intended to establish that there was no possibility of a phone conversation or communication between RW8 and PW3, Innocent Mutemwa during the period of 23<sup>rd</sup> and 30<sup>th</sup> September, 2011.

Counsel for the petitioner proceeded to assess the evidence adduced before the court with respect to the allegations in the amended petition. On the first allegation levelled against the 1<sup>st</sup> respondent of ferrying or transporting voters for registration, it was contended on behalf of the petitioner that the petitioner

(PW1) and Stephen Phiri (PW2) on this matter remained unchallenged by the 1<sup>st</sup> respondent and his witnesses as none of the 1<sup>st</sup> respondents witnesses adduced any evidence to deny the allegation of ferrying voters from Katete to Chadiza for registration as voters during the run up to the 20<sup>th</sup> September, 2011 elections.

With respect to the allegation of character assassination of the petitioner, Counsel's assessment and contention is that according to Apton Kalemba's (PW14) and Stephen Phiri's (RW2) evidence, RW2 was responsible for the allegation that the petitioner was not from Chadiza. However, RW2 denied the allegation and had testified that he was in Vubwi most of the time. Counsel for the petitioner however, contended that RW2 failed to account for his time well and they urged the court to find PW14's testimony to be more believable than RW2's evidence.

On the allegation of voter intimidation and the collection of voter's cards it was observed by learned Counsel for the petitioner that only one witness PW15, Elizabeth Phiri testified on this allegation and that her evidence remained unchallenged by the respondent and his witnesses and they observed that the 1<sup>st</sup> respondent only denied knowing the person who was engaged in this serious electoral malpractice.

On the allegation of distribution of bicycles and foodstuffs, it was submitted by Counsel for the petitioner that in relation to the

donation of bicycles to Chadiza Parish by the 1<sup>st</sup> respondent the petitioner and PW12 testified that they were donated on 21<sup>st</sup> August, 2011 while RW1 and the 1<sup>st</sup> respondent attested that it was in or about April 2011. They also observed that the 1<sup>st</sup> respondent did not call Father Mushanga to testify as earlier indicated. They further contended that it was evident from the testimony that the 1<sup>st</sup> respondent and others who spoke reminded voters to remember the 1<sup>st</sup> respondent on election day and that therefore the 1<sup>st</sup> respondent was at the centre of the campaign.

Concerning the bicycles given to the Chiefs for distribution to their headmen, Sefani Nkhoma's (PW7) evidence was that they were given the bicycles by Government and Chadiza District Council officials so that they could campaign for MMD. Counsel for the petitioner further observed that although the 1<sup>st</sup> respondent's witnesses claimed that the bicycles were delivered in or about June 2011, the petitioner's witnesses testified that they were delivered in August 2011.

On the allegation of distribution of food it is the petitioner's contention that the 1<sup>st</sup> respondent through his agents distributed food during the campaign and on the election day itself according to the petitioner's witnesses Charles Phiri (PW10), Yona Phiri (PW11) and Kennedy Banda (PW12). They further submitted that since PW10's evidence was unchallenged, the 1<sup>st</sup> respondent's campaign team was distributing food on the date of the elections.

With regard to the allegation of the 1<sup>st</sup> respondent and his agents ferrying voters to and from polling station and provision of accommodation Counsel for the petitioner submitted that the petitioner submitted that the petitioner's witnesses gave correct and consistent accounts of the events of the election day whilst it was observed that the 1<sup>st</sup> respondent later became aware of the said ferrying of voters, he claimed that the said Dokotala Zulu was not authorised by him.

In conclusion, it was contended that from the evidence, it is clear that the 1<sup>st</sup> respondent financed those ventures and that that is why he was unable to call drivers of known motor vehicles to come and rebut the evidence.

With regard to the applicable election law, Counsel for the petitioner referred to section 93 (2) (a) and (c) of the Electoral Act Number 12 of 2006 and particularly section 93 (2) (a) and (c) of the said Act which 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) 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 the voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred;**

.....

.

.....

**(b) 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 petitioner submitted that section 93 (3) provides a reprieve by providing that an election will be declared void where it can be established that, notwithstanding proven malpractices, the candidate can show either that he or his agent was personally involved in the malpractice and that such candidate and his election agent took all reasonable means to prevent the commission of corrupt or illegal practice, and that in all other respect the election was free from any corrupt or illegal practice, on the part of the candidate or his election agent.

They submitted further that the application of these provisions has been the subject of various court decisions and Counsel for the petitioner referred to the case of **LUSAKA v CHEELO**<sup>1</sup> in which the Hon. Mr. Justice Cullinan considered the provisions of section 17(2) (a) and (c) of the Electoral Act, Cap 19 whose provisions were similar to those of the current section 93 (2) (a) and (c) of the Electoral Act No. 12 of 2006 and after evaluating the evidence before the court, he found that where the candidate was personally found to be blameworthy, the resulting election would be nullified under subsection (c) of the Act. They also cited the case of **WISAMBA v MAKAI**<sup>2</sup> in which the Hon. Judge in the course of reviewing the evidence was of the opinion that proof of each of the four paragraphs in section 17 (2) of the Electoral Act, Cap 19 could be a basis for nullifying an election.

The petitioner's advocates further referred to the case of **MLEWA v WIGHTMAN**<sup>3</sup> in which the Supreme Court, in considering the appeal from the decision of the High Court which ordered nullification of an election and fresh polls, made the following observation which is instructive on the application of section 93 (2) (a) and (c) of the Electoral Act, No. 12 of 2006:

**“On the consideration of the whole section, we are satisfied that the respondent missed the point of difference between the two distinct and separate**

**situations as paragraphs (a) and (c). The question of personal knowledge is quite irrelevant and inapplicable under (a) where it does not matter who the wrongdoer is and the scheme of the law appears designed to protect the electorate and the system itself by providing for nullification, whenever there is wrongdoing which the court feels satisfied, perhaps because of the scale or type of wrongdoing, has adversely and has probably affected the election. In other words, the conduct complained of has to affect the election.....**

.....  
.....

**In contrast (c) penalizes the candidate even one or two proven instances are enough and even if they could not conceivably have prevented the electorate from choosing their preferred candidate.”**

It was submitted, therefore, that the decisions referred to are a guideline where a person other than the candidate or his agent engaged in electoral malpractices which result, in the assessment of the court, leads to negation of a free and fair election, the resulting election will be nullified.

Counsel for the petitioner submitted further that what constitutes malpractices that should lead to nullification of an election is a matter of fact and depends on evidence presented to



court. They cited the case of **BATUKE IMENDA v ALEX CADMAN LUHILA**<sup>4</sup>, in which the Supreme Court refused to reverse findings of fact by the trial Judge who had found that the appellant had committed the corrupt practice of undue influence, in that the appellant had told voters they would lose their land and fish ponds among other things if they did not vote for the appellant.

On the issue of donation of gifts and other services to the electorate, the petitioner's Counsel referred to the case of **LEVISON MUMBA v PETER DAKA**<sup>5</sup> where the Supreme Court refused to reverse findings of fact made by the trial court on the unrebutted evidence that a clinic which had remained closed for a very long time was suddenly stocked with staff, drugs and an ambulance a day or so before the election which resulted in the petition to nullify it. They also relied on the provisions of section 79, 81 and 82 of the Electoral Act.

In conclusion, Counsel for the petitioner prayed that the court consider that the 1<sup>st</sup> respondent, both by himself and by his agents conducted themselves in a manner that defeats the whole purpose of a free and fair election. They submitted that the events that were disclosed during the trial of this petition weighed so heavily on the minds of voters in the constituency and denied them a chance to vote for a candidate of their choice. They added that the timing and fashion in which the 1<sup>st</sup> respondent

highly publicized his donation at a church service attended by many voters, the style of donation of bicycles to chiefs in the constituency to secure support for the 1<sup>st</sup> respondent and MMD is clearly what the High Court found and the Supreme Court upheld as being “outside the bounds of legitimate influence” in the case cited.

Counsel for the petitioner further submitted that the acts of ferrying voters to and from polling stations are strictly criminalised by the Electoral Act and that such acts must necessarily lead this court to the conclusion that the petitioner has proved his case to the standard contemplated by section 93 (2) (a) and (c) of the Electoral Act No. 12 of 2006. They concluded by submitting that the 1<sup>st</sup> respondent’s election cannot be allowed to stand, it must be nullified so that a fresh election for the Chadiza Central Constituency must be ordered.

In the 1<sup>st</sup> respondent’s submissions learned State Counsel, Mr. Sakwiba Sikota submitted that his client, the 1<sup>st</sup> respondent denied all the allegations levelled against him in paragraph 5 (i) to (vi) of the amended petition, in his Answer and his evidence and that of his witnesses was clear and straight forward.

On the allegation that the 1<sup>st</sup> respondent and his agents ferried voters to register as voters using vehicle registration number ABJ 4301, it was contended on behalf of the 1<sup>st</sup>

respondent that the evidence adduced by the petitioner does not meet the required standard. Learned State Counsel submitted that although the witness claimed that the motor vehicle used belonged to the 1<sup>st</sup> respondent, the records at the Road Traffic and Safety Agency indicate that the vehicle does not belong to the 1<sup>st</sup> respondent and has never belonged to him and that it belongs to a Mr. Mushani Popo Kamwela of Lusaka but he was not called to give evidence by the petitioner. It was further submitted that there was only one witness who came to court and testified that people were ferried on a particular day to register as voters but he did not state that the alleged practice was wide spread. It was also contended that the witness did not state how, if such a thing happened, it prevented the majority of the electorate from voting for a candidate of their choice. State Counsel referred the court to the provisions of section 93 (2) (a) and (c) of the Electoral Act, No. 12 of 2006 and which provisions have already been quoted and so I will not restate them for fear of being repetitive. It was submitted that from those provisions, it was clear that there is no evidence that the majority of voters were prevented from electing a candidate of their choice. It was also the 1<sup>st</sup> respondent's contention through learned State Counsel that considering the wide margin of voters between the 1<sup>st</sup> respondent and the petitioner, which were in excess of three thousand votes, it is clear that the number of people alleged to have been ferried to register would not have made a difference to the outcome of the election.

Further, the 1<sup>st</sup> respondent, submitted that with regard to the allegation that he and his agents conveyed false information and engaged in character assassination, the petitioner had not established the required standard of proof as he relied on hearsay evidence and even failed to lodge a complaint to the electoral District Conflict Management Committee (DCMC) or the police concerning the said allegation. State Counsel submitted that the petitioner in his evidence departed from his pleading as he stated that the misinformation was that he was not Zambian but a Malawian when infact that is not what was pleaded.

On the allegation of collection of national registration and voters cards, it was submitted that no credible or serious evidence was adduced to sufficient clarity to meet the burden and standard of proof placed on the petitioner. It is the 1<sup>st</sup> respondent's contention that there was no evidence that the alleged practice was widespread and they considered the allegation to be an insult to the intelligence of the people of Chadiza to say that they would believe the stories about the computer.

With respect to the allegation that seven bicycles were distributed to the catechists and the announcement was made in church at the farewell mass for the Parish Priest, State Counsel observed that the petitioner's witnesses did not state that the

said bicycles were distributed in their presence and his contention was that the 1<sup>st</sup> respondent and one of his witnesses testified that the donation was made outside the campaign period and months before Parliament was dissolved. He further submitted that Chief Mulolo's testimony on the bicycles given to the headmen (indunas) was embarrassing for him as he contradicted himself to the extent that the petitioner's advocates applied to have him declared hostile and that as such no credence can be placed on his evidence. It was also contended that the petitioner did not establish any linkage between the donation of bicycles to the headmen and the 1<sup>st</sup> respondent or that he was even aware of the distribution of bicycles.

On the allegation of distribution of foodstuffs, the respondent through State Counsel submitted that the petitioner had not established it to the required standard. He also referred the court to the fact that according to the witness, the food was being re-packaged in an open place in the market, thereby showing that they had nothing to hide. The 1<sup>st</sup> respondent's witness stated clearly that the food was for the party agents in the polling station where they would be monitoring the voting. Learned State Counsel observed that as a result of the alleged donation of the bag of mealie-meal, the witness was not prevented from voting for a candidate of his choice as there was no such evidence.

On the allegation of providing accommodation for the electorate, it was observed that it was not pursued by the petitioner as no witnesses were brought to testify on it and there was no evidence to prove that it was widespread.

With respect to the ferrying of voters, it was argued that the alleged drivers of the vehicles mentioned were not called to testify and in addition, no connection was established between them and the 1<sup>st</sup> respondent.

Learned State Counsel referred to a number of decided cases that he relied on. Some of these celebrated cases which outline the standard of proof required to be met or established in an election petition are **AKASHAMBATWA MBIKUSITA LEWANIKA & OTHERS v FREDERICK TITUS JACOB CHILUBA**<sup>6</sup> (also known as the “AKA case”), **MICHAEL MABENGA v SIKOTA WINA & OTHERS**<sup>7</sup> and **WEBSTER CHIPILI v DAVID NYIRENDA**<sup>8</sup>. In the “AKA” case, the Supreme Court observed that:

**“..it could be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than a mere balance of probability”**

The same principle was espoused in **MICHAEL MABENGA v SIKOTA WINA & OTHERS** wherein the Supreme Court stated that:

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

Further in the WEBSTER CHIPILI case the Supreme Court also gave very clear guidance on the standard of proof required for election petitions when the court stated thus:

**“.....the allegation of impropriety attributable to a respondent in a Parliamentary election evidence before a court requires to be proved to a standard higher than a mere balance of probability.”**

It was submitted on behalf of the 1<sup>st</sup> respondent that the petitioner had clearly failed to meet the requisite standard of proof that has to be established in such cases to a sufficient degree of clarity. The 1<sup>st</sup> respondent, therefore, prayed that the petition be dismissed with costs to be borne by the petitioner.

I have carefully considered the evidence before this court in its entirety, the submissions and authorities cited by Counsel. Evidence before this court which is not disputed is that on 20<sup>th</sup> September, 2011, tripartite elections that is, Presidential, Parliamentary and Local Government elections were held throughout the Republic of Zambia. It is also not disputed that Salatiel M. Tembo, as an unsuccessful candidate in the said tripartite elections as the United Party for National Development (UPND) Parliamentary candidate in the Chadiza Central Constituency of the Eastern Province of the Republic of Zambia, filed this petition challenging the election of the respondent, one Allan Divide Mbewe as Member of Parliament for Chadiza Central Constituency. The election petition was grounded on Article 72 (i) (a) of the Constitution of the Republic of Zambia and section 93 (i) of the Electoral Act, No. 12 of 2006 of the Laws of Zambia. In the petition, the petitioner made several allegations against the 1<sup>st</sup> respondent and averments concerning the conduct of the elections. In the subsequent amended election petition filed on 6<sup>th</sup> December, 2011, the petitioner stated among other things that contrary to the declaration by the Returning Officer that the 1<sup>st</sup> respondent was duly elected, he was not validly elected for the reasons the petitioner stated in paragraph 5 (i) to (iv) of his amended petition. Since the petitioner's allegations contained in paragraph 5 (i) to (vi) of the petition have already been reproduced for ease of reference, I will not endeavour to restate them for fear of being repetitive. I will, therefore, proceed to



analyse and evaluate them in relation to the evidence adduced before the court and the applicable electoral laws of Zambia and particularly the Electoral Act, No. 12 of 2006 with specific focus on section 93 and its provisions. Suffice to state that the allegations levelled against the 1<sup>st</sup> respondent are those of corrupt and illegal practices.

What constitutes and amounts to corrupt and illegal practices is provided for 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 any 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 referred to and relied on the case of **MLEWA v WIGHTMAN** which they considered to be very instructive on the issues of corrupt and illegal practices. I have had an opportunity to look at the said case and in particular 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 No. 12 of 2006 is intended to penalise the candidate. He stated that in order to nullify the election:

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

Further in the same case, the Supreme Court 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 section 18 (2) (a).**

The provision referred to is a replica of the current section 93 (2) (a) of the Electoral Act, No. 12 of 2006. Therefore, it is for the petitioner to prove that there were such corrupt and illegal practices as have been alleged by himself and his witnesses by presenting evidence of a 'fairly high degree of convincing clarity' so as to attain the required standard of proof for this court to find that the 1<sup>st</sup> respondent and/or his agents engaged in illegal and corrupt practices. Section 93 (2) (a) and (c) 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 1<sup>st</sup> respondent. These principles have been enunciated in several decided cases and it has been settled 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 stated in the case of **LEWANIKA AND OTHERS v CHILUBA**, where it was held that:

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

I now turn to petitioner's allegation in paragraph 5 (iii) (a) and (b) that between 1<sup>st</sup> August and 20<sup>th</sup> September, 2011, the 1<sup>st</sup> respondent and his agents Elias Phiri, Jason Banda and Mateyo Mbewe in Chadiza and Kapachi wards intimidated the electorate by collecting details of their national registration and voters cards from Thom Banda and other electorate as alleged and that they were threatened that they would not be paid in time for their maize which they supplied to the Food Reserve Agency (FRA) and that they would not benefit from Government fertilizer support if they voted for the opposition. The petitioner's evidence on the issue of collection of information from national registration and voters registration cards came from PW15, Elizabeth Phiri. PW15 testified to the effect that she met Agnes and Atiness who were their way to Mukoma village taking their cards to Annel Phiri so that their personal information could be transmitted to Lusaka. However, this witness' evidence was so contradictory in nature as the record will show, even to the extent that she even asked for forgiveness for the way she gave evidence. I find that her evidence is such that it cannot be relied upon as it lacks credibility. However, had the petitioner called Agnes and Atiness to testify on the same, there could have been some corroboration which would have made PW15's evidence worth considering. In the circumstances, PW15's evidence may be considered to be hearsay because it referred to an out of court statement made by someone who was or persons who were not called as witnesses and whose statement were being presented in court as the truth.

In the case of **SUBRAMANIAN v PUBLIC PROSECUTOR**<sup>9</sup> the Privy Council stated that:

**“Evidence of a statement made to a witness by a person who is not a witness and 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.”**

In view of the aforestated, PW15’s evidence on what she was told by Agnes and Atiness and Annel Phiri is clearly hearsay, especially since the persons mentioned were not called as witnesses and the object of PW15’s evidence is to establish the truth of what she alleged was stated by them.

Furthermore, there was no evidence adduced of any voters’ registration cards or national registration cards having been found with the 1<sup>st</sup> respondent or any of his agents. I am also of the considered view that if there was any collection of voters registration cards or national registration cards elsewhere, unless it was done with the 1<sup>st</sup> respondent’s knowledge approval and participation, and which evidence is not before this court, I am not satisfied that the petitioner has proved this allegation at all and I, accordingly, dismiss it as mere hearsay.

Turning to the issue of alleged threats to withhold distribution of fertilizer and payment for maize supplied to the Food Reserve Agency, I am of the considered view that PW11, Yona Phiri's evidence on the allegations was rather weak and needed to be corroborated since PW11 was contradicting himself in his evidence to the court. For example, he contradicted himself on who was present when Mr. Allan Mbewe allegedly told him about the delay in payment for maize and withholding of the Government support of fertilizer to the farmers who would not vote for the MMD. At first, he said that it was just himself and the 1<sup>st</sup> respondent who were present at Aaron Phiri's house, then he said that even Aaron Phiri was also present and later he said that there were other people there, some of them farmers. In view of these contradictions, I find that PW11, Yona Phiri is not a credible witness upon whose evidence this court can base any nullification. Therefore, for these reasons, I find that the petitioner has not proved the allegations in paragraph 5 (iii) (a) and (b) of the petition to the required standard of proof and I, accordingly dismiss the said allegations as possible fabrications.

Paragraph 5 (iv) (a) (b) and (c) of the petition relates to allegations of distribution of bicycles, foodstuffs and other gifts to the electorate by the 1<sup>st</sup> respondent and his agents. From the evidence before the court, the 1<sup>st</sup> respondent, Mr. Allan Mbewe did not deny buying seven bicycles for Chadiza Parish in April and May, 2011 but he denied donating the same on 21<sup>st</sup> August, 2011

as alleged by the petitioner and his witnesses and particularly PW12, Kennedy Banda who is also a member of Chadiza Parish. What strongly emerged from the 1<sup>st</sup> respondent's evidence is that he was requested by the Chadiza Parish leadership for fifteen bicycles but he only managed to buy seven which he donated between April and May, 2011. It is also evidence that this was long before the campaign period commenced as section 2 of Electoral (Code of Conduct) Regulations of 2011 under Regulation 8 states that:

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

In this case, I took judicial notice of the fact that the campaign period was from 12<sup>th</sup> August to 18<sup>th</sup> September, 2011. In the case of **LEWANIKA AND OTHERS v CHILUBA**, the Supreme Court gave guidelines on when certain activities can be carried out during election period when the Court held inter alia that:

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

In the instant case, that closed period was the period between 12<sup>th</sup> August, and 18<sup>th</sup> September, 2011. The petitioner did not adduce any evidence to show that the 1<sup>st</sup> respondent donated the bicycles on 21<sup>st</sup> August, 2011 at the farewell mass for Father

Abraham Mushanga and even PW12, Kennedy Banda confirmed that the 1<sup>st</sup> respondent was only thanked for the bicycles on 21<sup>st</sup> August, 2011. He did not confirm that the bicycles were necessarily given on that date and he also was unable to tell the court when the bicycles were delivered as he never witnessed the delivery. Therefore, I cannot conclusively find that the seven bicycles were donated to Chadiza Parish during the campaign period as an inducement to the electorate at Chadiza Parish. I, accordingly, find that the donation of the seven bicycles to Chadiza Parish was a public philanthropic activity which was outside the campaign window or closed season and is not prohibited by the Electoral Act Regulations and I am fortified by the Supreme Court's holding in the **LEWANIKA** (alias AKA case) case where it was held that:

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

That view is supported by the learned authors of the **HALSBURY'S LAWS OF ENGLAND**, Fourth Edition, Re-issue, Volume 15 at paragraph 689 where they 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 illegal at the time illegal and criminal.”**

In light of the cited authority, I am fortified in finding that the donation of the seven bicycles to Chadiza Parish by the 1<sup>st</sup> respondent was not bribery so as to fall within the definition of illegal and corrupt practice. I, therefore find that the petitioner and his witnesses have not proved this allegation to the required standard of proof and I, accordingly, dismiss it as a mere misconception.

With respect to the first allegation that during the registration of voters exercise conducted by the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent and his agents including the 1<sup>st</sup> respondents relation, Derrick using motor vehicle registration number ABJ 4301 and another relation driving motor vehicle registration number ALC 4302 ferried people from Katete and Mambwe districts in Msoro to Mangwe and Naviruli wards done with all the intention of procuring votes for the respondent, the evidence came from PW2, Stephen Phiri. This witness claimed that he was told by Israel Banda to go to Mr. Allan Mbewe’s house and he went there and he was assured by Mr. Allan Mbewe that transport would be organized for those who were originally from Chadiza to go and register as voters. PW2 testified to being transported in a Landcruiser registration number ABJ 4301 that is owned by Mr. Allan Mbewe but he said that he did not know who was driving the

vehicle. Although this witness gave an account of how they travelled and how Israel Banda was co-ordinating the travel arrangements, the fact that this witness claimed to have been in a group of about seventy people and the petitioner was not able to call even any of the other people mentioned weakened PW2's evidence. He referred to Yuda Mwanza and Israel Banda but not even Yuda Mwanza was called to corroborate his evidence. Further contrary to the petitioner's submissions that PW2's evidence remained unchallenged by the respondent and his witnesses, RW7, Wilson Malaila, the Road Transport and Safety Officer testified that Mitsubishi Canter registration number ABJ 4301 belongs to a Mr. Mushani Popo Kamwela of Lusaka and that it has never changed ownership and the fact that the owner of the said vehicle was not called, leaves room for speculations of whether or not the vehicle was in Chadiza during the period referred to. Since the court does not decide matters on speculations but facts, I am not satisfied that the petitioner has proved this allegation to the required standard of proof.

Reverting to the instance case, and the petitioner's allegation in paragraph 5 (ii) of the petition is that between 1<sup>st</sup> August and 20<sup>th</sup> September, 2011, in the course of the 1<sup>st</sup> respondent and his agent, Robert Phiri, Jane Phiri, Alick K. Phiri, Simon Mbewe and Mateyo Mbewe in all the wards in the constituency of Chadiza, maliciously conveyed false information and engaged in character assassination of the petitioner and his party, UPND at public rallies and meetings. The only evidence on this issue came from

PW14, Apton Philip Kalemba, who had testified that he was approached by Robert Phiri at his market stand at Chadiza market and challenged why his party UPND had fielded someone from Malawi as a candidate. This witness did not state that he was sent by the 1<sup>st</sup> respondent and his agents as alleged and the petitioner and his witnesses also did not adduce any evidence to that effect or that Robert Phiri was the 1<sup>st</sup> respondent's agent. In fact as learned State Counsel submitted, Robert Phiri's remarks (if they were made) could not have possibly caused PW14 to change his vote so as to affect the outcome of the elections because PW14 told the court that he argued with RW2, Robert Phiri as he knew the petitioner's origin very well and that I, therefore, find that even on this allegation of the 1<sup>st</sup> respondent and his agents maliciously conveying false information and engaging in character assassination at public rallies and meetings, the petitioner has failed to prove the said allegation. As a matter of fact, the petitioner himself based his allegation on hearsay and even departed from what was pleaded as learned State Counsel Mr. Sakwiba Sikota pointed out in his submissions by stating that the allegation was that he was Malawian as opposed to the allegation that he is not from Chadiza. Furthermore the evidence by the petitioner in cross-examination that it was the second time he had lost the election to the 1<sup>st</sup> respondent, clearly indicates that he was well-known in Chadiza as he himself stated and as such the allegation of him being a Malawian would not have affected the

way the electorate would have voted or the outcome of the election.

No evidence was adduced on the allegation in paragraph 5 (ii) (b) that the president of the petitioner's party UPND is a tribalist.

I, now, turn to the allegation in paragraph 5 (iii) (a) and (b) that between 1<sup>st</sup> August and 20<sup>th</sup> September, 2011, the 1<sup>st</sup> respondent and his agents Elias Phiri, Jason Banda and Mateyo Mbewe in Chadiza and Kapachi wards intimidated the electorate by collecting details of their national registration and voters cards from Thom Banda and other electorate as alleged and that they were threatened that they would not be paid in time for their maize supplied to the Food Reserve Agency (FRA) and that they would not benefit from Government fertilizer support program if they voted for the opposition, PW15, Elizabeth Phiri testified on the collection of the cards and her evidence was so contradictory in nature as the record will show, even to the extent that she even asked for forgiveness for the way she gave the evidence. Her evidence is such that it cannot be relied on and in any case, the petitioner should have called the Agnes and Atiness who are alleged to have been taking their cards to Annel Phiri. Further, there was no evidence adduced of the voters registration cards or national registration cards having been found with the 1<sup>st</sup> respondent or any of his agents. Further, I am also of the

considered view that if there was any collection of voters registration cards elsewhere unless it was done with the 1<sup>st</sup> respondent's knowledge, approval and participation which evidence is not before this court, I find that the petitioner has failed to prove this allegation as well.

On the issue of threats to withhold distribution of fertilizer and payment for maize, PW11, Yona Phiri's evidence on that point is rather weak and needed to be corroborated since the court observed during his testimony that he was contradicting himself on who was present when Mr. Allan Mbewe told him what he alleged. First he said that it was just himself and the 1<sup>st</sup> respondent who were at Aaron Phiri's house, then he said that Aaron Phiri was also present and later he said that they were other people there, some of them farmers and as such I found his evidence to be contradicting and unreliable. On this issue, I also find that the petitioner and his witnesses failed to prove the allegation.

The allegations of distribution of bicycles, foodstuffs and other gifts to the electorate by the 1<sup>st</sup> respondent and his agents are contained in paragraph 5 (iv) (a) (b) and (c) of the petition. From the evidence before the court, the 1<sup>st</sup> respondent did not deny buying seven bicycles for the catechists of Chadiza Parish in April and May, 2011 but he denied donating the same on 21<sup>st</sup> August, 2011 as alleged by the petitioner and his witnesses and

particularly, PW12, Kennedy Banda who is also a member of Chadiza Parish. What arose from the 1<sup>st</sup> respondent's evidence is that he was requested by the Chadiza Parish leadership for fifteen bicycles but he only managed to buy seven and also PW12 confirmed that the 1<sup>st</sup> respondent was thanked for the bicycles on 21<sup>st</sup> August, 2011 at the farewell mass for Father Mushanga and not necessarily that the 1<sup>st</sup> respondent gave the bicycles on that date. He also confirmed that he never witnessed the bicycles being delivered. Therefore, this court cannot conclusively find that the seven bicycles were donated during the campaign period as an inducement to the electorate at Chadiza Parish. I accordingly, find that the petitioner and his witnesses have not proved this allegation to the required standard.

On the second allegation of distribution of bicycles to the chiefs' headmen (indunas) to campaign for the MMD and the 1<sup>st</sup> respondent, from the evidence, adduced, it is clear that the bicycles were distributed by the Chadiza Council officials and none of the witnesses testified that the 1<sup>st</sup> respondent was present or was able to link him to the donation. Even the petitioner's witness, PW13 Chief Mulolo who gave such contradictory evidence did not mention the 1<sup>st</sup> respondent being at the palace during the donation. Seventeen bicycles were distributed to Chief Mulolo and the question by the court is whether the distribution of bicycles by the Council officials amounted to a corrupt and illegal practice on the part of the 1<sup>st</sup>

respondent and the answer is “no” since he did not distribute the bicycles and there is no evidence to show that he was aware, approved or was involved. Another question is whether the said distribution of bicycles could have affected the outcome of the election as it was restricted to Chief Mulolo’s area and the surrounding chiefdoms. Firstly, I have considered that the 1<sup>st</sup> respondent did not distribute the said bicycles and secondly, considering the wide margin between the 1<sup>st</sup> respondent’s votes of 6 464 and the petitioner’s votes of 2 492 the alleged distribution of the seventy-two (72) bicycles could not have had a bearing on the results in the whole Chadiza Central Constituency. This court finds that the distribution of bicycles by the Chadiza District Council officials cannot warrant the rendering of the election of the 1<sup>st</sup> respondent null and void, unless the petitioner can prove that the same was done with the knowledge and consent or approval of the 1<sup>st</sup> respondent or of his election agents. However, from the evidence adduced before this court there has been no such proof to satisfy this court that the petitioner has discharged the burden of proof to the required standard.

Under paragraph 5 (iv) of the petition there was also the allegation that mealie meal, salt, cooking oil and kapenta was distributed to the electorate throughout all the MMD candidates for ward elections to distribute to the electorate in Chongwe, Mangwe, Naviruli and other wards. Some of the beneficiaries are

to have included Kennedy Banda, Charles Phiri and Batulumeyo Lungu. The evidence of the said distribution came from PW10, Charles Phiri, PW11, Yona Phiri and PW12, Kennedy Banda. PW10, Charles Phiri had testified about receiving a bag of mealie meal from Richard Zimba, the MMD Councillor for Chadiza whilst PW11, Yona Phiri testified to having been given a blanket and salt by Hon. Allan Mbewe. This court, however, observed that the gift of the blanket and salt is alleged to have been made through one Aaron Phiri and the question that begs an answer is why he made it through a third party if he really had the alleged encounter with PW11. As this court had earlier observed, this witness tended to contradict himself such that his evidence lacks credibility. With respect to the alleged gift of a bag of mealie meal to PW10, Charles Phiri, as he testified, the same was not made to him by the 1<sup>st</sup> respondent or his agents and there was no evidence adduced to show that Richard Zimba was sent by him or his agents. PW12 had testified that he was given a packet of about four (4) kilograms of beans by Mateyo Mbewe who asked him to vote for Mr. Rupiah Banda and Mr. Allan Mbewe. However, his evidence was challenged by RW3, Grayson Ziwa who informed the court that he was not given the packet of beans but he took it from where they were re-packaging foodstuff for the MMD monitors and election agents to prepare and eat on election day and he jokingly told them that he had taken it as evidence for the future but he ate what he termed as evidence. From the evidence, PW12 clearly failed to establish that the 1<sup>st</sup> respondent



and his agents were distributing foodstuffs to the electorate as alleged in paragraph 5 (iv) (b) of the petition.

Further, with regard to the luncheon alleged to have been held at Andy Mvula and Dokotala Zulu's farms, there was no evidence adduced to prove that allegation. Even the petitioner conceded that he had relied on hearsay evidence and that he had not seen anyone distributing foodstuff. Therefore, on the evidence presented to this court, this court finds that there has been no evidence to prove that the 1<sup>st</sup> respondent and his agents distributed any foodstuffs to the electorate in any of the named wards as alleged. The allegation in paragraph 5 (iv) (b) and (vi) of the petition has, therefore, not been proved to the required standard. On the luncheon alleged to have been held after the voting at Andyford Mvula and Dokotala Zulu's farms, I found that there was no evidence that the 1<sup>st</sup> respondent or his agents arranged the luncheon, provided the food or funded the feast and so the lunch cannot be attributed to the 1<sup>st</sup> respondent without proof as it would be dangerous to make assumptions and as I earlier pointed out, courts do not decided on speculation but rely on factual evidence.

Finally, with regard to the allegation of the ferrying of voters by the 1<sup>st</sup> respondent and his agents, I am not satisfied that the petitioner has proved the said allegation to the required standard, especially since the vehicles mentioned were not proved to be

connected to the 1<sup>st</sup> respondent and his agents. The 1<sup>st</sup> respondent was also not seen driving any of the vehicles mentioned and neither are the said vehicles registered in his name or connected to him. In the circumstances, this court cannot accept the evidence adduced because it also did not satisfy the required standard of proof.

In conclusion, based on the evidence before the court, and my analysis and evaluation of the evidence, with the assistance of Counsel's submissions and the supporting authorities relied on and the provision of the electoral laws, I find that the petitioner, Salatiel M. Tembo has failed to prove his case against the 1<sup>st</sup> respondent in accordance with the required standard of proof. I also find that the allegations in this petition lack merit in many respects and I find that it would be unsafe for this court to rely on them to nullify the 1<sup>st</sup> respondent's election and I decline to do so.

I, therefore, accordingly find that the 1<sup>st</sup> respondent Allan Divide Mbewe, the current MMD Member of Parliament for Chadiza Central Constituency in the Eastern Province of Zambia was duly elected on the 20<sup>th</sup> day of September, 2011, Parliamentary elections and I, accordingly declare him to have been so duly elected and I dismiss the petitioner, Salatiel M. Tembo's election petition with costs for the 1<sup>st</sup> respondent.

DATED this.....day of June, 2012 at Lusaka

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F. M. Lengalenga

**JUDGE**