

**IN THE HIGH COURT OF ZAMBIA  
& 39  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**2011/HP/EP/11**

**IN THE MATTER OF:  
REPUBLIC  
AND**

**ARTICLE 72 (1) (a) OF THE CONSTITUTION OF THE  
OF ZAMBIA**

**IN THE MATTER OF:  
ELECTORAL ACT**

**SECTIONS 63, 79 TO 86 AND 93 TO 95 OF THE  
No. 12 OF 2006**

AND

**IN THE MATTER OF:  
INSTRUMENT**

**THE ELECTORAL CODE OF CONDUCT STATUTORY  
No. 52 OF 2011**

AND

**IN THE MATTER OF:**

**THE ELECTORAL PETITION RULES No. 426 OF 1968**

AND

**IN THE MATTER OF:  
CONSTITUENCY  
THE 20<sup>TH</sup> DAY OF SEPTEMBER,**

**PETAUKE CENTRAL PARLIAMENTARY  
ELECTIONS HELD IN ZAMBIA ON  
2011**

**BETWEEN:**

**LEONARD BANDA  
CUTHBERT PHIRI**

**1<sup>ST</sup> PETITIONER  
2<sup>ND</sup> PETITIONER**

AND

**DORA SILIYA**

**RESPONDENT**

**BEFORE THE HON. MR. JUSTICE C. KAJIMANGA THIS 13<sup>TH</sup> DAY OF APRIL, 2012**

**FOR THE 1<sup>ST</sup> PETITIONER:** Mr. B. C. Mutale, SC and Ms Mukuka, Messrs Ellis & Co; Mr. W. Mubanga, Messrs Chilupe & Permanent Chambers; Mr. A. Kasolo, Messrs Frank Tembo & Co; and Mr. B. Soko, Messrs Ferd Jere & Co.

**FOR THE 2<sup>ND</sup> PETITIONER:** Not in Attendance

**FOR THE RESPONDENT:** Mr. E. S. Silwamba, SC; Mr. J. Jalasi and Mr. L. Linyama, Messrs Eric Silwamba & Co.

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

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**Cases referred to:**

1. Akashambatwa Mbikusita Lewanika & Others v Frederick Jacob Titus Chiluba (1998) Z. R. 49
2. Michael Mabenga v Sikota Wina (2003) Z. R. 110

The 1<sup>st</sup> Petitioner, Leonard Banda and the 2<sup>nd</sup> Petitioner, Curthbert Phiri initially filed separate petitions challenging the election of the Respondent, Dora Siliya as Member of Parliament for Petauke Central Constituency and also against the Electoral Commission of Zambia. The two petitions were consolidated by an order of this Court made on 17<sup>th</sup> November, 2011 pursuant to Section 97(2) of the Electoral Act No. 12 of 2006 (hereinafter referred to as “the Act”). Following the said order, the Petitioners filed a joint amended petition on 25<sup>th</sup> November, 2011.

On 7<sup>th</sup> December, 2011 the Respondent’s advocates filed an application for leave to issue and serve request for further and better particulars in respect of paragraphs 6(i), (iii), (iv), (vii) and (xi). In granting the application the Court ordered that the Petitioners should furnish the said further and better particulars on or before 16<sup>th</sup> December, 2011 and that in default, the affected paragraphs would be struck out and expunged from the record. The Petitioners defaulted and the said paragraphs were accordingly struck out of the petition. Consequently, the paragraphs that now form the basis of this petition are as follows:

6(ii) that between 20<sup>th</sup> August, 2011 and 20<sup>th</sup> September, 2011, in the course of her campaigns, the Respondent and her agents with the intention of procuring votes commenced the grading of Kawere-Chisenjere road.

- 6(v) that on 12<sup>th</sup> September, 2011 the Respondent used a public school, Petauke Boarding Secondary School to conduct her campaigns amongst civil servants and distributed t-shirts and a newspaper called 'The Zambian' to the civil servants in attendance in order to procure and solicit votes from the electorate.
- 6(vi) that between 13<sup>th</sup> July, 2011 and 20<sup>th</sup> September, 2011, in the course of her campaigns, the Respondent and her agents did cause to be broadcast campaign messages for the Respondent and her party, the Movement for Multiparty Democracy (hereinafter referred to as "MMD") on the community radio station PASME to the exclusion of the Petitioners and other candidates. The Respondent was using the community radio station without paying for the services. This was done with the intention of procuring votes for the respondent.
- 6(viii) that between 13<sup>th</sup> July, 2011 and 20<sup>th</sup> September, 2011 the Respondent and her agents during their campaign, did with malice convey false information and engaged in character assassination on PASME radio station and public rallies, of the 1<sup>st</sup> Petitioner, his party the Patriotic Front (hereinafter referred to as the "PF") and its President Mr. Michael Sata to the effect that the 1<sup>st</sup> Petitioner and his party if voted into power would, *inter alia*:
- (a) instruct Food Reserve Agency (hereinafter referred to as "FRA") to stop payments to farmers who had supplied maize.
  - (b) the Fertilizer Support Programme would be abolished.
  - (c) homosexuality and lesbianism would be legalized.
  - (d) youths would be sent to Afghanistan. Further, the Respondent and her agents at Chimutowe and Kang'ambwa alleged that the 1<sup>st</sup> Petitioner was a thief and his party president Mr. Michael Sata

smoked dagga and was a mad person. This was meant to cause apprehension in the electorate and procure votes for the Respondent.

6(ix) that prior to the election date, the Respondent's agents intimidated the electorate by collecting details of their national registration cards and voters cards purporting that the details could be used on the computer to establish the candidate each particular electorate had voted for. The electorates 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 FRA would not be paid.
- (b) such persons will no longer benefit from government fertilizer programme. The threats were intended to coerce the electorate to vote for the Respondent, especially that the majority of the electorate are peasant farmers.

6(x) that between 1<sup>st</sup> August, 2011 and 20<sup>th</sup> September, 2011 with the intention of procuring votes from the electorate, the Respondent and her election agents threatened, intimidated and used violence on supporters and sympathizers of the Petitioners by -

- (a) attacking and severely beating the 1<sup>st</sup> Petitioner's supporter Gabriel Mwale in Nyika ward.
- (b) attacking and severely beating the 2<sup>nd</sup> Petitioner's supporter Edward Njobvu in Mbala ward.

On application by Mr. M. Mukwasa for the Electoral Commission of Zambia, the Court on 10<sup>th</sup> January, 2012 ordered the striking out of the said Electoral Commission of Zambia as 2<sup>nd</sup> Respondent, on the ground that the Petitioners did not make any allegations against the Electoral Commission of

Zambia. Consequently, the Respondent remained as the only Respondent in these proceedings.

The petition also disclosed that the Petitioners were candidates in the Petauke Central Parliamentary elections held on 20<sup>th</sup> September, 2011 having been adopted by their respective parties to contest the said elections. Other candidates were the Respondent, Ignasio A. S. Phiri and Osman A. Moosa. The returning officer declared the Respondent as being duly elected and the results of the said Parliamentary election

were as follows:

Respondent	MMD	14, 561 votes
1 <sup>st</sup> Petitioner	PF	5, 759 votes
Phiri Ignasio A. S.	UNIP	515 votes
2 <sup>nd</sup> Petitioner	UPND	515 votes
Moosa Osman A.	Independent	470 votes

Contrary to the returning officer that the Respondent was duly elected, the electoral campaign by the Respondent was characterized by widespread undue voter influence, electoral bribery, voter treating, abuse of government resources and all manner of illegal practices contrary to the Electoral Act and the Electoral Code of Conduct as particularized in the allegations referred to above.

The Respondent's answer disclosed that the Respondent denies the contents of paragraph 6(ii) of the petition and that if there was any grading of Kawere-Chisenjere road, which is denied, it was a government programme. The Respondent denies paragraph 6(v) and avers that at no time did she or her legally appointed agents distribute t-shirts save as

provided by the provisions of the Act and the Electoral Code of Conduct, S.I. No. 52 of 2011. She also denies that she distributed a newspaper called 'The Zambian' to the civil servants in attendance to procure and solicit votes from the electorate.

The Respondent's answer also disclosed that the Respondent denies paragraph 6(v) and avers that at no time did she or her duly appointed agents under the Act as read with the Electoral (General) Regulations, S.I. No. 92 of 2006 cause to be broadcast campaign messages for her and her party to the exclusion of the Petitioners. The Respondent denies the allegation in paragraphs 6(viii) of the petition and avers that the purported agents mentioned therein were not at any time the Respondent's agents duly appointed under the Act as read with the Electoral (General) Regulations. The Respondent denies the contents of paragraphs 6(ix) and 6(x) of the Petition and avers that if at all there were any instances of threats and violence, which is denied, the threats or violence were not instigated by her or her agents duly appointed under the provisions of the Act as read with the Electoral Code of Conduct. The Respondent denies the contents of paragraphs 7 of the Petition and avers that the election was conducted in accordance and in compliance with the principles laid down in the Act and attendant regulations and that the majority of the voters were not prevented from electing the 1<sup>st</sup> Petitioner as a candidate whom they preferred.

The 1<sup>st</sup> Petitioner's first witness was Davis Sankwana, Education Standards Officer in the Ministry of Education. His testimony was that on 12<sup>th</sup> September, 2011 he attended a meeting called for all civil servants at Petauke Boarding Secondary School in the assembly hall which was addressed by the Respondent. He said that after waiting for some time, the Respondent arrived in a vehicle clad in MMD campaign materials and was introduced by the District Education Board Secretary (DEBS), Mr. Samuel Phiri. He told the Court that the Respondent also wore and MMD Chitenge, t-

shirt and headdress. PW1 testified that during the meeting the Respondent mentioned unprecedented development that took place under the leadership of Mr. Rupiah Banda such as the building of schools, clinics, roads and the general improvement in the lives of Zambians. He said that the Respondent also told them that Mr. Sata failed lamentably when he worked in different portfolios in the MMD government and that it would be folly for them to experiment with people who were just making promises. He said that the Respondent told them that other political parties were also at liberty to invite them.

The witness further testified that the Respondent told them that she had brought them a gift and the man she came with went to her vehicle and brought bundles of MMD t-shirts, booklets with MMD manifestos and a newspaper called 'The Zambian'. The items were distributed to those who were interested. He said that his conscience did not allow him to get a gift as a civil servant and that after the meeting they went back and continued with their routine work.

In cross-examination, PW1 told the Court that according to the announcement on radio PASME, the convenor of the meeting was the District Commissioner, Mr. Jacob Mwanza. He said that the announcement was an open one but since DEBS was announced there were more teachers. PW1 told the Court that the people who attended the meeting arranged their own means of transportation. He testified that no role call was conducted at the meeting but he estimated the number at about six hundred. PW1 testified that the DEBS never took action against teachers who did not attend the meeting. He told the Court that it was wrong for the Respondent to distribute campaign materials to them because as civil servants they were non partisan. It was also his evidence that the Respondent told them that other political parties were at liberty to address a similar meeting. He however, said that the Respondent told them that those who were interested

were free to get the campaign materials. The witness conceded that there were also campaign materials for the PF in the constituency.

PW2 was Peter Banda, a teacher at Chileka Basic School. He testified that following an announcement on 11<sup>th</sup> September, 2011 on Radio PASME from the District Commissioner's office through the DEBS he attended a meeting at Petauke Boarding Secondary School on 12<sup>th</sup> September, 2011. He said that between five hundred and six hundred teachers attended the meeting. Like PW1, this witness also told the Court that the Respondent informed the audience about the unprecedented development programmes in most parts of the country under the MMD and cited the construction of schools, clinics, grading of roads and infrastructure. He said that the Respondent requested them to vote for her, the MMD President and all MMD councillors.

The witness told the Court that the Respondent informed them that she had come with a gift and any one who wanted to get was free to do so. PW2 said that when the Respondent started distributing the t-shirts some people began to walk out of the assembly hall and that he was one of the first ones to leave. He told the Court that there were no other people in the meeting apart from teachers. The witness said that he went to Petauke for a meeting in a Mitsubishi canter truck.

In cross-examination, PW2 testified that there was no register at the meeting he attended. He said that he was not forced to get a gift and freely walked away after the meeting. It was also his evidence that he used private transport just as other people who attended the meeting.

PW2 testified that political meetings at government institutions were not allowed. He however said that a political gathering can take place at the school if the school authorities accepted.



The witness also told the Court that the announcement on Radio PASME was directed to civil servants and was general. He said that he was not a recipient of t-shirts and campaign materials the Respondent was giving and that he exercised his free will to vote on the election day. PW2 told the Court that two thirds of the teachers did not get the gifts. The witness testified that it was not clear in the announcement if the meeting was a political one.

In re-examination, PW2 told the Court that it was strange for the Respondent to address them because Parliament had been dissolved and a former Member of Parliament had no powers to call for a meeting to address civil servants.

PW3 was Joseph Mwenda, a photo-journalist working for the Post Newspaper. He testified that prior to last year's elections he was assigned to cover Petauke Central, Chipata Central and Lundazi constituencies. He said that the Post decided that reporters would cover elections in areas where they came from and understood the local language spoken there.

PW3 testified that the first rally he covered on 8<sup>th</sup> September, 2011 was addressed by the 1<sup>st</sup> Petitioner at Chimusakasa village under a tree in Musambazi ward. He said that on his way from Chimusakasa village he found the Respondent addressing a rally at Minga Stop Basic School in front of one of the classroom blocks and estimated the crowd to be about five hundred. The witness testified that in her speech the Respondent told the people to vote for her because she was representing the party in power; the opposition PF was led by a man who was advocating for homosexuality; youths would be sent to fight in Afghanistan if the PF leader won; the 1<sup>st</sup> Petitioner was following his PF leader in advocating for homosexuality; and the Respondent would make sure that they got their payment for the maize sold to FRA.

PW3 testified that he got audio recordings of what the Respondent said and took pictures at the rally. He said that later in the day he listened to the full recording from which he wrote a story and sent it to the head office in Lusaka and that it was covered by the Post Newspaper on Saturday 10<sup>th</sup> September, 2011 appearing at page 20 of the 1<sup>st</sup> Petitioner's bundle of documents. The original copy of the newspaper was produced as exhibit P1. The witness testified that he recorded the rally from the beginning to the end and a tape was played in Court.

PW3 told the Court that he also covered the Respondent's second rally at Chisonso Basic School whose pictures were at pages 4, 5 and 11 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents. He testified that the Respondent also reminded the people at this rally to vote for her because she was the one giving them things unlike the 1<sup>st</sup> Petitioner whom she said had nothing to give them as he visited them empty handed. He said that the Respondent repeated her call for them not to vote for the PF because their leader was advocating homosexuality. The witness testified that the Respondent told the people not to vote for the 1<sup>st</sup> Petitioner because people would be separated from the ruling party which she described as government; and that voting for the PF was a waste of time because the PF leader was a failure who was attempting to contest elections for the fourth time.

PW3 testified that not everything said at the second rally was covered in his story under a kicker '*Petauke men ask Siliya to allow them to touch her breast*' and the lead story was '*Dora urges men to admire her bums*'. The original copy of the newspaper was produced as exhibit P2. It was also his evidence that like Minga Stop Basic School, Chisonso Basic School was a government school.

PW3 testified that the third rally for the MMD was held at Petauke old bus stop which was addressed by Mr. Rupiah Banda, the Respondent and

Precious Zulu. According to the witness, Precious Zulu told the people at the rally not to believe what was reported in the Post Newspaper about the Respondent because they were lies. He said that among other things, Mr. Rupiah Banda and the Respondent told the people to vote for the MMD for continuity. The witness told the Court that the Respondent did not repeat her message of calling people not to vote for the PF leader because he was advocating for homosexuality.

PW3 testified that he translated the speeches at Minga Stop Basic School and Petauke old bus stop from Nsenga into English but did not have time to do so for the third rally. The DVD and the transcriptions for Minga Stop Basic School and Petauke old bus stop rallies were respectively produced as exhibit P3.

In cross-examination PW3 testified that in the third column of his story at page 21 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents he was reporting on a meeting addressed by the 1<sup>st</sup> Petitioner. He said that the meeting took place under a tree in Chimusakasa village and not Kaluba Basic School. PW3 told the Court that he wrote that the meeting took place at Kaluba Basic School because a tree would not have appealed to his readers and Chimusakasa village was not as popular as Kaluba Basic School. He said that the tree was approximately two hundred metres from the school. PW3 told the Court that the Respondent's rally at Minga Stop Basic School took place under some trees.

The witness also testified that the picture at page 13 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents was a government truck registration number GRZ 348 BX which he took in Petauke on a date he could not remember. He confirmed that the picture was taken at a rally addressed by the Respondent and the then Republican President Mr. Rupiah Banda. The witness said that he was aware that the President and the Vice President

were allowed to use government and parastatal resources during election campaigns.

PW3 testified that in the third column of his story at page 21 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents the 1<sup>st</sup> Petitioner was likening the Respondent to a 'Kanongo', a bird that feeds on snails because he was saying what other people were describing her. PW3 told the Court that he did not verify the people the 1<sup>st</sup> Petitioner was quoting as having referred the Respondent to a 'Kanongo'. He denied that he was biased in his coverage. The witness recalled the Respondent playing a recording at the rally which was, according to her, the voice of the PF leader Mr. Michael Sata supporting gay rights. He said that the recording had a voice talking about the laws of Zambia and recalled hearing the word 'homosexuality'. He said that this aspect was not reflected in his story because it could not contain everything said and heard at the rally and that it was not important to state that the Respondent played a recording before attributing the homosexuality remarks to Mr. Michael Sata.

When shown the English version of the Minga Stop Basic School rally, particularly the statements of Precious Zulu and the Respondent which he read, PW3 told the Court that the two speakers were quoting what they heard in the recording. He said that he found it unnecessary to tell the nation that the two speakers were quoting a recording.

PW3 also testified that unless someone was there it was difficult for anybody to know that the photos on pages 5, 10, 11 and 12 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents were taken in Petauke.

In re-examination, PW3 told the Court that the meeting held by the 1<sup>st</sup> Petitioner in an area known as Kaluba was not within the school premises. He also said that although the President and Vice President are authorized to use government resources during campaigns, the truck at page 13 of the 1<sup>st</sup>

Petitioner's supplementary bundle of documents was being used by MMD cadres or supporters. It was his further evidence that the picture at page 10 was taken in Petauke because the background was a significant feature and it is near Petauke Trades Training Institute; the picture at page 11 shows a classroom block at Chisonso Basic School; and that he knew Dabwiso Mwanza; an Agriculture Extension Officer in Nyampande area near Petauke, Baruck Chambakata, an employee of Barclays Bank; and Ackim Banda, an official at the RCZ in Petauke.

PW4 was Jeremiah Mzyeche, the head teacher of Petauke Boarding Secondary School. He testified that on 9<sup>th</sup> September, 2011 he went to the office of the DEBS, Mr. Samuel U. Phiri for official business when he told him that there would be a meeting on 12<sup>th</sup> September, 2011 at Petauke Boarding Secondary School to be addressed by the Respondent and that he needed to prepare the assembly hall. He said that the venue was prepared and on 12<sup>th</sup> September, 2011 the Respondent came to the assembly hall, wearing an MMD t-shirt, MMD chitenge material around her waist and MMD headgear. Mr. Samuel Phiri set the meeting in motion and invited the Respondent to address them. He told the Court that the Respondent talked about unprecedented development brought by the MMD such as the building of hospitals, schools and the previous season's bumper harvest. He said that she appealed to the civil servants to vote for the MMD so that the unfinished projects could be completed. PW4 told the Court that the Respondent also threatened that if they voted for the PF and Mr. Michael Sata there would be war in the country.

The witness further testified that the Respondent also stated that if PF came into power the fertilizer support would be discontinued and their maize would not be bought by the government. He told the Court that the Respondent reminded them that it was during the time Mr. Michael Sata was Minister for Local Government and Housing that there were a lost of deaths

as a result of cholera outbreak. PW4 stated that the Respondent also told them that it was during the time Mr. Michael Sata was Minister of Health that a lot of doctors went on strike and that the choice was theirs.

The witness also testified that the Respondent finally told the audience that she had brought some materials. He said that her driver brought a bunch of MMD t-shirts; portraits of Mr. Rupiah Banda; an extract of copies of the MMD manifesto; samples of ballot papers which were already marked 'X' against Mr. Rupiah Banda's name; brochures with an outline of developmental projects done by the MMD government; and some newspapers. PW4 told the Court that the Respondent said that she was not forcing them to get these things but those who wanted could do so. He said that at that time some people started leaving the assembly hall but he was among those who remained behind. It was his evidence that classes were never taught the whole day because teachers were attending the meeting. He said that the meeting started around 10.00 hours and ended between 12.30 and 13.00 hours.

In cross-examination, PW4 testified that this was not an official but a campaign meeting and that some of the people who attended were eligible voters. He said that he did not recall the DEBS saying that other aspiring candidates were free to address a meeting of this nature as he was not in the meeting when he addressed the teachers. The witness told the Court that the Respondent correctly counselled them not to actively participate in campaigns as civil servants and that in the end she told them that they were at liberty to vote for a candidate of their choice.

PW4 also testified that the meeting ended unceremoniously after the distribution of the campaign materials because the people started leaving the hall. The witness told the Court that he saw campaign materials for the MMD and the PF in Petauke. As for the UPND he said that he just used to see them stuck on their vehicles as they were campaigning. He told the Court

that he did not come with any of the campaign materials distributed by the Respondent.

PW5 was Margaret Mwanza. She testified that on 17<sup>th</sup> September, 2011 at Mazala village in Kang'ambwa area, the Respondent addressed a meeting at which she said that if they voted for the PF, men would be marrying other men; that there would be no fertilizer; and that there would be no markets for them to take their maize. She told the Court that the Respondent said that the 1<sup>st</sup> Petitioner was a 'Yo bally' and that if they voted for the PF there would be war as their fire arms had acquired rust.

In cross-examination PW5 told the Court that she could not estimate how many people attended the rally. She said that she only attended one rally addressed by the Respondent in her village and that she found it in progress. PW5 told the Court that she could not recall a recording being played at the rally. She said that Kang'ambwa is in Nsimbo ward.

PW6 was Richard Banda. He testified that there was a meeting at Mazala village in Kang'ambwa area addressed by the Respondent on 17<sup>th</sup> September, 2011. He said that the Respondent told them that if they voted for PF, men would marry fellow men and women would do likewise; that the PF President would bring war in Zambia and that there would be no fertilizer. The witness further testified that the Respondent told them that they could not vote for the 1<sup>st</sup> Petitioner who was a 'Yo bally'.

In cross-examination, PW6 told the Court that it was the first time to hear that men would marry their fellow men and that he later heard it on radio. He said that he was at the rally from the beginning.

PW7 was Chakupa Chilembo, a reporter employed by PASME Radio. He said that the radio had a coverage of 120 km. He told the Court that on a Saturday whose date he could not recall in August 2011, there was a rally at Chintobe village addressed by the Respondent and he was assigned by the

Station Manager to cover it. He said that before going to the rally he went to the Respondent's farm where Nathan Banda gave him K200,000,00 for air time. He told the Court that the Respondent first addressed the people on the development she had done in Petauke Central from 2006 to 2011, for example, building schools and bridges as well as the provision of water in Petauke Central Constituency. He said that she also mentioned what Mr. Rupiah Banda had done in three years and that if they voted for the MMD development would continue. It was also his evidence that the Respondent told the people not to vote for PF otherwise men would be marrying their fellow men and women would do likewise.

The witness told the Court that being a live programme, he connected the phone to the radio station where the station manager and editor control the recording. He said that the coverage of the radio station goes up to the border with Mozambique, Nyimba, Sinda and Katete.

In cross-examination, PW7 told the Court that he was hearing the allegation about men marrying other men for the first time and that he had never heard it on the radio before. He testified that PAMSE radio covers a radius of 120 km on frequency 91.3 FM. He however said that they some times have interruptions due to network problems and that when this happens listeners do not hear anything. PW7 told the Court that he did not know if there was power failure on that day. He also said that he did not know if Radio PASME kept a CD of the broadcast and that he did not come with any evidence of the rally.

The witness also told the Court that Radio Explorer was the other radio station in Petauke and that he did not know which areas it covered.

PW8 was Jabes Njovu, an editor at PASME radio. He testified that PW7 covered live a rally at Chintobe village and that he was in on-air studio and editing some news in the news room at the same time. The witness told the



Court that he received the signal of the rally and managed to relay the whole rally to the listeners. He said that he did not monitor the transmission through out the rally as he was going back to the on-air studio after ten minutes because he was editing some news in the newsroom.

PW8 testified that he listened to part of the rally in a jumbled way. He said that he just picked a few things the Respondent said at the rally. He said that the Respondent encouraged voters to vote for MMD candidates because the MMD government had delivered development. He testified that the Respondent warned voters at the rally against voting for PF candidates because the PF government would scrap some of the good things the MMD government was doing, for example, that they would abolish the farmer input support programme.

PW8 also testified that on 17<sup>th</sup> September, 2011 he was assigned to cover the Kang'ambwa rally. He said that at this rally the Respondent first told the people that the MMD government ended a scenario where people could only have a single meal per day due to its good policies such as the farmer input support programme and that the MMD government deliberately reduced the number of fertilizer bags in a pack from eight to four so that more people could benefit from the programme. The witness also told the Court that the Respondent warned the voters against voting for the PF and its candidates on the ground that if ushered into power, the PF government would abolish the farmer input support programme and that the PF leader was advocating for homosexuality. It was also his evidence that the Respondent alleged that Mr. Michael Sata was saying that guns in Zambia had become rusty and there was therefore need to have a small war.

PW8 testified that the rally was recorded on a CD. He said that he transcribed the recording into Nsenga and then translated it into English. The two documents in the 1<sup>st</sup> Petitioner's notice to produce filed on 16<sup>th</sup> January, 2012 were respectively produced as exhibit P4.

In cross-examination PW8 testified that he transcribed the audio to Nsenga and translated it into English on 12<sup>th</sup> January, 2012 in Lusaka. He said that he did not transcribe the rally at Chimutowe because he was not the one who covered it but merely received the signal and transmitted to the listeners.

He told the Court that the Respondent at the Kang'ambwa rally said that if PF was voted into power they would promote homosexuality but he could not recall a recording of a man's voice at the rally before she said that. He said that he could not remember that those words were attributable to Precious Zulu and not the Respondent. He told the Court that he had a problem with his memory. The witness also testified that he did not recall the words 'Yo bally' being mentioned during the Kang'ambwa and Chintowe rallies.

In re-examination PW8 said that by having a problem with his memory he meant that he could not recall everything that transpired or was said at the rally.

PW9 was Christopher Phiri, a broadcaster at Radio PASME. He testified that he interviewed the Respondent a day before nominations. He said that during the interview the Respondent explained the MMD manifesto and what her party was going to do for the people. He told the Court that the Respondent also explained issues to do with roads, schools and hospitals. PW9 testified that the Respondent further said that Petauke residents loved peace and if they voted for PF there would be violence and homosexuality. He said that the interview was transcribed in Nsenga. The two documents containing the recording of the interview were identified as ID1.

In cross-examination PW9 told the Court that he was not aware if the interview was recorded as he was in on-air studio. He said that the interview

was transcribed by Jabes Njovu (PW8) and that he was seeing the transcripts for the first time in Court.

PW10 was Samuel John Phiri. He testified that some time in August 2011, the Respondent came to Chileka School to address a meeting where she explained what she had done and what she would do. He said that she cautioned people not to vote for PF especially Mr. Michael Sata because he would encourage homosexuality and lesbianism and she produced a picture of men kissing each other. He said that the front part had the words *"This is Sata's change"* and *"Is this the change you want?"*. PW10 told the Court that the flip side of the picture had the words, *"If you are a Zambian citizen, if you are a Christian, if you are a woman, if you are a youth, if you are a child, if you are a student and if you love Zambia say no to homosexuality."* The picture was produced as exhibit P5.

The witness also said that the Respondent told the people that those who will vote for the opposition parties will be seen by a big computer in Lusaka and that once identified they would be denied fertilizer and medicine in hospitals. He said that the Respondent also stated that if you vote for Mr. Michael Sata you have voted for war in the country. The witness testified that the Respondent also told the people not to vote for the 1<sup>st</sup> Petitioner because he had worked for so many companies where he had been stealing.

PW10 told the Court that Chileka Basic School belongs to Kovyane ward. He said that he was a UNIP candidate in the local government election. He told the Court that he is one of the PTA executive committee members at Chileka Basic School and that the meeting was held at the western side of the school near a classroom.

The witness also testified that on 19<sup>th</sup> September, 2011 Bennes Tembo was collecting voter's cards and National Registration Cards from voters and that Tasila Phiri confirmed that her voters card was collected. PW10 said

that he reported to UNIP, Petauke District Council and Petauke Police. He said that he was given two officers, a Mr. Chisanga and another to accompany him to Chileka village. The witness told the Court that upon arrival they found that the cards had been given back to the owners and that Bennes Tembo and his group had run away. He said that about three hundred people had their cards collected on 19<sup>th</sup> September, 2011.

In cross-examination, PW10 testified that the police did not apprehend the people who had collected the voters' cards and national registration cards. He said that he saw his neighbour being given his voters card and national registration card when they came back from Petauke Boma.

The witness told the Court that he lost elections as a councillor. He said that he could not confirm if Tasila Phiri and others whose cards were collected and given back voted. He testified that he received complaints from some people who got their cards late such as Madam Makusi Sakala.

PW10 told the Court that he only attended one meeting at Chileka School but not the one which was also attended by teachers from Turkey in June 2011. He said that the picture (exhibit P5) was not distributed at that meeting but at the one held on 19<sup>th</sup> September, 2011.

It was also the evidence of PW10 that he attended the MMD meeting because as a PTA executive committee member he wanted to see what was happening at the school and not because he wanted to hear the developments the Respondent had done in Petauke. He said that the Respondent had a box from which the youth were distributing exhibit P5. The witness conceded that exhibit P5 was not talking about any of the Petitioners. He said that he was a Christian and did not support homosexuality and that he was aware that it was a criminal offence in Zambia. He said that the writings on it were a confirmation of Zambian law

forbidding homosexuality. PW10 testified that exhibit P5 did not affect the way he voted.

PW11 was Tasila Phiri. She testified that on 12<sup>th</sup> September, 2011 she was approached by the MMD branch chairman Mr. Solomon Phiri that he was sent by the Respondent to collect their voters cards and national registration cards so that he could take down their names and when she comes on 15<sup>th</sup> September, 2011 she would give them chitenge materials. She told the Court that on 15<sup>th</sup> September, 2011 the Respondent came to address a rally at Chileka Basic School, about five metres from the classroom block. The witness said that the Respondent told them to vote for her because she wanted to bring development to the area. She told the Court that the Respondent also gave them papers showing two men kissing each other and said that if Mr. Sata was voted into power men would be marrying their fellow men. She identified the picture (exhibit P5) and said that she got one but threw it away because it was useless.

PW11 further testified that after the rally they were given back their national registration cards and voters' cards. She said that they queued up to receive chitenge materials from the Respondent and those who did not have voters cards were not given. It was also her evidence that the Respondent told them that if they voted for the opposition a machine would see them and that if she discovered this, they would not received the money for their produce.

In cross-examination, PW11 told the Court that she voted in the last election and there was nothing that prevented her from doing so.

The witness testified that she did not know Bennes Tembo. She also said that she did not see her uncle Mr. Samuel John Phiri (PW10) coming to Chileka village with police officers and that she did not give a statement to police officer Chisanga. She told the Court that the voting was conducted in

a very good atmosphere. The witness also said that she threw the picture (exhibit P5) because it was useless to her.

The 1<sup>st</sup> Petitioner was PW12. He testified that the Respondent was not validly elected because the elections were characterized by massive voter intimidation; malice and character assassination; abuse of government facilities and undue influence by the Respondent and her agents. He testified that voters were intimidated when the Respondent told them that once the PF President Mr. Michael Sata and himself were voted into power he would introduce homosexuality; that they would phase out the farmer input support programme; and that they would bring war in the country.

On character assassination the 1<sup>st</sup> Petitioner testified that the Respondent and her agents alleged during the campaigns that the PF President was a mad person and that the 1<sup>st</sup> Petitioner was a thief and that they both smoked dagga. It was also his evidence that the Respondent referred to him as a 'Yo bally'. The 1<sup>st</sup> Petitioner testified that this term means a riffraff; or young boy who sags his trousers, speaks a colloquial language and in the habit of abusing drugs.

PW12 testified that most people in Petauke Central Constituency depend highly on agriculture, particularly maize production for their economic livelihood and that they equally depend heavily on the farmer input support programme. He said that any person who was associated with its removal or termination would cause a lot of apprehension in the farmers of Petauke Central Constituency.

PW12 testified that the memories of turbulences along the Zambia/Mozambique border during the RENAMO uprising in the early 1990's and its effect in terms of a high influx of refugees to Ukwimi Resettlement Camp in Petauke District were still fresh. He said that as such the mention

that the PF would bring about wars caused a lot of apprehension in the voters of Petauke District.

It was also his evidence that the Respondent and her agents abused government facilities and resources for political purposes, for example, Petauke Boarding High School assembly hall was used to address civil servants in Petauke without paying for it. He said that this meeting disturbed the learning programme of the schools from which the teachers were drawn and that Petauke Central Constituency has over thirty-five primary and basic schools. He told the Court that he was informed about the meeting by teachers such as Peter Banda (PW2) of Chileka Basic School and Luciano Mumba of Petauke Day High School and PW1, Davis Sankwana, Education Standards Officer in Petauke. The 1<sup>st</sup> Petitioner also said that he received reports from Mr. Samuel Phiri (PW10) and Mr. Chilembo (PW7) that the Respondent used Chileka Basic School for her campaign. He said that he also found the Respondent and her agents addressing a rally at Minga Stop Basic School when he was coming from Kaluba. The 1<sup>st</sup> Petitioner testified that he also got a report from Mr. John Zulu of Kaluba that the Respondent held a meeting near the school grounds at Kaluba Basic School. PW12 further told the Court that he also got a report from Mr. Francis Daka of Kazala that the Respondent held a meeting at Kazala Basic School.

It was also his evidence that he recorded a rally addressed by the Respondent and Precious Zulu at Kang'ambwa which was broadcast live on 17<sup>th</sup> September, 2011 via his phone, down loaded to his computer and cut a CD. He said that he also recorded one radio broadcast of the Respondent's interview on radio PASME on 11<sup>th</sup> August, 2011 and that the presenter was Mr. Christopher Phiri (PW9). PW12 told the Court that in the interview the Respondent alleged that Mr. Michael Sata and himself were advocating for laws which would introduce homosexuality and she urged the voters not to vote for them because Petauke people were Christians and that such laws

would bring confusion. He said that she also urged the people to vote for MMD because as a party in government they would deliver development as the rest of the opposition had nothing to offer. The CD containing the interview and the Kang'ambwa rally was produced as exhibit P7.

The 1<sup>st</sup> Petitioner testified that he asked Jabes Njovu (PW8) to transcribe the audio CD into Nsenga and then translated it into English. The two transcripts (ID1) were collectively produced as exhibit P8.

The 1<sup>st</sup> Petitioner also testified that it was undue influence on the voters for the Respondent to call upon all civil servants in the district to attend a meeting at Petauke Boarding Secondary School on 12<sup>th</sup> September, 2011. He further said that undue influence was also used by the Respondent and her agent to gain absolute access to PASME radio by having aired several political campaign programmes, messages, advertisements and campaign songs in favour of the Respondent. According to the 1<sup>st</sup> Petitioner this gave undue advantage to the Respondent during the campaign period and on election day.

The 1<sup>st</sup> Petitioner testified that he was affected by things that were broadcast on Radio PASME because it has the widest coverage. It was his evidence that in view of all these allegations, the Court should nullify the election of the Respondent as Member of Parliament for Petauke Central Constituency with costs.

In cross-examination, the 1<sup>st</sup> Petitioner told the Court that he accurately recorded the Respondent's Kang'ambwa rally, exhibit P4. He conceded that there was nowhere in this exhibit referring to him as a 'Yo bally' by the Respondent. He also conceded that there was nowhere in the transcript referring to him as a "Ka Leonard" by the Respondent. He said that some one would be lying if he/she said that the Respondent contemptuously referred to him as such.



When shown the transcript for Chisonso rally (exhibit P3) the 1<sup>st</sup> Petitioner conceded that there was nowhere he was referred to as a 'Yo bally' by the Respondent. When shown the transcript for the radio interview (exhibit P8) he conceded that there was nowhere he was referred to by the Respondent as a 'Yo bally' or a thief.

The 1<sup>st</sup> Petitioner testified that during the campaign period there was a mechanism to resolve conflicts through the District Conflict Management Committee at which the PF were represented. He said that he never reported incidences of character assassination to this committee because some of his colleagues who did so did not have their concerns addressed, for example, the 2<sup>nd</sup> Petitioner. When shown the minutes of the District Conflict Management Committee dated 5<sup>th</sup> September, 2011 in the Respondent's bundle of documents, the 1<sup>st</sup> Petitioner said that he was not aware that at that meeting, the Committee considered complaints by the 2<sup>nd</sup> Petitioner and the Respondent.

The 1<sup>st</sup> Petitioner also testified that he appeared on Radio Explorer but he could not recall if the Respondent appeared or the 2<sup>nd</sup> Petitioner placed advertisements on this radio station which the Respondent was complaining about at the District Conflict Management Committee meeting.

The 1<sup>st</sup> Petitioner told the Court that he was accurately quoted in the story at page 21 of the 1<sup>st</sup> Petitioners' bundle of documents. He said that he was telling the rally that the Respondent had been nicknamed as a 'Kanongo' by the people of Petauke and he explained what the name meant. He conceded that 'Kanongo' was not a charitable word.

PW12 also testified that the Respondent used the facilities at Radio PASME without paying for them. When shown general receipts from Radio PASME in the Respondent's supplementary bundle of documents, he said

that according to the documents the Respondent paid for the facilities during the campaign period.

When referred to the transcript for the Minga Stop Basic School rally, particularly after the words 'CUE IN RECORDED VOICE', the 1<sup>st</sup> Petitioner told the Court that he heard the recording but he could not confirm that it was President Sata's voice. He said that there was a feeling at the rally that it was Mr. Sata's voice.

It was also his evidence that Kaluba Basic School where he had addressed a rally was a government school. He said that the Respondent did not stop him from addressing rallies at any school.

The 1<sup>st</sup> Petitioner also testified that the Respondent and her agents intimidated the voters by deliberately misrepresenting the policies of the PF manifesto. He however told the Court that he had no documents in Court showing the PF manifesto which the Respondent was misrepresenting.

In re-examination the 1<sup>st</sup> Petitioner told the Court that he did not recall addressing meetings at any school except at Kazala Primary School grounds, about 70 metres from the school. He said that the community decided that the meeting should take place there. The 1<sup>st</sup> Petitioner testified that the Respondent misrepresented the PF manifesto in respect of the farmer input support programme, wars, and homosexuality. He retracted his earlier evidence by confirming that the voice in the recording was that of President Sata. He said that he understood by the President's words that the Zambian laws acknowledged that homosexuality existed and that what was remaining was to implement them. He said that homosexuality was a crime.

PW13 was Doris Banda, Radio PASME station manager. She testified that the Respondent was their customer who made payment for some programmes but others were not paid for. She told the Court that between August and September 2011 the Respondent paid for two programmes, one

for K600,000.00 and the other for K1,200,000.00. PW13 testified that on 9<sup>th</sup> January, 2012 Jabes Njovu (PW8) called her that she should go to the PASME offices at PWD premises. She said that when she reached there, the Respondent's campaign manager who happened to be the chairman of PASME, Mr. Bernard Sakala told her to issue receipts for the programmes the Respondent aired on the radio station as they were needed in Lusaka. She said that she told him that only two programmes were paid for while others were not. PW13 testified that the chairman told her to issue the receipts which should be accompanied with invoices so that the Respondent could process the payment. She said that Jabes Njovu helped her to back date the receipts as he was the one who was covering political rallies for the Respondent.

The witness testified that they prepared six receipts dated 9<sup>th</sup> January, 2012 although she did not receive payment for the other four receipts. She said that Radio PASME had not yet been paid for the four receipts. She told the Court that the copies of receipts in question were on pages 1 to 2 of the Respondent's supplementary bundle of documents. PW13 testified that the receipt book numbered 1051 - 1200 was the General Receipt Book for Radio PAMSE where she extracted the receipts and it was given to her by the chairman. The receipt book was produced as exhibit P9.

In cross-examination, PW13 testified that she prepared the receipts together with Jabes Njovu. She said that it was not correct that the Respondent never paid for any of her programmes. It was also her evidence that she never refused the Petitioners from airing their programmes on Radio PASME and that they never approached her. The witness told the Court that the Respondent has never refused to pay but she has to date not paid.

The 2<sup>nd</sup> Petitioner neither appeared during the proceedings of this petition nor did he call any witnesses. I can only conclude that he had abandoned his petition against the Respondent.

The Respondent elected not to give evidence but she called two witnesses. RW1 was Jacob Mwanza, a former secondary school head teacher and District Commissioner for Petauke until 3<sup>rd</sup> October, 2011 when he was retired. He said that in the latter capacity he was head of the civil service at district level. RW1 testified that during the campaign period the then Republican President Mr. Rupiah Banda came to Petauke on 14<sup>th</sup> September, 2011 and addressed a rally at Petauke old bus station. He said that at that rally there were a lot of people including government vehicles as the then President had come as head of State and not as a candidate.

RW1 testified that prior to the arrival of Mr. Rupiah Banda, he among other things organized logistics including government transport and fuel. He said that the vehicle on page 9 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents was one of the government vehicles he organized from another district but not the one on page 13. He testified that some of the people on the two vehicles were wearing MMD party regalia and that as District Commissioner he could not stop them from boarding the vehicles because it was common practice that where ever the head of State was addressing a political or an ordinary meeting public facilities and resources had to be used.

RW1 also testified that during the campaign period he got a phone call from the Respondent that she wanted to see him. He said that the following day her campaign manager Mr. Bernard Sakala came to see him on her behalf and told him that her team had been receiving requests from civil servants in the district to be addressed by their candidates. He told Mr. Sakala that he had also been receiving similar requests from civil servants. He said that he gave conditions that if the MMD candidate was going to address civil servants, even other political parties should be given a similar opportunity. RW1 told the Court that he called the 2<sup>nd</sup> Petitioner to his office and suggested to him the possibility of his party addressing the civil servants

and he said that he would come back to him but never did so. The witness said that he also tried to approach the 1<sup>st</sup> Petitioner but without success because there was a lot of in fighting within the PF at the time.

RW1 testified that after the meeting with Mr. Bernard Sakala he issued a circular inviting civil servants to the meeting to be addressed by the Respondent. He said that the circular was broadcast on Radio PASME and Radio Explorer and that the meeting was held on 12<sup>th</sup> September, 2011 at Petauke Boarding Secondary School. The circular was produced as exhibit R1. He told the Court that he did not attend the meeting because he was preparing for the presidential visit and he delegated the District Education Board Secretary, Mr. Samuel E. Phiri to sit in for him. He said that the Respondent's meeting was transmitted through Radio PASME and Radio Explorer.

In cross-examination RW1 testified that he knew the rules of practice when a President was visiting a district and that it was in order for the President to use government vehicles. He said that the cadres were also allowed to use government transport. The witness told the Court that the vehicle on page 9 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents was not a Petauke government vehicle. He conceded that the people on the vehicle were MMD cadres. RW1, however, said that apart from government workers, it was not his duty to give vehicles to cadres. He said that he was in charge of government vehicles in Petauke as there was no controller of government transport at the time.

The witness testified that the circular was not paid for because there was an arrangement between the office of the District Commissioner and the radio stations that the former did not pay for the advertisement. He denied that he was using radio stations to support the Respondent. RW1 also told the Court that the teachers had a choice whether or not to attend the

meeting. He testified that the Respondent used the assembly hall arranged by his office and that she used it for free.

It was also his evidence that when he was told to leave the office hurriedly, he discovered that he also carried the circular, football jerseys and boots meant for the office. He said that the football jerseys and boots were taken back within three days but exhibit R1 being a paper it was not visibly seen. The witness also told the Court that his relationship with all the parliamentary candidates was good.

In re-examination RW1 testified that the Respondent was not required to pay for the assembly hall because the request for the meeting came from his office, then to the DEBS and finally to the school head teacher. It was also his evidence that the vehicles on pages 9 and 13 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents were facilitating the presidential rally.

RW2 was Benard Sakala, campaign manager for the Respondent in the last general election and also chairman of PASME Association, which among other things, runs Radio PASME. He testified that he never attended any of the Respondent's rallies as he was manning the campaign centre but he listened to a rally conducted at Kazala Basic School on Radio PASME.

RW2 told the Court that a person with a programme to be aired on Radio PASME would see the station manager and enter into an agreement whether to pay immediately or later. He testified that receipt numbers 1093, 1087, 1108, 1102, 1105 and 1096 were issued by Doris Banda (PW13) in January, 2012 when he directed her to do so as the Respondent had asked for them. He said that he directed PW13 to prepare the receipts and invoices which he gave to Nathan Banda after he had told him that two were paid for already. He told the Court that he was not involved in the preparation of the receipts.

The witness also testified that Radio PASME extends credit arrangements to its good customers. He said that the Respondent was entitled to credit arrangements because she had been their good customer. He told the Court that all the debtors including the Respondent had cleared their indebtedness.

It was also his evidence that the board of Radio PASME issued a directive to PW13 through him not to air any political advertisements on radio until the campaign was flagged off. He said that when the campaign period was declared candidates from any political party were free to air political advertisements. The witness told the Court that PW13 informed him that only the MMD came to the radio station for campaign programmes. He said that PF and other political parties were using Radio Explorer.

RW1 also testified that many civil servants used to approach him at the campaign centre that they wanted a meeting with the Respondent. He said that since they were civil servants he discussed the issue with the District Commissioner, Mr. Jacob Mwanza (RW1) on how such a meeting could be arranged and that he told him that his office was open to any political party that wanted to sell their messages to civil servants. He said that a meeting was subsequently held at Petauke Boarding Secondary School.

The witness also testified that he read in the Post Newspaper appearing at page 2 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents that the 1<sup>st</sup> Petitioner had a meeting at Kaluba Basic School during the campaign period. He told the Court that from his experience as a teacher many political meetings are held at schools because of their focal point and structures such as toilets.

RW2 further testified that he listened to the Respondent's campaign messages on Radio PASME. He said that she never talked much about the 1<sup>st</sup> Petitioner apart from saying that he could not win an election because MMD

had done a lot in improving the agricultural sector, education, health and infrastructure.

The witness also said that he listened to a rally at Kang'ambwa and not Kazala, which was transmitted in Nsenga. When shown the Nsenga and English translation of the rally, (exhibit P4) RW2 testified that it was a true reflection of what he heard from the radio. He said that page 4 contained the portion of the Respondent's speech and that there was nowhere she said that if the 1<sup>st</sup> Petitioner won he would legalize homosexuality or stop FRA from paying farmers. He told the Court that in the second sentence on page 4 the person being referred to in respect of men marrying fellow men was the PF President Mr. Michael Sata. He said that he heard about legalizing homosexuality in early 2011 on Zambia National Broadcasting Corporation in a programme entitled 'Stand up Zambia' by Chanda Chimba the III. According to the witness Chanda Chimba was saying that Mr. Michael Sata would legalize homosexuality if he came into power.

RW2 also told the Court that at the Respondent's rallies there was a CD being played which had the same voice of Mr. Sata talking about legalizing homosexuality. He said that there was no voice of the 1<sup>st</sup> Petitioner in the CD.

The witness also testified that on page 2 of the transcript they never asked people to surrender their voters' cards but to tell them to look after their cards well so that they could exercise their right to vote. He told the Court that exhibit P5 was a picture showing men kissing each other. He said that the only printed materials they distributed were pamphlets with an MMD emblem carrying messages for the then President Rupiah Banda and those showing how to vote. He said that these photographs were all over in Petauke town and he did not know who was distributing them.



In cross-examination RW2 testified that he directed PW13 to issue receipts to the Respondent although only two had been paid for. He conceded that four receipts brought to Court showed that payment was received. He told the Court that he directed her to prepare the paid up receipts without invoices but those not paid for to be accompanied with invoices.

It was also his evidence that more than thirty civil servants came to request him that the Respondent should address them. RW2 told the Court that RW1 also informed him that he had equally received such requests from civil servants. The witness said that even if he had been aware that it was an offence to use government facilities during elections he would still have encouraged the Respondent to use a school hall for free because it was common practice.

When shown page 6 of exhibit P4, RW2 said that the words about a war were spoken by the Respondent.

In re-examination, RW2 told the Court that he never directed PW13 to back date the receipts. He also said that at page 6 of exhibit P4, the Respondent was referring to the PF leader, Mr. Michael Sata and not the 1<sup>st</sup> Petitioner.

It was also his evidence that at Radio PASME advertisements from the Police, the Council and District Commissioner's office are aired freely. He further stated that from his experience, school grounds are used by all political parties in their campaign.

I have considered the petition and the answer as well as the evidence on record and the written submissions. I am indebted to both counsel for the various authorities they brought to my attention.

The burden of proof in an election petition has been espoused in a plethora of authorities some of which have been cited by counsel. In the case of ***Akashambatwa Mbikusita Lewanika & Others v Frederick Jacob Titus Chiluba(1)*** our Supreme Court stated as follows:

***“Parliamentary election petitions were required to be proved to a standard higher than a mere balance of probabilities and therefore in this, where the petition had been brought under constitutional provisions and would impact on the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Furthermore, the issues raised were required to be established to a fairly high degree of convincing clarity.”***

Later in the case of ***Michael Mabenga v Sikota Wina and Others(2)*** our Supreme Court held that:

***“an election petition like any other civil claim depends on the pleadings***

***and the burden of proof is on the challenger to the election to prove to a standard higher than on a mere balance of probability.”***

The allegation in paragraph 6(ii) is that between 20<sup>th</sup> August, 2011 and 20<sup>th</sup> September, 2011 in the course of her campaigns, the Respondent and her agents with the intention of procuring votes commenced the grading of Kawere-Chisenje road. It is plain from the record that the Petitioners did not furnish any evidence to support this allegation. Consequently this allegation is dismissed.

The allegation in paragraph 6(v) is that the Respondent used a public school, Petauke Boarding Secondary School to conduct her campaigns

amongst civil servants and distributed t-shirts and a newspaper called 'The Zambian' to the civil servants in attendance in order to procure and solicit votes from the electorate. Regulation 21(1) (k) of the Electoral Code of Conduct, Statutory Instrument No. 52 of 2011 provides as follows:

***“A person shall not use Government or parastatal transportation or facilities for campaign purposes:***

***Provided that this paragraph shall not apply to the President and the Vice President in connection with their respective office.”***

The record shows that the 1<sup>st</sup> Petitioner, PW1, PW2, PW3, PW10 and PW11 adduced evidence to support this allegation. The sum and substance of their evidence was that apart from Petauke Boarding Secondary School, the Respondent addressed campaign rallies at other government schools, namely, Kazala Basic School, Minga Stop Basic School, Kaluba Basic School and Chileka Basic School. The Respondent's witnesses, Jacob Mwanza (RW1) and Bernard Sakala (RW2) also confirmed that the Respondent held a campaign meeting at Petauke Boarding Secondary School. However, according to RW2, it is common practice in rural areas for campaign meetings to be held at government schools because of their location and availability of facilities such as toilets.

From the evidence on record, there can be no doubt that the Respondent held campaign meetings at government schools. However, I also find from the evidence on record that the 1<sup>st</sup> Petitioner was also *pari delicto* on the use of government schools. I note from his evidence that he held a campaign meeting at Kazala Basic School although he claimed that it was held 70 metres from the school. However, the 1<sup>st</sup> Petitioner did not call any independent witness to confirm this. The 1<sup>st</sup> Petitioner also testified that he held a meeting at Kaluba Basic School. This was confirmed by Joseph

Mwenda (PW3) who contrived to extricate the 1<sup>st</sup> Petitioner by claiming that the meeting took place under a tree approximately two hundred metres from the school. I find that this evidence flies in the teeth of Joseph Mwenda's own story in the Post Newspaper appearing on page 21 of the 1<sup>st</sup> Petitioner's supplementary bundle of documents. To the extent relevant to this issue the article reads in relevant part as follows:

***“Banda told a rally at Kaluba Basic School that Siliya had the money to dress trees in the constituency with campaign materials but could not dress a single orphan in Petauke”***  
(underline my emphasis).

PW3 testified that he wrote that the meeting took place at Kaluba Basic School because a tree would not have appealed to his readers and Chimusakasa village was not as popular as Kaluba Basic School. I do not believe so. It is clear from the newspaper article that any one reading it would conclude that the 1<sup>st</sup> Petitioner addressed a rally at Kaluba Basic School. I cannot agree more with the Respondent's submission that PW3's evidence that the meeting was not held at Kaluba Basic School was an obvious afterthought which must not be entertained.

The critical question to be determined is whether the use of government schools by the Respondent was so widespread that it offended the provisions of Section 93 (2)(a) of the Act which reads:

***“(2) The election of a candidate as a member of the National***

***Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say -***

***(a) that by reason of any corrupt practice or illegal practice committed in connection with the election***

***or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.”***

The evidence of the 1<sup>st</sup> Petitioner was that there are over thirty-five basic and primary schools in Petauke Central Constituency. The evidence on record only shows that the Respondent addressed campaign meetings at four schools. In my view, meetings at four schools out of more than thirty schools could not be said to be so widespread as to prevent the majority of voters from voting for the 1<sup>st</sup> Petitioner. I am satisfied that the 1<sup>st</sup> Petitioner has failed to satisfy the requirements of Section 93(2)(a) of the Act as no evidence to prove that the Respondent received more votes in the areas where the alleged illegal acts took place was adduced by the 1<sup>st</sup> Petitioner.

The 1<sup>st</sup> Petitioner also alleged that the Respondent used government transport for campaign purposes. It was submitted that the allegations of use of government vehicles at the Petauke old bus stop by or with the knowledge and consent of the Respondent was proven. I do not agree. The view I take is that although the Respondent was one of the speakers, it was in fact a Presidential rally. According to RW1, he organized transport and fuel in preparation for the rally scheduled to be addressed by the then President on 14<sup>th</sup> September, 2011 at Petauke old bus stop. Under cross-examination, PW3 stated that the pictures at pages 9, 12 and 14 of the 1<sup>st</sup> Petitioner’s bundle of documents were taken at the President’s rally. He further said that he was aware that the President and the Vice President are allowed to use government resources at campaigns. I therefore agree with the Respondent’s submission that the essence and presence of government vehicles at the said rally was a result of it being a Presidential rally and invariably a government programme. I also agree with her further submission that there is no evidence on record showing that the Respondent

used government vehicles at any of the rallies she addressed in the absence of the then Republican President. All in all, I find that the allegation in paragraph 6(v) has not been proved and it is accordingly dismissed.

The allegation in paragraph 6(vi) was that between 13<sup>th</sup> July, 2011 and 20<sup>th</sup> September, 2011 in the course of her campaigns, the 1<sup>st</sup> Respondent and her agents did cause to be broadcast campaign messages for the Respondent and her party, the MMD on the community radio station PASME - (1) to the exclusion of the Petitioners and other candidates; (2) the Respondent was using the community radio station without paying for the services; and (3) this was done with the intention of procuring votes for the Respondent.

There are three limbs to this allegation. The first is that the Respondent monopolized the use of Radio PASME to the exclusion of the Petitioners. Regulation 14 of the Electoral (Code of Conduct), 2011 Statutory Instrument No. 52 of 2011 reads in relevant part as follows:

***“14.(1) A public television, radio and electronic media shall allocate public air time equally to all political parties and candidates for their political broadcasts.”***

In the first place, I agree with the Respondent’s submission that contrary to the 1<sup>st</sup> Petitioner’s submission, this regulation applies exclusively to public media and not to a private radio station like Radio PASME. Even assuming that the Regulation also applied to private media, the evidence of PW13 in cross-examination was that she never refused the Petitioners from airing their programmes on Radio PASME and that they never approached her.

The second limb is that the Respondent never paid for the services. The evidence of PW13 was that the Respondent had paid for two programmes and four others had not been paid for. According to

RW2, Radio PASME has a policy of giving credit facilities to its good customers like the Respondent. This evidence remained unshaken during cross-examination. He also said that all the debtors of Radio PASME, including the Respondent, had settled their debts. In my view the debt incurred by the Respondent was a normal business transaction between parties which had no bearing on the outcome of the parliamentary election in Petauke Central Constituency.

The third limb is that the foregoing was done by the Respondent with the intention of procuring votes for herself. The Petitioners did not adduce any evidence linking their loss of the election to the Respondent's business transactions with a private radio station, Radio PASME. I therefore find that this allegation also lacks merit and it is dismissed.

The allegation in paragraph 6(viii) was that between 13<sup>th</sup> July, 2011 and 20<sup>th</sup> September, 2011 the Respondent and her agents during their campaign, did with malice convey false information and engaged in character assassination on Radio PASME and public rallies, of the 1<sup>st</sup> Petitioner, his party the PF and its President Mr. Michael Sata to the effect that if voted into power, the 1<sup>st</sup> Petitioner and his party would , inter alia, instruct FRA to stop payments of farmers who had supplied maize; the fertilizer support programme would be abolished, homosexuality and lesbianism would be legalized; and youths would be sent to Afghanistan. Further, that the Respondent and her agents at Chintowe and Kang'ambwa alleged that the 1<sup>st</sup> Petitioner was a thief and his party President Mr. Michael Sata smoked dagga and was a mad person. This was meant to cause apprehension in the electorate and procure votes for the Respondent. The allegations in this paragraph are anchored on Section 83(2) of the Act which reads:

***“Any person who, before or during an election, publishes any false statement of fact in relation to the personal character or conduct of a candidate in that election, shall be guilty of an illegal practice, unless that person can show that that person had reasonable grounds for believing, and did believe, the statement to be true.”***

The allegation on publication of false, defamatory and inflammatory statements was supported by the 1<sup>st</sup> Petitioner, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10 and PW11. The 1<sup>st</sup> Petitioner testified that the Respondent publicly alleged that he was a thief and a ‘Yo bally’. PW5 and PW6 also testified that the Respondent told a rally at Kang’ambwa that the 1<sup>st</sup> Petitioner was a ‘Yo bally’. PW5 added that the Respondent also referred to the 1<sup>st</sup> Respondent as ‘ka Leonard’. When shown exhibit P4, the transcript for the Kang’ambwa rally, the 1<sup>st</sup> Petitioner said that there was no reference to him as a ‘Yo bally’ or ‘ka Leonard’ by the Respondent. The 1<sup>st</sup> Petitioner also conceded that none of the transcripts contained a statement by the Respondent referring to him as a thief. He also conceded that the word ‘Kanongo’, a name for a bird that only appears in the rainy season and feeds on snails, in reference to the Respondent at a rally was not a charitable one. From the above, I can safely conclude that the 1<sup>st</sup> Petitioner’s allegation that he was referred to as a ‘Yo bally’ and a ‘thief’ by the Respondent has not been proved.

The 1<sup>st</sup> Petitioner, PW8, PW10 and PW11 adduced evidence in relation to the allegation about homosexuality and lesbianism. According to PW10 and PW11, the Respondent distributed a picture (exhibit P5) showing two men kissing each other. In cross-examination, PW10 told the Court that exhibit P5 was not talking about any of the Petitioners and that it did not affect the way he voted. PW11 equally said that she threw the picture because it was useless to her and the voting was conducted in a very good



atmosphere. Quite clearly, the evidence of PW10 and PW11 demonstrates to me that the picture could not have influenced how the way the people voted.

Furthermore, the words on the front part of the picture which were read by PW10 state as follows:

***“This is Sata’s change. Is this the change you want?”***

It is plain to me that these words do not in any way relate to the personal character or conduct of the 1<sup>st</sup> Petitioner to warrant its circulation to be in violation of Section 83(2) of the Act. Moreover, the transcripts in which the Respondent and Precious Zulu are reported to have made statements regarding homosexuality and lesbianism indicate that before they made the remarks there was a prelude of a recording of a voice alleged to be that of the then opposition PF President talking about this issue. According to the RW2 this fact has never been rebutted by the 1<sup>st</sup> Petitioner or his party.

It was also submitted by the Respondent that no single farmer was called to testify on the issue of the Fertilizer Support Input Programme and payments from the FRA and no evidence of statistics of farmers in Petauke district and how the words affected the manner in which the people voted was adduced. I cannot agree more with this submission. All that is on record is the evidence of the 1<sup>st</sup> Petitioner that because people in Petauke Central Constituency depend highly on agriculture and the farmer input support programme any one associated with its removal would cause a lot of apprehension in the farmers in Petauke Central Constituency. In my view this allegation has not been proved as the alleged threat did not relate to the 1<sup>st</sup> Petitioner’s candidacy or to him personally.

Further, the evidence of the 1<sup>st</sup> Petitioner was that given the history of the RENAMO uprising, the mention that the PF would bring wars caused a lot of apprehension in the voters of Petauke district. However, no other witnesses testified on the seriousness of the effect of the threats of a war.

The evidence of PW5, PW6 and PW8 was that they heard the Respondent saying that there would be war if PF came into power. This allegation related to the PF party and not the 1<sup>st</sup> Petitioner. Moreover, Halsbury's Laws of England, 4<sup>th</sup> edition at paragraph 784 state as follows:

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

From the record, there is no evidence of the effect of the threat of war on the people of Petauke Central Constituency and whether this affected their pattern of voting. I therefore, find that the allegations in this paragraph have not been proved and are accordingly dismissed.

The allegation in paragraph 6(ix) was that prior to the election date, the Respondent's agents intimidated the electorate by collecting details of their national registration cards and voters cards purporting that details could be used on the computer to establish the candidate each particular electorate had voted for. The electorates were warned that those that would be established to have voted for the opposition candidates would be punished by ensuring that those that had supplied maize to FRA would not be paid or benefit from the government fertilizer programme. The threats were intended to coerce the electorate to vote for the Respondent especially that the majority of the electorate are peasant farmers.

The 1<sup>st</sup> Petitioner testified that the Respondent and other agents had collected voters' cards and national registration cards of people and used them to coerce the people into voting for MMD candidates. He paraded PW10 and PW11 to support his testimony. PW10 testified that at the Chileka Basic School rally the Respondent informed them that a computer in Lusaka

would see those who voted for the opposition and would be denied fertilizer and medicine if she won. He said that on 19<sup>th</sup> September, 2011 he got a report that Bennes Tembo, the MMD ward chairman for Kovyane collected national registration cards and voters' cards from about three hundred people. He said that upon his return with an officer from Petauke police where he had gone to report the matter he found that most of them had their documents returned.

PW11 also said that Solomon Phiri, MMD branch chairman collected their national registration cards and voters' cards so that the Respondent could give them chitenge materials when she comes on 15<sup>th</sup> September, 2011 to address a rally at Chileka Basic School. She testified that after the rally they were given back their national registration cards and voters' cards and received chitenge materials.

There is manifest inconsistency in the testimony of these two witnesses. As aptly submitted by the Respondent, not only are the dates when the alleged event occurred different but the men who took the national registration cards and voters' cards are also different. According to PW10 the event took place on 19<sup>th</sup> September, 2011 while PW11 mentioned 15<sup>th</sup> September, 2011. According to PW10 the documents were collected by Bennes Tembo while PW11 mentioned Solomon Phiri. The 1<sup>st</sup> Petitioner submitted that this is a minor discrepancy. I am of the firm view that this cannot be a minor discrepancy. Being the only eye witnesses, their inconsistent testimony means that it is not reliable and no weight should therefore be attached to it.

I also find substance in the Respondent's contention that Bennes Tembo and Solomon Phiri were not her duly appointed election agents to make her accountable for their deeds. There is no evidence on record showing that they were duly appointed as such. I accordingly adopt the reasoning of our Supreme Court in the case of **Akashambatwa Mbikusita**

**Lewanika and Others v Frederick Jacob Titus Chiluba** cited by both parties where the Court stated as follows:

***“We are mindful of the provisions in the Electoral Act that a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not every one in one’s political party is one’s election agent since, under regulation 67 (now regulation 50) of the Electoral (General) Regulations, an election agent has to be specifically so appointed.”***

This decision is in tandem with Section 93(2)(c) of the Act which reads:

***“(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 -***

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

I therefore, find that this allegation has not been proved and it is accordingly dismissed.

The last allegation in paragraph 6(x) is that between 1<sup>st</sup> August, 2011 and 20<sup>th</sup> September, 2011 with the intention of procuring votes from the electorate, the Respondent and her election agents threatened, intimidated and used violence on supporters and sympathizers of the Petitioners by attacking and severely beating the 1<sup>st</sup> Petitioner’s supporter, Gabriel Mwale

in Nyika ward; and by attacking and severely beating the 2<sup>nd</sup> Petitioner's supporter, Edward Njovu in Mbala ward. Like allegation number 6(ii) this allegation is not supported by any evidence. It is therefore equally dismissed.

In the result, I find that on the whole of the evidence on record the Petitioners have not proved their allegations to a fairly high degree of convincing clarity and opine that on these facts no reasonable tribunal can nullify the election of the Respondent. I accordingly come to the ineluctable conclusion that this petition lacks merit and it is therefore dismissed. Consequent upon this conclusion, I determine that the Respondent, Dora Siliya was duly elected Member of Parliament for Petauke Central Constituency.

Costs naturally follow the event and will be taxed in default of agreement. Leave to appeal to the Supreme Court is granted

**DELIVERED THIS 13<sup>TH</sup> DAY OF APRIL 2012.**

**C. KAJIMANGA**  
**JUDGE**