

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

**2011/HP/EP/0036**



**IN THE MATTER OF: A PARLIAMENTARY ELECTION PETITION FOR  
MPONGWE CONSTITUENCY NO. 32 IN THE  
MPONGWE DISTRICT OF THE REPUBLIC OF  
ZAMBIA HELD ON 20<sup>TH</sup> SEPTEMBER 2011**

**AND:**

**IN THE MATTER OF: SECTIONS 63, 79 TO 86 AND 93 TO 95 OF THE  
ELECTORAL ACT NO. 12 OF 2006**

**AND:**

**IN THE MATTER OF: THE ELECTORAL PETITION RULES STATUTORY  
INSTRUMENT NO. 426 OF 1968 (AS AMENDED)**

**AND:**

**IN THE MATTER OF: THE ELECTORAL (CODE OF CONDUCT) REGULATIONS  
STATUTORY INSTRUMENT NO. 52 OF 2011**

**BETWEEN:**

**KEITH MAILA**

**PETITIONER**

**AND:**

**GABRIEL NAMULAMBE**

**1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION OF ZAMBIA**

**2<sup>ND</sup> RESPONDENT**

**CORAM:**

**SIAVWAPA J**

FOR THE PETITIONER:MR. M. M. MUNDASHI (SC) AND MR. M. CHITEBA  
OF MESSRS MULENGA MUNDASHI & CO.

FOR THE 1<sup>ST</sup> RESPONDENT: MR. M. LISIMBA OF MESSRS LISIMBA & CO.

FOR THE 2<sup>ND</sup> RESPONDENT: MR. M. MUKWASA OF MESSRS  
ATTORNEY GENERAL'S CHAMBERS

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## J U D G M E N T

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### **AUTHORITIES REFERRED TO:**

#### **A. Cases**

- 1. Michael Mabenga V Sikota Wina & others**
- 2. Anderson Kambela Mazoka & others V Levy Patrick Mwanawasa & others**
- 3. Akashambatwa Mbikusita Lewanika & others V Frederick Jacob Titus Chiluba**

#### **B. Statutes**

**Electoral Act No. 12 of 2006**

This is an election petition filed by the Petitioner following the general elections held on 20<sup>th</sup> September 2011. The Petitioner, who contested for Member of Parliament for the Mpongwe Constituency on the Patriotic Front (hereinafter referred to as PF) ticket, lost to the 1<sup>st</sup> Respondent who stood on the Movement for Multi-party Democracy (hereinafter referred to as

MMD) ticket who was declared as being duly elected by the Returning officer. The Petitioner, being dissatisfied with the result of the election, states as follows:

The 1<sup>st</sup> Respondent was not validly elected as his campaign was characterized by widespread voter treating, bribery, undue influence, abuse of Government vehicles (resources) and all manner of electoral malpractices contrary to the Electoral Act and the Electoral Code of Conduct afore stated.

The Petitioner made sixteen allegations to support the above stated grounds as follows;

- (i) Between 15<sup>th</sup> and 20<sup>th</sup> August 2011, the influential Chief Machiya, a self-confessed supporter of the Movement for Multi-party Democracy (MMD), ordered his retainer to detain the Patriotic Front's (PF) treasurer for Luswishi ward, Solomon Koffie Kalenga for attending a PF meeting and had him detained for three days
- (ii) The 1<sup>st</sup> Respondent based his campaign on tribal lines and had openly showed his hatred/dislike for Bembas. On 11<sup>th</sup> September 2011 the 1<sup>st</sup> Respondent accused the Bembas of having spoiled Lamba land and that those who would vote for the PF would be banished from Lamba land and lose their plots. The 1<sup>st</sup> Respondent further told the electorate that the anti retroviral drugs (ARVs) would not be given to persons who would vote for the PF

- (iii) On 8<sup>th</sup> August 2011 immediately after filing his nomination papers, the 1<sup>st</sup> Respondent held a party at his farm which was attended by hundreds of voters. The 1<sup>st</sup> Respondent had slaughtered a cow which was cooked and distributed to all attendees of the party
- (iv) The 1<sup>st</sup> Respondent donated a hammer mill during the campaign period which was installed at Chapula village in Ipumbu ward. At the function to officially handover the hammer mill officiated by the 1<sup>st</sup> Respondent, Chief Mwinuna addressed the villagers and warned them that he did not want the PF in his Chiefdom and also urged all the villagers to vote for the 1<sup>st</sup> Respondent and his Party the MMD
- (v) During the campaign period the then District Commissioner for Mpongwe distributed bicycles and mattresses to all chiefs' retainers and indunas and also directed them to campaign for the 1<sup>st</sup> Respondent and his party. The said items were distributed by motor vehicles belonging to the Government
- (vi) The Food Reserve Agency (FRA) was directed by the said District Commissioner on behalf of the MMD and the 1<sup>st</sup> Respondent to distribute relief maize to all the vulnerable persons in the constituency
- (vii) On the polling day at Nachitalu polling station, 41 ineligible voters were permitted to vote contrary to the directive (No. vi) by the Director of the Electoral Commission of Zambia in the certificate of voters for Nachitalu Baptist Church which stated;

***"under no circumstance should a person be allowed to vote where the voter card number produced appears under the exclusion list, even***

*though they hold what appears to be an apparently correctly issued voter's card"*

The names of the said 41 voters were listed under the exclusion list of the Nachitalu Baptist Church

- (viii) The 1<sup>st</sup> Respondent and the MMD further told voters the PF, if voted into power would introduce homosexuality. This made a lot of voters not to vote for your Petitioner and the PF
- (ix) On 20<sup>th</sup> September 2011 the 1<sup>st</sup> Respondent also bought a considerable quantity of chibuku opaque beer at Shingwa in Mpongwe central ward for the consumption of voters as they proceeded to cast their votes
- (x) On 20<sup>th</sup> September 2011 a known agent of the 1<sup>st</sup> Respondent ferried voters in a truck to Chipese polling station in Mpongwe central and other polling stations
- (xi) During the campaign period the then District Commissioner for Mpongwe, a Mr. Bulaya donated the sum of K11, 000, 000.00 to Chief Machiya to distribute to the electorate on the polling day and thereby induce them to vote for the MMD. The District Commissioner distributed to the aforementioned chief and the electorate. He also went to all 48 polling stations and distributed money to the voters
- (xii) The 1<sup>st</sup> Respondent further promised to give the sum of K120, 000, 000.00 to Ipumbu community school. Iron sheets were given to Ipumbu Baptist Church during the campaign period in chief Mwinuna's chiefdom

- (xiii) An Induna by the name of Stanslous Malindima was relieved of his position as Induna by chief Mwinuna for supporting the PF. This was calculated to humiliate all PF supporters in order that they do not vote for your petitioner
- (xiv) During the verification process several electoral irregularities were discovered. For example, in Mushipashi polling station about 850 ballot papers were issued by the 2<sup>nd</sup> Respondent but during verification, the presiding officer, a Mr. Bright Chilumba only accounted for 500 ballot papers. Your Petitioner strongly believes that the missing 350 ballots were unlawfully used in favour of the 1<sup>st</sup> Respondent in other polling stations
- (xv) During the campaign period an ox-cart was donated to Buyantanshi branch in Kanyenda ward by the MMD
- (xvi) The 1<sup>st</sup> Respondent and his agents collected voters' cards from the electorate. These cards were given back to the electorate on the actual polling day promising them money if they voted for the MMD

In consequence of the above allegations, the Petitioner prays that it be determined that the said Gabriel Namulambe was not duly elected or returned and that the election was null and void ab initio and asks for the following reliefs;

1. A declaration that the 1<sup>st</sup> Respondent was not duly elected and that the election is/was null and void ab initio
2. A declaration that the 2<sup>nd</sup> Respondent failed or neglected to perform its statutory duty to fairly conduct the election herein

3. Such declaration and orders as the court may deem fit
4. Costs of and incidental to this Petition

The Petition was accompanied by an affidavit in verification thereof.

To start with out of the sixteen allegations raised, no evidence was called in respect of allegations (iii), (vi), and (vii) which I will consider abandoned accordingly. This leaves me with thirteen allegations to consider through the evidence of eighteen witnesses called by the Petitioner and fourteen called by the Respondents. For avoidance of confusion, I will deal with each allegation and dispose of it in accordance with the evidence on record from both the Petitioner and the Respondents. Thus all the witnesses relating to one allegation will be considered at the same time.

I will further state at the outset that in disposing of each allegation herein, the standard of proof is that as stated in the Case of Michael Mabenga V Sikota Wina & others<sup>1</sup> wherein it was held that;

***"An election Petition is like any other civil claim depends on the pleadings and the burden of proof is on the challenger to prove to a standard higher than on a mere balance of probability"***

The Supreme Court upheld the same position in the case of Anderson Kambela Mazoka & others V Levy Patrick Mwanawasa & others<sup>2</sup> when it held among others that;

***"Standard of proof required to prove a Presidential Election Petition is higher than balance of probability and must be proved to a convincing degree of clarity"***

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<sup>1</sup>(2003)ZR 110

<sup>2</sup>(2005)ZR 138

All the parties made oral skeleton submissions at the close of the case which they followed up with detailed written submissions and I am great full to counsel for all the parties for the co-operation. After carefully reading the submissions, I do not find it necessary to review them. I however, take them into consideration as I deal with each of the specific allegations pleaded in the Petition.

Allegation (i) is that Chief Machiya, Rodgers Maoma, who testified as RW8, ordered the arrest and detention of one Solomon Koffie Kalenga for attending a PF meeting between 15<sup>th</sup> and 20<sup>th</sup> August 2011. The key witness on this allegation was Solomon Koffie Kalenga himself who testified as PW14 while, the Petitioner, who testified as PW16 and PW15 supplemented his evidence. According to Kalenga, he attended a meeting at Luswishi School called by the 1<sup>st</sup> Respondent where Chief Machiya spoke and urged everyone to vote for the MMD and threatened whoever would vote for PF with expulsion from the chieftdom and that Mr. Sata was a mad man while the Petitioner was a murderer.

Later, he decided to attend another meeting at the same school which was addressed by the PF at which he was given PF T-shirts to distribute to the members of the PF. He stated that the chief was annoyed on hearing that he had accepted PF T-shirts and that he sent his retainers to apprehend him. He was then taken to chief Machiya's palace where the chief told him that he had ordered his apprehension to send a warning to the others that he did not want anyone to vote for the PF. Thereafter, the chief called the police to go and pick him up and detain him. He was subsequently



detained at Mpongwe police station until PF officials went to have him released.

In cross-examination he said that it would take half a day by bicycle and the whole day on foot to make a round trip between Luswishi and chief Machiya's palace. He said that the chief sent members of the neighbourhood watch to apprehend him from a PF meeting. The witnesses who confessed to being a staunch PF supporter dismissed the letter signed by chief Machiya exhibited at page 10 of the 1<sup>st</sup> Respondent's bundle of documents linking his arrest to the use of illegal fishing methods as lies. In re-examination he said that he was apprehended by the chief's retainer who took him to the palace.

According to PW15, the criminal investigations officer based at Mpongwe police station, on 2<sup>nd</sup> September, 2011 he went to inspect the police cells when he found people that had been taken in at 00:20 from Machiya on allegations of using illegal methods of fishing among them PW14. He interviewed the suspects and the officer who went to pick them up from Machiya and on the accounts of the two he found that no case had been established against the suspects. He said the suspects denied using illegal fishing methods but that they were apprehended for campaigning for the PF.

The witness further said that earlier, some mosquito nets and an explosive had been received from Chief Machiya but with no suspects. The items were handed over to the department of Fisheries. According to him the items were handed to the police before 1<sup>st</sup> September 2011 while PW14

and his colleagues were taken to the police station on 2<sup>nd</sup> September 2011 after midnight. It was his testimony that his interview with the suspects established no connection between them and the items as a result of which he decided to release them.

He was however, advised that Chief Machiya would be going to the police station as a result of which he decided to keep them for another day to await the arrival of the chief. He said that the suspects were released on 4<sup>th</sup> September 2011 after the chief held a meeting with the officer in charge and the suspects on what he termed 'charge refused' which according to him means that the suspects had been charged with a wrong offence.

In cross-examination he said that he made the decision to release the suspects on 2<sup>nd</sup> September 2011 but that he kept them when he heard that the chief was coming. He however, back-tracked and said that the decision to release them was made by the officer in charge after the meeting with the chief for reasons as stated in the letter from the officer in charge dated 20<sup>th</sup> December 2011.

In re-examination he said that no complaint was laid against the chief and that the mode by which the suspects were released was recorded in the occurrence book (OB). He maintained that he made the decision to release the suspects because there was no evidence against them.

The evidence of the Petitioner, as it relates to the first allegation, is that about three weeks before the elections, he went to Machiya for a campaign meeting and at the pontoon he met chief Machiya and made an

appointment to meet him the following day. The following day he did not find the chief at the palace. He said that earlier, he had sent a campaign team ahead with campaign materials having been delivered at PW14's home. He then arrived at PW14's home at night where a few people were waiting.

The following morning, PW14 went to the school where he was lodging and that while he was addressing a meeting, PW14 told him that the Chief had sent for him and he left. He continued on his campaign trail and never heard from PW14 until he returned to Mpongwe where a councillor told him that the people he was with at Machiya had been arrested. He then called the officer in charge who told him that chiefs had a way of dealing with their subjects. When he explained to the officer in charge that PW14 was called from his meeting, he told him that he was going to release the suspects as there was no evidence upon which he could take the suspects to court.

In cross-examination he said that PW14 did not tell him why the chief had summoned him and that he did not know what had happened at the palace which he said was about thirty kilometres from the venue of the meeting. He further said that PW14 was released a day after he had visited him and that he never met with chief Machiya throughout his campaign period.

In rebuttal to the evidence on this allegation the 1<sup>st</sup> Respondent relied on the evidence of chief Machiya himself testifying as RW8. It was his testimony that on 25<sup>th</sup> August 2011, he went to Luswishi where he was informed by a member of the neighbourhood watch that PW14 was using

illegal fishing methods. He immediately sent for PW14 who was brought with others together with a wet mosquito net. A further search by the neighbourhood watch members yielded an explosive. According to this witness the suspects ran away as a result of which he issued call outs to them to appear on 1<sup>st</sup> September 2011.

Upon returning to his palace, he decided to surrender the nets and the explosive to the police on 26<sup>th</sup> August 2011. The suspects then reported themselves to him at the palace on 1<sup>st</sup> September 2011 as per his call outs. He then called the police who went to pick them up but that they used handcuffs for his retainer because they did not go with handcuffs.

He further testified that on 3<sup>rd</sup> September 2011 members of the royal family pleaded that he forgives the suspects and have them released from police custody. On 4<sup>th</sup> September 2011 he went to Mpongwe police station and spoke to the acting officer in charge and the suspects as a result of which they were released on compassionate grounds.

In cross-examination he pleaded that he had only gone up to the fifth grade and that the letter exhibited at page 21 of the 1<sup>st</sup> Respondent's bundle of documents was written by the palace secretary and that he signed it because he had understood the contents of the letter which he said were 100% correct. He further said that Musenge, a member of the Luswishi neighbourhood watch informed him about PW14's use of illegal fishing methods. He issued the call outs while he was near Luswishi on 25<sup>th</sup> August 2011 after the suspects had ran away abandoning the illegal fishing equipment. He said the suspects went to his palace on 1<sup>st</sup> September 2011.

at 11:00 hours in response to the call outs even though they had run away on 25<sup>th</sup> August 2011. He later called the police at 14:00 hours who arrived at 18:00 hours. He denied handcuffing the suspects because they did not give him any problems while at the palace.

He however, said that the contents of the letter at page 21 of the 1<sup>st</sup> Respondent's bundle of documents were correct with regard to the presence of Mr. Siamayi although he did not see him. He attributed this to the palace procedure which did not permit for more than one person to enter the palace after 18:00 hours. He said his decision to write the letter was due to his implication in the Petition.

He denied having PW14 arrested in connection with the PF meeting but that it was in connection with using illegal fishing methods. He dismissed the evidence PW 15 that the net and the explosives had nothing to do with the arrest of PW14.

He also denied belonging to any political party and that he learnt of his implication in the Petition when the 1<sup>st</sup> Respondent took it to him but denied attending any political meeting. He however, said that both the Petitioner and the 1<sup>st</sup> Respondent met with him.

From the evidence on the first allegation, the only relevant issue in dispute is whether PW14 was arrested in connection with his alleged attendance at a PF meeting addressed by the Petitioner or his alleged use of prohibited fishing equipment on 25<sup>th</sup> August 2011. The evidence of both accounts is fraught with inconsistencies for instance, whereas PW16, the Petitioner stresses the point that PW14 bade him farewell on being called by the

chief, PW14 himself emphasizes the point that the chief was not happy that he had collected PF T-shirts for distribution. Neither of the two versions proves the allegation that PW14 was detained for attending a PF meeting. What the two versions prove however is that PW14 was summoned by chief Machiya, a fact he acknowledges in his evidence.

On the other hand, both PW15's evidence and the letter written by the officer in charge attest to the fact that PW14 and his colleagues were reported to have been found fishing using illegal equipment. Further, both the letter and PW15 acknowledge that a mosquito net and an explosive had been surrendered to the police before PW14 and his colleagues were delivered to the police station on 2<sup>nd</sup> September 2011 in connection with fishing. This evidence is in consonance with that of RW8, chief Machiya to the effect that he had, on 25<sup>th</sup> August 2011, taken into his custody a mosquito net and an explosive allegedly used for fishing by PW14 and his colleagues.

The evidence of PW15 was discredited in cross-examination as it was at variance with that contained in the letter written by the officer in charge as to the circumstances leading to the eventual release of PW14 and his colleagues. The correct position however, which I accept is that the officer in charge and chief Machiya agreed to release PW14 and his colleagues following a meeting they had on 4<sup>th</sup> September 2011. I must also state that although chief Machiya's evidence was also discredited in cross-examination as to the time and circumstances of the arrest of PW14 and his colleagues, I do not think that serious damage was done to his version

of the reason for the detention of PW14 as being the suspicion that he was involved in illegal fishing methods.

The issue here is not whether or not PW14 and his colleagues were actually fishing as alleged but that the chief received such a report and subsequently summoned the suspects. The evidence shows that the chief acted properly by handing over both the fishing equipment and the suspects to the police and the subsequent release of the suspects by the police, does not in any way incriminate the chief. I therefore, do not think that the Petitioner has met the requisite standard of proof on this allegation as set out in the case of **Michael Mabenga V Sikota Wina and others** (supra) and I dismiss it accordingly.

The second (ii) allegation relates to the 1<sup>st</sup> Respondent's hatred and or dislike for Bembas and threats to expel anybody who would vote for the PF from Lamba land as well as the withdrawal of anti-retroviral drugs. PW1, PW2 and PW3 all testified on this allegation. PW1 and PW2 spoke of a meeting held at headman Chaala's place on 11<sup>th</sup> September 2011 which was addressed by the 1<sup>st</sup> Respondent. They both stated that in his address to the gathering which they said was attended by many people, the 1<sup>st</sup> Respondent accused the Bembas of having destroyed the Lamba culture and threatened to chase all the Bembas and repossess their plots if they voted for Mr. Sata. He also threatened to withdraw the supply of anti retroviral drugs.

In cross-examination PW1 said that he had lived in Mpongwe for fifteen years and that he was a sympathizer of the PF. He said that he knew

Christopher Chilangwa very well but that he did not know his tribe although he would not dispute if he was told that he was Bemba. He however, denied knowing Mr. Nsama but again stated that he would not dispute if he was told that he was Bemba. He also acknowledged that Mr. Chilangwa was in the 1<sup>st</sup> Respondent's campaign team. He said that the 1<sup>st</sup> Respondent lost in the area where he (PW1) lived.

PW3 on the other hand testified about a meeting on 17<sup>th</sup> September 2011 at Mpongwe Farmers' Training Centre which was addressed by the 1<sup>st</sup> Respondent. He estimated the crowd to have been between 600 and 1000 and that in his address; the 1<sup>st</sup> Respondent uttered disparaging remarks against Mr. Sata. He also said that the 1<sup>st</sup> Respondent told the meeting that Mr. Sata would allow same sex marriages and that anti retro-viral drugs would be discontinued. The 1<sup>st</sup> Respondent further alleged that Mr. Sata would chase the Lambas from Mpongwe because they were not Zambians. In cross-examination he said that he was a PF supporter and that he arrived at the meeting late and found the 1<sup>st</sup> Respondent speaking.

Rebuttal evidence on the second allegation came from the 1<sup>st</sup> Respondent, RW6 and RW7. The 1<sup>st</sup> Respondent denied ever campaigning on tribal lines stating that Mpongwe had different ethnic groups and that he had many Bemba friends and farm workers and as such he could not despise the very people on whom he depended for a vote. He also denied ever talking about anti retro-viral drugs saying that he did not know who was infected stating that his campaign focused on developmental issues.



RW6 and RW7 testified that they were both Bembas from Northern Province and that they were campaign manager/chief election agent and deputy campaign manager/ deputy election agent respectively, RW6 stated that although he did not attend every meeting that the 1<sup>st</sup> Respondent addressed, he always organized the meetings and had briefings before the 1<sup>st</sup> Respondent went to address a meeting. He however said that he was with the 1<sup>st</sup> Respondent at the meeting on 11<sup>th</sup> September 2011 and never heard him utter any disparaging remarks against Bembas and wondered how a person whose campaign manager was Bembas could utter offensive language against Bembas. He added that the 1<sup>st</sup> Respondent's other campaign manager was Mr. Nsama, (RW7) who was also Bembas.

As regards the threat against repossession of plots, it was his evidence that a Member of Parliament had no right to give plots in traditional land under the chief's custody.

In cross-examination he said that he left Northern Province to go to Mpongwe in 1989 when he took up a job with Mpongwe Development Company. He said that he would not know what the 1<sup>st</sup> Respondent said at meetings which he did not attend.

RW6 said that he used to speak at some of the meetings addressed by the 1<sup>st</sup> Respondent and that he used to travel with the 1<sup>st</sup> Respondent from the start of the campaign to the end. It was also his evidence that at no time did he hear the 1<sup>st</sup> Respondent utter any statement against Bembas.

In cross-examination he said that he never missed a single campaign meeting by the 1<sup>st</sup> Respondent and that he spoke at all the meetings

addressed by the 1<sup>st</sup> Respondent. He stated that headman Chaala was the constituency information and publicity secretary for the MMD and that the venue of the meeting of 11<sup>th</sup> September 2011 was under a big tree near headman Chaala's home, he further said this was the most suitable place for a large meeting and it was open to any political party.

The evidence by the 1<sup>st</sup> Respondent that he employs many Bembas on his farm, that he has many Bemba friends and above all that his two campaign managers are Bemba has not been challenged and I therefore, accept it. That being the case, a serious doubt is created as to whether indeed the 1<sup>st</sup> Respondent could afford to issue threats and disparaging remarks against the Bembas in general at public meetings attended by his own Bemba campaign managers and election agents. It also appears odd to me that there is no indication of a general feeling of discontent before, or after the elections among the Bembas in Mpongwe if at all they were despised and threatened by the 1<sup>st</sup> Respondent.

As regards other threats such as repossession of plots and the withdrawal of anti retro-viral drugs if the people voted for the PF, the same were equally not proved. The evidence of the two witnesses on the issues does not simply meet the requisite standard of proof that the 1<sup>st</sup> Respondent made the threats in that regard and I dismiss this allegation as well.

Allegation number (iv) relates to a hammer mill that was donated by the 1<sup>st</sup> Respondent during the campaign period in chief Mwinuna's area and there is no dispute that the said donation was made. The only issue to be considered here is whether the hammer mill was donated as an

inducement to the voters. According to PW6, Stanslous Malindima, who is also a traditional councillor, and PW7, they attended a meeting on 12<sup>th</sup> July 2011 at Chapula women's club near PW6's farm at which the 1<sup>st</sup> Respondent announced the donation of K120 million for the construction of a school, 40 iron sheets to the local Baptist church and a hammer mill to the women's club. The iron sheets and the hammer mill were said to have been on a vehicle at the venue of the meeting. The 1<sup>st</sup> Respondent then urged the people to vote for him for fulfilling his promises. They stated that chief Mwinuna spoke at the same meeting and urged his subjects to vote for MMD.

In cross-examination they said that the hammer mill and the iron sheets were handed over on 12<sup>th</sup> July 2011 and pleaded ignorance of the official campaign period being from 8<sup>th</sup> August to 18<sup>th</sup> September 2011. They both stated their support for the PF.

In rebuttal, RW1, who is also chief Mwinuna, said that on 12<sup>th</sup> July 2011 he heard about the 1<sup>st</sup> Respondent's impending visit to his area to inspect developmental projects. The entourage went to his palace where a new school was being constructed but that he turned down the request for the 1<sup>st</sup> Respondent to meet him because he had bereavement. On 22<sup>nd</sup> July 2011, he learnt that the 1<sup>st</sup> Respondent would take a hammer mill to the women's club the following day as well as speak about a new community school at Ipumbu. This excited him and he decided to attend the meeting. He arrived at the meeting while the 1<sup>st</sup> Respondent was giving his address and that he had the hammer mill for donation to the women's club.

He said that the 1<sup>st</sup> Respondent further announced that the Council had sat and decided to allocate K100 million from the Constituency Development Fund to start the construction of the school. When the 1<sup>st</sup> Respondent had finished speaking, he asked if he had something to say and it was then that he stood up to thank the 1<sup>st</sup> Respondent for the money for the school and called on the community to play its part in the construction of the school and the women to look after the hammer mill well.

RW2 stated that at the meeting addressed by the 1<sup>st</sup> Respondent on 12<sup>th</sup> July 2011, the women community requested for a hammer mill to which he promised to get back to them later. On 23<sup>rd</sup> July 2011, the 1<sup>st</sup> Respondent delivered the hammer mill to the area for use by five women's clubs in the area. In cross-examination she said that when the women heard that a hammer mill would be delivered, they decided to invite RW1 to be in attendance.

From the evidence on record, the picture is that the 1<sup>st</sup> Respondent made the promise to donate a hammer mill at a meeting he addressed on 12<sup>th</sup> July 2011 and delivered it at a meeting he held on 23<sup>rd</sup> July 2011. It is also clear that in the name of inspecting developmental projects, the 1<sup>st</sup> Respondent was also busy bolstering his image to the electorate.

It is not a secret that the previous Government made developmental projects a major campaign issue and as such, the 1<sup>st</sup> Respondent in this case exploited that to the fullest. In fact, the bulk of his evidence in chief is a catalogue of what he saw as his successes in the previous five year tenure as area Member of Parliament. There is therefore, no doubt that the

series of meetings that the 1<sup>st</sup> Respondent held in Mpongwe Constituency prior to the election date, as well as the donations were meant to be, and were undoubtedly viewed by the electorate as an inducement for them to vote in a certain pattern.

It is a matter of common knowledge that Members of Parliament do from time to time donate various pieces of equipment to communities in their constituencies and the evidence shows that the hammer mill and the iron sheets were donated on 23<sup>rd</sup> July 2011, before the official campaign period was declared by the Electoral Commission of Zambia. The argument is that the Government cannot go to sleep as it has the mandate to continue with all its developmental projects and there is no dispute to that.

What appears to offend against the Electoral Act as well as its Regulations and the Code of Conduct thereto is the use of private resources to bribe the voter into voting otherwise than on the basis of their free choice. The Act also prohibits the abuse of public resources for the same purpose. I however, do not see it as the intention of the Legislature that during the campaign period, public resources should not be applied to the activities for which they are intended. I further do not think that there is anything in our current legislation that prohibits the presentation to the electorate, equipment for use by the community procured at the expense of the Government.

This appears to be the case with the K120 million under allegation number (xii) which in fact, turned out to be K100 million as approved by the Constituency Development Fund Committee on 20<sup>th</sup> July 2011. To the

extent that no evidence has been led to show that funding of the projects was left until July deliberately so that it could be used for campaign purposes by the 1<sup>st</sup> Respondent, I consider it a normal Government process of project implementation and no fault will be attributed to anyone.

What however, appears not to sit well with the Electoral Act No 12 of 2006, and in particular, section 79 (1) (c) is the hammer mill and the 40 iron sheet donations made by the 1<sup>st</sup> Respondent to the women clubs and the Baptist church at Ipumbu on 23<sup>rd</sup> July 2011. Although the rebuttal witnesses to both allegations have indicated that the donations were as a result of their earlier requests to the 1<sup>st</sup> Respondent, it cannot be doubted that the timing was offensive to the above cited provision of the law.

Even though the campaign period had not yet been declared, it is public knowledge that every aspiring candidate was already campaigning. I further note that the 1<sup>st</sup> Respondent makes no mention of these two donations in his evidence as a result of which an inference can be drawn that the donations were his personal initiatives. I am therefore satisfied that the two allegations have been sufficiently proved.

Allegation number (v) relates to the distribution by the then District Commissioner for Mpongwe of bicycles and mattresses to chiefs' retainers and indunas using Government motor vehicles. This allegation is not disputed as RW9, who was the District commissioner for Mpongwe at the time, admitted carrying out the exercise in August 2011. He however, explained that the materials so distributed were the ones that were being used for the census in 2010. He exhibited a circular from Mr. Evans Chibiliti

the deputy Secretary to the Cabinet, dated 25<sup>th</sup> July 2011 occurring at pages 13 and 14 of the 1<sup>st</sup> Respondent's bundle of documents. The exhibit titled; "CABINET CIRCULAR MINUTE OF 2011" is addressed to all Provincial Permanent Secretaries under the subject; "DISTRIBUTION OF MATERIALS FROM THE 2010 CENSUS OF POPULATION AND HOUSING." The circular, at page 14 paragraph 4, makes reference to a directive by "His Excellency the President" that all chiefs' retainers benefit from the bicycles. So it is obvious that by the time the circular reached the Districts, and the exercise got under way, the campaign period was equally underway.

The apparent defence here is that this was beyond the 1<sup>st</sup> Respondent as the decision to distribute the materials was made by Government and that the District Commissioner was simply carrying out a directive from above. From that perspective, no blame can be apportioned to the 1<sup>st</sup> Respondent for the distribution. But putting the matter in its proper context, It is no doubt that since the exercise was carried out nation-wide, at that critical moment in the electoral process, the Government had the motive to induce the electorate at every level to vote for the candidates from the ruling party. For how else would one explain the decision to distribute materials that had been used in a census that took place in 2010? Why would it become necessary to distribute the materials a few weeks before elections? This is in my view, gross malpractice by the Government and in our situation where levels of illiteracy and poverty reign supreme in the country side, the tendency is to be grateful to the Government for such gestures. In return, the beneficiary will feel obligated to pay back and in an election season, voters will be induced to vote in a certain way.

I am however, unable to find that this kind of malpractice and bribery on the part of the Government falls within the purview of the Electoral Act particularly section 79. This is so because the provisions there target individuals natural, and I believe to some extent, legal. Secondly as I have already stated, the exercise was carried out throughout the country and since the concern of this Petition is Mpongwe Constituency, it cannot be the criterion for determining the impact the malpractice had on the electorate in the Constituency. This, I suggest, would be a real issue for consideration in a Presidential Election Petition as opposed to a Parliamentary election. This allegation consequently fails as well.

Allegation (vi) relates to the alleged distribution of maize by the District commissioner. After considering the evidence both in support and in rebuttal, I come to the conclusion that even though there is irrefutable evidence that indeed hundreds of tons of relief maize were delivered to various locations within the Constituency, no such maize was officially distributed until the elections were over. I will therefore, dispose of this allegation without any further discussion by dismissing it for being misconceived in fact.

Allegation (viii) relates to the allegations on homosexuality. The allegation is to the effect that the 1<sup>st</sup> Respondent, at several of the meetings he addressed, informed the electorate that if they voted the PF into Government, it would legalize homosexuality and lesbianism. The allegation comes from the evidence of PW3 who said the 1<sup>st</sup> Respondent uttered the words at a meeting he addressed on 17<sup>th</sup> September 2011. There was no specific rebuttal to this allegation save for the general denials by RW6 and



RW7 that the 1<sup>st</sup> Respondent never uttered any disparaging words against the Bembas.

It is however, to be noted that the issue of homosexuality and lesbianism was widely publicized both in the print and electronic media following Mr. Sata's interview with some diplomats from a named European nation. The MMD in turn made it a campaign issue during the run up to the general elections of 20<sup>th</sup> September 2011. In the circumstances I am inclined to believe the evidence of PW3 on this allegation. I however, do not think that it was widely used by the 1<sup>st</sup> Respondent given that of all the Petitioner's witnesses only PW3 testified hearing it from the 1<sup>st</sup> Respondent. Consequently, I find no harm caused and the same must fail.

Allegation (ix) relates to the buying of chibuku/opaque beer for the voters by the 1<sup>st</sup> Respondent. One witness testified in support of this allegation while the 1<sup>st</sup> Respondent's rebuttal was that he travelled to Lusaka soon after casting his vote to visit his sister who was admitted to the University Teaching Hospital. The witness simply said that on Election Day, he was at Shingwa when the 1<sup>st</sup> Respondent arrived and bought beer which he and others drunk. He said that the 1<sup>st</sup> Respondent left soon after he had bought the beer. This is a witness who did not speak with any conviction at all and who stated in cross-examination that he did not vote because he was scared. This allegation fails the test and I dismiss it.

Allegation (x) relates to the ferrying of voters by truck to Chipese and other polling stations on the polling day. On this allegation PW10 testified that he was a PF polling agent stationed at Chipese polling station on the polling

day. He said that whilst monitoring the voting from outside, a white truck carrying people stopped about 45 metres from the polling station. As the people disembarked, Gregory Ngowani, who testified as RW10, told them to vote for the MMD and not the PF. He then called the Council Secretary who later came and advised that if there was another such incidence, he should report to the police officers at the polling station. When the second truck came, he informed the police officers who in turn went inside and came out with the presiding officer , a Mr. Meemba who told him that he could not do anything since he was working from inside.

In cross-examination he said that he used to see the truck parked at the 1<sup>st</sup> Respondent's premises but that he did not master its registration number. He also said that he did not know the driver of the truck. In re-examination he said that the truck belonged to the 1<sup>st</sup> Respondent.

PW11 testified that after voting at Nampamba ward he met Steven Mumba near Chipese polling station who told him that RW10 had a big truck he was using to ferry voters to Chipese polling station and urging them to vote on the clock. He then called Mr. Daka the Criminal Investigations Officer at Mpongwe police station who advised him to report to any other police officer since he was out of the station. He then called a Mr. Falanga, who was his polling agent to report to the police station.

He further testified that around 10:00 hours, while at home, he received a phone call from Eddie Mangala who told him to go and see what was happening at Chipese polling station. When he got to Chipese polling station he found RW10 with a truck load of people. As the people were

disembarking from the truck, others were telling them to vote on the clock. He then called the Council Secretary and told him what was happening but that he advised him to report to the police officers at the polling station since he was far. It was at that point that he asked PW10 to go to the polling station to report while he remained at the truck. Later RW10 instructed the driver to drive away. He went to speak to the presiding officer who advised that they also could do the same provided it was not within 400 metres of the polling station. On the ownership of the truck, he said he did not know but that he had seen two such trucks parked at the 1<sup>st</sup> Respondent's shop.

In cross-examination he said that he lost the Mpongwe central ward to RW10 and that the 1<sup>st</sup> Respondent was not present at the time. He further said that he started seeing the trucks a Friday before elections. In re-examination he said that the truck had parked within 400 metres of the polling station.

In rebutting this evidence, RW10 testified that he contested the Mpongwe central ward and won. His evidence was that on voting day he and his wife went to vote at 05:30 hours and returned home around 06:30 hours. He said that he was at home resting until evening when his polling agent called him to inform him of the result. He denied knowledge of a vehicle marked "Fleet 8" saying that he was using a bicycle for his campaigns as he did not own a vehicle.

In cross-examination he said that he voted from the Farmers' Training Centre about 1.5 kilometres from his home. He said that it took him and

his wife about twelve minutes to walk to the polling station. He stated that there was no delay in opening on the stream he voted from. In the process he said that he did not have a watch and as such the twelve minutes was just estimation. He denied going to Chipese after voting.

After considering the evidence, I find the evidence of PW10 and PW11 more detailed and therefore, more credible than that of RW10 who looked confused during cross-examination. It also seems certain to me that the truck had breached the 400 metre limit and therefore, constituting malpractice. It is noted however, that although the allegation refers to the malpractice occurring at other polling stations, the evidence adduced points to the malpractice occurring only at Chipese polling station. I will therefore, take it that the malpractice occurred only at that polling station and no other. The result is that this allegation has been proved to the requisite standard.

Allegation (xi) relates to the donation of the sum of K11 million to chief Machiya by Mr. Bulaya, who testified as RW8 and RW9 respectively. The Petitioner did not call any evidence on this allegation. When asked to comment on this allegation by Mr. Lisimba, RW9 denied ever giving any cash to RW8. He further stated that it was impossible to visit all the 48 polling stations in one day. This allegation therefore, stands no chance and I dismiss it accordingly.

Allegation (xiii) is to the effect that Stanslous Malindima, who testified as PW6 was relieved of his duties as a traditional councillor by chief Mwinuna for supporting the PF. In his evidence in chief, this witness never talked of

his removal as traditional councillor. In fact, during cross-examination he categorically stated that he was still a traditional councillor even though he admitted being a PF supporter. Further, chief Mwinuna, who testified as RW1, stated that he had no power to remove PW6 from his traditional position because he was appointed by his predecessor. In the event, this allegation has not been proved and I dismiss it accordingly.

Allegation (xiv) relates to electoral irregularities discovered during the verification exercise. This is in connection with the accounting of the 850 ballot papers supplied to Mushipashi polling station. The key witness for the Petitioner on this allegation was PW12, George Nsali, who said that he was a polling agent for the PF in the 20<sup>th</sup> September 2011 elections.

He testified that he monitored the totalling of the results at the Civic Centre. He further said that during the day he visited a number of polling stations and that after the close of the voting, presiding officers were taking records of results announced at polling stations to the totalling centre and handing them over along with the equipment to the elections officers. He said that at the totalling centre he observed that Bright Chilumba, (RW13), who was the presiding officer for Mushipashi polling station, had taken a carton box stuffed with unsealed ballot papers and other unsealed election materials. He then brought the matter to the attention of the returning officer Mr. Chitambo (RW14) who acknowledged the anomaly. It was then resolved that the materials be sealed and they were accordingly sealed.

After the results had been announced, the Petitioner called him and informed him of the verification process which was under way and asked him to attend. On arrival at the verification centre, he found the exercise had already started and in due course, he observed that the record of ballot papers for Mushipashi polling station presented by RW13 showed that 500 ballot papers had been accounted for at the polling station as per document exhibited at page 9 of the Petitioner's bundle of documents. He further said that whereas the document at page 9 showed that 500 ballot papers had been accounted for, the record of voters from the Electoral Commission of Zambia exhibited at pages 30 to 64 showed that the polling station had 828 registered voters. The variance between the two documents led him to the conclusion that there was an anomaly.

A decision was then made to postpone the verification exercise to the following day at 10:00 hours but that when he went to the verification centre the following day as agreed upon, RW13 and the other officers were not present. He called the deputy district elections officer Mr. Mangwale and a Mr. Malekano both of whom told him that they were attending to other matters. Thereafter, a security guard, a Mr. Nyambe told him that he had earlier in the morning seen Mr. Mangwale and RW13 enter the office of the returning officer and that he called Mr. Mangwale who confirmed that position. He later complained to the returning officer, RW14 who promised to look into the matter.

When referred to the documents exhibited at pages 14 and 15 in the 2<sup>nd</sup> Respondent's bundle of documents, he said there was a disparity with the document marked 9 in the Petitioner's bundle of documents. He observed

that while the document marked 9 is dated 20<sup>th</sup> September 2011, the one marked 14 is dated 19<sup>th</sup> September 2011. He also observed that while the document marked 9 showed a total number of ballot papers as 500, the one marked 15 had a total of 850 ballot papers.

In cross-examination he said that he did not know the total number of people who voted at Mushipashi polling station. He admitted that the unsealed ballot papers affected all the candidates. He stated that there were 828 registered voters at Mushipashi polling station and that he had registers of voters for the constituency which he said has about 35,000 voters. He further said that of the 48 polling stations in the constituency, only one had the said anomaly.

He further said that the verification exercise was attended by Mr. Chilangwa from MMD, Mr. Kangolo from the PF as well as Mr. Mangwale and Mr. Malekano. He said that at the end of the verification process the parties are supposed to sign a verification report. He recognized the document marked 16 in the 2<sup>nd</sup> Respondent's bundle of documents as the verification report issued by the returning officer stating that all the ballot papers were accounted for.

As for the documents marked 9 in the Petitioner's bundle of documents and the document marked 15 in the 2<sup>nd</sup> Respondent's bundle of documents, he said that he took possession of the former at the verification centre from Mr. Malekano while he saw the latter for the first time in court.

In re-examination he said that the sealed envelopes were being opened during the verification exercise and there were counterfoils for used ballot papers. He said that verification was by way of comparing the serial numbers on the counter foils with those on the actual ballot papers and that the ballots on exhibit 9 were verified. As for exhibit 16, he said the same was signed by the returning officer and not witnessed by anybody. He concluded that exhibit 16 was not a correct reflection of the true position.

In rebuttal the Respondents called RW13, Bright Chilumba, who was the presiding officer for Mushipashi polling station and RW14, Mr. Robbie Chitambo, who was the Returning officer for Mpongwe constituency. According to RW13, he collected a total of 850 ballot papers on 19<sup>th</sup> September 2011 packed in two boxes. The Returning officer then instructed him to complete ballot paper account forms for each election namely; Presidential, Parliamentary and Local Government each with 850 ballot papers. He then left the forms with the Returning officer before being taken to the polling station.

When the poll closed, he had only used ballot papers from the box with 500 ballot papers upon which he completed the necessary documents. He further said that from that box of 500 ballot papers, he had only used 380 ballot papers and he filled in the ballot paper account form for the 500 ballot papers in respect of the parliamentary election which he identified as exhibit 9 in the Petitioner's bundle of documents.



He explained that this was an oversight on his part because he only used the box containing the 500 ballot papers while he did not touch the box containing the 350 ballot papers as a result of which he took the box to the totalling centre unsealed. He said that the oversight was brought to his attention by the Returning officer and subsequently to the attention of all the stake holders who all agreed that the box be sealed. It was further his evidence that he recorded the serial numbers for all the 350 ballot papers before they were sealed in the presence of all the stake holders. After presenting the results he was asked to leave.

He was later called to the verification centre by the assistant returning officer Mr. Mangwale where the issue was raised and he explained that the 350 ballot papers were the same ones which were sealed in the presence of the stake holders after which he was asked to leave. A week later, the returning officer called him and advised him to merge the two ballot paper account forms for 500 and 350 into one by completing a fresh ballot paper account form. He identified exhibits 14 and 15 as the fresh ballot paper account form he completed later to merge the two. When asked why the document exhibited as 14 which he filled much later bore the date 19<sup>th</sup> September 2011, he said it was just a mistake.

In cross-examination he said that he explained that the number of ballot paper account forms completed depends on the number of voters. He said the form contains the number of ballot papers used, spoiled and unused. He said that according to the voters' roll Mushipashi had 828 registered voters and that the form is supposed to be completed at the polling station after the close of the poll but that he completed exhibits 14 and 15 two

weeks after the close of the poll at the Civic centre in the presence of the returning officer but without the present of representatives of political parties.

He further said that he transferred the information on exhibit 9 to exhibit 14 and that stake holders were present when he completed the ballot paper account form for the 350 ballot papers and during the sealing of the box. He however, said that he did not know where the ballot paper account form for the 350 ballot papers was. He admitted that it was a mistake not to have sealed the 350 ballot papers as that was the first time he was serving as a presiding officer having earlier served as a polling assistant. He said that on collecting the election materials, the ballot paper account forms are filled with the number of ballot boxes collected. He said that exhibit 9 was completed on 20<sup>th</sup> September 2011 after the close of the poll in accordance with the rules.

In re-examination he maintained that the 350 ballot papers which were unsealed were sealed at the totalling centre in the presence of the stake holders. He further said that while the presiding officer co-ordinates and supervises the election, the polling assistant assists the presiding officer.

RW14, the returning officer, said that Mpongwe constituency had in excess of 34,000 registered voters with 48 polling stations. He stated that at the time of deployment of electoral officers, RW13 was issued with 850 ballot papers but that at the totalling centre, he only accounted for 500 leaving a balance of 350 unrecorded. He brought that fact to the attention of the stake holders and showed them the unrecorded 350 ballot papers. He

further informed the stake holders that the failure to account for the 350 ballot papers by the presiding officer was an anomaly. They all eventually agreed to have the 350 ballot papers sealed and they were sealed after which the stake holders, who were agents of political parties, signed the declaration forms.

He further said that the verification process began on 28<sup>th</sup> September 2011 and attended on the opening day but missed the second day because he took his child to the hospital leaving his two assistants at the centre. During the course of the second day one of his assistants telephoned him and told him that the PF representatives were saying that only 500 ballot papers had been accounted for at Mushipashi polling station. He expressed surprised at the turn of events as the PF representatives had seen the 350 ballot papers at the totalling centre before they were sealed. His assistant further informed him that the PF representatives had rejected the explanation as a result of which he advised that they meet them the following morning in the presence of RW13.

The following day, his assistant told him that the PF representatives were not happy to see RW13 and no agreement was reached with the PF threatening to petition the result. He then went to the verification centre but that he found the PF representatives had already left the hall. He added that other than the incident at Mushipashi polling station, the verification process was a success as there were no disputes from other polling stations.

With regard to exhibit 9 in the Petitioner's bundle of documents, he said that it was the one RW13 had submitted to him on polling day around 21:00 hours. As for exhibits 14 and 15 in the 2<sup>nd</sup> Respondent's bundle of documents, he said that the two represented the merger of the 500 and the 350 ballot papers by RW13 on his instructions. He said this was done by completion of fresh ballot paper account forms so that he could submit a report to the Electoral Commission of Zambia. He identified the verification report he submitted to the Electoral Commission of Zambia as exhibit 16 in the 2<sup>nd</sup> Respondent's bundle of documents.

In cross-examination he said that his role was to supervise the conduct of elections by training electoral officers, issuing them with election materials, collecting results, declaring the winner at Parliamentary and Local Government level and announcing the Presidential results. He further said that elections officers are trained including presiding officers and their assistants before elections and that the presiding officer for Mushipashi, RW13 was trained both as presiding officer and earlier as polling assistant and as such the presumption was that he was well versed with the election procedures.

He maintained that it was wrong for the presiding officer not seal the 350 ballot papers but that the anomaly was brought to the attention of the stake holders who all agreed that the ballot papers be sealed and they were sealed accordingly. He also said that all the stake holders signed at the end of the totalling before the results were announced and that a dissatisfied party was at liberty not to sign.

He said that PW12, George Nsali, was one of the stake holders that signed the declaration form at the totalling centre despite being vocal over the anomaly and that he did not deem it necessary to invite him when RW13 was completing exhibits 14 and 15 because the PF had already made the decision to petition the election. He expressed shock at seeing that exhibit 14 bore 19<sup>th</sup> September 2011 as the date of its completion when it was filled in on or about 30<sup>th</sup> September 2011.

In re-examination he said that RW13 went to the totalling centre with 500 ballot papers accounted for on the ballot paper account form while the 350 ballot papers had not been used. He stated that RW13 was one of the 48 presiding officers who were trained and that he was the only one who had made errors as it happens in a class where some fail despite being taught.

The issues in this allegation are straight forward as the irregularity is admitted by all the parties and so the only issue to be resolved is whether or not the 350 ballot papers were not accounted for at Mushipashi polling station as alleged. What we have in the evidence is that all the stake holders, including PW12, saw the 350 unsealed ballot papers taken to the totalling centre by RW13 after which they all agreed to seal them. This position should have ordinarily settled the matter but for the failure by the 2<sup>nd</sup> Respondent to exhibit the ballot paper account form purportedly filled in at the totalling centre for the 350 ballot papers and the date appearing on exhibits 14 and 15. These are factors that raise legitimate concerns on the part of the Petitioner that required clear explanations to clear them.

RW14 has testified that PW12 refused to accept the explanation rendered despite having seen the ballot papers at the totalling centre as the PF had already made up its mind to petition the election. It is however, noted that PW12, acknowledged in his evidence that he saw the unsealed ballot papers at the totalling centre brought in by RW13 and that a decision was made to seal them. This to me is clear indication that the stake holders, including PW12 satisfied themselves that all the unused 350 ballot papers were accounted for save for RW13's failure to seal and account for them on the ballot paper account form at the polling station. It is therefore, an irregularity that was corrected without having caused any harm to any of the candidates or indeed advantaged any candidate, particularly the 1<sup>st</sup> Respondent in this case.

It is further note worthy that the allegation asserts that the unaccounted for 350 ballot papers are believed to have been used in favour of the 1<sup>st</sup> Respondent in other polling stations. It is however, noted that no other irregularity was reported from the other 47 polling stations and having already found it as a fact that the 350 ballot papers were in fact seen by the stake holders at the totalling centre after voting had closed in all the polling stations, there is no chance that any of the 350 ballot papers found themselves at any of the other polling stations. This therefore, rules out any possibility of malpractice in relation to the 350 ballot papers. I therefore, find this allegation without merit and dismiss it accordingly.

Allegation (xv) relates to the donation of an ox-cart by the MMD. According to PW8, who said that he was a member of the PF campaign team, the MMD organized a meeting in Buyantanshi section in Kanyenda east

towards the end of August 2011. He attended the meeting at which the main speaker was the 1<sup>st</sup> Respondent. He further said that the 1<sup>st</sup> Respondent announced that he had donated an ox drawn cart for use by the community. According to him the ox cart was painted in blue with the inscription; "vote for R.B."

In rebuttal, RW11, Emmanuel Mutandi said that he was the chairman of Buyantanshi club which is engaged in agricultural activities growing maize and ground nuts. He said that in May 2011, he heard an announcement on radio that the Ministry of Community Development and Social welfare was giving out hammer mills and ox carts. The club then decided to approach the 1<sup>st</sup> Respondent so that he could shed more light on the programme. He then travelled to Mpongwe where he met the 1<sup>st</sup> Respondent who told him that he needed to get more information.

In June he travelled to Mpongwe for personal business when he met the 1<sup>st</sup> Respondent by coincidence. When he asked him about the ox cart, the 1<sup>st</sup> Respondent told him that he had in fact sourced for the ox cart and advised him to go and collect it. On 17<sup>th</sup> July 2011, he travelled to Mpongwe and collected the ox cart

In cross-examination he said that he was the MMD chairman for Kanyenda. He further said that the ox cart bears a sticker for Community Development and Social Services. He said that the only date he could remember was the date he collected the ox cart. He admitted attending a campaign meeting by the 1<sup>st</sup> Respondent at Buyantanshi but said that the ox cart was not there. He further admitted that the 1<sup>st</sup> Respondent

mentioned the donation of an ox cart at the meeting but refuted the suggestion that the ox cart was donated by the MMD. He denied belonging to the same club as Middleton Chitafu, PW18, who he said lived 10 kilometres away from his home but admitted that they met in many meetings including those of the community neighbourhood health committee for which he said that he was the co-secretary with PW18.

The fact that an ox cart was donated to the Buyantanshi community is not in dispute and neither is the fact that the 1<sup>st</sup> Respondent told a campaign meeting held at Buyantanshi about the donation. It is further well established by evidence that the 1<sup>st</sup> Respondent was involved in the sourcing of the ox cart. In considering the evidence of PW8 and that of RW11, I find that of the former more credible than that of the latter. In as far as the petition is concerned, it is immaterial what inscriptions are on the ox cart because what is in issue is whether or not the 1<sup>st</sup> Respondent donated the ox cart and the answer is in the affirmative. This allegation is proved to the requisite standard.

The final allegation (xvi), relates to the collection of voters' cards. According to PW8, Patson Kapungwe, he observed some MMD officials among them, RW11, Emmanuel Mutandi and his wife, collected National Registration and voters' cards from people. He also said that some victims told him about it. He named some of the victims as Rabson Banda and Edom Muke. He said the names of the people whose cards were collected were recorded and that on the Election Day he saw RW11 handing back the cards to Mr. Rabson Banda before voting closed.



In cross-examination he said that he witnessed the collection of the cards from Rabson Banda and Edom Muke and the handing back to two of the four people.

PW18's testimony was that on 17<sup>th</sup> September 2011, he was attending a neighbourhood health meeting at Kanyenda clinic together with RW11 who approached him and asked to have a chat with him. During the chat he asked him to give him his voter's and National Registration Cards. On asking him why, he said good things would come. He then went to his home and brought the cards and handed them over to RW11. He then told him that since he was running out of time, he needed to go home with the cards. He said that he thought that RW11 wanted the cards in connection with his position as general secretary of the neighbourhood health committee and that he would return them the following day. The following day he met him at the market and on asking for the cards he said that he would give them back to him the following day.

On 19<sup>th</sup> September 2011, RW11 took the cards to him at his home and further told him that he had put the details on the computer so that they could know if he did not vote on the clock. He then handed over the cards together with a K25, 000.00. He urged him to vote on the clock and that if he did not they would know.

In rebuttal, RW11 denied collecting voters' and National Registration Cards from Andrew Musonda and Middleton Chitafu (PW18). He said that he could not do such a thing because he had attended a meeting by the

Electoral Commission of Zambia where the rules were explained relating the collection of people's National Registration and voters' cards.

The evidence on record on this allegation has not been seriously challenged and more so that earlier in this judgment, I indicated that RW11 was a less credible witness than PW8. So given the evidence of PW8 and that of PW18, pointing to the collection of voters' and National Registration Cards by RW11 and others, I do not hesitate to find that this allegation has been proved to the requisite standard.

The final position is that out of the thirteen allegations that were argued, five have been found proved and that is more than enough to avoid this election given the holding in the case of **Michael Mabenga V Sikota Wina & others** (supra) that satisfactory proof of just one corrupt act or misconduct is sufficient to nullify any election. This position should however, be understood in the light of section 93 (2) (a) of the Electoral Act No. 12 of 2006 which requires that for an election to be avoided, the court must be satisfied that the proved allegation (s) prevented or may have prevented the majority (emphasis mine) of the voters in the constituency from electing the candidate whom they preferred.

This section places a very stringent condition for the nullification of an election as mere proof of any allegation alone is not sufficient. This position was well elucidated and given weight by the Supreme Court's decision in

the case of Akashambatwa Mbikusita Lewanika & others V Frederick Jacob Titus Chiluba<sup>3</sup> where it was held among others that;

*"In any event, and having regard to the type of constituency concerned, which is nation-wide, it was not established to the satisfaction of the court that the proven irregularities were such that nationally, the majority of the voters were, or may have been prevented from electing the candidate whom they preferred or that the extent, frequency and nature of the irregularities was such that they must have affected to any significant extent the national result."*

The question now is whether any of the five proved allegations prevented or may have prevented the majority of the voters in Mpongwe constituency from electing the candidate whom they preferred in order to avoid the election.

In considering this question regard must be had to the impact that a corrupt practice or illegal practice could reasonably be expected to have on the electorate in the constituency. This will to a large extent depend on the number of people affected and the level of dissemination. In the case of a donation to a community, such as a hammer mill, iron sheets and an ox-cart in this case, the beneficiaries are the most likely to be affected by reason of which they are likely to vote in a manner that will reflect appreciation for the benefit derived from the gift. Where threats are issued at a political meeting, the determinants will be the number of people in attendance and or, the means by which the threats are disseminated to the electorate.

In this case, of the five allegations proved, two of them occurred in Ipumbu namely; the donation of iron sheets and the hammer mill. The

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<sup>3</sup> (1988)ZR 79

other three namely, the donation of an ox-cart, the ferrying of voters to a polling station and the collection of voters' cards happened in different areas. This means that out of the 48 polling stations in the constituency, these malpractices occurred in only five of them leaving the other 43 unaffected. Applying the Akashambatwa case (supra) to this scenario, it means that the extent of the malpractices was insignificant in relation to the whole of the constituency.

It would have been a different story if the proved malpractices were widespread in the constituency to cover a substantial part of the electorate as that would have had the effect of affecting the constituency result in a significant way. I do not think that landmark was achieved by the proved malpractices in this case. In the same vein section 93 (2) (a) of the Electoral Act No. 12 of 2006, is very significant by its use of the word "majority" and although the word is not defined, I believe it is to be understood in its ordinary sense that a simple majority is all that is required to be attained. In this case, the judge must be satisfied that the malpractices proved prevented or may have prevented at least fifty plus one per cent of the voters in the constituency from voting for the candidate of their preference.

It has been argued, and submitted that the low voter turnout in the constituency is attributable to the various malpractices set out in the Petition. I however, do not subscribe to that argument or proposition because no evidence was adduced to prove it. I also take judicial notice of the fact that voter apathy in the 20<sup>th</sup> September 2011 tripartite elections

was generally, a nationwide phenomenon and not peculiar to Mpongwe constituency.

The other factors that the Akashambatwa case brings out are the frequency and nature of the malpractices. It is a fact that if a malpractice is recorded only once, and it falls short of the majority standard, then it cannot be used to avoid an election. This is not in any way to suggest that a single occurrence of an instance of corrupt practice, irregularity or malpractice is not sufficient to avoid an election as the Mabenga case has put the matter to rest.

What that means however, is that the single occurrence proved must meet the test set out in section 93 (2) (a). If for instance, the malpractice happened in one ward five times, even if the occurrence is high, it is unlikely to affect the rest of the constituency and as such, it cannot cause the avoidance of the Parliamentary election although it can lead to the nullification of an election in that ward for the councillor.

As for the nature of the malpractice, it is a fact that some of the malpractices are so insignificant in nature that no one would expect them to have any significant effect on the majority of the voters. For instance in this case, four people had their voters' cards collected and handed back to them on voting day. Granted that this is illegal, the number of people affected is so insignificant that it would have no bearing on the result at constituency level.

Ultimately, I am not satisfied that the allegations herein proved prevented or may have prevented the majority of the voters in Mpongwe constituency

from electing the candidate whom they preferred in terms of section 93 (2) (a) of the Electoral Act No. 12 of 2006.

I therefore dismiss this Petition with costs and hereby determine that the 1<sup>st</sup> Respondent herein, Gabriel Namulambe, was duly elected and the Parliamentary election for the Mpongwe constituency held on 20<sup>th</sup> September 2011 is valid pursuant to section 104 (1) and (2) of the Electoral Act No. 12 of 2006.

**DELIVERED THE 27<sup>TH</sup> DAY OF JANUARY 2012 AT LUSAKA IN OPEN COURT**



**J.M. SIAVWAPA  
JUDGE**