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**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

2016/HP/EP/0001

IN THE MATTER OF:

**AN ELECTION PETITION**

AND

IN THE MATTER OF:

**ARTICLES 51 (a) and Article 73 of the  
Constitution of Zambia (Amendment)  
Act No. 2 of 2016**

AND

IN THE MATTER OF:

**Sections 83 (c), 84, 96, 97, 98 and 99 of  
Electoral Process and Regulations 15  
(1c) and (1f) of the Electoral Process Act  
No. 35 of 2016**

AND

IN THE MATTER OF:

**The Electoral (Code of Conduct) Act of  
2011**

AND

IN THE MATTER OF:

**The Parliamentary Elections held in  
Zambia between 11<sup>th</sup> and 14<sup>th</sup> August,  
2016 in Lukashya Constituency**

IN THE MATTER OF:

**Any other Enabling Act and Regulations**

**B E T W E E N:**

ALFREDA KANSEMBE

**PETITIONER**

**AND**

MWENYA MUNKONGE  
THE ELECTORAL COMMISSION OF ZAMBIA

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

**Before Honourable Mrs. Justice M. Mapani-Kawimbe in Open Court this  
14<sup>th</sup> day of November, 2016**

For the Petitioner:

Major C.A. Lisita of Messrs Central  
Chambers.

For the Respondent:

Mr. M. Mundashi, S.C and Mr. D. Chakoleka  
and Ms. S. Sichone of Messrs Mulenga  
Mundashi Kasonde Legal Practitioners.

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# J U D G M E N T

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**Case Authorities Referred to:**

1. **Mlewa v Wightman (1995-1997) Z.R. 171.**
2. **Leonard Banda v Dora Siliya SCZ/95/2012.**
3. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.**
4. **Khalid Mohamed v The Attorney-General (1982) Z.R. 66.**
5. **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo And George Samulela (2003) Z.R. 110**
6. **Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, The Electoral Commission Of Zambia, The Attorney General (2005) Z.R. 138.**
7. **Kufuka Kufuka v Ndalamei Mundia Appeal No. 80 of 2012**
8. **Galunia Farms Limited v National Milling Company Limited (2002) Z.R. 135.**
9. **OTK Limited v Amanita Zambia Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited, Amanita Milling 2005/HPC/0199**
10. **Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114/2007**
11. **Lazarus Chota v Patrick Mucheleka Appeal No.18/2015, SCZ/8/83/2013**
12. **City Express Services Limited v Southern Cross Motors Limited SCZ/8/262/2006.**
13. **Zambia National Holdings Limited and United National Independence Party vs. Attorney General (1994) (SJ) 22 (SC).**
14. **Admark Limited v Zambia Revenue Authority (2006) Z.R. 43.**
15. **Bater vs. Bater (No. 2) (1950) ALL ER 458.**
16. **Lewanika and Others vs. Chiluba (1998) Z.R. 79.**

**Legislation and other Works Referred To:**

1. **Electoral Process Act No. 35 of 2016.**
2. **Constitution of Zambia (Amendment) Act No. 2 of 2016.**
3. **Electoral Process (General) Regulations S.I. No. 63 of 2016.**
4. **Halsbury's Laws of England, 4<sup>th</sup> Edition, at Paragraph 784.**

On 19<sup>th</sup> August, 2016, the Petitioner, **ALFREDA KANSEMBE**, filed an Election Petition in which she stated that she was a candidate in the Lukashya Parliamentary Elections, which were held on 11<sup>th</sup> August, 2016 after having been adopted by her party, the Patriotic Front, hereinafter referred to as PF, to contest in the aforesaid election.

The Petitioner stated that besides herself, the other candidates were the Respondent **Mwenya Munkonge, Geoffrey Bweupe, Rodrick Chewe, Gabriel Kaliminwa** and **Ephraim Mutale**. The Returning Officer was **Robert Posa** who declared the 1<sup>st</sup> Respondent as being duly elected. The results as declared by the said Returning Officer for the said Parliamentary Election were as follows:

- i) **Mwenya Munkonge** Independent 11,870 votes
- ii) **Alfreda Kansembe** PF 7,936 votes
- iii) **Rodrick Chewe** UPND 4,180 votes
- iv) **Geoffrey Bweupe** UDF 1,123 votes
- v) **Gabriel Kaliminwa** FDD 675 votes

vi) **Ephraim Mutale** Rainbow 218 votes

The Petitioner disputed the declaration by the Returning Officer that the 1<sup>st</sup> Respondent had been duly and validly elected for the reason that days prior to the polling date, the 1<sup>st</sup> Respondent had conducted himself in a manner that was designed to promote or procure his own election, in contravention of Regulations under the **Electoral Process Act**.

Under paragraph 5 of the Election Petition, the Petitioner gave the particulars of the alleged contraventions as follows:-

- “viii. **Between 30<sup>th</sup> July, 2016 and 10<sup>th</sup> August, 2016 the 1<sup>st</sup> Respondent procured the services of Chief Munkonge of Munkonge Chiefdom in Kasama District, his grandfather, to go round the Villages for the sole purpose of campaigning for the 1<sup>st</sup> Respondent as an Independent Candidate.**
- ix. **The 1<sup>st</sup> Respondent further abused his privileged position as a grandson of the said Chief who went round the Constituency in the course of making misrepresentations to the electorate saying that if they should not vote for PF and the Petitioner and that if they did, they would be displaced from their land and chased from the Chiefdom. [These events greatly placed the 1<sup>st</sup> Respondent at an advantage as compared to the Petitioner].**
- x. **These events greatly placed the 1<sup>st</sup> Respondent at an advantage as compared to the Petitioner.**
- xi. **Further, the 1<sup>st</sup> Respondent, at Kasakula Polling Station accused the Petitioner of being a thief who had embezzled Social Cash Transfer Funds meant for the aged in the District, which District has not**

yet been placed on the list of beneficiaries in the Province.

- xii. **The 1<sup>st</sup> Respondent was masquerading as a Patriotic Front (PF) sponsored Candidate and was distributing PF material and using PF Campaign songs such as "Dununa Reverse" contrary to the Electoral Code of Conduct.**
- xiii. **On the 9<sup>th</sup> August, 2016 the 1<sup>st</sup> Respondent went on radio Lutanda, a local radio station, and stated that he was a PF member and his President was Edgar Chagwa Lungu implying that he had not yet resigned from PF yet he stood as an Independent Candidate contrary to Article 51(c) of the Constitution.**
- xiv. **Your Petitioner states that as a consequence of the aforesaid practices and false statements attributed to the 1<sup>st</sup> Respondent, his election agents and campaign team, the majority of the voters in the affected areas and or polling stations were prevented from electing a candidate whom they preferred in the Constituency."**

The Petitioner accordingly prayed for the following reliefs:-

- "1. **[For] a declaration that the election of the 1<sup>st</sup> Respondent as a Member of Parliament for Lukashya Parliamentary Constituency is null and void.**
- 2. **[For] a declaration that the illegal practices committed by the 1<sup>st</sup> Respondent and or his agents affected the election results and that the same ought to be nullified.**
- 3. **[For] a declaration that the Petitioner was duly elected.**
- 4. **[For] an Order that the costs of and incidental to this Petition be borne by the Respondents."**

The Petitioner filed an Affidavit in Support wherein she begun by giving an overview of the election results as stated above.

The allegations as set out in the Affidavit are as follows:

***“8. During days prior to the polling date the 1<sup>st</sup> Respondent so conducted himself in a manner that was designed to promote or procure his own election in contravention of the Regulations made under the Electoral Process Act No 35 of 2016;***

- i. Between 30<sup>th</sup> July 2016 and 10<sup>th</sup> August, 2016 the 1<sup>st</sup> Respondent procured the services of Chief Munkonge of Munkonge Chiefdom in Kasama district, his grandfather, to go round the villages for the sole purpose of campaigning for the 1<sup>st</sup> Respondent as an Independent Candidate.***
- ii. The 1<sup>st</sup> Respondent further abused his privileged position as a grandson of the said Chief who went around the Constituency in the course of making misrepresentations to the electorate saying that if they should not vote for PF and the Petitioner and that if they did, they would be displaced from their land and chased from the Chiefdom.***

- iii. *These events greatly placed the 1<sup>st</sup> Respondent at an advantage as compared to the Petitioner.*
- iv. *Further, the 1<sup>st</sup> Respondent, at Kasakula Polling had embezzled Social Cash transfer funds meant for the aged in the District which District has not yet been placed on the list of beneficiaries in the Province.*
- v. *The 1<sup>st</sup> Respondent was masquerading as a PF sponsored Candidate and was distributing PF materials and using PF Campaign songs such as “Dununa Reverse” contrary to the Electoral Code of Conduct.*
- vi. *On the 9<sup>th</sup> day of August 2016 the 1<sup>st</sup> Respondent went on radio Lutanda, a local radio station, and stated that he was a PF member and his President was Edgar Chagwa Lungu meaning he had not yet resigned from PF yet he stood as an Independent Candidate contrary to Article 51 (c) of the Constitution.*

- vii. *Your Petitioner states that as a consequence of the aforesaid practices and false statements attributed to the 1<sup>st</sup> Respondent and his Election Agents and Campaign teams the majority of the voters in the affected areas and/or polling stations were prevented from electing a candidate of their choice in the Constituency.”*

In his Answer dated 14<sup>th</sup> September, 2016, the 1<sup>st</sup> Respondent confirmed the names as given by the Petitioner of the persons that participated in the Lukashya Parliamentary Constituency Election, as well as the results, which tallied with the parliamentary election results as given in the Petition. The 1<sup>st</sup> Respondent stated that the election was conducted by the Electoral Commission of Zambia (ECZ) which is established under the provisions of Article 229 of the **Constitution of Zambia**, (the Constitution).

The 1<sup>st</sup> Respondent averred that the Petitioner's claim that he was not validly elected was within the Petitioner's knowledge. The 1<sup>st</sup> Respondent admitted being a grandson of Chief Munkonge of Munkonge Chiefdom in Kasama District, but however, denied the

allegation that he procured the services of the said Chief Munkonge to campaign on his behalf around the villages.

The 1<sup>st</sup> Respondent also denied that the said Chief Munkonge was his election agent under the provisions of the **Electoral Process (General) Regulations**, (the General Regulations). The 1<sup>st</sup> Respondent averred that if the alleged acts on the part of Chief Munkonge were carried out, then they were carried out without his knowledge, consent or approval whether express, implied or otherwise. The Respondent further averred that the said Chief Munkonge's area covers two out of the nine Wards in Lukashya Constituency, namely Lusenga and Mukanga Wards.

The 1<sup>st</sup> Respondent further denied the particulars in paragraphs 5(ix), 5 (xiii), 5(x), 5(xi) and 5 (xiv) of the Petition and contended, with regard to paragraph 5(xii) of the Petition, that as an independent candidate, he had his own campaign material, which he distributed and were distinct from that of the PF.

The 1<sup>st</sup> Respondent insisted that the election was conducted in accordance with and in compliance with the principles laid down in the provisions of the **Electoral Process Act** and the attendant **Regulations** made thereunder such that the majority of voters were

not prevented from electing him as the candidate whom they preferred. Further, that he did not breach the provisions of the **Electoral Process Act** and he is the duly elected Member of Parliament for Lukashya Constituency. The 1<sup>st</sup> Respondent concluded with a declaration that the Petitioner was not entitled to any of the reliefs sought.

The 1<sup>st</sup> Respondent filed an Affidavit Verifying his Answer on 14<sup>th</sup> September, 2016 wherein he asserted that during the days prior to the polling date, he had not conducted himself in a manner that was designed to promote or procure his own election against the **Regulations** made under the **Electoral Process Act**. He reiterated that he did not procure the service of Chief Munkonge in Kasama District to go round the villages for the sole purpose of campaigning for him as an Independent Candidate. He reaffirmed his denial that he did not abuse the proximity of his relationship with Chief Munkonge to make misrepresentations to the electorate that if they voted for the PF and the Petitioner, they would be displaced from their land and chased from their Chiefdom. He denied that he was placed at a vantage point because of Chief Munkonge's alleged actions.

The 1<sup>st</sup> Respondent insisted that he neither masqueraded nor distributed PF material, but in some instances he received unsolicited support from the PF Party and its supporters. Further, that it was impossible for him to dismiss or stop the multitudes of PF cadres or supporters from other parties who out of their own free will, decided to campaign for him.

The 1<sup>st</sup> Respondent denied that he had on 9<sup>th</sup> August, 2016, appeared on radio Lutanda to state that he was a PF member or that the Presidential candidate of the party he belonged to was Edgar Chagwa Lungu, the PF nominated Presidential candidate .

The 1<sup>st</sup> Respondent, further, insisted that he stood as an independent Candidate in his quest to be elected as Member of Parliament for Lukashya Constituency and did not contravene Article 51 (c) of **the Constitution**.

The Petitioner filed a Reply dated 16<sup>th</sup> September, 2016 wherein she insisted that the 1<sup>st</sup> Respondent did procure the services of his grandfather, Chief Munkonge, who was seen campaigning for the 1<sup>st</sup> Respondent. She also averred that the 1<sup>st</sup> Respondent abused his privileged position as a grandson of the said Chief who threatened voters if they voted for the PF Parliamentary candidate.

The Petitioner insisted that the Chief's actions and the 1<sup>st</sup> Respondent's utterances that the Petitioner had been embezzling funds for the Social Cash Transfer Programme placed him at an advantage, and was tantamount to electoral malpractices and false statements.

The Petitioner maintained that the 1<sup>st</sup> Respondent breached the provisions of the **Electoral Process Act** and is therefore not the duly elected Member of Parliament for Lukashya Constituency. In conclusion, the Petitioner maintained that she is entitled to the reliefs as prayed for in the Petition.

Before the commencement of trial the 2<sup>nd</sup> Respondent by consent of all the parties withdrew from the proceedings. Consequently the 1<sup>st</sup> Respondent will be referred to as the Respondent.

At the hearing of the matter, the Petitioner called ten witnesses.

The Petitioner **Alfreda Chilekwa Kansembe** testified as **PW1**. She told the Court that she had stood as the PF parliamentary candidate in Lukashya Constituency, Kasama against **Mwenya Munkonge** who stood as an independent candidate. She testified that there were so many electoral malpractices that were observed

on the part of the Respondent and contributed to her loss in the said election. PW1 told the Court that Mwenya Munkonge posed as the PF nominated candidate and at all meetings he told the electorate that he was the PF party President Edgar Chagwa Lungu's preferred candidate and not herself. PW1 testified that she was not present at any of the meeting addressed by Mwenya Munkonge. She further, stated that Mwenya Munkonge distributed PF campaign materials at his meetings which included PF labelled chitenge materials, t-shirts, work suits and hoodies purporting that they had been given to him by the Party President.

PW1 stated that on several occasions Mwenya Munkonge appeared on a radio station where he said that he was not a PF candidate but a PF member with his President being Edgar Chagwa Lungu. PW1 further, stated that she had been a member of the PF party for the last ten years, and had never seen Mwenya Munkonge at any of the party activities in the Constituency except for his younger brother, who was an active party member.

PW1 also testified that according to reports she received, Mwenya Munkonge was alleging at several polling stations in Chief Munkonge's Chiefdom, to have told the electorate that she received money from the , " Social Cash Transfer Programme", a Government

programme, administered by, the Ministry of Community Development and Social Welfare which targets the aged and underprivileged in society. That Instead of delivering the money to the intended beneficiaries, Mwenya Munkonge accused the petitioner of misappropriating the said monies and being a thief. It was PW1's further testimony that Mwenya Munkonge procured the services of Chief who is his grandfather to canvass votes for him in Mukanga and Lusenga wards in Lukashya Constituency. Further, that the Chief went to each polling station in the Wards imploring the electorates not to vote for PF and the Party Presidential Candidate, Edgar Chagwa Lungu. It was PW1's testimony that the two polling stations covered twenty one wards.

In cross-examination, PW1 told the Court that as a parliamentary candidate she was busy and engaged in her own campaign and did not attend Mwenya Munkonge's meetings. However she saw him at one of his campaign meetings with his grandfather, sometime in July 2016. She testified that she did not attend the meeting, where Mwenya Munkonge pronounced himself as the PF preferred candidate, but had received reports from her officials. PW1 also stated that she did not personally see Mwenya Munkonge distributing campaign materials at meetings but was

informed by persons who received the same and presented the materials to her. PW1 stated that she did not keep count of the recipients who received materials from Mwenya Munkonge but was told that the materials were distributed at almost every meeting held.

PW1 told the Court that she was announced as the PF parliamentary candidate sometime in May, 2016. Between the end of July and beginning of August, the PF Party Presidential candidate addressed a huge rally in Kasama at the Golf Course where she, together with a Kelvin Sampa, were announced as the preferred PF candidates for Kasama Central and Lukashya constituencies. She also told the court that Lukashya Constituency is very rural and most of her supporters did not attend the meeting due to long distance. PW1 further told the Court that the two wards she had earlier referred to were in Chief Munkonge's chiefdom, although she had not personally seen the Chief campaigning against the PF Party in the twenty-one polling stations except for one, where she found him seated with Mwenya Munkonge and his campaign team. PW1 testified that she did not hear the Chief telling people not to vote for the PF Party and that she had relied on reports from her officials. Further, the reports

were that the electorates were told not to vote for Petitioner as a candidate but for Mwenya Munkonge, as Member of Parliament who was standing as an independent candidate, and not to vote for PW1 and the PF Presidential candidate. PW1 further, stated that Mwenya Munkonge's team had been campaigning for him as Member of Parliament and the PF party Presidential candidate for Presidency, while Chief Munkonge at presidential level was supporting an opposition party in which his nephew is a member.

PW1 testified that she was related to Chief Munkonge through marriage as she was married to his son traditionally. She stated that when she found Chief Munkonge at the meeting, she had gone to hold her own meeting, which coincidentally was at the same venue as Mwenya Munkonge's at Mutale Munkonge Primary School. When she found them, she moved away from the meeting to allow Mwenya Munkonge to conclude his meeting. PW1 also testified that she decided to move her meeting elsewhere and at a place near the grocery stores where there were mango trees. She stated that she actively campaigned in Chief Munkonge's chieftom and Chief Munkonge was not the Respondent's electoral agent. She only discovered that Mwenya Munkonge was a PF member at the time of filing nominations, within the PF party for Parliamentary candidacy.

Further, that Mwenya Munkonge ceased to be a PF member when he stood as an independent candidate. However he, campaigned as if he was still a PF member. She also stated that if Mwenya Munkonge was no longer a PF member he should have written a resignation letter to the Party Secretary General.

In re-examination, PW1 insisted that after Mwenya Munkonge was not adopted by the PF, he did not resign from the party, and there was no written evidence that he resigned from the party. For that reason she could not tell if Mwenya Munkonge was still a PF member by 11<sup>th</sup> August, 2016 or not. She told the court that Mwenya Munkonge posed as a PF member both in speech and conduct. PW1 also stated that the rally in Kasama was huge and it was difficult for her to tell who was in attendance.

**PW2 was Patson Bwalya Chipako.** He told the Court that prior to the elections of 11<sup>th</sup> August, 2016, he was engaged as a foot soldier in PW1's campaign team in Lukashya Constituency. On the day of nominations for Member of Parliament for Lukashya constituency, he received a phone call at Chisanga village from Mwenya Munkonge who he also knew as Kasama Milling. In the conversation that ensued, he told Mwenya Munkonge that he had resigned from the United Party for National Development (UPND)

and intended to join the PF party together with his supporters. Mwenya Munkonge then requested him to hire a Canter vehicle so that he could take his supporters to his office at Kasama Milling, where PF officials had gathered to receive new party members.

PW2 told the Court that he knew Mr. Munkonge because he had lived in Kasama for a long time and had met him at Kasama Milling and at funerals. PW2 testified that he and his supporters went to Kasama Milling and upon arrival, they found a lot of PF officials clad in PF regalia bearing portrait pictures of the PF Party President. Other persons were singing PF songs, whilst raising their fists, These songs include Dununa Reverse, Sela Tubombeko and Lukasa Mubwato. Inside Mr. Munkonge's office, he found Mwenya Munkonge, Lupando Munkonge, Bernard Malama who was the PF Chairperson for Lukashya Constituency, Lameck who was PF Chairperson for Pumabula Ward, Mr. Sonsa the PF Information and Publicity Secretary for Pumabula Ward, Mushika the PF Pumbaula Youth Chairperson who was in the company of his vice Ken. PW2 also testified that there were other PF officials who he did not know. PW2 and his supporters thereafter accompanied Mwenya Munkonge to the Civic Centre where the nominations were being filed. At the Civic Centre, PW2 saw groups of PF cadres, which puzzled him. He

told the court that the response he got from Mr. Munkonge on the two PF groups was that one belonged to him, while the other group belonged to PW1 who was standing on the PF ticket and had used underhand methods to do so. Mwenya Munkonge told PW2 that he was standing on "Lukasa Mubwato", (foot in the boat) which PW2 did not understand as there was just one boat that is the PF. PW2 stated that Mwenya Munkonge told him that he would invite him back to his office where he would explain his campaign strategy.

PW2 told the Court that the petitioner filed her nomination as the PF candidate. He did not accompany Mwenya Munkonge when he entered the Civic Centre office to file his nominations. He saw Mr. Munkonge after he had successfully filed his nomination, and he invited all his supporters for a celebration at his office, where PW2 refused to go. PW2 stated that he refused to go because after he had left United Party for National Development (UPND) he wanted to join the proper PF party so that he could lend support to all PF candidates during the election. PW2 told the Court that Mwenya Munkonge provided PW2 and his supporters K150.00 transport money for their return to Chisanga Village and also gave them another K150.00 for food and drinks. They went back to their homes.

PW2 testified that after two days, he received a call from Mwenya Munkonge who asked him to attend a meeting at his office at Kasama Milling. PW2 recalled that it was on a Saturday and that he was accompanied by Kelly Sampa. At the offices, he and Kelly Sampa found Mwenya Munkonge, Lupando Munkonge, Bernard Malama, Lameck, Nsonsa, Ken, Mushika and others. Mwenya Munkonge told him that they were formulating a campaign strategy and had PF t-shirts, chitenge materials which he showed him. PW2 was given a PF t-shirt bearing the PF Party President's portrait. PW2 stated that he told Mwenya Munkonge that as an independent candidate, he was not supposed to give out PF campaign materials. Mwenya Munkonge's response was that they had been given to him by the PF Party President.

PW2 testified that he declined to take part in Mwenya Munkonge's strategy. He testified that he knew Lupando Munkonge who was the campaign manager for Mwenya Munkonge. Lupando Munkonge told PW2 that if he did not accept Mwenya Munkonge, then he did not like the PF and its President. PW2 insisted that Mwenya Munkonge's intention was to confuse people and that he preferred to be identified as a member of the real PF party. PW2 also stated that he told Mwenya Munkonge that he would report the

matter to PW1. Mwenya munkonge gave PW2 and Ken K20 each as transport money to return to their homes. PW2 testified that thereafter he began to campaign for PW1.

It was PW2's testimony that about three days before the elections Mwenya Munkonge and his campaign team visited Chisanga Village where they held a meeting. PW2 was in attendance and he and the other Village committee members had gathered at the headman's home to discuss Village's development issues. He said Mwenya Munkonge and his campaign team members namely Lupando Munkonge, Bernard Malama, Mushika, Lameck, Sonsa and Ken, were all clad in PF t-shirts except for Mwenya and Lupando Munkonge. He also saw Mwenya Munkonge's vehicles which were playing the PF songs Dununa Reverse, Sela Tubombeko, Ba Lungu Balibomba, and Sonta Epo Wabomba were all playing from the vehicles they were in while their supporters were shouting "pa bwato".

PW2 testified that he told Mwenya Munkonge's team that their supporters were confusing people. He was told to leave since he belonged to PW1's team. He also testified that Mr. Munkonge's vehicles in his convey namely a Canter and Pajero both had posters stuck on them with Mwenya Munkonge's portrait, the Councillor's

portrait and that of PF Party President. After he left, he met a Forum for Democracy and Development (FDD) group led by their branch Chairperson, Ba Shi Junior who told him that they were heading to the place where the PF party was playing the song Dununa Reverse so that they could join PF. PW2 testified that he told them that the meeting was not a PF one but a meeting for an independent candidate. The FDD members did not heed his advice. Later at around 10:00 hours on the same day, he was visited by Ba Shi Junior who was dressed in a PF t-shirt. PW2 stated that he went to the PF provincial office where he found the Provincial Vice Chairperson, Mr. Mwansa and reported the activities of Mwenya Munkonge.

In cross-examination, he testified that he could not recollect when he actually received the call from Mwenya Munkonge but that it was on a Tuesday, in a month he could not remember, but a day before nomination. He did not recall when he left the UPND.

PW2 told the Court that he had stored Mwenya Munkonge's number on his mobile phone. When asked to give out the number in Court he claimed that his mobile phone had discharged. He also told the Court that he had never interacted with Mwenya Munkonge prior to the nomination day except through his mobile phone. He

had saved the contact number only after he had called him. After being prompted by the Respondent's advocates, he recalled that the nomination day for Members Parliament was on Tuesday 31<sup>st</sup> May, 2016.

PW2 testified that he could not estimate the distance from Chisanga Village to Kasama Milling. He stated that over one hundred supporters had gathered at his home on that day. Further, the Canter he had organized was small and could not carry all his supporters and some remained at his home. PW2 told the Court that over ninety supporters accompanied him in the Canter to Kasama Milling as the Canter was big enough to accommodate all of them. PW2 stated that their passage to and from Kasama Milling cost K150.00 and that the money was given to the driver by Mwenya Musenge. PW2 also stated that the Canter reached Kasama Milling in the early afternoon, between 12:00 and 13:00 hrs.

PW2 testified that Lameck stays with him in the Village but is not his neighbour and that he had known him for over three years, even though he did not know his surname.

PW2 testified that PF supporters were the ones who sang the song *dununa reverse* and did not know when the song was released even after being told by the Respondent's advocates, that released

was on 19<sup>th</sup> June, 2016 and; first played at a rally addressed by the PF Party President in Chongwe.

PW2 could not recall the time his group spent at Kasama Milling nor when they left for the Civic Centre to accompany Mr. Munkonge for the filing of his nomination. PW2 stated that on nomination day he did not have an opportunity to view the electoral symbol of Mwenya Munkonge until after the nomination when he was told that it was a "foot in a boat". PW2 testified that he only saw the electoral symbol after the campaign posters had been mounted on the walls and motor vehicles. He insisted that his knowledge of Mr. Munkonge's official agents was based on information given by him, and that they were Lupando Munkonge, Bernard Malama, and Lameck. Further, that Lupando Munkonge confirmed who the election agents were.

PW2 told the Court that he was given a t-shirt by Lupando Munkonge on a Tuesday and Mwenya Munkonge was present. Further, that party materials could only be given to party members and those that have been recruited. He also stated that if a person was not a PF member he could not be given a PF t-shirt, as the party insisted on proof of membership and that PF materials were given to branch officials who distributed them.

PW2 stated that he did not know the PF policy on distribution of PF materials, however Lupando Munkonge and Bernard Malama's action in distributing them to non-members was wrong. Further, they were giving materials to the independent candidate's supporters. He told the court that his interpretation of the PF rules was based on his experience of the UPND policy and that he had not seen the PF policy document on distribution of campaign materials.

PW2 testified that after a week, he went back to Mwenya Munkonge's office out of respect and to receive an explanation on what a "foot in a boat" meant. At Mr. Munkonge's office he found the team that was there on nomination day. PW2 stated that he did not offer himself as a foot soldier to Mr. Munkonge and he is not one who skips from party to party for material gain. He told the Court that the two Munkonges were not dressed in PF regalia but the people in their company were.

In re-examination, PW2 stated that the song Dununa Reverse is a PF song and was sang by the PF Party President on television at rallies. Further, that the PF Party President is mentioned in the song. He testified that he refused to go back to Kasama Milling offices on the nomination day, because he did not know what "foot

in the boat” meant. PW2 further, stated that he agreed to meet Mr. Munkonge on a Saturday because there would be no noise compared to the nomination day. He also stated that before he joined UPND he was a PF member and had gone back to PF.

**Kellyson Sampa** testified as **PW3**. He told the Court that he lives in Chisanga Village in Pumabula Ward and is a member of the PF Party. He was a foot soldier and a polling agent in the last general elections on behalf of PW1. He also told the Court that he knew PW2 who lived with him in the same Village and was also a politician. PW3 stated that he joined the PF Party just after the nominations, and after he had defected from the UPND, He could not remember the date of his defection but had left the UPND party as an individual. He testified that on Saturday, a week after the nominations, he escorted Mr. Chipako to Kasama Milling offices where they met Mwenya Munkonge and Lupando Munkonge. He had never met these gentlemen prior to that day. Whilst at Kasama Milling Lupando Munkonge explained to them that they were formulating a campaign strategy and was grateful for their attendance. The strategy was to use the PF structures in Lukashya Constituency for Mwenya Munkonge’s campaign as all Ward

Councilors had expressed their loyalty to him had all been adopted to stand on the PF ticket.

PW3 told the Court that the people who were in the meeting were Bernard Malama, PF Lukashya Constituency Chairman, Lameck Chisanga, Ward Chairperson for Pamabula Ward, Mushika the team leader for youths in Lukashya Constituency, Mr. Kennedy and Mr. Nsonsa. PW3 stated that Lupando Munkonge introduced himself as the campaign manager for Mwenya Munkonge. He testified that Lupando Munkonge asked him and Mr. Chipako to join their team, in the case of Mr. Chipako with the adult group and PW3 with the youths. Lupando Munkonge further told them that he was supposed to have stood as the PF Member of Parliament candidate but had instead paved way for his brother Mwenya Munkonge. Further, that his brother was the PF party President's choice and not PW1, who had used underhand methods to be adopted on the PF ticket. He also stated that as a result Mwenya Munkonge elected to stand as an independent candidate upon the PF party President's instruction.

PW3 testified that when Lupando Munkonge was asked by Mr. Chipako if they had campaign materials, Lupando Munkonge told them responded that they would make use of PF t-shirts and

chitenge materials bearing President Lungu's portrait. Further, that the independent candidate did not have printed materials. PW3 told the Court that Lupando Munkonge gave Mushika K60.00 to share with his friends, while PW3 and Mr. Chipako were given K40.00 by Mwenya Munkonge to share. PW3 testified that he and Mr. Chipako did not join the team.

PW3 told the Court that in the first week of July, 2016 he went to Mumbi Mfumu Village to visit his mother on a Sunday He saw a Canter vehicle which had the portrait pictures of Mwenya Munkonge affixed on it and PF chitenge material tied to it. The passengers on the Canter were clad in PF regalia and the song Sonta Epo Wabomba was being played from the Canter. He testified that the vehicle went in the direction of Mumbi Mfumu Primary School and was followed by a Prado vehicle which turned at the residence of Mumbi Nfumu, where he was staying. PW3 stated that on the Prado vehicle there was affixed portrait posters of Mwenya Munkonge while the vehicle windows had portrait posters of the PF Party President stuck on them. He told the Court that the people who alighted from the vehicle were Mwenya Munkonge, Lupando Munkonge, Bernard Malama, and David Changa. PW3 told the Court that the said people met the Chieftainess where Lupando

Munkonge explained that the team would be holding a rally after the Church service.

PW3 testified that the venue of the rally was arranged at the grounds of Mumbi Mfumu Primary School. Lupando Munkonge introduced Mwenya Munkonge to the Chieftainess as the PF candidate and his elder brother. Further he told the rally that they were PF members and would not support PW1 who had used trickery to procure her adoption, as well as the influence of the Women's Lobby Group, whose choice was for a female candidate. He also stated that PW1 was not the PF Party President's choice but that Mwenya Munkonge was and for that reason Mwenya Munkonge and his team were using PF campaign materials. According to PW3 Lupando Munkonge asked Bernard Malama to give Chieftainess Mumbi Mfumu a t-shirt and chitenge while and PW3 was given a work suit labelled "ECL 2016", which he accepted.

PW3 testified that Mwenya Munkonge then confirmed Lupando Munkonge's sentiments and told the Chieftainess that he would complete the development projects in Lukashya Constituency. The entourage departed the Chieftainess's palace between 12:00 and 13:00 hours and later held a meeting at Mumbi

Mfumumu school in the afternoon between 12 and 13hrs the entourage left.

PW3 testified that at the PF campaign meeting at Mumbi Mfumumu school Bernard Malama introduced the members of the team and the positions they held to the people. At the campaign meeting PW3 testified that Lupando Munkonge, the campaign manager, chanted the PF slogan "pa bwato" whereat the crowd responded "pa maka". He also told the meeting that his team had support from the entire PF Lukashya Constituency structures and the support of the PF Party President. Further, that PW1 had not done any work in the constituency and that the PF Party President did not want to work with her. Furthermore that she had tricked her way into adoption by the PF Party. PW3 stated that Mwenya Munkonge then told the crowd that he was President Lungu's child and the one he had chosen. Mwenya Munkonge also stated that a lot of development works had not been completed in the Constituency including the bridge, even when money was released sometime back and that he did not know where the funds had been taken. According to PW3 the crowd retaliated that PW1 had eaten the money. PW3 also stated that Mr. Malama urged the meeting to chant the slogan "foot in a boat", which they did.

PW3 testified that the campaign materials were distributed to the gathering by Lameck Chisanga, Kenny and Mushika. PW3 told the Court that at the meeting, Bernard Malama was clad in a PF chitenge shirt, Lameck Chisanga wore a PF hat labelled "Sela Tubombeko" and a t-shirt belonging to the independent candidate. Ken wore a full PF work suit bearing the PF Party President's portrait in the front, with words "ECL 2016" written at the back. Mwenya Munkonge wore a striped t-shirt while Lupando Munkonge wore a checked shirt.

In cross-examination, PW3 stated that he had known Mr. Chipako for close to eight years as they live in the same Village and that he also knew Lameck Chisanga who lives with him in the same Village. He stated that he did not leave UPND at the same time with the said two and they are not neighbours in the Village. He could not recall when he joined the PF but it was after the filling of nominations as he was still an active UPND member on nomination day. He testified that he could not remember the date of filing the nomination but was present at the Civic Centre. After being prompted by the Respondent's advocates, he recalled that nomination day was on 21<sup>st</sup> May, 2016. He stated that Mr. Chipako approached him on an unknown date but on a Saturday to

accompany him to Kasama Milling for a meeting. At that time he had resigned from the UPND on the Thursday after the day of nomination. PW3 stated that Mr. Chipako did not disclose the purpose of the meeting but had a gut feeling that Mr. Munkonge wanted him to work in his campaign team.

PW3 testified that he and Mr. Chipako walked to Mr. Munkonge's office which was quite far, and that he could not estimate the time taken. However, they went there in the morning. PW3 stated that he had not met the Munkonge brothers but knew Lupando Munkonge, whom he formally met on that Saturday. At the offices he met Bernard Malama, the PF Chairman for Lukashya Constituency, whom he knew him from his political life. Also in attendance was Mushika the youth group leader, Ken a youth in Mr. Munkonge's group, and Lameck Chisanga who is PF Chairman for Pumaluba Ward where PW3 lives. PW3 stated that there was a Mr. Nsonsa at the meeting who was introduced as a member of the campaign team and whom he met for the first time. PW3 stated that he did not know if Bernard Malama, Mushika, Kennedy, Nsonsa, Lameck were officials recognized by the Electoral Commission of Zambia as Mwenya Munkonge's agents. He also testified that he and Chipako were given t-shirts by Lupando Munkonge, while

Mwenya Munkonge gave him and Chipako K20.00 notes each for transport money to return to Chisanga Village.

PW3 told the Court that the Chieftainess Mumbi Mfumu was his mother and that he had gone to visit her at the palace. He also stated that Maria, his elder sister, was not at the meeting held at the palace, but that the team met the Chieftainess. He stated that he could not recall the license registration number or colour of the Toyota Land cruiser Prado, which came to the palace but that it was covered with portrait posters of the PF Party President and posters of Mwenya Munkonge. He also told the Court that he did not pay attention to the labels on the posters and did not see the driver of the vehicle. PW3 testified that he knew Mumbi Mfumu Polling Station but did not vote from there. He stated that he was aware of the bridge project in Mumbi Mfumu and did not know if the team met his brother and sister. He also stated that he did not know if the team failed to see the Chieftainess because they had not paid homage. He did not know if it was tradition to pay homage to a Chief. PW3 explained that he only knew that Mwenya Munkonge and his team planned to have a gathering after meeting with his mother.

When referred to the meeting at Kasama Milling, PW3 stated that he just listened to the strategy but did not agree with it, and did not convey his objection. He also stated that Mr. Chipako spoke for himself and he did not discuss the strategy with his mother or anyone else. PW3 stated that he accepted the PF materials given to him. He recalled that the Canter was white in colour but he did not note its registration number. He could not tell if the people in the Canter were Mwenya Munkonge's official electoral agents.

In re-examination, PW3 clarified that he knew Lupando Munkonge from a distance but met Mwenya Munkonge for the first time at the Saturday meeting at Kasama Milling. He stated that he did not know everyone in the Village where he resides. Maria, his sister, was not present at the meeting and she does not live at the palace. Further, during the campaign period he only visited the palace twice and saw the Munkonge brothers only once at the palace. In addition that he did not know if the Munkonge brothers went back to the palace without his knowledge.

PW3 also clarified that his brother does not live at the palace. He testified that the same entourage that visited the palace spoke at the rally. Since then he had never been in contact with any of the team members. He further stated that at the Chieftainess' palace at

Mumbi Mfumu the team gave his mother a chitenge material and a t-shirt and that he was only given a work suit, which he accepted.

**PW4** was **Amos Bwalya** who testified that on a Wednesday at 10:00 hrs a week before elections he was selling maize at a satellite depot in Kasakula Village. He saw two vehicles, a Prado white in colour and a Canter whose number plates he did not take note of. The Prado vehicle had speakers mounted on it where it was being announced to all subjects of Kasakula Village to attend a meeting which would be addressed by the Member of Parliament. Following that announcement PW4 went to the venue of the meeting at Kabila turn-off at 14:00 hrs. At the venue he saw people who alighted from a Prado and lined up in front of the gathering. Their names were Mwenya Munkonge, Bernard Malama and Lupando Munkonge. He testified that out of the three he knew Lupando Munkonge and Bernard Malama. PW4 stated that from the Canter three people alighted, of whom he knew, Moses Muma and did not know the rest. According to PW4 all the visitors at the meeting were introduced by Mr. Malama. Lupando Munkonge was introduced as Mwenya Munkonge's campaign manager, whilst Mwenya Munkonge was introduced as the Member of Parliament who had been given to the people of Lukashya by the PF Party President and not PW1.

Muma Moses introduced himself as the PF Ward Chairperson for Mukanga Ward and confirmed that Mwenya Munkonge was the preferred PF candidate. PW4 testified that while in the meeting, Lupando Munkonge asked the people if they received money meant for poor people. Their response was that they never received the money. PW4 testified that Lupando Munkonge then accused PW1 of receiving the money and using it to build her own houses and sharing the remainder with her loyalists. PW4 stated that the meeting was told that Mwenya Munkonge had been brought so that the elders in Kasakula Village could be able to receive their money and to build houses as opposed to PW1 who was just stealing the money. PW4 also stated that Mwenya Munkonge spoke at the meeting where he just advertised himself. PW4 further stated that Kasakula Village is in Mukanga Ward under Chief Munkonge.

In cross-examination, PW4 testified that he could not remember the date when he was at the satellite depot and whether the Prado vehicle was white in colour. He insisted that he saw the people who were in the Prado vehicle when it passed at the satellite depot. He confirmed that he knew Lupando Munkonge because he lives in Kasama although he is not his neighbour. He also knew Mr. Bernard Malama the PF Chairperson for Lukashya Constituency.

He told the Court that he was the Chairperson for youths in Lukashya Ward and was chosen by a lot of people. He also knew the PF parliamentary candidate for Lukashya Constituency, PW1, because she had been adopted by the PF and the party announcement, on radio that PW1 was the PF Parliamentary candidate. PW4 stated that Lupando Munkonge introduced Mwenya Munkonge as the PF Party President's preferred candidate but did not believe his words. He could not estimate the number of persons that attended the meeting at Kasakula Village which is under Kasakula Polling Station but he stated that there was a large turnout.

PW4 told the Court that he voted at Kasakula Polling Station and that the person who won the election at that polling station was Mwenya Munkonge. He also told the Court that he had not worked closely with PW1 in her campaigns. Further, that the people who were disappointed with PW1 and her stealing were at the meeting. He could not count them as the complaints were echoed all around the meeting. PW4 stated that he was not happy with Mwenya Munkonge's election but not upset that PF lost He was just annoyed that PW1 was accused of stealing money meant for vulnerable

persons, when the said same money was not available in Kasama District.

The witness was not re examined.

**George Mubanga** testified as **PW5**. He testified that his Village is in Mukanga Ward. That on a date unknown there was a meeting in August, 2016, in his Village and from his home he could hear the sound of the song Dununa Reverse being played. He left home to follow the direction of the music. On the way he saw two vehicles, a Canter white in colour with a musical system, followed by a Pajero. According to PW5 the vehicles turned at a place where the borehole is located in Namayakuba Village and some people alighted from the Canter and started sticking posters. He recognized some and not others. Those he recognized were Moses Mumba and Bwalya Mumba, while those who came of the Pajero were Lupando Munkonge and three others. The entourage went to where the people had gathered. He testified that the entourage was introduced to the meeting by PF Ward Chairperson for Mukanga Ward. That Bernard Malama introduced himself as PF Constituency Chairperson Lukashya and then he introduced Lupando Munkonge. Mr. Misheck introduced himself as the PF Ward Chairperson for Chimba Ward. Patrick Kafula introduced himself as PF Ward

Chairperson for Lualuo Ward and that Lameck Chisanga introduced himself as PF Chairperson for Pamabula Ward. PW5 told the Court that Mwenya Munkonge was introduced as the candidate for Lukashya Constituency on the PF ticket by Bernard Malama.

PW5 testified that he knew of the meeting because it had been announced by Lupando Munkonge a day before in the Village after a rally that had been addressed by PW1. He stated that Lupando Munkonge made the announcement from a Pajero vehicle whose colour and license registration number, he could not remember. PW5 did not see the other passengers in the vehicle except for Lupando Munkonge. He testified that at the meeting Lupando Munkonge stated that Mwenya Munkonge would stand as Member of Parliament in Lukashya Constituency as he was the PF Party President's preferred candidate. Further, that he would bring development to the area in the form of roads, a health center and school.

In cross-examination, PW5 insisted that he knew Lupando Munkonge because he had wanted to stand as a parliamentary candidate in the 2011 election. That he personally knew Bernard Malama way before the rally as the PF Constituency Chairman. PW5 was a PF supporter and held the position of Youth Treasurer

for Mukanga Ward. Further, that he cast his vote at Kanyanta Polling Station in Mukanga Ward. Also that the distance from the venue of the meeting to his home was twelve meters. PW5 testified that Mwenya Munkonge only greeted the people at the meeting but did not address them. Other than the PF members including himself, he was unable to estimate the people who attended the rally, and did not know if UPND or FDD members were in attendance. He also testified that he knew that Mwenya Munkonge was standing as an independent candidate and that his electoral symbol was a "foot in a boat", although Lupando Munkonge told the meeting that he was standing as the PF candidate.

PW5 stated he never attended another rally organized by Mwenya Munkonge and his team. He only came to know Lameck Chisanga on the day of the rally. Further, that he had never seen Mwenya Munkonge distributing campaign flyers nor was he aware that Mwenya Munkonge's team had distributed flyers. He also did not know the official campaign agents for Mwenya Munkonge. PW5 added that Mwenya Munkonge was PF candidate because the people in his team said so.

In re-examination, PW5 told the Court that he attended the meeting but left the rally for ten minutes to drink water. Further,

Mwenya Munkonge's team did not use a public announcement system and that Bernard Malama told the crowd that Mwenya Munkonge and his team were PF members.

**Willbroad Silolani** testified as **PW6**. He told the Court that he lives in Kasonde Chisuna Village which is in Lualuo Ward. In the second week of June, on a Sunday, he was at St. Johns' Catholic Centre at the Catholic Church at 09.30 hours with other Christians. He testified that he saw Bernard Malama, Misheck, Patrick Kafula, Lupando Munkonge and Mwenya Munkonge who came to the said Church. They were accompanied by two other young men whose names he did not know. Bernard Malama gathered some of the congregants outside the church building for a meeting where he introduced the visitors and stated that he was the PF Chairperson for Lukashya Constituency. The visitors were Mwenya Munkonge, Lupando Munkonge and Patrick Kafula, PF Chairperson Lualuo Ward. The other visitors did not state their official positions. Bernard Malama then introduced Mwenya Munkonge as the PF candidate and stated that the entire entourage comprised PF members who had positions in the PF party.

PW6 stated that Mwenya Munkonge told the gathering that he was a real PF member, who had been sent by the PF Party President

to stand as MP, because the party knew that PW1 would lose the election. Thereafter Mwenya Munkonge told Bernard Malama to get 10 t-shirts and 10 chitenge materials from the canter vehicle, which were given to the youth and to the elderly respectively by Mwenya Munkonge. According to PW6 the materials were printed with a portrait of the PF Party President and the words "Sela Tubombeko". PW6 told the Court that he was a PF member and held the position of Youth Secretary in Lukashya Constituency. He was also the campaign manager for PW1 in Lualuo Ward. After distributing the chitenge materials Mwenya Munkonge assured the gathering that he would distribute more materials once the PF Party President sent him a consignment. PW6 told the Court that Mwenya Munkonge and his team then left the Church premises in their vehicles. One of his vehicles a Prado bore portrait pictures of Mwenya Munkonge as well as white Canter, which was playing the song entitled the Canter was entitled "Lekeni Ba Lungu Batwalile".

In cross-examination, PW6 stated that he had been with the PF party for 11 years and that he was well aware of the PF campaign posters and materials. Further, Mwenya Munkonge's vehicle had his portrait pictures stuck on it. PW6 stated that he had no authority to oppose Mwenya Munkonge's claim that he was

a PF member. Further, that he did not receive any campaign materials but saw the same being given out. Mwenya Munkonge was not wearing PF regalia but that he said that he was PF. PW6 told the Court that he was not happy that PW1 had lost the elections after putting in a lot of work and that whenever he heard PF campaign songs in the markets or shops he would associate the people playing that music with the PF Party.

PW6 did not count the number of people who were in attendance at the Church meeting. He did not know if everyone who attended church also attended the meeting. He discovered that Mwenya Munkonge was standing as an independent parliamentary candidate after he saw his posters and after the meeting he held at the church. PW6 stated that he did not know who the other parliamentary candidates in the election were, except for PW1 who was the PF candidate in Lukashya Constituency. He also stated that he voted at Kasonde Chisuna Polling Station.

In re-examination, PW6 insisted that the posters on both vehicles for Mwenya Munkonge bore his image. His coming to give evidence in Court was not out of his bitterness for PW1's loss, but because Mwenya Munkonge lied that he was a PF member who campaigned on PF's resources.

**PW7** was **Rayton Mubanga**. He testified that on 31<sup>st</sup> July, 2016, he was expecting PW1 at his Village, where she was to address a meeting. As her foot soldier he called people to attend the meeting using a megaphone. He then gathered people at Kapoko Sanja School Polling Station. He went back home and whilst there he heard the song playing Dununa Reverse playing. He left home on the assumption that PW1 and other PF members had arrived. PW7 testified that Kapoko Sanja is in Chimba Ward and that he did not know what time the people gathered, but that it was after Church sometime in the afternoon.

PW7 stated that after hearing the music, he rushed to the school where the meeting was being held and as he approached, he heard the song Mulenga Sata a PF campaign song, which also had the PF Party President's name mentioned in it playing. When He reached the school, he saw the Chumba Ward Chairman, Mr. Misheck, alighting from the vehicle and was followed by the Constituency Chairman Mr. Malama, Lupando Munkonge and Mwenya Munkonge. PW7 stated he did not know the rest. Mr. Misheck and Mr. Malama and the others introduced themselves. Later Mwenya Munkonge addressed the crowd on the purpose of their visit. PW7 testified that Mwenya Munkonge told the gathering

that he had come to Village as a PF member together with the other PF members to ask for their votes. He further stated, that his electoral symbol of a “foot in a boat” did not interfere with his membership in PF, as it was meant to step on PW1, and to take her out of the boat, so that she could return to the “Liberal Party”. PW7 testified that Mwenya Munkonge stated that the PF Party President knew him as a PF member. He then knelt down to ask for votes from the people of Kapoko Sanja Village. PW7 stated that Mwenya Munkonge and Mr. Malama had more t-shirts with the portrait of PF Party President as, well as the other members in the entourage.

In cross-examination, PW7 stated that PW1 had told him that she would hold a meeting on 31<sup>st</sup> July, 2016. He did not wait for PW1 because someone else addressed the meeting. He, however called PW1 to tell her that the wrong people appeared at her meeting. PW7's mission as a foot soldier was to campaign and organize campaigns for PW1 and not to challenge Mwenya Munkonge on not being a PF member. He also stated that he left the meeting because he did not want to rile Mwenya Munkonge's team by questioning their presence.

that the PF Party President was well aware. He also stated that he met Mwenya Munkonge for the first and only time at the meeting after he had been introduced.

In re-examination PW7, told the Court that he left the meeting because PW1 did not appear but other unknown persons who were using PF slogans were there. Because he was working for PW,1 and he did not like the language used at the meeting, and decided to leave. PW7 stated that he was bitter with the elections because PW1 who he campaigned for did not win. The issue of being rewarded with a post was entirely up to PW1.

**Ernest Mulenga** testified as **PW8**. He stated that he lives in Luyeya Village, which is in Chiba Ward. On 4<sup>th</sup> August, 2016 at about 08.00 hours he heard a vehicle passing, playing the song Dununa Reverse. He saw some young men and women wearing PF t-shirts and work suits in the vehicle making announcements, and inviting people go to Chiba High Life Bar to listen to the Member of Parliament who had been sent by the President. At around 09:00 hours, PW6 testified that he went to the venue of the meeting with Ian Mweemba and waited to see the Member of Parliament. A grey Pajero arrived at the venue carrying Mwenya Munkonge. PW8 asked

Mwenya Munkonge's cadres Samuel Longa and Chishimba Nkoma if he was a PF Member of Parliament as he knew him to be an independent candidate. PW8 testified that he was overheard by Mr. Malama the PF Constituency Chairman. Who told him that he was making noise. PW8 told the Court that he told the said cadres that Mwenya Munkonge was an independent candidate and yet was using the PF campaign materials and symbol. PW8 also told the Court that he was a member of the PF Party and held the position of Youth Chairperson Chiba Ward, Lukashya Constituency. PW8 said that he left the meeting venue when Mr. Malama told Samuel Longa and Chishimba Nkoma to beat him up. They chased him with stones but he ran away.

In cross-examination, PW8 testified that he was born on 4<sup>th</sup> May, 1990, and his home is in Luyeye Village. He did not see the person who was making the announcements using the public address system, as he was inside the vehicle. PW8 stated that he knew Mwenya Munkonge's people in the vehicle were cadres because they always used to pass by his Village, though they did not live there. He stated that he only made reference to Pajero and not a Canter. Although he was present at the rally, he did not

listen to the speeches as he was threatened did left. PW8 stated that he did not report his attack by the PF cadres, which was ordered by Bernard Malama to the Police. PW8 also stated he was involved in campaigning for PW1 and wanted her to win the elections. He was disappointed that PW1 did not do well in the election and that was his reason for coming to Court. He stated that Luyeye Polling Station was in Luyeye Village. Further, that he was not part of Patson Chipako's team was but from a different campaign team.

In re-examination, PW8 told the Court that he did not want a Member of Parliament who belonged to a different party, because he would not help the Villagers. Further, that an independent candidate does not have a father or a leader.

**PW9** was **Most Mwamba** a Senior Welfare Officer (Social Cash Transfer Department) at the Ministry of Community Development and Social Welfare. He told the Court that he been managing the Social Cash Transfer Programme as a Data Specialist for the past three years. The purpose of the programme was to reduce extreme poverty in poor households. PW9 told the Court that the programme started in 2003 in Kalomo and had expanded to 78 districts in 2016, spreading across all the ten provinces of Zambia.

He testified that the selection of districts for the programme is based on the poverty levels of a particular district. However, apart from the poverty criteria some districts in urban areas such as Lusaka had been included.

PW9 told the Court that the programme did not cover Kasama District and that in Northern Province not all districts were implementing the Social Cash Transfer Programme, apart from Chilubi District, Luwingu District, Mporokoso District, Kaputa District, Nsama District, Mbala District, Mpulungu District and Mungwi District. When referred to **pages 8 – 32** of the Petitioner's bundle, PW9 told the Court that a list of districts in Northern Province covered by the programme was stated. He also told the Court that he had generated the data on those pages as he was responsible for managing data in the programme. He testified that Lukashya Constituency was not in the data report because it was not one of the beneficiaries of the Social Cash Transfer Programme. Further, that the report in the Petitioner's Bundle was produced by the Social Cash Transfer Programme.

Kasama, where he works, and that he was a member of the PF Party. PW10 told the Court that campaigns for a candidate could only commence after the Central Committee had chosen a candidate. The Central Committee reserved the right to choose or not to choose a candidate, and did not proffer reasons for rejecting a candidate. PW10 told the Court that the party organs which are the constituencies, districts and provinces, processed names for contenders and recommendations. This was done for Lukashya Constituency, but PW10 could not recall the exact date that he received the application from PW1 and Mwenya Munkonge. He estimated that it could have been three months before the election. PW10 testified that at the time of filling nominations, Mwenya Munkonge was still a member of the PF Party and was very helpful to the party. PW10 also told the Court that Mwenya Munkonge was still a member of the PF Party as far as he was concerned and he had not written him a resignation letter from the party.

PW10 further, told the Court that during campaigns he provided materials such as posters, banners, bunting (flags) and money to PF candidates. He did not provide PF campaign materials to any other person. Further, he campaigned for PW1 who was the

only person that was allowed to use the PF campaign symbol, name and materials as the adopted candidate. PW10 added that it was possible that a person could bypass his office by going to the office of Party Secretary-General on resignation. In this case, the Secretary General was not informed of any resignations. He also stated the he was a member of the Central Committee.

In cross-examination, PW10 testified that the PF Party did not have a membership register or party cards. The Party estimated its membership from previous elections results by the Electoral Commission of Zambia (ECZ) in 2011. He told the Court that the ECZ does not keep the register of the membership of the Party but the Party's assumption was that the number of persons, who cast their votes for the PF, in an election, were all party members. PW10 added that there was information at Branch level of the members in the PF, which was passed on to his office. Further, the branches of the PF had registers of members including people who voluntarily went to the Branch. PW10 stated that he did not know the number of PF branches in Northern Province, thus the extra reliance on ECZ results. He conceded that it was possible for a Zambia citizen

to vote for the PF, without being a member. Further, that the ECZ records did not represent the party's true membership numbers.

PW10 confirmed that there was no procedure for joining the PF but there was a procedure on resignation which was not codified. He testified that the resignation from the Party had developed from custom or practice and that most people who resigned from the Party went to the media to proclaim their resignation. PW10 reaffirmed that there were no formal procedures for joining or resigning from the PF, and as such anyone could join or resign. PW10 did not know when Mwenya Munkonge joined the PF but was deemed to have left the Party when he defied its instructions and stood as an independent candidate. PW10 told the Court that Mwenya Munkonge stood as an independent candidate with his own electoral symbol that was accepted by ECZ. Further, that Mwenya Munkonge was using PF apparel, which was not given to him but could be readily bought on the market. According to PW10, a person did not need identification to buy the apparel, which was available to all and sundry. PW10 was shocked at the suggestion by PW1 that Mwenya Munkonge was not a PF member, when the Munkonge family whom he knew very well was a

benefactor of the Party. He stated that PW1's views that Mwenya Munkonge was not a member of the PF were slightly wrong because he knew Mwenya and his brother Lupando were very helpful to the Party. This explained the reason why Mwenya Munkonge had applied to stand as a Member of Parliament on the PF ticket though he was not adopted. He testified that he saw Mwenya Munkonge using PF apparel but did not lodge a complaint with ECZ.

In re-examination, PW10 stated that resignation from the Party was an individual decision and was done in many ways with some people going to stand on anthills, while others wrote to the Party and yet others would proclaim their resignation in the media. He stated that Mwenya Munkonge never made a pronouncement that he had resigned because if he had left the Party he would not have been considered for adoption.

The Respondent called four witnesses, though RW3 was withdrawn during the hearing.

**RW1** was **Mwenya Clement Munkonge**. He testified that in his tradition, thrones are inherited by different people and when a person becomes Chief, he also inherits the entire family. In this instance, the current Chief Munkonge, became Chief Munkonge in

2015. He also stated that when his biological grandfather, Chilekwa Mwamba, died in 1992, there were a number of other Chief Munkonge's and on accession of each one of them becoming Chief Munkonge, they would become his grandfathers. That was how the current Chief Munkonge is his grandfather. RW1 stated that before Chief Munkonge was appointed he was his cousin and his name is Musenga Mwamba and was now RW1's grandfather by virtue of his office. He told the Court that this tradition in the Bemba ethnic grouping is called **Ukupyana** which translates to succession. RW1 testified that the Petitioner's husband, Major Gilbert Mwamba, is also a son of Chief Munkonge using similar logic.

RW1 further, testified that he could not recruit Chief Munkonge to campaign for him or to represent him in any form or manner. He was not in a position to influence him because in their family structure, he is too junior to give such instructions. That he and his campaign team went on a campaign trail, which took RW1 into Wards, which fall under Chief Munkonge's area. namely Mukanga and Lusenga Wards. RW1 also told the Court that on one occasion, on a date he could not remember, he found Chief

Munkonge at a place where he was about to start a meeting. When Chief Munkonge saw them he allowed them to approach him and they told him that they wanted to have a campaign meeting. That Chief Munkonge then told them that he was going to meet his subjects the following day. He was just greeting people and allowed them to go ahead with their meeting and then left. RW1 testified that as they were holding their meeting a vehicle passed them and went to the house where Chief Munkonge was residing. RW1 was later informed that the PW1 was in the vehicle and had she had gone to see the Chief. They continued with their meeting and when they finished, they departed.

RW1 told the Court that after having sat through the entire Court session he had not heard anything attributed to him on the allegations with regard to Kasakula Polling Station. He categorically stated that he did not utter the words contained in the Petition. He also stated that when the witness from Kasakula came, his understanding was that the claim was specifically against him, but that the witness only referred to other people and not him. He also told the Court that he did not hear any of his campaign team members call PW1 a thief, and that his candidacy evolved from a

situation that several members of the Lukashya community approached him to consider standing as a Member of Parliament for Lukashya Constituency. They felt that the candidate who at that time was being considered to be the front runner for the PF Party candidacy, PW1, was not the best candidate for the seat.

The community suggested that even though he was not a member of PF, they asked him to file an application for Member of Parliament. RW1 accordingly applied so that he could offer his services to the PF as a Parliamentary Candidate for Lukashya Constituency. RW1 told the Court that he had lived in Kasama for the last three years and that he had been going there all his life. According to RW1 he had seen in places like the Eastern Province where Movement for Multiparty Democracy (MMD) members had stood on PF Parliamentary tickets without resigning from the MMD.

RW1 considered himself a PF sympathiser and he made contributions to the PF and civic or religious organisations such as the United Church of Zambia despite being a Catholic, over many years. That as a PF sympathiser RW1 felt that the best way for development to happen in his Constituency was to contribute to the PF. RW1 testified that despite submitting his application to the PF

Secretariat in Lusaka, he had not received a response and that it was the community that approached him and suggested that he stands as an independent candidate for the Lukashya Constituency seat.

RW1 testified that he had never been an official member of the PF and that to date he had never attended any PF meeting or rally. When he was initially approached to stand as an independent candidate he was hesitant because he was aware it would require great resources. After consulting his family he decided to stand as an independent candidate.

RW1 testified that he is aware of the PF symbol which is a boat and that during his campaign his electoral symbol was a foot. RW1 produced a flyer and told the Court that the flyer showed his electoral symbol. On top, the flyer had the words "***Umutima ukonka ico utemenwe***" meaning "the heart will only follow what it likes". Beneath that sentence, there was a photograph of RW1 on the left side followed by his name and his electoral symbol was the foot. RW1 stated that his objective was to choose an electoral symbol which would not cause confusion to the voters. Thus, his symbol was a foot while the Petitioner's was a boat. He pointed out

the word “independent” next to the symbol, followed by the words “MP Lukashya” and thereafter a large bold **X**. Underneath those words, the date of the election, 11<sup>th</sup> August, 2016 and the words “***Fwe bena Lukashya independent eo tulesala***” meaning “we the people of Lusakya, independent is the one we are going to vote for” were written.

RW1 stated that he did not use or distribute any PF campaign materials. However, in Kasama District specifically, PF materials could be acquired from the market and that in the rural setup, t-shirt and chitenges are considered clothing and have a resale value and one could collect such apparel for resale. According to RW1, during certain periods when the PF Party President visited Kasama, t-shirts and chitenges would be thrown out of moving vehicles indiscriminately. He also stated that it was also the case when Mr. Geoffrey Bwalya Mwamba or Mr Hakainde Hichilema of UPND visited Kasama. They too would also throw out UPND material indiscriminately. Therefore, the availability of the campaign material to the general public was not within his control. RW1 stated that he had his own campaign materials, which were very

distinct from all the political party participants in Lukashya Constituency.

RW1 told the Court that during the campaign he had a Toyota Dyna, which played music from various Zambian musicians. Also a number of local artists from Kasama sang songs for him and Dununa Reverse is one of the many songs that could have been sung during the campaign period. He testified that on more than one occasion his meetings would take him to places with bars nearby and that the song Dununa Reverse would be played in the bar by the owners. RW1 stated that he was aware that Dununa Reverse was sung by different Zambian artists but notably J.K, and that Dununa Reverse was a public song and not a PF song. RW1 testified that the symbol for the PF is a boat. He testified that Dununa Reverse is not the official song and symbol for the PF and that he personally had never listened to the song Dununa Reverse in full but only in bits. RW1 told the Court that at his meetings, music was never played because he never had an adequate public announcement system. His team members only played music before he arrived and after he left. He made that arrangement so that his campaign messages could be effectively delivered.

RW1 told the Court that he used three vehicles during the campaign, a Toyota Landcruiser white in colour, a Toyota Landcruiser Prado which was beige and had a grey undercoating and a white Toyota Dyna. He stated that the branding on the Landcruiser and Prado were covered about eighty percent of the vehicles. At page 1, of the Respondent's Notice to Produce, he showed the picture of the Toyota Landcruiser Prado and on page 2 a picture of the Toyota Dyna, which did not have any branding but posters stuck on it. At page 3 he pointed out the Toyota Landcruiser.

RW1 testified that he did not campaign for the PF Party President but made it known that he would be voting for him. He was standing as an independent candidate and he did not have a party president so it meant that he would have to pick a presidential candidate from the parties that were offering candidates. As a Zambian citizen, he stated that he was allowed to vote for a presidential candidate without affiliating himself to any political party.

RW1 told the Court that he did not call Mr. Chipako prior to the day of nomination. His first interaction with him was on

nomination day on 31<sup>st</sup> May, 2016 when they met at the Civic Centre. Mr. Chipako approached him and greeted him and stood next to him for a few minutes. When the drinks RW1 bought for his supporters arrived, Mr. Chipako moved away to get a drink and he did not see him again. Mr. Chipako and another gentleman went to RW1's office on a Saturday and they offered his services with regard to the campaign. RW1 stated that he was not alone in the office. He was with Lupando Munkonge his young brother and campaign manager, Mr. Bernard Malama and others who drifted in and out of his office. When Mr. Chipako offered his services, RW1 explained to him that he had not yet constituted a campaign team and a strategy and that he would get back to him once they were ready. RW1 stated that he gave Mr. Chipako and the gentleman K40.00 for transport because they had gone to him to offer their services. The first meeting at which he discussed his campaign team composition and strategy was not held at Kasama Milling but at his home in Kasama. Mr. Chipako was not present. RW1 did not give Mr. Chipako any t-shirts.

RW1 testified that he did not go to Mumbi Mfumu on a Sunday. He only made one visit to Mumbi Mfumu on 7<sup>th</sup> July, 2016

which was a Thursday. RW1 was able to confirm that it was on 7<sup>th</sup> July, 2016 because at Mumbi Mfumu Village, there is a bridge that is being constructed, which he inspected. One of the procedures for inspecting the bridge was that one had to sign the Visitors Book, which shows the date of the visit, name and comment. RW1 stated when he had the meeting at Mumbi Mfumu Village, various bodies in the community gave his team audience and requested several types of assistance. RW1 also produced a copy of a letter in Court that was given to him by the Mumbi Mfumu Health Centre, which was dated and stamped. It was written in Bemba language by the representatives of the Mumbi Mfumu Health Post.

RW1 stated that his campaign team could not visit Chieftainess Mumbi Mfumu's palace because they did not have the homage, which is traditionally required when visiting Chiefs and Chieftainesses. According to his Bemba tradition "**Ukutula**", that is taking a gift to a Chief, is done before one can get audience before a Chief. He stated that some people can do without it, but those who are in the structure of the Bemba Royal Family had to go with a gift. There was an exception if one was faced with an emergency.

RW1 testified that he and his team drove past the palace and went to the bridge that was being constructed. He held a campaign meeting after inspecting the bridge in a cleared field near Mumbi Mfumu School in the early afternoon after 12:00 hours but before 13:00 hours. He recalled that after mass, he stopped over at a Church to greet people and invited them to his meeting later in the day. RW1 stated that he gave no instructions to distribute t-shirts and chitenge materials. Further, that he did not make the statement that he was sent by the PF Party President and that he was the PF candidate because that would have implied that he was giving directions to the people to vote on the PF symbol, which was clearly not his symbol. RW1 stated that the Petitioner, PW1, is his aunt who is married to Major Gilbert Mwamba, who is his father's first cousin.

In cross-examination, RW1 told the Court that he is related to Chief Munkonge, and strictly speaking, the Chief is not related to PW1. He testified that he does not subscribe to the adage that blood is thicker than water. RW1 stated that in the Bemba ethnic group, there is a practice where the Chief makes occasional visits to his land and goes from village to village in his area. That it was on one

of those occasions when he was on his land visits, RW1 came across him. RW1 and his campaign team met the Chief when he was greeting his subjects and that it was not true that the Chief was part of his campaign team. The Chief greeted them and left.

RW1 testified that he was aware of the PF's adverts soliciting persons to apply as candidates for adoption for the Lukashya parliamentary seat but he was not aware of the selection criteria. He decided to stand and he was only aware of the application fees. He was not aware that for one to apply, one had to be a party member. RW1 stated that his brother Lupando Munkonge was not allowed to apply because he did not have the requisite qualifications. One needed a full Grade 12 certificate which he brother did not have. He told the Court that the PF had other people who wanted to be adopted as candidates for the Lukashya Constituency parliamentary seat.

RW1 testified that he was only approached to stand as an independent candidate when it was clear that PW1 would be adopted for Lukashya constituency. He stated that Lupando Munkonge took his application to the Provincial Secretariat together

with the fees. His application was received by the Provincial Secretariat.

RW1 testified that as chance would have it, at the time that he was in Lusaka Mr. Mfula the PF Provincial Chairman of Northern Province happened to be in Lusaka. He called Mr. Mfula and told him that he wanted to submit his application for Member of Parliament. Mr. Mfula agreed to meet him at the PF Secretariat very early in the morning and it was on day that a big press conference would be held at the Secretariat. He waited for Mr. Mfula for most of the day who he did not turn up. Upon Ms. Jean Kapata's advice RW1 left his application with the secretary at the Secretariat.

He told the Court that the procedure for application was that his application was supposed to be presented by the Provincial Chairperson, Mr. Mfula, to the Secretariat who never turned up. He was not aware that only members of the Central Committee were allowed to take their applications directly to the Secretariat. RW1 stated that Mr. Mfula was known to him as a public figure and that in terms of politics, he had very little contact with him. He did not remember Mr. Mfula saying that when he chose to challenge the PF candidate he ceased to be a PF member.

RW1 testified that his brother was his campaign manager. At the time of the campaign Mr. Bernard Malama, Chairperson PF Lukashya constituency, was a PF member and was part of his campaign team. Lameck Chisanga who is PF was part of his campaign team as well as Patrick Kafula and Moses Muma. His campaign team did not just comprise of PF members, but members from FDD, UNDP and United Democratic Front (UDF) political parties. Apart from these people, the PF members in his campaign team also held positions in PF.

RW1 told the Court that he did not attend the Kasama rally, which PF Party President addressed because he was not a member of the PF. RW1 stated that he did not go to Mumbi Mfumu for a second campaign visit and had never met or had a meeting with her royal highness, Chieftainess Mumbi Mfumu. RW1 stated that he was not aware of the political implications of seeing a Chief before visiting a project. Further, that he did not distribute any PF materials at any of the places mentioned by the Petitioners witnesses. Also that even though the song Dununa Reverse refers to President Edgar Lungu it is a public song and not a PF song. RW1 stated that Dununa Reverse was a public song being used by the PF

he had the provincial fee, which he was supposed to give to Mr. Mfula. He testified that his brother Lupando did not file an application because the only people whose applications were accepted were those that qualified. A person required a full grade twelve certificate and that Lupando Munkonge did not have a full grade twelve certificate.

RW1 testified that he had never been an official member of the PF and therefore he could not resign from an organisation that he did not belong to. He had a multiparty affiliated campaign team. The Toyota Dyna with the music system would usually be ahead of him to attract people to the meeting. At no time did he have music playing during his meetings.

**RW2** was **Nchimunya Mweemba** of Mumbi Mfumu Village, Kasama. RW2 told the Court that he was employed as a Site Clerk at Tomorrow Investments Construction Company. He kept an inventory of materials on site and received visitors who went to have a look at the bridge that the company was constructing. He testified that on 7<sup>th</sup> July, 2016, at 12.30 hours he received visitors and these were Mwenya Munkonge and his team. Mwenya Munkonge was a person he did not know. When they arrived at the site, he asked

them their mission and the response was that they had come to look at the bridge. He took them to the bridge and they had a look at it.

RW2 testified that he told Mwenya Munkonge and his team that he had a visitors' book where visitors were asked to sign and to enter their observations, and names in the book. He gave the book to Mwenya Munkonge who wrote his name and his observations of the bridge. After Mwenya Munkonge finished writing in the book he thanked them and left. RW2 clarified that the book he was referring to is called the Visitors Book and that he was in charge of keeping this book. RW2 identified the Visitors Book in the Respondent's Notice to Produce in Court with the writing "Visitors Book Tomorrow Investment, Construction of Mumbi Mfumumu Bridge across Lukashya River in Kasama". RW2 told the Court that at entry number 3, Mwenya Munkonge stated that he had visited the bridge on 7<sup>th</sup> July, 2016. RW2 told the Court that he had the original book.

During the cross examination, RW2 told the Court that the extract did not show who prepared the book. Further, that the company Site Engineer was present when Mwenya Munkonge and

his team visited the bridge. RW2 and the Site Engineer were in charge of taking visitors to the bridge. He was the one in charge of the Visitors Book while he and the Site Engineer were in charge of site visits. RW2 stated that his Company was aware that he was in Court.

**RW2** was not re-examined.

**RW3** was withdrawn by his Counsel as the events he was going to testify on were outside the period of the election campaign.

**RW4** was **Abraham Mwila**. He told the court that he stayed next door to the Chieftainess' home in Mumbi Nfumu. The Chieftainess' name is Petronella Mwila and she is his biological mother. His mother had ten children, six died and four have remained. These are Crispin Mwila, Patrick Mwila, Mary Mwila and Abraham Mwila.

On 7<sup>th</sup> July, 2016 at 12.00 hours whilst at his mother's house, he saw three vehicles passing and heading towards the school. He got on his bicycle and rode towards the school. He noticed that the vehicles posters mounted on them of Mwenya Munkonge and a symbol of a foot. When he reached Mumbi Mfumu School and at the

football ground he found three vehicles parked where politicians usually held meetings. The people in the vehicles he saw were Mwenya Munkonge and his group. At the meeting, Mwenya Munkonge greeted everyone and then explained the reason for his visit. He told the meeting that he was standing as independent candidate.

RW4 stated that Mwenya Munkonge asked the people to vote for him so that he could help them in bringing development to the area. Mwenya Munkonge explained how the area had lagged behind in terms of road and mobile telephone network. After the meeting Mwenya Munkonge and his team left.

RW4 testified that he knew Mwenya Munkonge as the independent candidate in Lukashya Constituency. At the meeting he testified that the people were not given any campaign material. RW4 stated that Mwenya Munkonge and his group never went to his mother's place. He testified that he knew Kellyson Sampa, and that he is a relative and the son of his mother's sister. He stays in Kasama in Chisanga Village near TAZARA. He told the Court that the posters on RW1's vehicles had pictures of Mwenya Munkonge, his election symbol with a provision on where to mark **X**.

In cross examination, RW4 told the Court that he observed that Mwenya Munkonge was wearing a stripped t-shirt and that he had many people with him in his three vehicles. Apart from Mwenya Munkonge, no one else addressed the rally. RW4 testified that he knew Lupando Munkonge because of the hammer mill at Kasama Milling and that he had been to RW4's mother's palace. Lupando Munkonge last went to his mother's palace on 5<sup>th</sup> October, 2016 and that Kellyson Sampa last went to his mother's palace ten years ago. He testified that Lupando Munkonge and his mother are not related and that he had come to ask his mother's permission for him to attend Court as a witness.

RW4 testified that he heard the slogan "Pa bwato" being chanted at Mwenya Munkonge's campaign meeting and that it was uttered by Mwenya Munkonge. He never heard the slogan "Ulukasa pa bwato" chanted at the campaign meeting. RW4 stated that he was not involved in the campaigns and he did not belong to any political party or support any party.

In re-examination, RW4 testified that Mwenya Munkonge chanted the slogan "voting on the foot" and that Mwenya Munkonge did not chant "Pa bwato". What Mwenya Munkonge said was that

they should vote “on the foot” because he was an independent candidate.

On 13<sup>th</sup> October, 2016 the Petitioner filed written submissions. Therein, Learned Counsel for the Petitioner begun by reiterating the evidence given by the Petitioner regarding the reports she had received about Chief Munkonge campaigning for the Respondent in Mukanga and Lusengu Wards. The evidence was to the effect that his subjects should not vote for President Lungu but vote for his grandson, the Respondent and not for the Petitioner. And that those who would vote for the PF party would be deprived of their land and chased from Chief Munkonge’s chiefdom.

Learned Counsel contended that despite the Respondent’s denial of this his response that the Chief was at the venue of his meeting to meet and greet his subjects, the question which arose was what the Chief doing at the gathering as Chiefs are greeted by their subjects at their palaces or residences.

Learned Counsel further submitted that based on the evidence of PW3, Kellyson Sampa, the Respondent and his campaign team visited Chieftainess Mumbi Mfumu at her palace to introduce the Respondent and left the Chieftainess some PF party campaign

materials. The Respondent denied this in his testimony saying that he did visit the area on 7<sup>th</sup> July, 2016 but went to inspect the bridge and did not visit the Chieftainess as alleged. The Respondent brought RW2, Mweemba Nchimunya, who gave testimony as to his visit to the said bridge thereby giving the Respondent an alibi. PW2, Chipako, also testified that the Respondent and his team had had a discussion with his village Headman before holding a rally at Headman Chisanga's place. RW1's team clearly brandished PF campaign materials and shouted PF slogans while singing PF party songs. Again the Respondent denied this but Counsel maintains that this was proved.

Counsel contended that the evidence of RW2 in the form of the signed Visitor's Book and the photographic evidence of the Respondent's alleged campaign vehicles and materials was only tendered into Court after the Petitioner had closed her case. Counsel questioned why this evidence had not been made available before and produced in accordance with the Orders for Directions.

Learned Counsel relied on the provisions of Regulation 14 of the **Electoral Code of Conduct** in the schedule to the **Electoral Act** which states that:-

**“A person or member of a law enforcement agency, civil society, a church, faith-based organisation, traditional leader, political party or media shall not, by means of threats, violence or sanction, coerce or intimidate another person during campaigns, public debates or elections.”**

And that Regulation 15(1) states that:

**“A person shall not –**

- (i) Abuse or attempt to abuse a position of power, privilege or influence, including parental, patriarchal or traditional authority for political purposes including any offer of a reward or for the issuance of a threat.”**

It was Counsel’s submission that there was issuance of threats by Chief Munkonge as stated above and the Respondent having known of this, did not disassociate or distance himself from it, such that he falls to be captured by Section 97(2)(a)(ii) of the **Electoral Process Act**, which entails the avoidance of his election. To buttress his arguments, Counsel relied on the case of **Mlewa vs. Wightman**<sup>1</sup>.

Learned Counsel argued that the Petitioner had received reports about the defamatory statements made by the Respondent’s campaign manager, Lupando Munkonge, at Kasakula Polling Station regarding the Social Cash Transfer Programme whose money it was alleged the Petitioner was misusing. Further, that PW4, Amos Bwalya, and PW5, George Mubanga, had both testified

to that effect. Counsel submitted that PW9, Most Mwamba, who was the person in charge of the Social Cash Transfer Programme under the Ministry of Community Development and Social Welfare, had testified that this programme was not available in Lukashya Constituency.

Learned Counsel argued that the Respondent offered a bald denial of the allegation stating that he had never heard any of his campaign team members utter such defamatory words and that neither did he utter them. Also that the Respondent did not call anyone to rebut the evidence, which, Learned Counsel argued, must then stand. He asserted that the bald denial of the allegation in the face of uncontroverted evidence of the incident was not enough to rebut the allegation. Further, that the strict proof that the Respondent pleaded as his defence to this allegation in paragraph 8 of his Answer was not only met, but surpassed. That faced with the unchallenged evidence of PW4 and PW5, this denial was simply not tenable.

Counsel submitted that an illegal practice was committed in connection with the election by or with the knowledge or consent of the Respondent as he did nothing to disassociate himself from the

same practice. To buttress his argument, Counsel cited the case of **Leonard Banda vs. Dora Siliya**<sup>2</sup>. Counsel submitted that the law against the making of such defamatory and false statements is laid down in Regulation 15(1)(c) in the schedule to the **Electoral Process Act**. This would lead to the voidance of the election in accordance with Section 97(2)(a)(ii) of the **Electoral Process Act**.

With regard to the allegation that the Respondent was masquerading as a PF member, distributing PF campaign materials and using PF songs, Learned Counsel argued that other than the Petitioner's testimony, PW10, Felix Mfula the PF Provincial Chairman told the court that the Respondent was a member of the PF party and that he contributed well to the PF party programmes. In addition he had not resigned from the said party. Further, that PW2, PW3, PW6, PW7 and PW8 also testified to the Respondent's behaviour and affiliations which aligned him to the PF. Counsel stated that the Respondent in his defence tendered a bald denial in the face of unchallenged evidence given by the Petitioner's witnesses.

Counsel submitted that the Petitioner testified that the Respondent had appeared for an interview at Radio Lutanda during

the campaign period and that she had listened to the interview. During the interview, the Respondent had stated that he was a member of the PF. This evidence was never challenged.

Counsel submitted that the main issue raised in the Petitioner's Submission is, was the Respondent a member of the PF party before and during the election campaign period? The Petitioner was aware that the Respondent was a member of the PF party and had fought to be nominated as a candidate on the PF ticket and even went to the National Secretariat where he was allowed to deposit his application.

Learned Counsel argued that this would not have happened had the Respondent not been a PF party member. The Petitioner's evidence as well as that of the PF Provincial Chairperson with regard to the Respondent's membership to the PF party and the testimony of both that the Respondent did not resign from the party proved that the Respondent was a PF member. Further that by the Respondent's own testimony he had not resigned from the PF party because he was not a member to start with when by his own admission, he played PF campaign songs at his rallies and had PF officials on his campaign team, his meetings at Kasama Milling

regarding his campaign strategy were witnessed by two of the Petitioner's witnesses, and the evidence regarding the Respondent's demeanour and behaviour at his rallies pointed to the fact that the Respondent was a member of the PF party at the time of the nominations and during the election campaign up to the election day. He quoted section 97(1)(2)(c) of the **Electoral Process Act** states as follows:-

- “(1) **An election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall not be questioned except by an election petition presented under this Part.**
- (2) **The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—**
  - (c) **The candidate was at the time of the election a person not qualified or a person disqualified for election.**

And Article 51 of **the Constitution** provides as follows:-

**“A person is eligible for election as an independent candidate for a National Assembly seat if the person-**

- (a) **is not a member of a political party and has not been a member of a political party for at least two months immediately before the date of the election;**
- (b) **and meets the qualifications specified in Article 70 for the election as a Member of Parliament.”**

Counsel argued that the Respondent was not qualified to participate in the said election according to the above cited

provisions of **the Constitution** as read together with Section 97(2)(c) of the **Electoral Process Act**.

He submitted that the foregoing exposition on the undisputed roles of the Chiefs, the defamatory statements and the self-confessed fact that the Respondent was at the material time and still is a PF member. It was his submission that the Petitioner had proved her case beyond the requisite standard of proof and that the Lukashya Constituency Parliamentary election of 11<sup>th</sup> August, 2016 be declared null and void. Further, that a declaration be pronounced that the Respondent was not the duly elected Member of Parliament of the said Lukashya Constituency. The Petitioner prayed for costs.

The Respondent filed written submissions dated 20<sup>th</sup> October, 2016. In the submissions Learned State Counsel raised a point of law asserting that the Court has no jurisdiction to hear the election petition as it was made pursuant to Article 51(a) and Article 73 of **the Constitution**. Since the Petitioner made reference to constitutional provisions, Learned State Counsel contended that the determination of those issues is the preserve of the Constitutional Court.

On the allegation of illegal practices, State Counsel submitted that the Petitioner bore the burden of proving her allegations to the standard required by law. He cited the cases of **Wilson Masauso Zulu Vs Avondale Housing Project Limited<sup>3</sup>**, **Khalid Muhammad V Attorney General<sup>4</sup>** where the Supreme Court has elucidated the principle on burden of proof. He also cited the case of **Michael Mabenga V Sikota Wina and the Others<sup>5</sup>** where the Supreme Court held that in an election petition the challenger is required to establish to a fairly high degree of convincing clarity the allegations made.

He also referred to the case of **Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda Vs Levy Patrick Mwanawasa, the Electoral Commission of Zambia, the Attorney General<sup>6</sup>**. He argued that the Petitioner had a duty to establish to a standard of convincing clarity that the Respondent committed the alleged illegal practices in connection with the election; or the illegal acts were done by his election or polling agents with his knowledge, consent or approval. Further, that due to the Respondent's alleged illegal practices, the majority of voters in Lukashya Constituency, were prevented from electing the

Petitioner. Learned State Counsel contended that the key element to be satisfied by the Petitioner was that the illegal practices complained of affected the majority of voters in the said Constituency. It was his submission that the Court had the power to uphold the election of a candidate even where it was found that there may have been illegal practices. He placed reliance on Section 97(3) of the **Electoral Process Act** which provides that:

- "(3) Despite the provisions of subsection (2), where, upon the trial of an election petition the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court or a tribunal further finds that such candidate has proved that-**
- (a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent.**
  - (b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election, and**
  - (c) in all other respects the election was free from any corrupt practice or illegal practice, declare that election of the candidate void."**

Learned State Counsel contended that the Petitioner's allegation that Chief Munkonge was involved in the Respondent's campaigns was based solely on reports given to her by her election campaign team. He argued that the reports were hearsay and were

therefore inadmissible in line with the holding in the case of **Kufuka Kufuka V Ndalamei Mundia**<sup>7</sup>.

Learned State Counsel's submitted on the allegation that the Respondent abused his privileged position, as the grandson of Chief Munkonge, to gain vantage in the election, was based on hearsay. He averred that there was no evidence adduced by the Petitioner except her testimony that she received reports from her campaign team, regarding the Chief's involvement.

Learned State Counsel further averred that there was no evidence adduced in Court showing that Chief Munkonge uttered the threats on his subjects which he was accused of. State Counsel declared that it would be impossible for the Court to conclude that the Respondent or the Chief, acted contrary to Regulations 14 and 15 of the **Code of Conduct**, of the **Electoral Process Act** in the absence of cogent evidence. He cited the case of **Galunia Farms Limited V National Milling Company Limited**<sup>8</sup> where the Supreme Court reiterated the principle of burden of proof, holding that:

**"The burden to prove any allegation is always on the one who alleges."**

Learned State Counsel drew my attention to the Learned Authors of **Halsbury's Laws of England, 4<sup>th</sup> Edition, at paragraph 784** quoting 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."**

It was his submission that the Petitioner did not lead evidence to show the effect of the threats on the voters in Lukashya Constituency. As such, he urged the Court to find that the Petitioner had failed lamentably to prove her allegations pursuant to the **Regulations** in the **Code of Conduct**. He prayed to the Court to dismiss the allegation.

On the allegation of the Social Cash Transfer Programme, Learned State Counsel submitted that PW4 was the only witness who gave evidence that Lupando Munkonge called the Petitioner a thief at one of the Respondent's campaign meeting. He attacked the credibility of PW4 whom he submitted was a witness with an interest to serve. Further, that because of that status, PW4's evidence required corroboration, which was not done. State Counsel went on to submit that the evidence of PW9 was of no value to the Court. The reason advanced was that PW9 did not lay foundation

for the production of the computer generated evidence in the Petitioner's Bundle. State counsel referred me to the case of **OTK Limited Vs Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited, Amanita Milling Limited**<sup>9</sup> where the Court, quoting the learned author Edward J. Imkwinkelried, **Evidentiary Foundations** held that it is an important procedural rule that before documents are produced, they must be properly authenticated. According to State Counsel, PW9 did not lay any foundation for the production of the computer generated evidence but merely made reference to the contents of the document. Thus, PW9's evidence did not meet the test in the case stated above.

Learned State Counsel rejoined his submissions with the argument that there was no evidence whatsoever to the effect that the Respondent made any of the false statements against the Petitioner. As far as State Counsel was concerned, the allegation that the Respondent called the Petitioner a thief was not proved before Court.

The submissions veered into the differences of an election and polling agent, which I immediately wish to comment on. My comment is that the allegation regarding the Social Cash Transfer

Programme has a narrow dimension. It requires strict proof as to whether the Respondent uttered the allegation complained of or not. It is therefore, not necessary for the Court to engage into a long winded expedition of how an election or polling agent is described and the responsibilities that attend on them. For this reason, I will not make any further reference to the Respondent's submission on this point.

Be that as it may Learned State Counsel submitted that the Respondent's election should not be voided under Section 97(2)(a)(ii) of the **Electoral Process Act** as there was no evidence to show that the majority of voters in Lukashya Constituency were affected by the allegation at Kasakula polling station. He noted that the Petitioner at Kasakula polling station polled 116 votes, while the Respondent polled 41 votes out of a total of 336 votes which were cast.

State Counsel advisedly referred me to the case of **Mubika Mubika Vs Poniso Njeulu**<sup>10</sup>, where the Supreme Court at page 30 of the judgment stated thus:-

**"The evidence, therefore, does not indicate widespread vilification of the Respondent; neither does it indicate that the majority of the registered voters were influenced against**

**the Respondent. In this type of allegation, statistics of registered voters who attended the rallies should have been given to assist the trial Court on the extent of influence in the Constituency."**

Learned State Counsel's submission was that the Petitioner did not name any person, who allegedly received PF campaign materials from the Respondent. He argued that it was not convincingly clear from the Petitioner's evidence that the Respondent distributed PF campaign materials. He contended that the Petitioner's evidence regarding the Respondent's alleged masquerading as a PF cadre was given by her witnesses who were office bearers in the PF party. He concluded that the said witnesses all had an interest to serve. Learned State Counsel argued that since the evidence of the said witnesses was not corroborated it could not be relied on.

State Counsel contended that the Respondent never distributed PF campaign materials at any of his rally meetings. He also contended that the Petitioner or indeed the PF party did not lodge a complaint against the Respondent on his use of PF material during the campaign period.

On the song Dununa Reverse, State Counsel argued that there was no single witness who testified that the Respondent was using

or playing the song. Further, there was no evidence adduced before Court to show that the PF party or Petitioner have proprietary rights in the song Dununa Reverse or that the said song was part of the PF or Petitioner's electoral symbol.

State Counsel argued that the use of the song Dununa Reverse did not prove the allegation that the Respondent masqueraded as a PF candidate in the Lukashya Constituency election. He challenged the Petitioner to show the enabling provision under the **Electoral Process Act** upon which the offence of masquerading is created. State Counsel submitted that the Petitioner had failed lamentably to prove that the majority of voters in Lukashya Constituency were prevented from selecting a candidate of their choice.

Learned State Counsel concluded with a prayer to the Court to dismiss the Petitioner's Petition on the ground that it lacked merit. He also prayed for costs to be awarded to the Respondent.

The Petitioner filed a Reply to the Respondent's submissions on 25<sup>th</sup> October, 2016. It was Counsel's submission that the Respondent's argument that this Court has no jurisdiction to interpret Article 51 of **the Constitution** was misguided to say the

least for the simple reason that the court is not being asked for an interpretation of the Article, but to determine the Petition under the provisions of Section 97 and in particular subsection (2) of the **Electoral Process Act**. He argued that Article 51 as read together with Article 70 of **the Constitution** which states the circumstances, under which one may qualify to contest an election as a Member of Parliament or be disqualified therefrom, is but an enabling provision under which a Petition may be brought in conjunction with Article 73 of **the Constitution**. It was Counsel's submission that the point was that whether or not one is disqualified falls to be decided by the High Court under Section 97 of the **Electoral Process Act**.

Counsel's argument was that the crux of the matter is that the High Court clearly has jurisdiction to hear and determine matters falling under Section 97 of the **Electoral Process Act**, whereas the Constitutional Court has appellate jurisdiction under the provisions of Article 72(1)(2)(h) of **the Constitution** as follows:-

- “(1) **A Member of Parliament shall, except the Speaker and the First Deputy Speaker, vacate the seat in the National Assembly upon a dissolution of Parliament.**
- (2) **The office of Member of Parliament becomes vacant if the member-**

(h) **Is disqualified as a result of a decision of the Constitutional Court;...**"

Counsel reiterated that from these provisions, it was clear that the High Court has original jurisdiction to hear and determine this Petition under the **Electoral Process Act** as determined above, whereas the Constitutional Court has appellate jurisdiction to deal with a Petition under Article 72 of **the Constitution**. Hence, there is no conflict between the provisions of Articles 128 and 134 of **the Constitution** on the one hand, and Section 97 of the **Electoral Process Act** on the other. Further, that Article 128 and 134 simply state the establishment of the Constitutional Court and the High Court and their jurisdictions whereas Article 51 states the circumstances under which a person may be disqualified.

Learned Counsel submitted that whereas Section 97 guides the Court on how to go about an election petition hearing and the available remedies for illegal practices or other misconduct. Counsel contended that Article 51 does not call for the determination of anything but simply states the qualification to stand, and that determination of the effect of such a clause is to be undertaken by the High Court under the provisions of Section 97 of the **Electoral**

**Process Act.** He prayed that the objection raised by the Respondent must fail.

Counsel contended that the evidence about the Respondent being a member of the PF party was clearly unchallenged and that there was no doubt that the Respondent fell to be disqualified under the provision of Section 97(1)(c) of the **Electoral Process Act**. Counsel argued that the Petitioner and her witnesses demonstrated to a clear and convincing standard that the Respondent engaged in malpractices. Counsel argued that the Respondent's submission that the key element to be satisfied that the illegal practices complained of were such that the majority of voters were prevented from electing the candidate of their choice, was an attempt to mislead this Court. He argued that the correct position is stated in Section 97(2)(a)(i) and (ii) of the Electoral Process Act as follows:-

- “(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
- (a) Corrupt practice, illegal practice or other misconduct has been committed in connection with the election-**
    - (i) By a candidate; or**
    - (ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling**

agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

The true test therefore was whether the majority of the voters were prevented from electing the candidate they preferred or the majority of voters **may** have been prevented from electing a candidate they preferred. Counsel argued that the Petitioner was not obliged to prove that the voters were prevented from electing a candidate of their choice as long as the Petitioner could prove that there was a malpractice that could have influenced the voters not to choose their preferred candidate.

Counsel cited the case of **Lazarus Chota vs. Patrick Mucheleka**<sup>11</sup> where the Supreme Court in construing the provisions of Section 93(2)(c) of the **Electoral Act No. 12 of 2006 of the Laws of Zambia**, which in his view is couched in literally the same terms as Section 97(2)(a) of the **Electoral Process Act**, had this to say:-

**“We therefore, hold that in the instant case, the learned trial Judge was bound to look at the evidence and pleadings before him to determine whether paragraphs (a), (b), (c) or (d) of subsection 2 of Section 93 of the Act were proved to the required standard as established in the Michael Mabenga case. We hold that on the pleadings and evidence of this case, the appropriate paragraph the learned trial Judge should have used was paragraph (c) because the illegal practices were committed by the Respondent or with the Respondent’s knowledge, consent or approval.”**

Learned Counsel argued that as long as the Respondent or his election agent or polling agent knew, consented or approved of such words either one of them was guilty of the offence. Counsel further argued that as a consequence of Section 97(3) of the **Electoral Process Act**, the evidential burden of proof shifted to the Respondent to prove that the illegal act was not committed by him, his agent or with his knowledge, consent or approval or that of his agent and to prove that he took or his agent took all reasonable means to prevent the commission of illegal practices at the election. That based on the evidence on Record, there was no effort whatsoever made to prevent the commission of the utterances.

Learned Counsel stated that it is argued that PW4 is a witness with an interest to serve. He contended that the evidence of this witness as to the utterances was never challenged in cross-examination and as stood unblemished.

Counsel also argued that the evidence of PW2, PW8 and PW10 who are PF party office bearers did not automatically taint them as not being credible.

I will start by addressing the issue *in limine*, raised by Learned State Counsel for the Respondent and replied to by the Petitioner's

Counsel. It is submitted by the Respondent that this Court has no jurisdiction to determine this election petition which alleges breach of Article 51(a) and Article 73 of **the Constitution**. State Counsel contends that the determination of the alleged breach is the preserve of the Constitutional Court. In support of his contention, Learned State Counsel cited the case of **City Express Service Limited Vs Southern Cross Motors Limited**<sup>12</sup> where the Supreme Court held that:

**"There can be no estoppels against a statute. A litigant can plead benefit of a statute at any stage."**

For his proposition on the point of law, State Counsel further referred me to other cases, where the Supreme Court reiterated its position in the **City Express Service Limited Case**<sup>12</sup>. State Counsel contended that the determination of the point of law could summarily determine the election petition, without recourse to the evidence before Court. He substantively argued that under Article 134(a) of **the Constitution**, while the High Court has been accorded unlimited and original jurisdiction in civil and criminal matters; it does not have authority under Article 128(b) of **the Constitution** to deal with matters relating to the violation or contravention of the Constitution. Further, he argued that Article

1(5) of **the Constitution** accords the Constitutional Court as a matter of right, the power to hear matters relating to the Constitution.

Learned State Counsel argued that since the alleged violation of Article 51 of **the Constitution** fell within the provision of Article 128(1)(b) of **the Constitution**, then the Constitutional Court has exclusive jurisdiction. He called in aid the case of **Zambia National Holdings Limited and United National Independence Party V Attorney General**<sup>13</sup>, where the Supreme Court defined what is meant by the High Court's unlimited jurisdiction as follows:

**".....the jurisdiction of the High court on the other hand is not so limited; it is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law....."**

Learned State Counsel submitted that Section 97(2)(a) of the **Electoral Process Act**, which allows this Court to void an election of a Member of Parliament is in conflict with Article 128 of **the Constitution**. The Article sets out the qualifications for the election of Member of Parliament and the grounds for disqualification. Thus, the question of qualification or disqualification could only be determined by the Constitutional Court. He then adverted to Article 72(h) of **the Constitution** which sets out one of the grounds of

vacancy in the office of Member of Parliament, being that, a person can be disqualified as a result of a decision of the Constitutional Court. Learned State Counsel urged this Court to summarily dismiss the allegation against the Respondent on the ground that the Court had no jurisdiction to determine the alleged breach of Article 51(a) of **the Constitution**.

The Petitioner, on the other hand has argued that the Respondent's argument above is misguided as the issue before me is not to interpret Article 51, but rather to determine the Petition under the provisions of Section 97 of the **Electoral Process Act**. The High Court clearly has jurisdiction to hear and determine matters that fall under Section 97, whereas the Constitutional Court has appellate jurisdiction under the provisions of Article 71.

I have seriously considered the point of law and the arguments canvassed there on by the advocates for the Petitioner and the Respondent. I understand Learned State Counsel's contention to be that this Court has no jurisdiction to determine this election petition on the ground that the election petition makes reference to Article 51(a) and Article 73 of **the Constitution**, which are issues that can only be determined by the Constitutional Court. Learned

State Counsel also submits that while the point of law is raised rather belatedly in submissions, the law permits the course of action that he has taken. I have no quarrel with his proposition as that is the position of law. The Supreme Court has in any event given sufficient guidance on preliminary issues in a plethora of authorities including the case of **Admark Limited Vs Zambia Revenue Authority**<sup>14</sup> cited by Learned State Counsel.

Article 51 of **the Constitution** provides that:

- "51. A person is eligible for election as an independent candidate for a National Assembly seat if the person-**
- (a) is not a member of a political party and has not been a member of a political party for at least two months immediately before the date of the election; and**
  - (b) meets the qualifications specified in Article 70 for election as a Member of Parliament."**

On the other hand Article 73(1) provides that:

**"A person may file an election petition with the High Court to challenge the election of a Member of Parliament."**

Section 96(1) of the **Electoral Process Act** sets out thus:-

**"A question which may arise as to whether-**

- (a) A person has been validly appointed or nominated as a Member of Parliament;**
- (b) The seat of an elected or nominated Member of Parliament, mayor, council chairperson or councilor, has become vacant, other than a**

**question arising from the election of a candidate as a Member of Parliament; or**

**(c) A petition may be heard and determined by the High Court or tribunal upon application made by-**

**(i) Any person to whom the question relates; or**

**(ii) The Attorney General;**

**may be determined by the High Court or a tribunal, as the case may be.”**

In my considered view, Article 51(a) and Article 73(1) of **the Constitution**, predicate the application of Section 96(1) of the **Electoral Process Act**. By that, the sequence created in those provisions of law is deliberate but with purpose. Firstly, Article 51(a) lists the qualifications upon which a person can stand as an independent candidate. The criteria being that such person should not be belong to a political party at the time of filing of nominations for Member of Parliament. Secondly, Article 73(1) invokes the process after an election has been held, where a person who is aggrieved by the result of an election of Member of Parliament can challenge such election in the **High Court**. Thirdly, Section 96(1) of the **Electoral Process Act** buttresses Article 73(1) to the extent that it sits election petition hearings with the **High Court**.

The central theme running in the **Electoral Process Act** is that the High Court is the Court that has jurisdiction at first

instance to determine election petitions involving Members of Parliament. Under Section 99 of the **Electoral Process Act**, the High Court has power either to grant the relief that an election of a Member of Parliament is void or that a candidate has been duly elected.

Learned State Counsel submitted that Article 134(a) and Article 128(b) of **the Constitution** confers the Constitutional Court with exclusive jurisdiction in as far as determining issues regarding **the Constitution**. Learned State Counsel referred to Article 134(a) which provides that:

**"134. The High Court has, subject to Article 128-**

**(a) unlimited and original jurisdiction in civil and criminal matters;.."**

He then cited Article 128(b) of **the Constitution** which provides that:-

**"128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-**

**(b) A matter relating to a violation or contravention of this Constitution;.."**

Learned State Counsel further referred me to the case of **Zambia National Holdings Limited V. United National Independence Party**<sup>13</sup> where he argued that the jurisdiction of the Court is not

limitless. It is bound by all the laws which govern the exercise of its jurisdiction.

I wish to state that according to Article 73 of **the Constitution** as read with Section 96(1) of the **Electoral Process Act**, I have unlimited jurisdiction to hear and determine questions relating to election petitions of a Member of Parliament. While there is a clear distinction between matters which fall under **the Constitutional Court's** jurisdiction and those under the High Court; my opinion is that the **Constitution** and **Electoral Process Act** confer me with jurisdiction to wholesomely determine issues that might arise under the said pieces of legislation. Being a Court of first instance I find fortitude in Article 128(1)(d) of **the Constitution** which provides that:-

**"128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-**

**(d) Appeals relating to election of Members of Parliament and councilors;.."**

As a consequence, I opine that the Constitutional Court will have jurisdiction to hear this election petition if it goes on appeal to that Court. Let me reiterate that in hearing this election petition, I have jurisdiction as the Court of first instance to sit with constitutional authority and any other jurisdiction conferred upon

me by the Electoral Process Act. I therefore hold that the election petition is competently before me.

I wish to clarify that one of the reliefs sought by the Petitioner is the **voidance of the Respondent's election** and not the **Respondent's disqualification from the election**. Thus, I find that the argument canvassed by the Respondent in terms of Article 72(1)(h) of **the Constitution** is misconceived. It has no bearing on the nature of relief sought by the Petitioner in terms of Section 99 of the **Electoral Process Act**. I therefore hold that the issue *in limine* raised by the Respondent has no merit. It accordingly fails and is hereby dismissed.

I will now deal with the allegations made by the Petitioner against the Respondent as contained in the Petition. I have seriously considered the Petition and the Affidavit in Support, the Respondent's Answer, the evidence given by both parties and their witnesses as well as the written submissions of the Petitioner and the Respondent and the Petitioner's Reply to the Respondent's Submissions.

It is not in dispute that the Petitioner was adopted by her party, the PF to contest the Lukashya Parliamentary Elections. The

Respondent, Mwenya Munkonge, stood as an independent candidate for the aforesaid elections. It is also not in dispute that the results for the Parliamentary Election for Lukashya Constituency showed that the Respondent, Mwenya Munkonge was the winner with 11,870 votes. The Petitioner, Alfreda Kansembe came second with 7,936 votes. It is also common cause that the Petitioner has disputed these results and has made a number of allegations against the Respondent that he conducted himself in a manner contrary to the **Election Process Act**.

Having established what is not in dispute, I will now consider the burden of proof and standard of proof applicable to the case in *casu*. It is trite law that he who alleges must prove. In the case of **Masauso Zulu vs. Avondale Housing Project**<sup>3</sup> it was stated that where a plaintiff makes any allegation, it is generally for him to prove those allegations. That a plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case. Further in **Khalid Mohamed v The Attorney-General**<sup>4</sup> it was held that a plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. It follows that for the Petitioner to succeed

in the present Petition, it would not be enough to say that the Respondent has completely failed to provide a defence or to call witnesses, but that the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity. Therefore, the Petitioner herein is obliged to call evidence and prove the case to the required standard and that it is not for the Respondent to call witnesses to prove his innocence.

Having established that the burden of proof lies squarely on the Petitioner, the question remains as to what the required standard of proof is in the case in *casu*. It is trite law that in civil matters the standard of proof has traditionally been on the balance of probabilities. In **Bater vs. Bater**<sup>15</sup>, Lord Denning discussed the standard of proof required in civil and criminal matters. He stated that:-

**"A civil Court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."**

Clearly in civil matters, depending on the subject matter and the allegations pleaded, the court will require a higher degree of

probability, than just a balance of probabilities. And, as stated above, the degree of probability must be commensurate with the occasion.

I am guided by the decision of the Supreme Court with regard to the degree of probability in election petition cases such as the case in *casu*. In the case of **Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda vs. Levy Patrick Mwanawasa, The Electoral Commission Of Zambia, The Attorney General**<sup>6</sup> the Supreme Court made it clear that in civil cases, the standard of proof required to prove a presidential election petition is higher than the balance of probability and must be proved to a convincing degree of clarity. In **Lewanika and Others vs. Chiluba**<sup>16</sup> it was stated that:-

**"As part of the preliminary remarks we make in this matter, we wish to assert that it cannot be seriously disputed that Parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore, that in this case where the petition has been brought under Constitutional provisions and would impact upon the governance of the nation and the deployment of the Constitutional power and authority, no less a standard of proof is required. It follows also the issues raised are required to be established to a fairly high degree of convincing clarity."**

From the above authorities, one cannot dispute that parliamentary election petitions, as is the case with presidential election petitions,

require to be proved at a higher standard than on a mere balance of probabilities. The Petitioner, having the burden of proof, must adduce evidence which must firmly establish the allegations made in the Petition to a higher degree of convincing clarity.

The Petitioner pleaded several general and specific allegations relating to the electoral process. I will now consider the allegations made by the Petitioner and show which have and have not been proved and in so doing, I will not be making findings of fact on those found not to have been proved. Paragraph 5 of the Election Petition contains the Petitioners allegations of the alleged contraventions made by the Respondent.

The first allegation laid by the Petitioner was that *“between 30<sup>th</sup> July, 2016 and 10<sup>th</sup> August, 2016 the 1<sup>st</sup> Respondent procured the services of Chief Munkonge of Munkonge Chiefdom in Kasama District, his grandfather, to go round the villages for the sole purpose of campaigning for the 1<sup>st</sup> Respondent as an Independent Candidate”*. The first allegation is closely related to the second and third allegations. The second allegation was that *“the 1<sup>st</sup> Respondent further abused his privileged position as a grandson of the said Chief who went round the Constituency in the course of*

*making representations to the electorate saying that they should not vote for PF and the Petitioner and that if they did, they would be displaced from their land and chased from the Chiefdom.”*

In the third allegation the Petitioner averred that “*these events greatly placed the 1<sup>st</sup> Respondent at an advantage as compared to the Petitioner.*”

I wish to state that on account of the first, second and third allegations being interrelated and interdependent, I will deal with them at the same time. The Petitioner is the only witness who called evidence on this ground. The gist of her evidence was that she received reports from her campaign team that the Respondent procured the services of his grandfather Chief Munkonge to solicit votes for him in Mukanga and Lusenga Wards in Lukashya Constituency. It was also her evidence that the two Wards covered twenty-one polling stations. The Petitioner testified that she did not see Chief Munkonge personally campaigning against the PF in the twenty-one polling stations, except for one where she found him seated with the Respondent, when she had gone to Mutale Munkonge Primary School, where she was scheduled to have a meeting. She further, testified that she actively campaigned in

Chief Munkonge's Chiefdom and Chief Munkonge was not the Respondent's electoral agent.

In response, the Respondent conceded that Chief Munkonge was his grandfather but by virtue of his office. He denied that he had recruited Chief Munkonge to campaign for him or to represent him in any form or manner. He testified that he was too junior in the family structure to influence the Chief. He however, conceded that he met Chief Munkonge during his campaign trails, when he went to Mukanga and Lusenga Wards, which fall under the Chief's jurisdiction.

He recalled that he found Chief Munkonge at a place where the Respondent intended to hold a meeting and that when the Chief saw the Respondent and his team, he allowed them to approach him and they explained the nature of their mission to the Chief. The Chief told them that he was visiting his subjects and he had arranged a meeting with his subjects the following day. The Chief then allowed the Respondent and his campaign team to proceed with their meeting and left thereafter. In the Petitioner's submissions, Counsel raised the question that if the Chief was holding his meeting with his subjects the next day what was he

doing at the gathering since Chiefs are generally greeted by their subjects at their palaces or residences? In my view, a further question arises from the Petitioner's assertion which, is whether the Chief is constrained by any authority to greet subjects on his own accord without being followed to his palace or residence? Further, is the Chief constrained to greet his subjects or participants in a public place during election campaigns?

The view I take on the first question favours the testimony of the Respondent. His explanation of his lineage and the fact that his own biological grandfather once served as Chief Munkonge in my view predisposed him to knowledge of the Royal Bemba traditional practices. The traditional practice in this regard being that a Chief makes occasional visits of his land and goes from village to village in his area and during his visits, the Chief greets his subjects.

There was no evidence laid by the Petitioner to the contrary to show that a Chief cannot greet his subjects without having to see them at his palace or residence. This being the case and in response to the second question I see nothing wrong with the fact that Chief Munkonge greeted the Respondent and his campaign team, when he met them and just before they proceeded to the

venue of the meeting. They like other subjects in the village were bound to be greeted by the Chief. Therefore, the evidence of the Petitioner falls far short of what she was expected to prove this allegation. It is not enough that she relied on reports that were not corroborated by any one of her witnesses.

I also find that the allegation that the Chief was found with the Respondent on the date that he was scheduled to hold the rally has not been proved to mean that he was campaigning on the Respondent's behalf. By her own admission the Petitioner states that she did not hear the Chief telling people not to vote for the PF party and that she relied on reports from her officials. This evidence I must add falls in the realm of hearsay and as a rule requires corroboration.

With regard to the second allegation, I wish to add that other than the reports given to the Petitioner on the Chief's representations, there was no other evidence that was called to corroborate her evidence. The Court's decision may have swayed in her favour had she called witnesses who would have proved the fact of the Chief's involvement. I, thus find that Regulations 14 and 15

(1)(i) of the **Electoral Code of Conduct** are of no use to the Petitioner's case.

The Petitioner produced the map of the Wards and Polling Stations in Lukashya Constituency. Since the map was not drawn to full scale, I found it hard to locate the position of the Wards and polling stations complained of. I, however, proceeded to examine the Record of Proceedings at the Totalling of the Votes for National Assembly for Lukashya Constituency and equally found it hard to attribute the twenty-one polling stations that were associated to the Wards complained of. I have not lost sight of the fact that during the Petitioner's case, no reference was made to the said documents in her Notice to Produce other than to demonstrate their existence.

In my considered view, therefore, there was no evidence led by the Petitioner to prove that the Respondent and the Chief were working together and that their actions placed her at a disadvantage in the Wards complained of. Had the Petitioner called an official from the ECZ to educate me on the location of the affected Wards and polling stations, then I might have found differently. Since this is not the case, I refuse to accept that the voters who are registered in the twenty-one polling stations in

Lusenga and Mukanga Wards, which allegedly fall under Chief Munkonge's Chieftainship were influenced by the said Chief to the Respondent's advantage. The first three allegations therefore fail.

I have noticed in the Petitioner's submissions that there was an ingenious attempt to include Chieftainship Mumbi Mfumu as one of the traditional authorities used to solicit support for the Respondent's election. In particular and according to the evidence of PW3, the Chieftainship was given a PF t-shirt and a PF piece of chitenge material. I have taken keen interest to highlight this argument not because it presents anything new in substance for the Petitioner, but because it widens the scope of the Petitioner's allegations against the Respondent. The Petitioner's allegations were clear and directed at Chief Munkonge. I am therefore bewildered to note that the allegation now includes Chieftainship Mumbi Mfumu. I therefore refuse to accept the Petitioner's arguments on this issue and I will make no further comment on it.

The fourth allegation is that *the 1<sup>st</sup> Respondent, at Kasakula Polling station accused the Petitioner of being a thief who had embezzled the Social Cash Transfer Funds meant for the aged in the District, which District has not yet been placed on the list of*

*beneficiaries of the scheme in the Province.* The evidence on this allegation was given by the Petitioner who testified that according to reports she received, the Respondent was alleging at several polling stations that she had received money from the Social Cash Transfer Programme under the Ministry of Community Development and Social Welfare, which she embezzled. PW4 told the Court that while at the Respondent's meeting at Kasakula Village, Lupando Munkonge asked the people if they received money meant for poor people to which the response was that they never received the money. Lupando Munkonge then told the people that PW1 received the money and was using it to build houses and was also sharing some of that money with her loyalists.

In response, the Respondent testified that he was not personally attributed to the allegations levied against him with regard to Kasakula Polling Station. Further, that the witness from Kasakula who came to Court referred to other people and not the Respondent. I have carefully considered the wording used in the fourth allegation. It points to an allegation that the 1<sup>st</sup> Respondent is the person who accused the Petitioner of being a thief. Other than the reports given to the Petitioner about the allegation, the only

other evidence that was presented to the Court is that of PW 4. To recap PW 4 stated thus:-

**“While in the meeting, Lupando Munkonge asked the people if they received money meant for poor people to which the response was they never received. Further the Respondent spoke at the meeting where he just advertised himself.”**

This is the evidence of the Petitioner's witness who was at that meeting in Kasakula Village which was addressed by the Respondent and his campaign team. I thus, have no reason to doubt his testimony that the Respondent did not utter the words attributed to him regarding the Petitioner's embezzlement of funds. Had the allegation been directed at the members of the Respondent's campaign team, then perhaps I might have reached a different conclusion.

I wish to comment that according to PW 9's evidence, the Social Cash Transfer Programme is not being implemented in Lukashya Constituency. I have come to observe that persons residing in rural areas though not mostly educated can be quite conscientious. I also do not believe that they are easily swayed by political rhetoric and are therefore quite capable of knowing when a development programme exists in their villages; especially that

Government programmes are usually announced and involve the Village development committees.

It is therefore in my considered view, a question of fact, and a fact that must be proved beyond doubt, that all the residents in Kasakula Village believed that the Petitioner embezzled funds from the non-existence Social Cash Transfer Programme. Since something more was laid before this Court, I opine that the allegation has not been proved to a convincing degree of clarity.

The fifth allegation was that *the 1<sup>st</sup> Respondent was masquerading as a Patriotic Front (PF) sponsored candidate and was distributing PF material and using PF campaign songs such as Dununa Reverse contrary to the **Electoral Code of Conduct***. The Petitioner testified that she did not personally see the Respondent distributing campaign materials but was informed by persons who received the same and presented the materials to her. She could not keep count of the recipients.

PW 2 testified that when he went to the Respondent's office on the day of filing nominations for intending Members of Parliament at Kasama Milling he found a lot of PF officials clad in PF regalia bearing pictures of the PF Party President. Some of the people at the

Respondents office were singing PF songs such as Dununa Reverse, Sela Tubombeka and Lukasa Mubwato whilst raising their fists. At his office, the Respondent was in the company of Lupando Munkonge, Bernard Malama the PF Chairperson for Lukashya Constituency, Lameck the PF Chairperson for Pumabula ward, Mr. Nsonsa the PF Information and Publicity Secretary for Pumabula Ward, the Youth Chairperson and his vice Ken.

PW2 testified that the group at the Respondent's office left to accompany him to the filing of his nomination at the Civic Centre where they met another PF group. PW2 testified that the Respondent told him that he was standing on "Lukasa Mubwato". PW2 further, testified that when he was invited by the Respondent to go back to his office after the successful filing of his nomination but he refused because he wanted to support only PF candidates during the election.

In my view and by implication, what PW2 meant was that he did not believe that the Respondent was real a PF candidate. PW2 also testified that the Respondent's association with the PF party executives in Lukashya Constituency and the playing of PF songs while shouting "pa bwato" confused people on who to vote for. He

further testified that the Respondent's campaign vehicles which bore portraits of himself, the Councillor and those of PF Party President also misled the people in the Constituency. PW2 told the Court that he reported the activities of the Respondent and his teams to the PF Provincial Vice Chairperson that the Respondent as an independent candidate was using PF material.

In cross-examination, PW2 told the Court that he resigned from the UPND a day before the nominations for Members of Parliament. He did not know that the song Dununa Reverse was first played at a public rally which was addressed on 19<sup>th</sup> June, 2016 by the PF Party President. He only saw the Respondent's electoral symbol after it was mounted on the walls and his motor vehicles. He stated that the PF party apparel could only be given to party members. PW2 also told the Court that he went for a meeting at the Respondent's office with Kellyson Sampa where the Respondent asked them to help him in his campaign using PF materials. He declined to work with him insisting that he wanted to work with the real PF. He denied that he was in a habit of skipping from party to party for material gain.

PW3 testified that he joined the PF party from the UPND party a week after nominations for Members of Parliament. He went to the Respondent's office at the invitation of PW2 and confirmed the evidence on the events Kasama Milling. He disclosed that he knew why PW2 had invited him to the meeting even though he did not disclose the purpose. In his view the purpose of the meeting was that the 1<sup>st</sup> Respondent wanted to discuss his campaign strategy. PW3 told the Court that the Respondent wanted to work with PW2 and himself during the campaigns and that when PW2 asked Lupando Munkonge for the campaign materials he was told that the Respondent would make use of PF t-shirts, chitenge material bearing the PF President portrait since RW1 did not have campaign materials.

PW3 told the Court that while at the Respondent's office he made up his mind not to work with the Respondent and his team but kept quiet about his decision. PW3 testified that when the Respondent visited Mumbi Mfumu Village for a campaign meeting, the Canter vehicle, which was in RW1's entourage had portrait posters of the Respondent and the PF Party President as well as PF chitenge material tied to it. The song Sonta Epo Wabomba was

being played from the Canter. There was also a Prado vehicle which had portrait pictures of Mwenya Munkonge affixed on it, while the vehicle windows had portrait pictures of the PF Party President. PW3 told the Court that Lupando Munkonge introduced the Respondent as the PF Party President's choice and for that reason the Respondent and his team were using PF campaign materials. PW3 testified that Lupando Munkonge in his introduction of the Respondent at the campaign meetings chanted the PF slogan "pa bwato". The Respondent told the crowd that he was President Lungu's child and the one he had chosen. He also told the meeting that he was going to complete the development projects in Lukashya Constituency.

PW4 a resident of Kasakula Village testified that when the Respondent went to the Village to hold a campaign meeting he was in the company of Bernard Malama, Lupando Munkonge, Moses Muma and others he did not know. Lupando Munkonge introduced the Respondent as the Member of Parliament who had been given to the people of Lukashya by the PF Party President. PW4 told the Court that he knew the PF Parliamentary candidate for Lukashya

Constituency who was PW1 because of his affiliation to the party and through announcements on radio.

PW5 a resident of Namayakuba testified that sometime in August, 2016 the Respondent addressed a campaign meeting in his Village. He went with a Canter vehicle which was playing the song Dununa Reverse. He recognized Moses Mumba and Bwalya Mumba in the entourage. Further, Lupando Munkonge, Bernard Munkonge, Misheck, Patrick Kafula, Lameck Chisanga and the Respondent alighted from a Pajero vehicle and came to address the meeting. The Respondent was introduced as the candidate for Lukashya Constituency on the PF ticket by Bernard Malama and that RW1 was the PF Party President's preferred candidate. He told the Court that he knew that the Respondent was standing as an independent candidate.

PW6, a resident of Kasonde Chisuna Village told the Court that the Respondent, Bernard Malama, Misheck, Patrick Kafula and Lupando Munkonge went to St. Johns' Catholic Church and outside the church building Bernard Malama told the gathering that the Respondent was the PF's real Parliamentary candidate who had been accepted by PF members who had positions in the PF party.

Further, that the Respondent had been sent by the PF Party President to stand as Member of Parliament. The Respondent told Bernard Malama to get ten t-shirts and ten chitenge materials from the said canter vehicle, which was given to the youth and the elderly respectively. The t-shirts had a portrait of the PF Party President and the words Sela Tubombeko. PW6 told the Court that he discovered that the Respondent was standing as an independent candidate after the church meeting and when he saw his campaign posters. PW6 testified that he did not know the other parliamentary candidates except for the Petitioner who was the PF candidate in Lukashya Constituency.

PW7 was a resident of Kapoko Sanja Village and his evidence was no different from the other Petitioner's witnesses who testified that the Respondent's vehicle played the song Dununa Reverse at a campaign meeting. He saw the Respondent with Bernard Malama, and Lupando Munkonge, and that the Respondent told the meeting that he was a PF member and his election symbol was a foot in a boat, which did not interfere with his membership in the PF party. The slogan was meant to rid the Petitioner from the PF back to the Liberal Party where she belonged.

PW8, a resident of Luyeya Village in Chiba Ward testified along the lines of the earlier Petitioner's witnesses that the Respondent's Canter vehicle played the song Dununa Reverse at the campaign meetings. Further, that the Respondent's Canter carried young men and women clad in PF material. He testified that the Respondent's cadres told him that the Respondent was a PF Member of Parliament, when he knew him as an independent candidate. It was his evidence that the Respondent being an independent candidate was using the PF campaign materials and symbol.

PW10, the PF Provincial Chairperson in Northern Province, told the Court that the Respondent had applied to stand as Member of Parliament in Lukashya Constituency but was not chosen. He testified that the Respondent's family was one of the benefactors of the PF party. He told the Court that the applications for those that intended to stand as Member of Parliament on the PF Party ticket were received about three months before the election. He stated that the Respondent was a PF party member because he had not resigned from the party. He told the Court that the Petitioner was

the only person who was allowed to a campaign using the PF symbol and materials.

In cross-examination he told the Court that the PF Party did not have a membership register or party cards. He also told the Court that there was no procedure for joining the party or for resignation. PW10 did not know when the Respondent joined the party but was deemed to have left when he defied the party's instructions by standing as an independent candidate. He told the Court that the Respondent had his own electoral symbol distinct from the PF Party symbol, which was accepted by the ECZ. PW10 also told the Court that PF materials were available to all and sundry and could be purchased on the open market. He further told the Court that he did not lodge a complainant to the ECZ about the Respondent's alleged use of PF materials.

In my considered view, the evidence adduced by the Petitioner on the allegations that the Respondent masqueraded as a PF sponsored candidate, distributed PF materials, played PF songs such as Dununa Reverse can be summarized thus:

- i) The Respondent was assisted in his campaigns by PF members, some of whom had positions within the PF party.

Notable among these are: Lupando Munkonge, Bernard Malama, Nsonsa, Misheck, Moses Mumba, Bwalya Mumba, Patrick Kafula, and Lameck Chisanga.

- ii) The Respondent was consistently introduced by the members of his campaign team as the PF parliamentary candidate, who was fondly referred to as the PF Party President's preferred choice or his child.
- iii) PF materials in the form of t-shirts and chitenges were distributed by the Respondent and his team at campaign meetings and other occasions. However, the PF materials are available on the open market.
- iv) The song Dununa Reverse and other PF signature tunes were played at the Respondent's campaigns meetings.
- v) The Respondent was known to be a PF member although it is not known when he joined the PF party or resigned from it.
- vi) The Petitioner was known as the PF party candidate in the 2016 Lukashya Constituency election while the Respondent was known as the independent candidate.

From the evidence before me, there was no confusion amongst the Petitioner's witnesses as to what the PF party symbol looked like. The witnesses only came to know the Respondent's electoral symbol when they saw it on his campaign posters. In rebuttal, the evidence of the Respondent was that he was approached by the PF party members to stand as a candidate on the PF ticket as Member of Parliament for Lukashya Constituency but was not adopted. He then opted after consulting with his family members to stand as an independent candidate.

The Respondent testified that he considered himself as a PF sympathizer and that he made contributions to the PF party and to other civic or religious organisations. He told the Court that his electoral symbol was a foot, while that of the PF was a boat. He had produced and distributed flyers which bore his electoral symbol and in choosing his symbol he had ensured that it was different from that of the PF. He denied that he distributed PF campaign materials and that in Kasama PF apparel could be sourced on the open market.

The Respondent told the Court that during campaigns his vehicle, a Toyota Dyna, played music from various musicians and

one of the songs played was Dununa Reverse and that the song was played in several places in Kasama. He contended that Dununa Reverse was not a PF official song and had not listened to the song in its entirety. He produced images of the campaign vehicles in Court which showed that his campaign vehicles namely a White Toyota Landcruiser and Biege Toyota Landcruiser Prado which had all been branded with his portrait pictures. The Toyota Dyna had posters stuck on it but was not branded. The Respondent told the Court that he did not campaign for the PF Party President but made it known that he would be voting for him since he was an independent candidate and like any other voter in Zambia he was entitled to cast a vote in favour of his preferred Presidential candidate.

The Respondent denied that he had asked PW2 and PW3 to join his campaign team because he did not know them. Further, the meeting to discuss his strategy was held at his home where PW2 and PW3 were not in attendance. He denied that he had gone to Mumbi Mfumu to hold a meeting. He stated that he only went there to inspect the bridge. The Respondent's evidence was corroborated by RW3 to the extent that he did inspect the bridge under

construction in Mumbi Mfumu Village. He denied visiting Chieftainess Mumbi Mfumu's palace because he did not have homage to present to her. He denied that he ever made a statement that he had been sent by the PF Party President. Further, that he did not use the PF symbol at the meetings as doing so would have implied that he was PF and that position would have disadvantaged him in the elections.

The Respondent in cross-examination admitted that Bernard Malama, Lameck Chisanga, Patrick Kafula, Moses Muma and Lupando Munkonge were the members of his campaign team.

RW4 a resident of Mumbi Mfumu Village testified that he was the biological son of Chieftainess Mumbi Mfumu. He attended a rally that was addressed by the Respondent who stood as an independent candidate in Lukashya Constituency. He testified that the posters on the Respondent's vehicles bore pictures of him. He testified that the rally in Mumbi Mfumu was addressed by the Respondent. He told the court that PW3 last went to Mumbi Mfumu Village ten years ago. He heard the Respondent chant the slogan "Pa bwato" in cross-examination but later retracted in re-

examination that he did not utter the words because he was an independent candidate.

The Petitioner's main contention as attested by herself and her witnesses is that the Respondent masqueraded himself as a PF member and was in fact a PF member, when he contested the Lukashya Parliamentary seat. As a result and by the misuse of the PF party slogan, PF party apparel and PF signature songs such as Dununa Reverse, the Respondent violated Section 97 (2) (c) of the **Electoral Process Act.**

The findings that are obvious from the evidence before me are that:-

(a) The Respondent's campaign team comprised PF members some of whom held positions in the PF. The Petitioner's witnesses all made allegations that the Respondent was referred to as the PF Party President's preferred candidate since the witnesses were all drawn from different villages without other witnesses from their respective villages to corroborate their testimonies. The allegation was not substantiated.

(b) The Respondent had his own campaign materials bearing his portrait, which was proved in the pictures shown in his Notice to Produce. The Petitioner's witnesses all made assertions about the PF branding on the Respondent's vehicles, but beyond that, they did not produce any cogent evidence to support their allegations. It is immaterial that the Respondent's Notice to Produce was only introduced into Court after the Petitioner closed her case. It goes without saying that he who alleges must prove. Thus, it was incumbent on the Petitioner to have produced all the evidence that was necessary for the prosecution of her case. Likewise it was incumbent on the Respondent to have produced evidence that would have assisted him with his defence.

(c) I further find that the Petitioner's allegation that the Respondent was distributing PF materials which, by the admission of PW10, could be sourced on the open market and not restricted to party members, neutralized her allegation that the Respondent distributed the materials. I say so because it is possible to draw two inferences. That is, that the Respondent distributed the PF campaign materials or that the

persons who attended the Respondent's meetings all came dressed in PF apparel. Needless to say, the law supports the inference most favourable to the Respondent.

(d) I find that the Respondent played the song Dununa Reverse which was associated with the PF although it is a notorious fact that the song was played in public places during the election campaigns of 2016. What I am bothered by is whether by playing the song Dununa Reverse, an alleged PF party song, an unsuspecting voter could have been swayed to vote for the Respondent who stood as an independent candidate.

(e) I find that the Petitioner's witnesses' claims that the Respondent was a PF member have not been proved as the evidence of PW10 that the rules on joining and resigning from the PF party are not codified. The PF does not have a membership register, thus, a person is identified as a party member merely on the basis of participation in the PF party activities.

(f) I find that the Petitioner was known to be associated with the PF. Perhaps PW10 best describes him when he testified that the Petitioner and his family are well known to the PF

party and are benefactors. In my view there is no mistake as to the Respondent's association and affiliation to the party. The Respondent in fact refers to himself as a PF sympathizer.

(g) I find that the Respondent stood as an independent candidate in the Lukashya Constituency Parliamentary election. The Petitioner's witnesses who were paraded in Court all testified that they all knew the Petitioner as the PF Parliamentary candidate for Lukashya Constituency, while they knew the Respondent as the independent candidate.

The Petitioner and her witnesses were all fully clear of the Respondent's participation status in the election and this credits the view that I take, that the Respondent did not masquerade as a PF aspiring Member of Parliament. He had a clear electoral symbol upon which his supporters voted on.

I would dare to say that in the 2011 general elections, the Petitioner who won the elections in Lukashya Constituency for a second time must have been well know in that Constituency and that she was a PF Member of Parliament. In 2016, she was challenged by RW1 the independent candidate. I find it far-fetched to imagine that when she sought re-election, her identity as a PF

member would be confusing to the electorate who mostly voted for the PF in Lukashya Constituency at presidential level. It is a great wonder that the electorate who voted for the PF candidate at Presidential level would be so confused so as not to vote for the Petitioner at the Parliamentary level.

Having carefully evaluated the evidence before me, I can only come to the conclusion that the people of Lukashya Constituency were not misled by the independent candidate who allegedly masqueraded as a PF party sponsored candidate. They cast their vote for the independent candidate whom they knew stood in the position he did and not as a PF candidate.

The sixth allegation raised by the Petitioner is that *on 9<sup>th</sup> August, 2016, the 1<sup>st</sup> Respondent went on radio Lutanda, a local radio station and stated that he was a PF member and his President was Edgar Chagwa Lungu, implying that he had not yet resigned from PF yet he stood as an independent candidate contrary to Article 51 (c) of **the Constitution**.*

The Petitioner testified that the Respondent appeared on Radio Lutanda. However, the recording of the Respondent's interview was not produced in Court. In my considered view, the Petitioner needed

to prove her allegation by producing the recording from Lutanda radio station. As it is hearsay evidence is inadmissible without corroboration. I therefore find no merit in the Petitioner's allegation.

All in all, I find that the majority of the voters in the Lusenga and Mukanga Wards, which the Petitioner alleges covers over twenty-polling stations were not prevented from electing the candidate whom they preferred in the Constituency. Having found so, I hold that **MWENYA MUNKONGE**, the Respondent, was validly elected as **Member of Parliament** for **Lukashya Constituency**. I also hold that the illegal practices alleged to have been committed by the Respondent and or his agents were not proved to a convincing degree of clarity to warrant the voidance of **MWENYA MUNKONGE'S** election.

Although costs normally abide the event, I am of the considered view that each party must bear its own costs.

Leave to appeal is hereby granted.

Delivered at Lusaka this 14<sup>th</sup> day of November, 2016.

  
M. Mapani – Kawimbe  
**HIGH COURT JUDGE**