

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT MANSA
(Constitutional Jurisdiction)**

2021/HP/EP/0043

IN THE MATTER OF: THE PARLIAMENTARY ELECTION RELATING TO
LUAPULA CONSTITUENCY HELD ON 12TH

AND

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, THE
CONSTITUTION OF ZAMBIA ACT, CHAPTER 1,
VOLUME 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: ARTICLES 1, 2, 5, 8, 9, 45, 46, 47, 48, 49, 50, 54,
70, 71, 72, AND 73 OF THE CONSTITUTION OF
ZAMBIA, CONSTITUTION OF ZAMBIA ACT,
CHAPTER 1, VOLUME 1, OF THE LAWS OF
ZAMBIA

AND

IN THE MATTER OF: SECTIONS 29, 37, 38, 51, 52, 55, 58, 59, 60, 66,
68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83, 86, 87,
AND 89 OF THE ELECTORAL PROCESS
(ELECTORAL CODE OF CONDUCT) ACT NO 35 OF
2016 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SECTIONs 96, 97, 98, 99, 100, 106, 107, AND 108
OF THE ELECTORAL PROCESS (ELECTORAL
CODE OF CONDUCT) ACT NO. 35 OF 2016 OF
THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT,
2016

BETWEEN:

DANIEL CHISALA

PETITIONER

AND

A.B. CHANDA KATOTOBWE

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2nd RESPONDENT

**BEFORE THE HONOURABLE MR. JUSTICE KENNETH MULIFE IN OPEN
COURT**

For the Petitioner: Mr. James Mataliro - Messrs James and Doris Legal
Practitioners

For the 1st Respondent: Mr. Henry Soko – Messrs Central Chambers

For the 2nd Respondent: Mr. Nicholas Okware – Messrs Okware and
Associates

J U D G M E N T

Cases referred to:

1. Lewanika & Others vs. Chiluba (1998) ZR 79
2. Brigadier General Kankinza Kenneth & Others vs Sarah Saifwanda & Electoral Commission of Zambia, 2011/HP/54
3. Abuid Kawangu v Elijah Muchima, Appeal no. 8 of 2017
4. Mubika Mubika v Poniso Njeulu, SCZ Appeal no. 114 of 2007
5. Jonathan Kapaipi v Newton Samakayi CCZ Appeal no, 13/2017
6. Mubita Mwangala v Inonge Mutukwa Wina, SCZ Appeal no. 80 of 2007
7. Josephat Mlewa v. Eric Wightman (1995/1997) Z.R 171

8. Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General Appeal no. 10 of 2016
9. Margret Mwanakatwe v Charlotte Scott, Selected Judgment no. 50 of 2018
10. Christabel Ng'imbu v Prisca Chisengo Kucheka, CCZ Appeal no. 16 of 2017
11. Giles Chomba Yambayamba v Kapembwa Simbao, Selected Judgment no. 6 of 2018
12. Sibongile Mwamba v Kelvin M. Sampa, CCZ Appeal no. 2 of 2017
13. Reuben Mtolo Piri v Lameck Mangani Supreme Court, Appeal no. 135/2012
14. Michcal Mabenga v Wina and Others (2003) Z.R 110
15. Austin Liato v Sitwala Sitwala, selected Judgment no. 23 of 2018
16. Austin C. Milambo v Machila Jamba CCZ, Appeal No. 6 of 2016
17. Venkataramana Devaru v The State of Mysore (1958) SC 25
18. Wilson Masautso Zulu v Avondale Housing Project Limited (1982) ZR 172
19. Khalid Muhammad v Attorney General, (1982) ZR 66
20. Anderson Kambela Mazoka and Two Others v Levy Patrick Mwanawasa and Two Others, (2005) ZR 138
21. RTD Dr. Kizza Besigye v Museveni Yoweri Kaguta (2006)
22. Mbololwa Subulwa v Kaliye Mandandi, Selected Judgment no. 25 of 2018
23. Richwell Siamune v Gift Sialubalo, Selected Judgment no. 58 of 2017
24. Nelson Vs AG & Anor (1990) 2 EA 160 (CAF)
25. Karokora Vs EC & Kagonyera, Election Petition no. 2 of 2001
26. Saul Zulu V Victoria Kalima, (2014) ZR 14
27. Breilsford James Gondwe v Catherine Namugala, Appeal no. 175 of 2012
28. Independent School Dist v Independence School District 170, N. W 2d 433, 440 (Mini, 1969)
29. Herbert Shabula v Greyford Monde (Appeal No. 13 of 2016 – 2019/CC/A032

30. Simasiku Kalumiana v Lungwangwa Geofrey and the Electoral Commission of Zambia, 2006/HP/ EP007
31. Simasiku Namakando v Eileen Imbwae 2006/HP/EP/002
32. Nabukeera Hussein Hanifa v Kibule Ronald and Another (2011) UGCH72
33. Christopher Kalenga v Annie Munshya and Two Others, 2011/HK/EP/03
34. Webster Chipili v David Nyirenda, SCZ Appeal Judgment No. 35 of 2003
35. Raila Odinga and Five Others v Independent Electoral and Boundaries Commission and Three Others, Kenyan Supreme Court Election Petition No. 5 of 2013

Statutes referred to:

1. Constitution of Zambia, Chapter 1 of the Laws of Zambia
2. Constitution of Zambia (Amendment) Act No. 2 of 2016
3. Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.
4. Electoral Process Act, Act No.35 of 2016
5. Electoral Process (Code of Conduct) (Enforcement) Regulations, 2016
6. Electoral Process (Code of Conduct) (Amendment) Regulations, 2020
7. Electoral Process (General) Regulations, 2016

Works referred to:

1. Halsbury's Laws of England, 4th Edition
2. Halsbury's Laws of England, 5th Edition
3. Steven H. Gifis, Dictionary of Legal Terms: Definition and Explanations for Non-Lawyers, Third Edition
4. Black's Law Dictionary, 8th Edition, Edited by Bryan A. Garner
5. Registered Voters per Polling Station, 2021, ECZ Register

1.0. INTRODUCTION

- 1.1. This is a judgement in an election petition resulting from a parliamentary election that was held in the Luapula Constituency in the Lunga District of the Luapula Province, of the Republic of Zambia, during the 12th August 2021 General Elections.
- 1.2. In the said election, the Petitioner and the 1st Respondent were sponsored by the United Party for National Development (UPND) and the Patriotic Front (PF), respectively. There were two other candidates namely Lukas Mwansa and Bulanko James. However, they are not part of this petition.
- 1.3. At the conclusion of the polls and on 14th August 2021, the 1st Respondent was declared duly elected and therefore winner of the contest, by the Returning Officer of the second Respondent, the Electoral Commission of Zambia (ECZ), having polled 8, 962 votes out of a total of 13, 784 votes which were cast. This aspect is confirmed by exhibit 'DC1' in the affidavit sworn by the Petitioner filed in support of the Petition. The exhibit is ECZ Form 19 entitled "Record of Proceedings at the Totalling of the Votes - National Assembly". It discloses that the Petitioner came out second with 4443 votes. The other two candidates polled a combined total of 167 votes and 212 ballot papers were rejected.

- 1.4. According to the Registered Voters per polling Station, 2021, ECZ Register, the total number of registered voters in the Constituency for purposes of the subject elections is 17,353.
- 1.5. Dissatisfied with the mentioned declaration, the Petitioner filed the present Petition into this Court on 27th August, 2021.
- 1.6. On 13th September, 2021, the Petitioner made a *viva voce* application to amend the said Petition. The application was granted and the amended Petition was filed into this Court on 14th September 2021. Herein, the Petitioner is claiming as against the Respondents, the reliefs reproduced below thus:

- i. That the said 1st Respondent was not duly elected and therefore the election of the 1st Respondent as a Member of the National Assembly for Luapula Parliamentary Constituency is void;
- ii. The illegal practices committed by the 1st Respondent and/ or his agents materially affected the election result so that the same ought to be nullified. And,
- iii. An order that the costs occasioned by this Petitioner be borne by the Respondents

2.0. AVERMENTS

2.1.0. Averments on behalf of the Petitioner

- 2.1.1. The following are the averments which the petitioner made in his amended Petition: That he was a candidate in the subject election wherein the 1st Respondent was declared duly elected as outlined

above; that contrary to the said declaration, the 1st Respondent was not validly elected for the reason that he did not comply with the provisions of the Constitution and of the EPA based on the following incidents: that the 1st Respondent and his agents , during the campaign period including between May and August 2021, gave money to village headmen amounting to K200.00 each; that on 9th and 11th June, 2021 the 1st Respondent and his agents, gave out money in notes of K10 to most of the voters in Lunga District thereby affecting the integrity of the election. On the poll day, the 1st Respondent and his agents continued to give money to voters at almost every polling station in the Constituency within the premises of the polling stations in sight of the presiding officers in some instances.

2.1.2. The Petitioner avers that the 1st Respondent and his agents took over the distribution of relief food into a campaign tool by distributing mealie-meal selectively only to their supporters and persons who pledged to vote for the 1st Respondents; that the 1st Respondent, his agents and campaign team induced the voters to vote for the 1st Respondent by threatening to remove the voters from the social cash transfer system if they did not vote for the 1st Respondent. Further that the electorate were promised that the 1st Respondent would facilitate for the payment of social cash transfer paid between 9th and 11th September if they voted for him.

2.1.3. The Petitioner also averred that at around 13:00hrs to 15:00hrs on the poll day, the 1st Respondent's aide shot at voters while voting

was taking place in which one voter was shot in the leg. That this incident severely disrupted the voting process and instilled fear into the voters; that on the 11th and 12th August, 2021 after the period for the campaigns had lapsed, the PF Councillors who were part of the 1st Respondent's campaign team were found in Chafwe and Mwenshi with Chitenge materials and money for distribution to voters and that Senior Chief Nsamba was openly campaigning for the 1st Respondent and threatened to banish people who would not vote for the 1st Respondent, from his chieftdom. That this affected the integrity of the election.

2.1.4. That at Matipa polling station, the Presiding Officer, one Jeff Nkandu was involved in a ballot paper scandal where seven ballot papers were issued to a lady who was in possession of multiple voter's cards; that at the same Matipa Polling Station, more than 4 ballot papers were issued to some voters and that the said Jeff Nkandu was not trained for the exercise but only handpicked at the last moment.

2.1.5. It was also averred that Voters who were not in the voter's register were allowed to vote at the Matipa Polling Station; that people below the age of eighteen were allowed to vote at various polling stations which include Matongo Primary School, Mukabe Community Market, Kasomalunga Primary School and Chafye Primary School.

2.1.6. That at Kasomalunga Polling Station one of the 1st Respondent's polling agents was issued a whole ballot booklet contrary to the

electoral practice; that in multiple polling stations including 01 Itala,, Kasomalunga 02, Mwachikonde and Chibulu 01, presiding officers were overcrowding tables with over ten voters obstructing the view of the Petitioner's electoral agents so that agents were not able to see what was happening at the tables, in the voting booths and near the ballot boxes; that there were unnecessary and unexplained delays in counting the votes at Kasomalunga Primary School Polling Station where they concluded voting around 21:00hrs on 12th August, 2021 and started counting the votes around 02:00hrs on 13th August 2021 contrary to electoral practice.

2.1.7. That Andrew Chiboni acting under the instructions of the 1st Respondent pepper sprayed a UPND official who was in the company of the petitioner while the Petitioner was inquiring over why the PF had camped at the polling station for the entire campaign period and that the Petitioner, his agents and campaign team were allowed to campaign freely in the district and the registered voters did not have a chance to make an informed decision.

2.1.8. It was averred that the 1st Respondent's agents and cadres also camped at a polling station namely Kasoma Lunga Primary School for the entirety of the campaign period up to the polling day. Further, the 1st Respondent and his agents used government property on nomination day and during the campaign period in the form of boats and tents from the Disaster Management and

Mitigation Unit (DMMU) as well as Lunga District Council boats which were kept by the District Commissioner.

- 2.1.9. That the Presiding officers appointed by the 2nd Respondent refused to issue GEN20 Forms to the Petitioner's polling agents at some Polling Stations; and, that the 2nd Respondent employed as poll staff, supporters of the PF and more especially supporters of the 1st Respondent, leaving out a majority of serving government workers in Lunga District against standard electoral practice.
- 2.1.10. That on 10th August, 2021, the 1st Respondent had meetings with poll staff in the absence of the Petitioner and other candidates and or their agents;
- 2.1.11. It was the Petitioner's contention that the above listed illegal practices committed by the 1st Respondent did not create conditions conducive to the conduct of free and fair elections. That in the circumstances, the 1st Respondent was not validly elected and the majority of the voters in the Constituency were prevented or enticed to avoid electing their preferred candidate.
- 2.1.12. These are the averments in the petition.
- 2.1.13. Turning to the affidavit verifying the Petition, the averments therein are similar to those in the Petition save for the reference to exhibit 'DC1' described above; exhibit 'DC2' being pictures depicting the multiple ballot papers which were given to a lady at Matipa Polling Station and exhibit 'DC3', being a true copy of the said lady's national registration card (nrc).
- 2.1.14. These are the Petitioner's total averments.

2.2.0. *Averments by the 1st Respondent*

2.2.1. The 1st Respondent is opposed to the said Petition. In doing so, he filed an answer into Court dated 16th September 2021 in which he avers that he was duly elected in the subject election after complying with the electoral process law.

2.2.2. He denies, in his own right and that of his agents, the Petitioner's allegations that he distributed any money to village headmen or voters across Lunga District, or having distributed relief food as this was distributed by the government and non-governmental organisations.

2.2.3. The 1st Respondent denies having distributed social cash, facilitate for its payment or exclude a beneficiary thereof adding that he does not have that power or authority to facilitate the payment for social cash transfer and the powers to remove anyone from the list of beneficiaries of such money.

2.2.4. The 1st Respondent admits having camped his team at Kasoma Lunga Primary school but adds that he legitimately paid for the use of the school from 26th July 2021 to 11th August 2021. He however denies having camped at the school up to the polling day. He admits using tents for Lunga District Council on the nomination day adding that the tents were available to all candidates. He denies in his own right and that of his agents, having used government property in form of boats on any day. He denied the allegation that his councillors were caught at Chafye and Mweshi with Chitenge materials and money for distribution to voters; that at no time did

he instruct any of his agents to pepper-spray a UPND official. He denied the Petitioner's allegations relating to Chief Nsamba adding that the Chief never attended any of his meetings in the chiefdom.

2.2.5. The 1st Respondent averred that the alleged shooting took place at the harbour which is not visible at Mweshi Polling Station in view of the distance of about 800m separating the two places. That gunshots were fired in the air by Mr. Haggai Bwalya his supporter, to disperse supporters of the UPND who were pursuing his team and throwing stones at their boat with a view to harm everyone on the boat. That in the due course, a member of the 1st Respondent's team was injured by a stray bullet.

2.2.6. The 1st respondent maintains that Jeff Nkandu was in fact trained for the role of Presiding officer. He denied the allegation that the said Jeff Nkandu was handpicked. That the following allegations are within the peculiar knowledge of the Petitioner and he would be put to strict proof at trial: that voters who were not in the voter' register were allowed to vote at Matipa Polling Station; that people below the age of eighteen years were allowed to vote at the various polling stations; that presiding officers refused to issue GEN 20 Forms; that at Kasomalunga polling station, one of his polling agents was issued a whole ballot book; that in multiple polling stations listed above, presiding officers were crowding tables with voters thereby obstructing the view of the Petitioner's electoral officials; that there were unexplained delays in counting votes at Kasomalunga Primary School; that the 2nd Respondent employed

supporters of the 1st Respondent and the PF leaving out government workers; that the Petitioner, his agents and campaign team were not allowed to campaign freely in the district and the registered voters did not have a chance to make an informed decision.

2.2.7. The 1st Respondent averred that contrary to the Petitioner's allegation, he only met his polling agents and for that reason, the Petitioner was not entitled to be in attendance.

2.2.8. Based on the foregoing, the 1st Respondent prayed for the following:

- i. A declaration that the 1st Respondent was duly elected as Member of Parliament for Luapula Constituency
- ii. A declaration that the said election was neither void nor a nullity and the elections results be upheld as true and accurate. And,
- iii. An order that the Petitioner is not entitled to any further or other relief and that the Petition be dismissed with costs.

2.2.9. These are the 1st Respondent's averments.

2.3.0. Averments on behalf of the 2nd Respondent

2.3.1. The 2nd Respondent is similarly opposed to the petition and in doing so, filed its answer into Court on 15th September 2021 in which it made similar admissions to those by the 1st Respondent.

2.3.2. The 2nd Respondent did not make comments on allegations which concern the 1st Respondent. It denies the allegation that there was

a ballot paper scandal at Matipa adding that the Presiding officer at Matipa was trained and not handpicked.

2.3.3. That no voter was issued with more than one ballot paper at Matipa Polling Station; that no unregistered voters were allowed to vote and that no voter below the age of 18 was allowed to vote either.

2.3.4. It was averred that contrary to the Petitioner's allegations, presiding officers issued GEN 20 Forms to all polling agents including those for the Petitioner; that no one was issued with a whole ballot book adding that the Petitioner has not mentioned the individual who was allegedly issued with the book; That there was not at all overcrowding of voters in polling stations thereby obstructing the view of the Petitioner's electoral agents. Rather, voting was transparent and orderly and fully viewed by all polling agents; that contrary to the Petitioner's allegations, counting of the votes at Kasomalunga Primary School Polling Station commenced immediately the last vote was cast.

2.3.5. The 2nd Respondent denied the Petitioner's allegation that its polling staff held meetings with the 1st Respondent in the absence of other candidates; that it employed qualified Zambians as its poll staff without having regard to political affiliation adding that the allegation is not supported by evidence; that contrary to the Petitioner's allegation, the 2nd Respondent at Kasomalunga Polling Station or at all adding that its polling staff have no powers to issue a whole ballot booklet to a polling agent.

2.4.0. The 2nd Respondent avers that the 1st Respondent was duly elected Member of Parliament for Luapula Constituency and the Petitioner is not entitled to any of the reliefs he is seeking or at all.

2.5.0. There were no averments in reply by the Petitioner. These are the averments in toto.

3.0 THE EVIDENCE

3.1.0 Evidence on behalf of the Petitioner

3.1.1 The Petitioner testified in his own right. He additionally called sixteen witnesses. He told the Court that Luapula Constituency has 10 wards with a total number of 17, 353 voters and 32 polling stations for purposes of the subject General Elections. That the Constituency shares boundaries with Kanchibiya, Chitambo, Bangweulu and Chilubi Constituencies. Water is the mode of transport.

3.1.2 The Petitioner stated that Luapula Constituency is largely governed by the following: Chiefs Bwalya Mponda, Nsamba, Kasoma Lunga and Senior Chief Kalimankonde, and 4 sub-chiefs namely Milambo, Ponga, Kambala and Mwishi. That since government's presence is not very much available, governance of the area lies with the chiefs, sub-chiefs and village headmen.

3.1.3 That for the past two years, the area in which the Constituency is situated has been experiencing hunger because of flash floods during the past two rainy seasons.

3.1.4 The 1st Respondent and other members of the PF started their campaigns in June 2021 up to 11th August 2021. That the PF being a governing party and being in-charge of the distribution of relief food

and the social cash transfer program, took advantage of the hunger situation in the Constituency by selectively giving relief food or threatened to remove people who were not members of the PF from the beneficiaries' list.

3.1.5 The Petitioner told the Court that social cash transfer is a government program administered by the Department of Community Development and Social Welfare. It involves relief money that is distributed to poverty-stricken people.

3.1.6 That from the time Lunga District was declared a disaster zone after the floods, the district would from time to time, receive relief food from the Government, in form of mealie meal, beans and cooking oil. The DMMU would ferry food up to Panta Harbour. That PF officials took advantage of this situation by taking over the delivery and distribution of the relief food to the Constituency, selectively to only those who supported the PF. That he found boats being loaded with mealie-meal at Panta Harbour and PF councillors who included Joshua Chanda, Shepherd Kabashi and Vincent Mambwe, were the ones in-charge of the exercise. The food was destined for all the wards.

3.1.7 The Petitioner stated that as result of the said food distribution done by the PF, it was very difficult for the Petitioner's supporters who were hunger stricken to support the UPND. Further, the 1st Respondent and his agents (such as Power Kalaliki, Andrew Chiboni and Bwalya Jimmy) threatened to exclude the people who did not support the PF from accessing the relief food and the social cash. The threats were issued using mega phones particularly by Bwalya Jimmy. He would

start disseminating the threats from 04:00 hrs up to 07:00 hrs as he moved from one village to the other and the message was heard by everyone in Lunga especially at Kasomalunga where it was disseminated. That this practice scared a lot of people prompting them to desert the UPND and to join the PF so that they could access the social cash and relief food.

3.1.8 The Petitioner told the Court that he personally perceived Jimmy's said threat as he was in Kasomalunga from 4th - 10th August. He stressed that on one occasion, he even met Jimmy making such announcements.

3.1.9 The Petitioner further testified that among many other incidents, on 14th May, 2021, the day of nominations, the PF got tents belonging to the DMMU, a government agency, which were kept by the District Commissioner, to use for their camping at Kasomalunga Polling Station. That they camped there during the entire period of the nominations namely from 15th to 19th May and during the entire campaign period up to 11th August 2021.

3.1.10 Further, the PF used government boats to conduct their campaigns in the Constituency. These boats belonged to the District Commissioner, the DMMU and the District Council adding that the 1st Respondent was using the District Commissioner and the District Council's boats citing the following examples: that in May, the 1st Respondent travelled from Samfya to Kasoma Lunga using a boat belonging to the District Council and that in July, the 1st Respondent used the District Commissioner's boat to travel from Samfya to

Kasoma Lunga. He could not remember the other times when the 1st Respondent used the boats. That he is not aware if the DMMU, the District Commissioner and the District Council had arrangements where their boats could be used by private individuals. He however maintained that being government facilities, they were reserved only for government operations.

3.1.11 The Petitioner told the Court that the Chief campaigner for the UPND, the President for the UPND, was denied permits on several occasions to fly and enter into Luapula Constituency by relevant government authorities then. That he was negatively affected by these developments because voters could not vote for him on account of not seeing his chief campaigner who should have led the campaigns.

3.1.12 It was the Petitioner's testimony that Senior Chief Nsamba personally campaigned for the PF and the 1st Respondent in his chieftdom. The said Senior Chief further uttered hate speech bordering on tribe during his campaigns.

3.1.13 That on 7th July, 2021 while the Petitioner was at Nsalushi Ward, he heard Senior Chief Nsamba campaign for the PF. That during the occasion, the Chief told the people not to vote for a Tonga President and the Petitioner because if they did so, the country would be divided. That the Lungas use boats for transport and so they should vote for the boat (meaning the PF because that was its symbol) and that if they voted for the UPND they will bring cattle to the swamps and it will be difficult for people to move using cattle.

3.1.14 The Petitioner stated that Senior Chief Nsamba further threatened that he will chase all those who voted for UPND from his chiefdom. That the Chief held other meetings in the chiefdom which the Petitioner did not attend but were attended by some of his witnesses. That because of the high illiteracy levels in his area, upon hearing the hate speech by Senior Chief Nsamba, many people were influenced not to vote for the Petitioner. Consequently, the Petitioner was disadvantaged.

3.1.15 The Petitioner told the Court that there are two incidents; one in Chumbwe Ward and the other in Mweshi Ward, where the PF were found campaigning outside the prescribed campaign period. That at 18:00 hrs on 11th August 2021, UPND officials found PF officials campaigning in these two Wards and at about 23:00 hrs and at about 02:00 hrs on 12th August 2021. That they were found distributing Chitenge materials and money.

3.1.16 During cross-examination by Mr. Soko, Legal Advocate for the 1st Respondent, most of the Petitioner's responses were similar to his evidence in-chief save to add the following: that he has contested parliamentary elections on five occasions and lost on all the occasions but this is the first time he is petitioning the outcome; that Lunga District which is in other words the Luapula Constituency has 150 headmen; that at no time did he find himself campaigning in the same area as the 1st Respondent; that he did not personally see the 1st Respondent distribute the relief food he spoke about but that the food was being distributed by the 1st Respondent's agents; that he has no

witness from the DMMU to confirm that the distribution of the relief food was usurped by the PF; that he personally witnessed the PF inducing voters using the social cash in Kasoma Lunga Ward adding that he won the election in Kasoma Lunga Ward.

3.1.17 The Petitioner state that there are no lodging places in Kasoma Lunga Ward; that he is not aware that the 1st Respondent and his agents had legitimately paid for the use of Kasoma Lunga Primary School during the period he said they had camped there. When referred to page 2 of the 1st Respondent's bundle of documents, the Petitioner said that the document there is a government receipt depicting a payment for use of school facilities but added that the mentioned receipt was issued as an afterthought resulting from his oral complaint to the headteacher of the school.

3.1.18 The Petitioner stated that according to ECZ regulations, no one is allowed to camp at a polling station and he was disadvantaged when the 1st Respondent and his agents camped there.

3.1.19 When asked about his allegation that the 1st Respondent used government boats to conduct campaigns, the Petitioner told the Court that he is aware that the 1st Respondent purchased some boats. When referred to pages 1 and 14 of the 1st Respondent's bundle of documents, the Petitioner stated that they are documents depicting purchase of boats and fuel by the 1st Respondent. He denied being aware that Lunga District Council hires out its boats. This was despite having been referred to a document at page 3 of the 1st Respondent's bundle of documents adding that the said document refers to a cargo

boat and not a passenger boat which he talked about during examination-in-chief. Quoting only relevant portions, the document states as follows

I, EVANS MWANZA ON BEHALF OF THE PATRIOTIC FRONT LUAPULA CONSTITUENCY...have today the 29th July 2021 acknowledged payment of TWO THOUSAND KWACHA ONLY...to LUNGA TOWN COUNCIL the same being payment for...HIRE OF CARGO BOAT FOR USE.

3.1.20 The document shows that it is signed by Mwanza Evans of the one part and Lunga Silwenga of the other part and on behalf of Lunga Town Council, on 29th July 2021. It is endorsed with a date stamp for the Lunga Town Council inscribed with the word "received", dated 29th July 2021.

3.1.21 In further cross-examination by Mr. Soko, the Petitioner told the Court that on the election day, he witnessed the 1st Respondent's agents giving out money to voters at Itala Polling Station. However, the 1st Respondent was not there and he was not the only candidate for the PF; that he has not exhibited pictures depicting a lady with multiple voter's cards. This is in relation to his allegation that Presiding Officer Jeff Nkandu of Matipa Polling Station, had issued seven ballot papers at that polling station, to a lady who had multiple voter's cards.

3.1.22 When referred to pages 4 – 5 of the 1st Respondent's bundle of documents, the Petitioner told the Court that the last name thereon is Jeff Nkandu but that the list can be manipulated since it is handwritten. The Petitioner told the Court that Jeff Nkandu's names

similarly appear on documents appearing at pages 6 and 8 of the 1st Respondent's bundle of documents. This was in reference to his allegation that Jeff Nkandu was not trained for the role of presiding officer but was just handpicked.

3.1.23 The document at page 4-5 of the 1st Respondent's bundle of documents is entitled "Attendance List – Poll Staff Training: Day 2; Dated 29/07 2021". Indeed, the name of Nkandu Jeff appears at the end of the list. The document at page 6 of the said bundle of documents depicts an answer sheet with a mark of 71% for Nkandu Jeff. The document at page 8 of the same bundle of documents is entitled "Class One (1) – Poll Staff Results". Nkandu Jeff's name appears at number 28 with a mark of 71%. The list has a total of 42 names.

3.1.24 Under further cross-examination by Mr. Soko, the Petitioner stated that he has not produced a voter's register for the Luapula Constituency and that he noticed that people aged below 18 years were allowed to vote way before the polling day except his polling agents had no opportunity to stop the incident. This was in connection with his allegation that people of that age were allowed to vote in the Constituency.

3.1.25 The Petitioner stated that at no point did the 1st Respondent or his agents get to the site where he had camped with his agents; that before Court, he did not tender medical reports to confirm his allegation that people were pepper-sprayed by the 1st Respondent's agents particularly Andrew Chiboni.

3.1.26 The Petitioner also told the Court that his polling agents were denied GEN 20 Forms in 18 polling stations though he did not witness this. Further, that his polling agents were not allowed to take part in the counting of votes and that he personally perceived the overcrowding of voters in polling stations resulting into his poll staff being blocked from seeing what was going on at the voting tables. When asked, the concerned presiding officers admitted that the obstruction of polling agents by overcrowding, was an anomaly.

3.1.27 Concerning his complaint of the 2nd Respondent's unexplained delay to start counting votes at Kasoma Lunga Primary School Polling Station, the Petitioner said that when voting closed, there were no attempts to tamper with ballot papers; that notwithstanding the fact that he won the election at Kasoma Lunga ward, the delay in counting of votes affected the outcome of the election because the ECZ requires that counting of votes should begin immediately after voting has closed.

3.1.28 The Petitioner stated that the 2nd Respondent is not under an obligation to consult anyone or any candidate in employing its poll staff and that he did file a complaint with the Conflict Management Committee that his agents and campaign team were not allowed to campaign freely.

3.1.29 When cross-examined by Mr Jeah Madaika, the Petitioner stated that he did not file a complaint to the Conflict Management Committee in the prescribed form regarding his complaints outlined above concerning the manner officers of the 2nd Respondent

conducted the subject election and this is because the relevant officials of the 2nd Respondent did not advise him on the procedure to lodge a complaint in the prescribed form.

3.1.30 The rest of Mr. Madaika's questions were covered by Mr. Soko because they touched on the 1st Respondent save to add as follows: that he did not see the 1st Respondent in the company of the individual who issued threats on a megaphone to exclude non-PF supporters from accessing relief food and social cash. Further, he did not see the 1st Respondent instruct that person to issue the threats. That he never witnessed the 1st Respondent collect anything from the DMMU; that he never saw the 1st Respondent in the company of Chief Nsamba when the Chief was allegedly campaigning for the 1st Respondent and threatening to banish non-PF supporters from the chiefdom. Further, he never saw the 1st Respondent consent to the threats by the chiefs.

3.1.31 When the Petitioner was re-examined by Mr. Matalilo, he stated that he did not know by what margin he had won the election in Kasoma Lunga; that the name of the school on the receipt at page 2 of the 1st Respondent's bundle of documents, is not visible; that he never saw the boats referred to in documents at page 10 – 14 of the 1st Respondent's bundle of documents. Further, the documents at page 10-11 of the same bundle of documents do not indicate the 1st Respondent's name.

3.1.32 **PW1** was Matthews Mwewa a Chairperson of the UPND. He testified that on 8th August 2021, he with the Petitioner, Mr. Kapasa

Knife and Chabu Kalaliki left Itala ward and went to Kasoma Lunga District. They arrived at 07:20hrs and found 10 boats belonging to the District Commissioner, at the harbour. The members of the PF who were wearing the PF regalia were loading bags of mealie-meal labelled "Urban Relief Food Program under the Office of the Vice President 12.5 kg DMMU", they got from the District Commissioner, on the said boats. At that harbour, Pw2 saw the 1st Respondent in the company of his political party affiliates who included Bwalya Katotobwe, Chibolya Andrew, Kambala Kabebe, George Musaba, Bibiana Chipampa. The 1st Respondent then instructed his political party affiliates to distribute the mealie-meal to members of the PF and people who wanted to join the PF. This, they did and the people he saw distributing the mealie-meal include the following: Michael Mwansa, the Luapula Constituency Chairperson for PF, Rodgers Musalame, an agent for the PF, Power Kalaliki, the Lunga Ward Counsellor. But due to starvation in Lunga, even some members of the UPND lined-up to receive the mealie-meal.

3.1.33 When PW1 asked why the PF members were distributing mealie-meal selectively, Katebe answered and said that they would distribute to PF members only as the 1st Respondent is for the PF. When PW1 got to Lubale ward, village headmen Kabulu, Mandwe, and Mutwamina informed PW1 the agents of PF and Councillors told the Headmen that the mealie-meal would be distributed to PF members only. He found the same situation in Chumbwe ward. He reported the

matter to the Conflict Management Team and was advised that the chairperson was not present.

3.1.34 When cross-examined by Mr. Soko, PW1 mainly recited what he had stated in examination-in-chief save for the following: that none of the people in his company had a camera to take pictures of the events at Kasomalunga and all their phones were off.

3.1.35 When cross-examined by Counsel for the 2nd Respondent, PW1 repeated evidence-in-chief and cross-examination by Counsel for the 1st Respondent save to add that the UPND won in the ward which is subject of his testimony. He also stated that he heard the 1st Respondent campaign because he followed him to Kasoma Lunga, Kapaya, Mukabe and Mwenda. That UPND won the election in the Kasoma Lunga Ward and that the mealie meal was distributed to both UPND and PF members.

3.1.36 When re-examined by Mr. Matariro, PW1 still repeated his averments from his examination-in-chief and cross-examination by both Counsel.

3.1.37 PW2 was John Yambayamba. He testified that on 12th August, 2021 around 01:00hrs while in his house sleeping, he heard someone knock on his door. He woke up to go and check who was knocking. He found Bowas Mubanga and Justin Kongole with chitenge materials branded PF. The said Justin and Bowas told PW2 that they were there to campaign. They gave PW2's wife two chitenge materials. He told them that the campaign period closed on 11th August 2021 at 18:00 and that he would take them to the polling station. The two PF

members then fled leaving 18 chitenge materials, 5 T-shirts plus 2 chitenge materials which they had given to PW2's wife.

3.1.38 In further testimony, PW2 testified that on 7th August 2021, relief food came to Chumbwe ward from Mpata but was only distributed by PF members who included Marko Chilubi and Mr. Sanshi Mukuta, on 11th and 12th August 2021. They said they would only give the UPND members if they surrendered their voter's cards and NRCs and PW2 was denied the mealie meal.

3.1.39 During cross-examination by Mr. Soko, Pw2 stated that he did not personally attempt to receive the mealie-meal but he personally heard the PF officials tell the voters that they would not receive relief food if they did not support the PF.

3.1.40 When cross-examined by Counsel for the 2nd Respondent PW2 stated that he testified on behalf of Mr. Salashate in the Council Chairperson Election Petition.

3.1.41 There was no re-examination.

3.1.42 **PW3** was Vivian Chipelembe. She testified that on 12th August 2021 she went to Mweshi Polling Station. She found that Steven Chipulu, a PF Councillor, had been brought on allegation that he was distributing money in denominations of K20 in K5 notes. A while later, she saw the 1st Respondent arrive in a boat while wearing a scarf which looked green. People started chanting slogans for the PF while lifting their clenched fists. The 1st Respondent in return lifted up his clenched fist and went into the polling Station. There was commotion as people started shouting that the 1st Respondent should come out of

village to vote for the 1st Respondent and not the Petitioner since the UPND is for Tongas. That the Chief further stated that Lunga uses boats as a mode of transport and that if the people voted for UPND, they won't be able to use cows as a mode of transport. That the Chief said that the people who will vote for UPND will not be benefiting from incentives such as mealie-meal and social cash transfer money.

3.1.46 PW4 testified that all the people in the village got scared because of the authority that the chief has over his subjects and that when the Chief says something all his subjects obey. Thus, a lot of UPND members left their party and joined the PF. PW4 did not defect to PF.

3.1.47 When cross-examined by Mr. Soko PW4 repeated his testimony in examination-in-chief. He added that he was not a beneficiary of social cash transfer and that about 80 -100 people are beneficiaries in Lubale village. The total number of people in Lubale village aged above 18 years, is about 900-1000. He did not know the results of the election in Lubale village.

3.1.48 There was no cross-examination from Mr. Okware and there was no re-examination.

3.1.49 PW5 was Quentina Lumbo, a candidate for the position of Councillor in Shinga Ward, on the UPND ticket. He stated that on 3rd July 2021, he went to Mutoni village in Shinga Ward of Luapula Constituency with the Petitioner. When they got to Mutoni Harbour, they found some members of the PF who were drunk. The said PF members started drumming, singing and insulting them.

3.1.50 The meeting which PW5 and the Petitioner intended to hold could not take place and the people who gathered were dispersed as a result thereof. On their way back to the harbour, the same PF members blocked them and held their boat. They only released them after being satisfied the insults they had showered on them.

3.1.51 As they boarded the boat, PW5 witnessed a quarrel that ensued amongst the PF members about how the beer and money which was given to them by the 1st Respondent was being unfairly distributed.

3.1.52 They proceeded to Cheta Ward where they were welcomed by members of the UPND. Later, they went to their camp. Shortly, members of the PF began singing the same songs which disrupted PW5's tour at Mutoni. The songs continued in the night at the time PW5's team went to bed and resumed at 04:00 hrs on 4th July 2021 thereby disturbing their sleep. They only stopped at 06:00 hrs. PW5's team lodged a complaint before Chief Bwalya Mponda. Members of the PF refused to answer to the Chief's summons and PW5's team left the palace. Further, the team failed to conduct the scheduled meetings in Cheta Ward due to the malicious disturbances by the PF. This included the workshop which they were scheduled to hold at Bwalya Mponda Primary School, a government facility, which facility, they had requested for and were permitted by teachers at that school to use.

3.1.53 On 17th July 2021, the UPND Vice President came to tour Cheta ward. The meeting was disrupted by the said unruly PF members who were insulting, drumming and playing loud music. PW5 decided to walk back home with his wife. When they got to Mutoni, the PF

members beat him and his wife using sticks and other objects. Thereby, he sustained an injury on his right eyebrow. That the foregoing incidents disadvantaged the UPND particularly the Petitioner as they were not able to freely conduct their campaigns compared to the PF.

3.1.54 When cross-examined by Mr. Soko, PW5 testified that he and his wife were beaten on their way from Mutoni to Chikoti village. He did not go the hospital for treatment of the injuries he sustained. He lost his seat as Counsellor as a result of the violence by PF members.

3.1.55 PW5 testified that he never saw the 1st Respondent and that the 1st Respondent was not in Lunga District between 3rd July, 2021 and 17th August, 2021.

3.1.56 There was no cross-examination from Mr. Okware.

3.1.57 When re-examined by Mr. Matarilo, PW5 stated that the workshop they had intended to hold at Bwalya Mponda Primary School was about teaching them dialogue.

3.1.58 PW6 Was Jasper Mulenga, one of the polling agents for the UPND, alongside Brendah Kapapula. They were deployed at Kasomalunga Primary School Stream 1 Polling Station on the election day, 12th August 2021. His complaints according to his testimony are as follows: firstly, that the Presiding Officer at that Polling Station, Mr. Samson Kambwali did not announce to the polling agents, the time the voting would start. Secondly that Mr. Samson Kambwali illegally gave a PF agent, Musaba George, a ballot book without the knowledge of other polling agents. When asked, Mr. Kambwali apologised and

withdrew the ballot book. He said it was given out by mistake. Thirdly, that at 22:05hrs after finishing conducting the voting, Mr. Kambwali ordered all the polling agents to leave the polling room and PW6 was hounded out of the polling room by a police officer. Counting of the votes started before he and Brendah Kapupula (who was visiting the toilet) could return to the voting room. PW 6 returned to the voting room at 22:20 hrs. That he argued with Mr. Kambwali about this.

3.1.59 When they finished counting presidential ballot papers at around 02:00 hrs on 13th August 2021, Mr. Kambwali ordered all the polling agents to leave the voting room but PW6 resisted and Mr. Kambwali yielded/gave in. The counting continued and only ended at 14:30 hrs. They were the last polling station to finish counting votes in all the wards. PW6 stated that the Presiding Officer at Kasoma Lunga did not follow procedure for counting of ballot papers of Parliamentary elections.

3.1.60 When cross-examined by Mr. Soko, PW6 stated that out of the five agents in the voting room, he was the only one who was ejected from the voting room; that Musaba George had an extra ballot book in his hands and yet there was one which they were all using. As polling agents, they are not allowed to handle a ballot book as it is just shown to them by the presiding officer to capture or verify its serial number before it is put to use. That if its serial number has not been verified by polling agents, it is not possible for a ballot book to be used.

3.1.61 PW6 stated that he did not see the contents of the ballot book which Musaba George had as such he could not tell whether the said

ballot papers were pre-marked. That despite all this, the election results for all the contested positions went in favour of the UPND candidates.

3.1.62 Under cross-examination by Mr. Okware, PW6 stated that he would not know if the ballot book that was found with George Musaba found itself in the ballot box; that the number of the cast votes was equal to the number of people he saw voting. Thus, 402 people voted for the position of member of parliament and after counting, it was found that the total votes for all parliamentary candidates was 402.

3.1.63 There was no re-examination.

3.1.64 PW7 was Shadreck Sela. He was a candidate for the position of council chairperson on the UPND ticket in the subject General Elections. He testified that on 27th July 2021, he with the campaign team for UPND left for Kasoma Lunga ward. When they got there, they found some members of the PF (namely the 1st Respondent and his PF team) had camped there contrary to the provisions of the law against the use of Government property for campaigns.

3.1.65 PW7 complained about this to the headteacher of the school who told him that he had been overpowered by the PF as they told him that they were empowered to use the facility since they are the political party in power. The PF continued camping at the school even when schools had opened. This prompted the UPND team to escalate their complaint to the police who guided that government facilities should not be used for political activities but the PF continued camping at the school even after the campaign period had closed.

Further, Kasomalunga Primary School, their camping site, was a polling station. This prompted PW7 and the members of his team to report the incident to the District Electoral Officer (DEO), a Mr. Frazer Chipili.

3.1.66 That on 11th August 2021, in the process of seeking the intervention of officers of the ECZ to evict the PF team from Kasomalunga Primary School, PF supporters sprayed chemicals into the Campaign Manager for the UPND, Mr. Mathew Mwewa's eyes. Further, they fired two 2 gunshots. This violence caused fear and PW7 with other members of UPND fled to their homes.

3.1.67 PW7 further stated that at 14:41 hrs on 12th August 2021, he noticed the following three anomalies at Matipa Polling Station in Mashiba Ward: firstly, that the manner the voting booths were arranged and the overcrowding of voters in the voting room obstructed all the polling agents from viewing the voting process. The Presiding Officer, Jeff Nkandu was approached and he corrected the anomalies.

3.1.68 Secondly, that PW7 saw a female voter by the names of Kunda Mwewa with 7 ballot papers as follows: one for the presidency; two for the National Assembly, two for the mayoral and two for the local government. Six of the said ballot papers appeared in Kunda Mwewa's name and voter's card number 12021035 whereas one ballot paper was in the names of a different person of voter's card number 12061035 which did not appear in the voter's register. When asked, Kunda Mwewa said she was given the ballot papers by Jeff Nkandu and the latter admitted this aspect.

3.1.69 Thirdly and connected to the foregoing (ballot papers incident), PW7 discovered that Jeff Nkandu was not authorised to issue ballot papers but one Tresford Kabamba. When asked, Jeff Nkandu said he issued the ballot papers by way of standing-in for Tresford Kabamba as the later was experiencing stomach pains whereupon he requested Jeff Nkandu to stand-in for him. Pw7 was further puzzled when Jeff Nkandu declared the ballot papers which were found on Kunda Mwewa, as spoilt, before the voting process had ended.

3.1.70 Further, PW7 and other interested individuals protested the conduct of Jeff Nkandu resulting into Jeff Nkandu stepping down and appointing one Kasuba to take over the position of Presiding Officer for the polling station.

3.1.71 When cross-examined by Mr. Soko the witness testified that he was aware that UPND also used Government property namely Bwalya Mponda Primary School for their political activities. That however, it was wrong for the PF to use Kasomalunga Primary School as a camp albeit even beyond the campaign period and the school being a polling station.

3.1.72 PW7 disputed the authenticity of the receipt at page 2 of the 1st Respondent's bundle of document on the basis that it does not show the name of the person who signed it and the name of the school adding that whether or not the facility was paid for does not alter the fact that use of government property for political purposes is not allowed.

3.1.73 PW7 also stated that what affected the UPND are the results of the election and not the sitting arrangements of the polling agents at polling station; that he is not aware that by 18:00 hrs on 11th August 2021, all the classrooms designated as polling stations were occupied and that the 1st Respondent polled more votes as compared to the Petitioner at Mashiba Polling Station.

3.1.74 There was cross-examination from Mr. Okware.

3.1.75 In re-examination by Mr. Matarilo, the witness stated that the UPND equally used Bwalya Mponda Primary school for their seminar and there was nothing wrong with it because the use was for a short period. That on the contrary, it was wrong for the PF to use the Government facility because the use was for a long period of time.

3.1.76 PW8 was Brenda Kapupula. Her testimony was as follows: on 10th July 2021 around 04:00a.m while sleeping at her home in Mukabe village, she heard Jimmy Bwalya make an announcement using a micro-phone that the 1st Respondent has said all those who will not vote for the PF candidates in the 12th August 2021 elections will stop receiving social cash transfer money. He only stopped spreading the threats at 07:00 hrs. However, the conduct continued until the 11th August 2021. That on 11th August 2021, the same Jimmy came back with the same message adding that the following day was a polling day and that he had made himself clear that all those who won't vote for the PF candidate will be captured on cameras that will be placed in the voting booths.

3.1.77 In further testimony the witness stated that the people were afraid of losing the benefit of social cash transfer money and this was in view of the hunger situation in the district caused by flood in the past two years. As such they depended on the social cash for livelihood. Thereby, the threats prevented the people from voting for their preferred candidate.

3.1.78 PW8 further stated that on 11th August, 2021, while she was at her restaurant, the 1st Respondent came with some members of the PF among them was Chakolwa Steven and Power Kaliki. They asked PW8 if she was the one who prepares food for members of the UPND. Before she could respond, Andrew Chiboni got a bottle from his pocket and sprayed on her face whereupon she collapsed. The 1st Respondent did nothing about it. Mwansa Dickson Kaluba then called for help. PW8 Sustained a red eye which she showed the court and was taken to the hospital where she received treatment. That this incident of pepper spraying caused a lot of fear in the people of the village and they never went to vote.

3.1.79 The incidents happened in Lunga Ward.

3.1.80 During cross-examination by Mr. Soko, PW8 testified that she was not aware that the 1st Respondent was not in Lunga ward on 11th August, 2021; that she is a beneficiary of social cash transfer and that there are 630 members who receive the said money in Kasoma East. She did not have the medical report in Court relating to the assault on her by Andrew Chiboni. That the Petitioner won the elections in the Lunga ward and PW8 was able to vote.

3.1.81 There was no cross-examination from Mr. Okware.

3.1.82 There was no re-examination.

3.1.83 **PW9** was Cephas Kabamba a polling agent for the UPND deployed at Mweshi Ward. He stated that on 12th August 2021, he was at Mweshi Polling Station. Around 13:00 he saw the 1st Respondent arrive in the company of others. Suddenly there was confusion as the people started chanting slogans while lifting up clenched fists shouting "power! Only on the boat!". The 1st Respondent did nothing but it would appear that he entered the voting room but voters who did not support him protest that he should leave. He left and PW9 was one of the people who escorted him to where he had docked his boat. As the big crowd started going back to the land PW9 heard two gunshots fired and his friend who was walking behind him, Abraham Bwalya, fell down and was bleeding on his right leg. People ran away and the voting was disrupted until 5 police officers were deployed to the Polling Station. Abraham was taken to a house where he was treated as they do not have clinic.

3.1.84 Under cross-examination by Mr. Soko, PW9 mainly re-cited his evidence-in-chief save to add the following: that as a parliamentary candidate, the 1st Respondent had a right to visit the Polling Station; that he does not know if the 1st Respondent had directed the people at Mweshi Polling Station to celebrate his presence; that the 1st Respondent did not do or say anything wrong when he entered the polling room at Mweshi Polling Station; that he was sure that the gunshots came from the 1st Respondent's boat that he is aware that

Mweshi Polling Station has 879 registered voters but is not aware that 690 people voted and that the victim of the shooting incident was taken back by people, to vote.

3.1.85 There was no cross-examination by Mr. Okware and no re-examination.

3.1.86 PW10 was Kwila Benkeni. He told the Court that on 28th July 2021 and 11th August 2021, he and 218 other people were called to attend a training at Kasomalunga Primary School as a poll staff. The training ended on 30th July 2021 and he passed the exams after obtaining 74%. On 11th August, 2021, he with many others went to Civic Centre to wait for deployment during which he saw the 1st Respondent, Jeff Nkandu (a teacher at Kasomalunga Primary school), Chakolwa Steven and others he did not know, come to the civic centre. Save for Jeff Nkandu, the other people, on different occasions, went into the room where deployments were being processed and came out.

3.1.87 Shortly, the deployment list came out. PW10 was left out on the list but Jeff Nkandu appeared on the list as a Presiding Officer for Matipa Community School Polling Station despite not having attended the training. When referred to page 5 and 6 of the 1st Respondent's bundle of documents, PW10 stated that the documents were attendance list of poll staff who were trained and Test papers which showed that Jeff Nkandu attended the training and wrote the exam. However, the documents are a lie because Jeff Nkandu never attended

the training. That he was surprised to see that Jeff Nkandu appeared as presiding officer.

3.1.88 When cross-examined by Mr. Soko PW10 restated his evidence-in chief save to add the following: that he was able to know the other trainees because at the beginning of the training, there were introductions and that there were only three people he knew who were replaced among the list of the 219 attendees.

3.1.89 There was no cross-examination by Mr. Okware and no re-examination.

3.1.90 PW11 Chrispin Chilibu. In his testimony, he stated that on 11th August, 2021 around 23:00hrs, he received a phone call from the headman (Mr. Timothy Mofya) that a certain man was giving out money to people so that they can vote for him. He made a follow up which led him to the house belonging to Mr. Timothy Mofya where he found Mr. Edmond Pongwe a candidate for the position of councillor for Chumbwe Ward telling Mrs. Mofya to vote for the 1st Respondent, Mr. Edgar Chagwa Lungu, Mr. Steven Chakolwa and himself. PW11 then lit a torch and was able to see the money as it dropped from Mr. Pongwe's hands. It was an amount of K185.00 made up of K5.00 notes. Mr. Pongwe was apprehended.

3.1.91 When cross-examined by Mr. Soko, PW11 stated that he personally did not see the 1st Respondent give money to Mr. Edmond Pongwe to and give to Mrs. Mofya. That Mr. Pongwe was not with the 1st Respondent when Mr. Pongwe was found attempting to give Mrs. Mofya the money.

3.1.92 There was no cross-examination from Mr. Okware and no re-examination.

3.1.93 PW12 was Derrick Nkaya, Headman for Kalosa Village. His testimony was that between 1st and 10th May 2021, he with other 45 village headmen from Machila Ward, were called to Kasoma Lunga Primary School. When they got there, they were addressed by Mr. Haggai Bwalya the Campaign Manager for the PF. Whilst there, Mr. Haggai Bwalya told the Headmen to inform their subjects to vote for the 1st Respondent. Haggai Bwalya further gave the Headmen a 'sitting allowances' of K200 in K2 notes as sitting allowance while the 1st Respondent watched. The second speaker whose names he did not know, told the headmen that the 1st Respondent was their servant who was appointed for Lunga District and that they should vote for him. He also called upon the 1st Respondent to introduce himself to the headmen which he did.

3.1.94 That on 10th August, 2021 PW11 with 25 other headmen from Lunga Ward were called by District Commissioner at his home. The District Commissioner told the Headmen to entice the voters to vote for the PF candidate and that a marine team and officers from Kamfinsa would be deployed to guard Lunga District and punish members of the UPND. He urged them not to vote for the Petitioner or other candidates sponsored by the UPND and to convey the information to their subjects. That some of the headmen conveyed the information to their subjects and fearing the hunger situation in the area and noting that mealie meal in the area was distributed to the

people by the Campaign Manager for the PF, the subjects listened.

Further, each village headman was paid K10 as sitting allowance.

3.1.95 During cross-examination by Mr. Soko, PW12 restated his evidence-in-chief save to add the following: that he was aware that the campaign period according to the ECZ calender had not yet opened between 1st and 10th May, 2021 and that the 1st Respondent was not in the meeting that was convened by the District Commissioner and that he has not tendered the physical evidence of the bribes before Court because he used the money and the envelopes cannot be found by now.

3.1.96 There was no cross-examination from Mr. Okware and re-examination.

3.1.97 **PW13** was Henry Chabu who stated that on 5th August 2021, the 1st Respondent and his campaign team came to hold a meeting in his Mwenda Village situated in Lunga District. The first person to address the villagers was Andrew Chiboni. He first introduced the 1st Respondent to the villagers, as the candidate on the PF ticket. Next, PW13 told the audience that relief food distribution would cease if they voted for the Petitioner and the UPND.

3.1.98 When the 1st Respondent rose, he greeted the audience and told them to vote for him and the PF.

3.1.99 The next speaker was John Mulombe who told the audience that if they did not vote for the 1st Respondent, they will stop receiving social cash.

3.1.100 After that, Mr. Andrew Chiboni started giving out a chilenge to each member of the audience. Mr. John Mulombe gave out a T-shirt to each attendee whereas the 1st Respondent gave them a K10.00 each.

3.1.101 PW13 further testified that, on 7th August 2021, he later went to his farm situated in Mashiba Ward. Whilst he was there, the 1st Respondent came with the same PF members and held a meeting repeating the message and handouts for the previous meeting he had attended in Lunga Ward.

3.1.102 Under cross-examination by Mr. Soko, Pw13 mainly repeated his examination-in-chief save for the following: that he is not aware that Lunga District has 7200 beneficiaries of social cash transfer; that relief food was distributed on a regular basis up to August 2021 and that he was not given the money during the said two meetings because the distributors knew he was a member of the UPND.

3.1.103 There was no cross-examination by Mr. Okware and no re-examination.

3.1.104 PW14 was Grevazio Matafwali, a candidate in Mweshi Ward for the position of councillor contesting on the Socialist Party ticket. His testimony was that on 12th August 2021 he went to cast his vote at Mweshi Polling Station. While at the polling station he saw a mob of people bring to the presiding officer, one Steven Chipulu a candidate for the position of councillor contesting on the PF ticket. They alleged that he was found with K20 in K5 bank notes.

3.1.105 Later, PW14 saw the 1st Respondent arrive amidst a crowd shouting 'on the boat' while the 1st Respondent lifted a clenched fist

which is a symbol for the PF. He proceeded to enter the voting room but members of the opposition political parties protested that he leaves. When the 1st Respondent left the polling room for the harbour, PW14 heard two gunshots fired and later saw Abraham Mwansa being lifted by other people as he had been shot. The voters fled in fear. Abraham was later brought after treatment and he cast a vote.

3.1.106 When cross-examined by Mr. Soko, PW14 stated that the gunshots disturbed the voting process.

3.1.107 There was no cross-examination by Mr. Okware. There was no re-examination.

3.1.108 PW15 was Mukosa Knife one of the members of the UPND campaign team. He testified that on 8th August 2021, he left to go and meet with other members of the UPND campaign team in Kabala area in Munsalushi. While there, Chief Nsamba came and held a meeting during which the Chief told the villagers that they should not vote for the UPND candidate. That if they voted for UPND which has a Tonga President, he will banish them from his chiefdom. These sentiments instilled fear in PW15 because of the power and influence which the chief has. Consequently, PW15 and his fellow UPND members suspended their intended campaign meeting in Kabala area.

3.1.109 When cross-examined by Mr. Soko, PW15 repeated his testimony-in-chief save for the following additions: That he did not report the matter to the Conflict Resolution Committee as there was no such institution in Kabala; that Chief Nsamba was alone when he

said the foregoing and that he, the Petitioner actually got more votes at Kabala Polling Station than the 1st Respondent.

3.1.110 There was no cross-examination by Mr. Okware and there was no re-examination.

3.1.111 **PW16** was Dickson Kaluba Mwansa. He testified that on 3rd July 2021 he with other UPND members went to Nkutila ward. They found a group of women who mistook them for PF members whom they said they were expecting. They told PW16 that they want the 1st Respondent who gives them money.

3.1.112 On 12th August 2021, he was assigned to be at Totalling Centre at the Civic Centre at Lunga Town Council to ensure that the results which were brought there from the 32 polling stations in the Luapula Constituency, were correct on behalf of the UPND. This entailed that he had to ensure that the UPND polling agents in all the 32 polling stations obtained GEN 20 Forms from respective presiding officers. He discovered that the UPND was given GEN 20 Forms from 14 polling stations. Among these, there were no GEN 20 Forms for two Parliamentary polling stations. He only received GEN 20 Forms for presidential, mayoral and council results. That this made it difficult for PW16 to compare results from the presiding officers and the results from the UPND polling agents.

3.1.113 Further that PW16 did not receive GEN 20 Forms from 18 Polling Stations. He asked one of the polling agents who was deployed at Kapama Polling Station, as to the whereabouts of the GEN20 Forms, the agent said they had been denied the forms. PW16 went

and complained to a presiding officer who gave him the GEN 20 Form for Kasoma Lunga Primary Polling Station.

3.1.114 When cross-examined by Mr. Soko, the witness added to his testimony that, he was not aware that the 1st Respondent was not in Lunga District on 3rd July, 2021. He stated that the GEN 20 Forms were supposed to be brought to the Polling agents by the Presiding Officer. The Polling agents then brings the GEN 20 Forms to the totalling centres.

3.1.115 When Mr. Okware cross-examined the witness, he stated that he was not given GEN20 Forms for 20 Polling Stations at the totalling centre and he listed the concerned polling stations as follows: Kapama, Itala, Mwabachikonde 1 and 2, Chibushi 1 and 2, Nsamba Local Court, Nsamba Primary School 1 and 2, Mutuwamina Primary School, Kabulu Primary School, Mutoni Primary School, Chikonde Health Post, Bwalya Mponda Primary School 1 and 2, Chafye Primary School, Kalimankonde Primary School, Mungomba Primary School and Kabala Community Market.

3.1.116 The witness stated that he did not witness presiding officers refusing to give the UPND polling agents, GEN 20 Forms.

3.1.117 In re-examination, PW16 repeated his testimony in-chief.

3.1.118 This marked the close of the case for the Petitioner.

3.2.0 Evidence on behalf of the 1st Respondent

3.2.1 Turning to the 1st Respondent, he testified on his own behalf and called three witnesses. He testified after his witnesses. And, unknown to the Court, he was present in Court when his three witnesses

testified. I am cognisant that there is no law that prohibits a plaintiff, petitioner or any other witness from listening to the testimony of another witness before they could themselves testify. However, in the event of contradiction with the opponent, less weight would be attached to such a witness' evidence. This is the exact position with the 1st Respondent in the present petition.

3.2.2 With that said, I turn to consider the evidence of **1RW1**, the 1st Respondent's witness. He is Mpongwe Edmond. He told the Court that he ended his campaign period at Mwanamaila village on 11th August 2021 at around 19:00hrs. He thereafter visited his uncle (Mr. Tebulo Mwansa) at his residence but whilst there, the candidate for councillorship in Chumbwe Ward on the UPND ticket and his team which included Chilibu Kabanga and Kunda Chiko beat him on after accusing him that he is a PF thief. Further, they got his phone and money in excess of K200.00 but made up of various denominations which included K50.00 and K5.00 bank notes. He denied the allegation that his assailants had found him with money and chitenge materials for distribution to voters.

3.2.3 There was no cross-examination from Mr. Okware.

3.2.4 Under cross-examination by Mr. Matariro, the witness mostly recited the evidence of PW12 save for the following: his campaigns also embraced the other PF candidates; that the 1st Respondent told him not to distribute campaign materials after the campaign period had closed; that on the material day and time, the UPND team alleged that he was distributing money; that Crispin Chilibu (PW11) was not

present on the date of the incident adding that he knows the said Chrispin Chilibu and one Thomas Mofya and that the duo also know him and can identify him under torch light.

3.2.5 During re-examination, RW1 re-stated his answers under cross-examination.

3.2.6 **1RW2** was Chipulu Steven, a candidate for the position of Councillor for Mweshi Ward on the ticket of the PF. He denied the allegation that he was caught distributing Chitenge materials on 11th and 12th August 2021. He stated that on 12th August, 2021, around 9 to 10:00hrs, voting at Mweshi Polling Station was disrupted because members of the UPND were stopping members of the PF from voting. He lodged a complaint to a police officer who was there and in the process of the police officer and presiding officer trying to end the confusion, the 1st Respondent walked in and this, delighted members of the PF. However, members of the other political parties became agitated by the presence of the 1st Respondent at the Polling Station and demanded that he leaves the polling room.

3.2.7 When the 1st Respondent came out of the polling station, the agitated people began throwing stones and sticks at him. RW2 and other members of the PF shielded him as they escorted him to the harbour to board the boat. From the polling Station to the harbour, it was a distance of about 300 meters. In the process, the agitated people were hitting RW1 and the others who were shielding the 1st Respondent, using stones and sticks.

3.2.8 The 1st Respondent finally entered the boat but the people continued throwing stones and sticks at the boat such that there was no time to start the engine of the boat. That that one of the people who was with the 1st Respondent fired two gunshots and that is when the people reduced throwing the stones and sticks and the boat was able to start-off. Further, the voting process resumed.

3.2.9 There was no cross-examination by Mr. Okware.

3.2.10 During cross-examination by Mr. Matariro, RW1 admitted knowing each other with Gravazio Matafwali; that the said Gravazio Matafwali was a candidate for the position of councillor at Mweshi Ward, on the ticket of the Socialist Party but that he was not at Mweshi Polling Station at the time of the incidents he talked about.

3.2.11 Rw2 also admitted knowing the wife to Mr. Mofya and that she also knows him as well but denied seeing her at Mweshi Polling Station on the material day. He denied the suggestion that the commotion that occurred at Mweshi was caused by the fact that he was found distributing money but that it was caused by the incidents he has outlined above. That he was never brought to the presiding officer with money that was found on him. He denied seeing the 1st Respondent lift the PF symbol. That during the process of shielding and escorting the 1st Respondent to board the boat at the harbour, he was beaten with sticks but did not sustain any injuries.

3.2.12 Rw2 denied Counsel's suggestion that the shooting incident terrified people at the polling station. Further, he just heard that someone was injured in the shooting incident.

- 3.2.13 1RW2 stated that the 1st Respondent had prohibited him from distributing Chitenge Materials after the campaign period.
- 3.2.14 There was nothing in re-examination.
- 3.2.15 **1RW3** was Joachim Mumba, an official of the PF in Lunga District. He denied the allegation that he alongside the 1st Respondent and other members of the PF took over the distribution of relief food (mealie-meal) from, the DMMU. He stated that relief food was not part of the campaign materials which his team distributed.
- 3.2.16 1Rw3 told the Court that he witnessed the shooting incident at Mweshi Polling Station. His testimony here is the same as that of 1RW2 save for the following: that he saw Abraham bleeding from a fresh wound and he even removed the blood and massaged the wound adding that he told Abraham that he could have been injured from the stones and sticks which were being thrown. Further, he helped Peter Musenge escort Abraham Bwalya to a health post. Abraham Bwalya was limping. That after this, he went back to vote and found a peaceful atmosphere at the polling station as there were five police officers.
- 3.2.17 There was no cross-examination by Mr. Okware.
- 3.2.18 Under cross-examination by Mr. Mataliro, RW3 repeated his evidence in-chief save to state that he does not know what had happened at Mweshi Ward between 06: 00 hrs and 07:00 hrs before he got there; that he was among those who were injured in the process of protecting the 1st Respondent; that he knows Chipulu

Steven and that he saw him at Mweshi Polling Station on the material day but did not hear him shout that someone had been shot.

3.2.19 Rw3 stated that when the 1st Respondent arrived at Mweshi Polling Station, the supporters of the PF jubilated whilst shouting "ours, ours, has come!". That the 1st Respondent did not stop them. Further, the jubilant crowd did not raise its symbol of clenched fists.

3.2.20 RW3 reiterated that the gunshots did not scare voters since they went back to the polling station to vote. That he was not part of the group and is not aware that a group of members of the PF went round to persuade people to go back and vote, after the gunshots.

3.2.21 In re-examination, RW3 stated that he did not see anyone throw stones at Abraham Bwalya.

3.2.22 As stated already, the 1st Respondent testified after his three witnesses. He first outlined the geographical location and situation of Luapula Constituency which as noted already, covers the entire Lunga District. That the Constituency is situated in the Bangweulu wetlands and is largely accessible by water (and therefore boats) from Samfya District. That Lunga District is made-up of seventeen islands one of which is called Lunga or Kasoma Lunga and that is where the Lunga District Civic Centre is situated.

3.2.23 The 1st Respondent vehemently denied all the allegations in the petition which at the expense of repetition, I will briefly repeat them for convenience thus: that neither he nor his agents gave village headmen a sum of K200.00 each or K10.00s to most of the voters across the district or at all; that they never at any time or at all took

over the distribution of relief food or social cash and neither did he threaten to exclude people who would not vote for him from accessing the social cash.

3.2.24 The 1st Respondent told the Court that the period his campaign team had camped at Kasoma Lunga Primary School Polling Station was legitimate as it was paid for and proof of the payment is the receipt exhibited at page 2 of his bundle of documents. That personally, he had only camped at the school from 25th July 2021 to 28th July 2021 when he flagged-off his campaigns. He therefore disputed the assertion that he had camped at the school for the entire campaign period.

3.2.25 About the shooting incident at Mweshi Polling Station, the 1st Respondent stated that he visited the polling station in the company of two of his relatives, on the polling day by way of finding out how the voting process was going on. They used a motorised boat and arrived at the polling station by 09:00 hrs. The polling station is between 750 – 950 meters away from the harbour where they had docked.

3.2.26 He was welcomed by his members who narrated to him how the voting was halted as a result of confusion which was caused by Sub-Chief Mweshi and supporters of the UPND, the DP and the Socialist Party particularly PW13 and PW3. He entered the Polling Station to find out why the voting had been halted and this caused alarm and the people on the queues started shouting that he comes out. He left the room but as he was going to the boat he was attacked. Stones, sticks and various objects were thrown at him. His sympathisers

shielded him as he rushed to board the boat at the harbour. He was nonetheless hit twice with stones. When the attacks intensified, one of his relatives, one Haggai Bwalya pulled out a pistol and fired two shots in the air by way of dispersing their attackers.

3.2.27 The 1st Respondent denied the allegation that the voter turn-out was adversely affected by the shooting incident as there was a turnout of 78.5% as compared to about 64 % for the 2016 General Election.

3.2.28 Concerning allegations that he and his agents used government facilities such as boats and tents to campaign, the 1st Respondent stated that Lunga District Council hires out its cargo boat as a revenue-generation venture and arising from this, PF District officials paid for the use of the Council cargo boat and proof of the payment is exhibited at page 3 of his bundle of documents highlighted above. That for nomination purposes, the District Commissioner allowed his team to use three or four of the District Commissioner's tent adding that the tents were available to all political parties because there are no lodging facilities in Lunga. Further, the PF in the District and himself, respectively own motorised boats.

3.2.29 The 1st Respondent refuted allegations that that PF councillors were caught at Mweshi distributing chitenge and money to voters.; that he is not aware that Chief Nsamba either campaigned for him or threatened to banish people who would not vote for him from the chieftdom as the duo never attended each other's meetings. That he only met his pool staff adding that there is no law which required him

to meet the said agents in the presence of the Petitioner. He denied having met with ECZ polling agents.

3.2.30 The Petitioner denied witnessing Andrew Chiboni pepper-spray a UPND official adding that he never met the Petitioner during his campaign trails or at all. He also denied the allegation that one of his polling agent was issued the whole ballot book at Kasomalunga Polling Station as the number of registered voters tallied those who voted and those who did not vote. He added that the voter turnout in the Constituency in the 2021 General Elections was higher (79.6%) than the turnout in the 2016 General Elections (62%).

3.2.31 Based on the foregoing, the 1st Respondent maintained that he was duly elected and the petition must be dismissed.

3.2.32 There was no cross-examination by Mr. Okware.

3.2.33 When cross-examined by Mr. Matariro the 1st Respondent maintained his repudiations as in examination-in-chief. I will therefore not resound them to avoid replication. Save for the following: that Andrew Chiboni was not part of his campaign team; that he is not aware that Haggai Bwalya had carried a gun from which two shots were fired. That he was not sure someone was injured by the gunshots and that he never reported the incident to the police that Henry Chabu's assertion that he was giving out money in Mwenda village is false because he was not in that area at the material time. Rather, he was in Chief Nsamba's village.

3.2.34 There was nothing in re-examination.

3.2.35 This marked the close of the 1st Respondent's case.

3.3.0 Evidence on behalf of the 2nd Respondent

3.3.1 **2RW1** was Nkandu Jeff a Presiding Officer at Matipa Primary School Polling Station and a teacher stationed at Kasomalunga Primary School. He was the only witness for the 2nd Respondent. He explained to the Court how he got appointed to the said position of Presiding Officer thus: on 1st June 2021, the ECZ advertised for the recruitment of poll staff. In July 2021, the list of successful candidates was published. He was not successful. On 28th July 2021, the training for poll staff commenced at Kasomalunga Primary School. In the evening of 28th July 2021, his friend told him there was massive replacement of successful candidates who did not report for the training that day. **2RW1** tried his luck for a replacement on 29th July 2021 and he was successful and he joined the training and wrote the exam with other attendees on 30th July 2021.

3.3.2 **2RW1** told the Court that he passed the exam upon scoring 71% and he was deployed at Matipa Primary School Polling Station as presiding officer.

3.3.3 On 12th August 2021 at 06:00 hrs, voting started at Matipa Polling Station. Around 14:00hrs, one of the polling assistants at Table three Kabamba, sought permission from him **2RW1** to enable him visit the toilet. **2RW1** granted the permission and to avoid delaying the voting process, **2RW1** stood in for Kabamba whose role was to issue three ballots as follows: one for the National Assembly, one for mayoral and one for councillorship. 5 – 10 minutes later, one Shadreck Chela a candidate for the mayoral seat on the UPND ticket and one Bulanko a

Parliamentary candidate for the DP came in the voting room and queried RW3 on why the booths were set up facing the wall. RW3 changed the set up in answer to the query.

3.3.4 RW3 stated that as a result of the disturbance by Shadreck and Bulanko, when he went back to table number three, he erroneously gave six ballot papers to the person he had already given. This was because he thought the voter that he last gave three ballots before attending to Shadreck Sela and Blanco, had already left Table 3 for the voting booth. So unknown to 2RW1, when he returned to resume issuing ballot papers at Table 3, he mistakenly thought that the previous voter had left and he was now dealing with a new voter and accordingly gave him three fresh and the voter (a female) proceeded with all the ballot papers to vote. 2RW1 explained that in total, the voter had seven ballot papers in total by the time she entered the voting booth because she had been issued with one ballot paper for the presidency at Table number 2.

3.3.5 In his continued testimony, RW3 testified that despite having a lot of ballot papers this lady only marked one ballot paper for the parliamentary election. That when a polling assistant at Table 5 queried her when he noticed that she had excess ballot papers. She said she was given by RW3. He struggled to appreciate why the lady was saying it was him who gave her the extra ballot papers but later, he rewound how that possibility happened. Two candidates who were present (who included Sela Shadreck) became furious in the thought that he been conducting the illegality despite explaining the

circumstances leading to the anomaly. They told him to relinquish his position of presiding officer because they had lost trust in him and he stepped down after declaring the said ballots as spoilt to avoid disadvantaging any of the candidate.

3.3.6 2RW1 stated that using his powers as presiding officer, he appointed one Kasuba who was operating at Table1 to act as presiding officer of the polling station. 2RW1 took up the position of usher and the usher took up Kasuba's position at Table 1.

3.3.7 It was 2RW1's testimony that Sela Shadreck did not trust him anymore and decided to remain at the polling station and even witnessed the counting of the votes. Sela shadreck was satisfied with the process and he left the polling station.

3.3.8 The witness denied the allegation that four ballot papers had been issued to one voter, at Matipa Polling Station. He also denied the allegation that people who were not in voter's register voted. He explained that the only circumstance where such a position is possible is where, a certificate of authority to vote has been issued adding that the certificate is issued to government personnel who are assigned to manage an election away from the polling station they were registered as voters.

3.3.9 When cross-examined by Mr. Matariro, 2RW1 repeated his testimony in examination-in-chief; that he did not attend the lecturing of poll staff that took place on 28th July 2021; that his name appears on the document at page 5 of the 1st Respondent's bundle of documents.

3.3.10 2RW1 denied ever going to the Civic Centre with the 1st Respondent on 11th August 2021 adding that he only met him during this petition. Similarly, he only came to know Mr. Steven Chakolwa during this petition. That he was not told that the poll staff that got 70-74 marks would be deployed as ushers and that he was deployed as Presiding Officer even if he got 71 marks; that a declaration of a ballot being spoilt can be done before the end of the polls and that such a declaration can be done without the consent of entire poll staff and agents.

3.3.11 There was no re-examination by Mr. Okware.

3.3.12 This marked the close of the 2nd Respondent's case and the entire evidence in this petition.

4.0. SUBMISSIONS

4.1.0. Submissions by the Petitioner

4.1.1. I only received submissions from the Petitioner and the 1st Respondent. The 2nd Respondent filed its written submissions into Court out of time and without leave of court. For this reason, I have not considered the submissions. However, it is not thereby prejudiced because I have considered the evidence and the requisite law.

4.1.2. The Petitioner's submissions were filed into Court on 20th October, 2021. Those for the 1st Respondent were filed into Court on 27th October 2021.

4.1.3. On behalf of the Petitioner, Mr. Mataliro first informed me that the Petitioner would rely on the amended petition, affidavit in support of

petition, Petitioner's bundle of documents and oral evidence. This, I have taken into account.

4.1.4. Next, Counsel submitted that the subject petition has alleged that the election of the 1st Respondent was irregular and therefore null and void because of corrupt practices; illegal practices and misconduct committed by the 1st Respondent and his agents. And, non-compliance to the electoral law and regulations by both Respondents.

4.1.5. Counsel referred me to the cases of **Lewanika & Others v Chiluba (1)**, **Brigadier General Kankinza Kenneth & Others v Sarah Saifwanda & Electoral Commission of Zambia (2)**, **Abuid Kawangu v Elijah Muchima (3)**, to highlight the burden and standard of proof in an election petition. According to these authorities, the burden is upon a petitioner to prove his allegations to a *"fairly high degree of convincing clarity"*.

4.1.6. I was also referred to section 97 of the Electoral Process Act No. 35 of 2016 (hereinafter referred to as the 'EPA') regarding the grounds and threshold for purposes of nullifying the election of a Member of Parliament. The provision outlines two instances under which the election can be nullified. The first instance relates to the conduct of the petitioned candidate and/or his election and polling agents. This is that they should have committed, consented to or approved the commission of a "corrupt practice, illegal practice or other misconduct" in relation to the election in issue. Further, as a result of such conduct, the majority of the voters in the constituency should have been prevented from electing a candidate of their choice.

4.1.7. In support of the foregoing position, Mr. Mataliro cited the petitions of **Mubika Mubika v Poniso Njeulu (4)**, **Jonathan Kapaipi v Newton Samakayi (5)**, **Mubita Mwangala v Inonge Mutukwa Wina (6)**, **Josephat Mlewa v. Eric Wightman (7)**, **Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General (8)**, **Abiud Kawangu v Elijah Muchima (supra)** and **Margaret Mwanakatwe v Charlotte Scott (9)**.

4.1.8. The second instance relates to the manner officers of the ECZ conducted the election in issue, namely that they had breached their official duty relating to adherence to the principles outlined in the EPA governing the conduct of elections and consequently, the result of the election in issue was affected. In support of this position, Mr. Mataliro cited the petitions of **Christabel Ng'imbu v Prisca Chisengo Kucheka (10)**, **Giles Chomba Yambayamba v Kapembwa Simbao (11)** and **Sibongile Mwamba v Kelvin M. Sampa (12)**.

4.1.9. Counsel referred me to section 28 (1) (a) (v) of the EPA and Regulation 4 (1) (e) of the 2016 Electoral Code of Conduct, which of relevance to the present petition, require candidates in a parliamentary election, to adhere to a campaign timetable issued by the ECZ.

4.1.10. Having cited the above law, Mr. Mataliro submitted that the 1st Respondent used corruption to induce voters in the Luapula Constituency to vote for him in the subject election. That the allegation of corruption has been proved to the required standard by the evidence adduced by the Petitioner and his witnesses.

- 4.1.11. Counsel lamented the effects of corruption and thereby urged me to address the allegation with severity.
- 4.1.12. I was referred to section 81 (1) of the EPA which enacts corruption into an offence by way of one person corruptly giving the other, any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce that other person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election.
- 4.1.13. Counsel submitted that in the petition of **Reuben Mtolo Piri v Lameck Mangani (13)**, the Court held that a donation made to a church by an election candidate was a bribe and the election was nullified based on that. Counsel narrated that in that petition, an election candidate gave a church a sum of K1,000.00 and an amount of K500.00 to a choir of the church whereupon he asked the members of the church to vote for him in the election. That the Court found that such a donation was a bribe and not a philanthropic act because it was accompanied by a plea for votes.
- 4.1.14. Turning to the present petition, Mr. Mataliro submitted that the evidence discloses that the 1st Respondent, by himself and his campaign teams, went round to give money to people in the Constituency. That some of the 1st Respondent's agents were even caught with money while they were distributing the same to voters including on the poll day.
- 4.1.15. Further, that there is evidence that the 1st Respondent and his agents gave sums of K200.00 and K10.00 to village headmen and

people. That the 1st Respondent and his agents also took over the distribution of government relief food and Social Cash Transfer programs, to the voters and used the same to induce voters to vote for him. That the 1st Respondent and his agents went round the constituency telling people that if they did not vote for the 1st Respondent, the distribution of relief food and social cash transfer would be withdrawn.

4.1.16. Concerning relief food, Mr. Matariro submitted that the 1st Respondent distributed mealie-meal to people across the constituency while telling them that they should vote for him in exchange for votes. That the 1st Respondent took advantage of the hunger situation in the Constituency and thereby swayed the people to his advantage. Therefore, the facts in the Mtolo Phiri case (supra) are applicable to the present petition.

4.1.17. Counsel submitted that the evidence also discloses that the 1st Respondent committed a lot of illegal practices and engaged himself in unfair practices by campaigning on the poll day through his agents and thereby violating section 28 (1) (a) (v) of the Act which prescribes that election campaigns were to end at 18:00 hours on 11th August, 2021. The provision stipulates as follows

28. (1) Subject to the Constitution, the Commission shall, before the polling day— (a) compile an election timetable for each election to provide for the following...(v) the opening and closing dates of the campaign period

4.1.18. That according to the Petitioner and his witnesses, the 1st Respondent went to Mweshi Polling Station where he took over the Polling Station with his supporters and started chanting PF slogans such as 'pamaka' and 'pabwato' while waving the PF symbol of a clenched fist. That there is also evidence indicating that the 1st Respondent's agents were caught with campaign materials at Chafye and Mweshi Polling Stations on the polling day.

4.1.19. Mr. Mataliro submitted that there is also evidence about the 1st Respondent and his agents using government facilities namely a school and that the 1st Respondent himself admitted this aspect except he explained that he paid for the use of the facility. That as it may, the election law and regulations do not provide an exception that when the government facility is paid for, its use for political purposes ceases to be an election irregularity.

4.1.20. Further, that the 1st Respondent used traditional leaders to campaign for him around the villages particularly Chief Nsamba adding that the said Chief uttered tribal and hate remarks against the Petitioner during the campaigns thereby creating hate against the Petitioner.

4.1.21. Further, that there is evidence that the 1st Respondent and his agents mounted violent attacks both physical and verbal against the Petitioner and his campaign team in several places including at Mutoni Harbour and Ncheta Village. That the 1st Respondent's agents assaulted Quintino Lungo and Abraham Bwalya who was shot at. That Brenda Kapapula was pepper sprayed in her eyes at her

restaurant by the 1st Respondent's agents and that Mr. Mwewa was also pepper sprayed in his eyes by one Andrew Chiboni.

4.1.22. Mr. Mataliro also submitted that there was rampant non-conformity with the electoral law in the manner the subject election was conducted in the Constituency rendering the election of the 1st Respondent voidable. Counsel maintained that, non-conformity to the electoral process can render an election of a candidate null and void. Here, Counsel cited the following examples: that some election officers such as Jeff Nkandu (2RW1) was an untrained staff who later on failed to properly handle the election at his polling station and that resulting from his incompetence, he was removed from being a Presiding Officer. Counsel submitted that the said Jeff Nkandu was employed as a poll staff because he is the 1st Respondent's acquaintance and he supports the PF thus compromising the fairness of the subject election.

4.1.23. Further, that there were ballot mishandling and ballot books were issued to wrong people and in irregular numbers thereby demeaning the integrity of the election. That GEN 20 Forms were not provided in many polling stations thereby shrouding the transparency and authenticity of the results.

4.1.24. That based on the foregoing, this Court should avoid the election of the 1st Respondent pursuant to section 97 of the EPA. That in the event I find the majority of the voters in the Constituency were not prevented from electing a candidate of their preference owing to the corruption, I should nonetheless nullify the 1st Respondent's

subject election on the basis of section 97 (3) of the EPA based only on the 1st Respondent and/or his agents' corrupt practices. The provision states as follows

(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 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; 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 in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent;

the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

4.1.25. It is Mr. Mataliro's submission that this provision empowers me to nullify an election where corruption has been proved without necessarily requiring proof that the electorates were prevented from electing a candidate of their preference. That unlike section 97 (2) (b) of the EPA where it must be shown that by reason of such corrupt practice, the majority of voters in a Constituency were or may have

been prevented from electing the Candidate in that Constituency whom they preferred, under section 97 (3) of the same Act, that requirement is not needed. But that all that is needed is proof of the wrong doing on the part of the 1st Respondent and/or his agents.

4.1.26. Counsel submitted that I should nullify the 1st Respondent's subject election on grounds that it has been established that he was involved in corrupt activities whether or not the act prevented many voters from electing their preferred candidate.

4.1.27. Counsel submitted that in the petition of **Josephat Mlewa v Eric Wightman (supra)**, the Court nullified an election where corruption was proved without necessarily proving that the electorates were prevented from electing a candidate of their preference. That in construing section 18 (2) of the Electoral Act No. 2 of 1991, the Court held that the four paragraphs in the said section 18 (2) were independent and separate grounds. That the Court further held that the question of personal knowledge was quite irrelevant and inapplicable under paragraph (a) where it did not matter who the wrong doer was, and that the scheme of the law appeared designed to protect the electorates and the system itself by providing for nullification whenever there was wrong doing which the Court felt satisfied, perhaps because of the scale or type of wrong doing, probably adversely affected the election. That the Court went on to discuss section 18 (2) (c) and found that mere proof of the corruption, could lead to the nullification of an election.

4.1.28. Counsel submitted that the Court held the same view in the petitions of **Michael Mabenga v Wina & Others (14)** and **Reuben Mtolo Phiri vs. Lameck Mangani (supra)** based on proof of a corrupt act without necessarily proving that the same affected the outcome of an election. I was urged to adopt the same position and thereby to nullify the election of the 1st Respondent based on the corruption he committed.

4.1.29. In conclusion, Mr. Mataliro submitted that the Petitioner has proved his allegation in the petition and thereby urged me to grant him the reliefs he is seeking.

4.1.30. I shall pause here for a moment to correct Counsel. His interpretation of section 97(3) of the EPA is flawed because contrary to his view, in no way does the said provision refer to the majority or widespread principle. Rather, the provision is echoing the principle laid down in section 97(2)(b) of the same Act that a petitioned candidate can only be held liable for wrongful conduct which he or his agents committed or with the approval or consent of any of them. Thus, where the candidate has acquitted himself or his agents of the wrongful conduct complained of, his election cannot be nullified despite such wrongful conduct having occurred albeit on a widespread scale.

4.1.31. That the majority or widespread principle is one of the considerations for nullifying the election of a Member of Parliament, is well settled by either the Supreme or Constitutional Courts of Zambia in a plethora of cases some of which have been forcefully cited by Mr.

Mataliro himself in his present submissions. An example, is the following holding by the Supreme Court of Zambia in the petition of **Mubika Mubika v Poniso Njeulu (supra)**, which was cited with approval by the Constitutional Court of Zambia in the petition of **Jonathan Kapaipi v Newton Samakayi (supra)**

The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or might have been prevented from electing a candidate of their choice, it is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate.

4.1.32. The foregoing is contained in paragraph 2.9 of Counsel's submissions. Counsel further stresses the majority or widespread principle in paragraph 2.8 of his subject submissions, in the following terms

It is not sufficient for a petitioner to prove only that a candidate committed a corrupt practice or illegal practice or engaged in other misconduct in relation to the election without proof that the corrupt practice or illegal practice or misconduct was widespread and prevented or may

have prevented the majority of the voters in the constituency from electing a candidate of their choice.

- 4.1.33. Aside of Mr. Mataliro's submissions, the following holding by the Constitutional Court of Zambia in the petition of **Austin Liato v Sitwala Sitwala (15)** supports the majority or widespread principle

...it is not sufficient for a petitioner to prove that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice.

- 4.1.34. The view expressed in section 97(3) of the EPA that a petitioned candidate can only be held liable for his or her agents' wrongful conduct, is supported by a plethora of authorities from the Supreme and Constitutional Courts of Zambia. An example is the following holding of the Constitutional Court of Zambia in the petition of **Austin C. Milambo v Machila Jamba (16)**

...We agree with the trial Judge that where wrong doing not associated with the candidate or their election or polling agents is proved, the law as it stands now does not recognise such wrongs as grounds for nullifying an election.

- 4.1.35. Similarly, in the case of **Lewanika and Others v Chiluba (supra)** the Supreme Court of Zambia guided as follows

...a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since...an election agent has to be specifically so appointed.

4.1.36. The agents referred to in the foregoing petitions, are either the election or polling agents as defined by section 2 of the EPA and specified by Regulation 55(1) of the Electoral Process (General) Regulations, 2016. The latter provision states as follows

a candidate shall name an election agent in the nomination paper and, subject to the other provisions of this regulation, the person named shall be the election agent of the candidate for the purpose of that election.

4.1.37. In view of the foregoing law, Counsel is not only contradicting himself but also contradicting well-settled law by suggesting that section 97(3) of the EPA is intended to oust the majority or widespread principle.

4.1.38. Further, adopting Mr. Matariro's view would result into an absurdity in the sense that the same law would be contradicting itself by prescribing for the majority or widespread principle on the one hand, and discarding the same principle, on the other hand. And, I absolutely resist to entertain the assumption that the legislature intended to contradict itself or to oust the majority or widespread principle envisaged by section 97(2) (b) of the EPA when it enacted section 97(3) of the same Act. I resist this temptation on the authority of the 'harmonious canon of construction' of statutes adopted by the Supreme Court of India that the Legislature never intends to contradict itself by providing two conflicting provisions in the same statute and that what the Legislature gives with one hand, it does not take away with the other. In explaining this canon of construction, the Supreme Court of India in the Indian case of **Venkataramana**

Devaru v The State of Mysore (17), held that a construction which reduces one of the provisions to a 'useless lumber' or 'dead letter' is not harmonious.

4.1.39. Applied to the present petition, this holding implies that it would be defying the harmonious canon of construction to impute that the legislature intended to nullify the majority or widespread principle prescribed in section 97(2)(b) of the EPA when it enacted section 97(3) of the same Act.

4.1.40. With that said, I reiterate that Counsel misconstrued the said section 97(3) of the EPA or cited it out of context. The law regarding the threshold for nullifying the election of a parliamentary candidate is settled. It ignites and does not extinguish the majority or widespread principle in all respects relating to the wrongful conduct of a petitioned candidate or his agents.

4.1.41. I hasten to add that the Mlewa case was decided on the basis of a repealed law, namely section 18 of the Electoral Process Act, Chapter 13 of the Laws of Zambia, whose provisions are not *pari passu* with the current provision – section 97 of the EPA. The two provisions are different so that applying the principles that are anchored on the repealed law to the present petition, would inevitably lead to wrong results. Further, it will be defeating the intention of the legislature and a contravention of the tenets of the principle of separation of powers between the arms of government.

4.1.42. These are the Petitioner's submissions.

4.2. Submissions on behalf of the 1st Respondent

4.2.1 On behalf of the 1st Respondent, Mr. Soko submitted that according to the cases of **Wilson Masautso Zulu v Avondale Housing Project Limited (18)** and **Khalid Muhammad v Attorney General (19)**, the burden is upon the Petitioner to prove his allegations in this petition. Further according to the case of **Michael Mubenga v Sikota Wina & Others (supra)** and **Anderson Kambela Mazoka and Two Others v Levy Patrick Mwanawasa and Two Others (20)**, the standard of proof in an election petition is higher than that on the 'balance of probabilities' applicable in ordinary civil cases. Rather, it is proof to a "fairly high degree of convincing clarity".

4.2.2 Counsel recalled that the petition is anchored on allegations involving corrupt practices, illegal practices and electoral malpractices on the part of the Respondents. Regarding the allegation involving corrupt practices, Mr. Soko referred me to the following holding in the Ugandan Presidential Election Petition No.1 of 2001 between **RTD Dr. Kizza Besigye v Museveni Yoweri Kaguta & EC (21)**

the offence of electoral bribery is not committed unless the gift, money or other consideration is given to or received by a person who is proved to be a registered voter...the mere distribution of money to agents or their supporters did not amount to bribery unless the corrupt motive and status of the receiver of the money as a voter were established...It is therefore not enough for a Petitioner or any person to merely allege that agents gave money to voters, a high degree of specificity is required. The agent must be named, the receiver of the money must be named and he/she must be a voter; the purpose of the money must be to influence his vote

- 4.2.3 Counsel submitted that in line with the foregoing holding and the Petitioner's requisite allegation in the petition, the Petitioner ought to have called registered voters to confirm that they were indeed bribed by the 1st Respondent or his agents. However, such witnesses were not called.
- 4.2.4 Mr. Soko insisted that specification is required in an allegation of bribery or corruption. That on the contrary in the present petition, the Petitioner or his agent was not named at all in the allegation of handing out of money and the receiver of the money was not named either and even if named, the Petitioner ought to have gone an extra mile in proving that such a receiver was in fact a registered voter within the Luapula Constituency.
- 4.2.5 Further, that in cross-examination, the Petitioner admitted that he did not personally see the 1st Respondent or his agents give or distribute money in K10 notes to voters across Lunga District and neither did he tender pictorial evidence to prove his allegation. That further, the Petitioner confirmed that he never at any time campaign in the same area with the 1st Respondent and this implies that there is no way the Petitioner could have seen the 1st Respondent or his agents give money across Lunga District if indeed such ever happened.
- 4.2.6 Counsel submitted that the only witness who testified on the distribution of K10.00 notes to voters across Lunga District, was one Henry Chabu (PW 13) but that the said Henry Chabu denied having been given the money alongside other attendants of the 1st Respondent's alleged campaign meeting, is evidence that the witness

Thus, the allegation falls short of the majority or widespread principle explained above.

4.2.9 Mr. Soko submitted that the petitions of Reuben Mtolo Phiri V Lameck Mangani and Lewanika & Others V Chiluba (1998) Z.R.79, are distinguishable from the present petition firstly because in the aforesaid petitions, the donations, to the church were made by an election candidate and secondly that the donations were made during a campaign period. On the contrary, in the present petition, the distribution of the alleged amounts of K200.00 by the 1st Respondent (if at all), was done before the campaign period and at a time when the 1st Respondent was not a candidate within the meaning of the EPA as he only filed his nominations on 17th May, 2021.

4.2.10 Mr. Soko further submitted that the allegation that the 1st Respondent took over the distribution of government relief food and Social Cash Transfer programs and used the same to induce voters to vote for him, has equally not been proved and this is because the Petitioner denied having personally seen the 1st Respondent distributing the relief food. Further, he did not provide pictorial evidence.

4.2.11 Counsel added that the Petitioner was contradicted by his witness (PW1) here, when PW1 testified that he was with the Petitioner on 8th August, 2021 when they arrived at Kasoma Lunga from Itala and found 10 boats which belonged to the District Commissioner, at Kasoma Lunga harbour and that the said boats were loaded with bags of mealie-meal. That in his testimony, PW1 said that there were PF

cadres at the harbour and the 1st Respondent was equally present. On the contrary, under cross-examination, the Petitioner confirmed he was not at the harbour and that the Petitioner's campaign team and that of the 1st Respondent, never met at any point throughout the campaign period.

4.2.12 That further, while it was PW1's testimony that the mealie meal was distributed selectively to only PF supporters, PW1 under cross-examination confirmed that he saw some UPND supporters also get the mealie-meal. With this background, Mr. Soko urged me to regard PW1 as a witness with an interest to serve as he is a partisan witness.

4.2.13 Regarding the allegations of inducement involving threats of excluding beneficiaries from accessing the social cash transfer if they would not vote for the 1st Respondent, Mr. Soko recited the evidence of Brenda Kapapula (PW8).

4.2.14 Counsel cited the definition of the term "inducement" according to Black's law dictionary that it is the act or process of enticing or persuading another person to take a certain course of action. I was furthermore, referred to the following passage by the Learned Authors of the **Halbury's Laws of England, 4th Edition, at page 784**

In order to constitute undue influence or inducement, 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 a person threatened and not by the intention of the person using the threat.

4.2.15 Arising from aforesaid authorities, it is Mr. Soko's submission that the Petitioner has failed to prove the subject allegation and this is

in view of the fact that he won the election in Lunga Ward in which Kasoma Lunga and Mukabe Villages, the sites of the alleged inducement, are situated. That assuming that there were threats of social cash removal then it can be said that the inducement or threats were not serious and had no effect on the voters in the Ward. Otherwise, the 1st Respondent wouldn't have lost to the Petitioner in the Ward.

4.2.16 Further, that the 1st Respondent was not in the Luapula Constituency for campaigns until 26th July, 2021 and there is no evidence proving that the alleged threats by Jimmy Bwalya were known or authorised by the 1st Respondent or that the said Jimmy Bwalya was the 1st Respondent's duly appointed election agent. I was referred to the holdings in the petitions of Lewanika Vs Chiluba, Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General, Margaret Mwanakatwe v Charlotte Scott and Others, cited above and **Mbololwa Subulwa v Kaliye Mandandi**, (22) to posit that the 1st Respondent cannot be held liable for acts or omissions of persons other than those of his duly appointed election agents.

4.2.17 Further, Mr. Soko submitted that the Petitioner has failed to adduce cogent evidence to show that the 1st Respondent committed any illegal practices. That the allegation that the 1st Respondent through his agents engaged in unfair practices by campaigning on an election day, was not proved at all.

4.2.18 Counsel highlighted that the Petitioner's witness here, is John Yamba Yamba (PW2) and accordingly recited the witness' evidence.

4.2.19 He was however quick to rebuff PW2's evidence on grounds that the alleged chitenge campaign materials and T-shirts, which PW2 grabbed from Bowas Mubanga and Justine Nkongole, the people who were campaigning outside the legally prescribed time-frame, were not tendered in evidence. Further, that even assuming PW2 said the truth, there is no evidence that was led to connect the said Bowas Mubanga and Justine Nkongole to the 1st Respondent, apart from mentioning that the duo were PF cadres. Here, I was referred to the following holding of the Constitutional Court of Zambia in the petition of **Richwell Siamune Vs Gift Sialubalo (23)**

Mere proof that the UPND supporters were indeed involved in the said acts does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND.

4.2.20 Based on this authority, Counsel stressed that the 1st Respondent cannot be punished for acts of his political party affiliates unless that of his duly appointed election agents. That this principle extends to the allegations that the 1st Respondent's agents were caught with campaign materials at Chafye and Mweshi Polling Stations on the polling day. It is Counsel's contention that the only connection that was there between the 1st Respondent and the Councillors (the alleged actors) in the allegations touching on Chafye and Mweshi, is that both of them contested the election on the PF ticket. That the Petitioner ought to have showed that the two

Councillors were the 1st Respondent's duly registered agents within the meaning of regulation 55(1) of the Electoral Process (General) Regulations, 2016. Here, I was referred to the following holding by the Constitutional Court of Zambia in the petition of **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General (supra)**

We agree. A careful perusal of the record reveals that the 1st Respondent did not adduce a shred of evidence to support the involvement of the 1st Appellant's duly appointed election agents in the violent attack. Neither was it shown in evidence that the 1st Appellant or the election agents knew of the attack on the UPND campaign bus...That cadres or supporters of the PF were implicated in the attack is not enough to attach responsibility to the 1st Appellant or her duly appointed election agents and annul the election on the basis of section 97 (2)(a)(ii) of the Electoral Process Act, 2016.

4.2.21 That on the basis of the foregoing, to hold that the 1st Respondent is responsible for any of the actions of PF members, supporters or candidates other than his duly registered agents, will be legally calamitous.

4.2.22 Mr. Soko further submitted that contrary to the Petitioner's argument that the 1st Respondent went to Mweshi Polling Station where he took over the polling station with his supporters and started chanting PF slogans and waving PF symbols, no such evidence or testimony was led at trial. That in other words, none of the Petitioner's requisite witnesses (PW 4, PW 9 and PW 14) told the Court that the 1st

Respondent chanted PF slogans. Rather, the three witnesses told the Court that when people saw the 1st Respondent, they on their own, started chanting PF slogans and the 1st Respondent quietly went inside the polling room. That Steven Chipulu (1RW2) and Joakim Mumba 1(RW3) corroborated the position that people at Mweshi Polling Station were happy to see the 1st Respondent because according to the rumours, he had been badly beaten at Kasoma Lunga and was in hospital. That under cross-examination, 1RW2 and 1RW3 maintained that the 1st Respondent neither waved a clenched fist nor chanted a PF slogan.

4.2.23 That the evidence of PW14 and PW4 should not be considered because according to 1RW2 and 1RW3, they were not even present at Mweshi Polling Station at the time the 1st Respondent arrived there and this is why in their testimonies they said that the 1st Respondent arrived at Mweshi Polling Station at around 13:00 hours when he arrived there between 09:00 hours – 10:00 hours. Further, that their evidence that around 07: 00 hrs, they saw a mob that dragged Steven Chipulu for being caught giving out money to the electorates on the poll day, lacks credence because what emerges from their testimony is that they were not there when the said Chipulu was allegedly caught. Therefore, their testimony is hearsay. That the proper witness ought to have been anyone that was given money by the said Steven Chipulu or at least someone that was part of the mob that allegedly dragged the said Steven Chipulu.

4.2.24 Regarding the allegation relating to the use of government facilities, Mr. Soko submitted that Shadrack Sela (PW 7)'s attempt to challenge the authenticity of the receipt (at page 2 of the 1st Respondent's bundle of documents) depicting payment by the 1st Respondent's team, for the use of Kasoma Lunga Primary School, should be dismissed because it has come too late as such an objection was tenable at inspection and discovery stages and there being no objections during those stage, the question of authenticity cannot arise at trial. That the 1st Respondent legitimately used the school facility having paid for its use as depicted on the said receipt. That it would have been irregular and abuse of public facilities if no payment was made. Further, there is evidence that the Petitioner and his agents equally utilized a government facility known as Bwalya Mponda Primary School even though in their case, no evidence was adduced to show that they paid for the use of the school.

4.2.25 Counsel submitted that the 1st Respondent also paid for the use of Lunga Town Council cargo boat and evidence thereof is the document at page 3 of the 1st Respondent's bundle of documents. Similarly, it would have been irregular if the boat had not been paid for. In sum, the use of both Kasoma Lunga Primary School and the Council cargo boat resulted from purely a commercial activity.

4.2.26 Mr. Soko also submitted that there is no evidence supporting the Petitioner's allegation that the 1st Respondent used Chief Nsamba to campaign for him and during which the Chief used hate speech against the Petitioner and his political party and this is because there

is no evidence linking the 1st Respondent to the Chief. That in effect, the Petitioner in cross-examination, confirmed that the Chief took it upon himself to campaign for the 1st Respondent.

4.2.27 Mr. Soko further submitted that the Petitioner has not tendered evidence to prove his assertion that the 1st Respondent and his agents mounted violent attacks both physical and verbal against him and his political supporters in several places including at Mutoni Harbour and Ncheta Village. In the premise, I was urged to apply the principle cited above, in the petition of Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General, regarding agents.

4.2.28 Counsel submitted that the evidence of Quintino Lungo that on 3rd July, 2021 he was in the company of the Petitioner at Mutoni Harbour where they wanted to hold a campaign meeting but were disrupted by the provocative and insulting conduct of PF supporters, lacks credibility on account of lack of corroboration even by the Petitioner considering that Quintino Lungo claimed to have been with the Petitioner throughout the incidents. Secondly, being a UPND member who was even part of the Petitioners campaign team, Quintino Lungo ought to be treated as a witness with an interest to serve since he could have been saddened by the Petitioner's loss. That in an election petition, just like in the elections themselves, each party is set out to win. Therefore, the Court must cautiously and carefully evaluate all the evidence adduced by either party. I was referred to the Tanzanian case of **Nelson Vs AG & Anor (24)** where the Court

held that evidence of partisan witnesses must be viewed with great care and caution, scrutiny and circumspection. I was also referred to the following holding by Justice Musoke – Kibuuka, in another Tanzanian case of **Karokora Vs EC & Kagonyera Election Petition** (25)

...It would be difficult for a Court to believe that supporters of one candidate behaved in a saintly manner, while those of the other Candidate were all servants of the devil.

4.2.29 I was further referred to another Tanzanian case of **Banatib Issa Taligola Vs EC and Wasugoya Bob Fred**, whose holding, I have not considered because the case was not cited in full to enable me search for it. I urge Counsel to be thorough in citing cases to avoid similar experiences in the future.

4.2.30 Mr. Soko submitted that based on the foregoing authorities, the evidence of Quintino Lungo and other Petitioner's partisan witnesses, should not be given so much weight because they are witnesses with an interest to serve.

4.2.31 Regarding the shooting at Mweshi Harbour, Mr Soko submitted that it was an accident which occurred in the course of self-defence by the 1st Respondent who was together with his entourage under a serious attack and this was the 1st Respondent's testimony including 1RW 2 and 1RW 3. Further, that the alleged gunshots did not stop or prevent people from voting for a candidate of their preferred choice as evident from the fact that even the victim of the shooting went back to vote.

4.2.32 Concerning the allegation involving pepper-spraying, Mr. Soko urged me to discard the testimony of Brenda Kapapula (PW8)'s evidence of having been pepper-sprayed at her restaurant because it is irrelevant as it does not support any allegation in the Petitioners petition. That the only allegation where pepper-spraying is alleged in the petition, relates to Andrew Chiboni. That acting under the direction of the 1st Respondent, he pepper-sprayed a UPND official in the company of the Petitioner, while the Petitioner was enquiring over why the PF had camped at the polling station for the entire campaign period. That the allegation does not refer to a pepper-spraying incident at the restaurant. That if PW8's evidence is admitted, it will defeat the functions of pleadings. Here, I was referred to the case of **Saul Zulu V Victoria Kalima (26)** where it was that

The Petitioner is not allowed to bring in any evidence other than the evidence which is connected to the pleadings and goes to support pleadings. Put simply, pleadings in an election petition are allegations by the Petitioner against the Respondent(s) what this means is that the Petitioner cannot go at sea, the petitioner is restricted only to evidence which is supportive of the allegations outlined in the petition. If the petitioner or indeed any witness for the petitioner adduces evidence which does not support the pleadings then that evidence is irrelevant and inadmissible to the extent of its irrelevancy.

4.2.33 That the foregoing is the similar guidance according to the petitions of **Michael Mabenga v Sikota Wina (supra)**, Brelsford

**James Gondwe V Catherine Namugala (27) and Anderson Mazoka
v Levy Mwanawasa. (supra)**

4.2.34 Counsel submitted that the principles laid down in the above petitions, should be extended to the testimony of one Shadreck Sela (PW 7) who testified that gunshots were discharged at Kasoma Lunga Primary School because the amended petition only contains one allegation of gunshot discharge at Mweshi polling station which turned out to be Mweshi Harbour and this allegation is in paragraph 10 of the amended petition.

4.2.35 Counsel submitted that PW 7 testified that Andrew Chiboni, acting under the direction of the 1st Respondent, pepper sprayed a UPND official in the company of the Petitioner, while the Petitioner was enquiring over why the PF had camped at the polling station for the entire campaign period. However, the Petitioner, in his examination in-chief did not mention any incidence of that sort and while PW7 identified the UPND official who was pepper sprayed at Kasoma Lunga as Mr. Mathews, the said Mr. Mathews was not called at trial to come and confirm the incidence especially that he was the alleged victim. Further, under cross-examination, PW7 indicated that the 1st Respondent was not present at the time of the alleged pepper-spray incidence.

4.2.36 That on the basis of the above-cited authorities, PW 7 must be treated as a witness with an interest to serve having been a candidate on the UPND ticket at the material time.

4.2.37 Mr. Soko refuted the Petitioner's allegations involving electoral process irregularities as follows: regarding assertions that some election officers such as Jeff Nkadu was an untrained staff who later failed to properly handle the election at his polling station, that there is unchallenged evidence on record to prove that the said Jeff Nkandu was trained and not handpicked. That the evidence further shows that the issuing of extra three ballot papers was a pure mistake which was rectified in the presence of all stakeholders by declaring the said ballot papers as spoilt pursuant to the powers conferred on a presiding officer under section 63 of the EPA. The provision states as follows

Where a voter inadvertently deals with a ballot paper in such manner that it cannot be used as a valid ballot paper, the voter shall deliver that ballot paper to the presiding officer and, if the presiding officer is satisfied that the ballot paper has been spoilt inadvertently, the presiding officer shall issue another ballot paper to the voter, and shall cancel the spoilt ballot paper and the counterfoil to which it relates.

4.2.38 Therefore, the Petitioner cannot claim to have been disadvantaged by the ballot paper incidence at Matipa polling Station.

4.2.39 Counsel submitted that 2RW1 told the Court that he was not involved in the issuance of ballot papers until the person that was responsible for that, at Table 3, excused himself for a while. That from the time of the alleged extra ballot paper issuance incidence, PW7 remained observing inside the polling room until vote-counting was concluded and thereafter verified the number of ballot papers in the ballot boxes against the voter register for Matipa Polling Station.

4.2.40 Counsel also refuted the Petitioner's allegation that there was ballot mishandling or that ballot books were issued to wrong people and in an irregular manner. This is on grounds that the requisite witness for the Petitioner, Jasper Mulenga (PW6) conceded that the votes which he saw being cast were equal to the votes which were counted as having been cast. Therefore, that there was no manipulation of the voting process.

4.2.41 Further, that despite PW6 mentioning that he was with PW 8 at Matipa Polling Station where they were both UPND appointed polling agents, it is surprising that PW8 never spoke about the subject incident. Counsel submitted that the evidence of PW6 ought to have been corroborated by PW 8.

4.2.42 I was also urged to treat PW6 as a witness with an interest to serve.

4.2.43 Concerning the Petitioner's allegation that some of his polling agents were denied GEN 20 Forms by officers of the 2nd Respondent, Mr. Soko submitted that the evidence of the Petitioner's witness here, Dickson Kaluba Mwansa (PW 16) should be rejected because none of the concerned polling agents was called to confirm the incident especially considering that the witness said he was only informed by the agents that presiding officers had refused to issue GEN 20 Forms. In the result, the witness gave inadmissible hearsay.

4.2.44 Counsel urged me to treat PW16 as a witness with an interest to serve.

same cannot be said to have been proved on a fairly high degree of convincing clarity to warrant the annulment of the election of the 1st Respondent as prescribed by section 97 of the EPA.

4.2.48 Further, that even assuming that the Petitioner has proved the allegations in the petition, there is no evidence to demonstrate that the alleged corrupt practice or misconduct or illegal practice was widespread so as to prevent the majority of the voters in the Constituency from electing a candidate of their choice. That the difference of 4,519 votes between the 1st Respondent and the Petitioner, shows the true reflection of the will of the majority of the people in the Constituency.

4.2.49 Mr. Soko submitted that the Petitioners' argument that this Court is empowered to nullify the election of the 1st Respondent on the basis that corruption practices have been proved without necessarily requiring the proof that the electorates were prevented from electing a candidate of their preference, is highly misconceived. Counsel contended that sections 97(2) of the EPA should be read together with section (97)3. That the proper reading of section 97(3) in its entirety reveals that this Court "shall" not by reason only of such corrupt practice or illegal practice, declare the election of the 1st Respondent void. That the use of the word "shall" in subsection 3 of section 97 is of great significance, as it denotes a mandatory requirement and the case of **Independent School Dist V Independence School District (28)** was cited as the authority on point.

4.2.50 Counsel maintained that in terms of subsection 3 of section 97 of the EPA, this Court is mandated not to declare the election of the 1st Respondent void only by reason of corrupt practice or illegal practice. However, it can only do so where it is proved that the majority of voters were or may have been prevented from electing a candidate of their choice by reason of the corrupt practice or illegal practice. In support of this position, I was referred to the petition of **Austine Liato Vs Sitwala Sitwala** (supra)

4.2.51 That the context in which the cases of *Mlewa v Wightman*, *Michael Mabenga v Wina and 7 Others* and *Rcuben Mtolo Phiri v Lameck Mangani*, have been applied by the Petitioner in aiding his argument, is not legally tenable under the current law because the law as it is today, provides for a higher threshold for the nullification of the election of the Member of Parliament and this was settled by the Constitutional Court of Zambia, in the petition of *Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney* (supra). That the Petitioner has in his submissions at page 10 in paragraph 2.14 admitted this position by quoting and relying on the petition of *Margaret Mwanakatwe v Charlotte Scott*.

4.2.52 Based on the foregoing, Counsel urged me to uphold the declaration that the 1st Respondent was duly elected as Member of Parliament for the Luapula Constituency. And, that the present petition be dismissed with costs.

4.2.53 These are the submissions in toto and I am indebted to both Counsel. For the reasons already stated, the 2nd Respondent is not disadvantaged by the none-consideration of its submissions.

5.0 DETERMINATION

5.1 The above are the issues in toto. I have considered them. Henceforth, I shall state my findings and apply the law thereto. I shall begin this task by outlining the law governing the electoral process in Zambia. This comprise domestic legislation and relevant international and regional human rights instruments to which Zambia is a State Party. The latter category includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Commonwealth Charter, the African Charter on Human and Peoples' Rights, the African Union Declaration on the Principles Governing Democratic Elections and the SADC Principles and Guidelines Governing Democratic Elections in Africa.

5.2 Relevant to the present petition, domestic electoral legislation is as follows:

- (i) The **Constitution of Zambia, Chapter 1 of the Laws of Zambia** (hereinafter referred to as 'Cap. 1') as read with the **Constitution of Zambia (Amendment) Act No. 2 of 2016** (hereinafter referred to as Act. No.2 of 2016;
- (ii) The **Electoral Process Act, Act No.35 of 2016** (hereinafter referred to as the 'EPA')

- (iii) The Electoral Petition Rules, Statutory Instrument No. 426 of 1968 as amended by the Electoral Petition (Amendment) Rules, Statutory Instrument No. 443 of 1968;
- (iv) The Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016; and
- (v) **The Electoral Process (Code of Conduct) (Enforcement) Regulations, 2016** (herein after referred to as the '2016 Electoral Code of Conduct') as amended by the **Electoral Process (Code of Conduct) (Amendment) Regulations, 2020** (hereinafter referred to as the '2020 Electoral Code of Conduct') Statutory Instrument No. 35 of 2020; and,
- (vi) The Electoral Process (Registration of Voters) Regulations, 2020, Statutory Instrument No. 80 of 2020

5.3 The principles established to govern the conduct of elections in Zambia, originate from the supreme law of the Republic, particularly Article 45 of Act No. 2 of 2016. Of relevance to the present petition, they include the following: that citizens are free to exercise their political rights...(a) that elections are free and fair; that elections are free from violence, intimidation and corruption; independence, accountability, efficiency and transparency of the electoral process...and timely resolution of electoral disputes.

5.4 Suffice from the onset to state that on the authority of section 100(3) of the EPA read with section 97 (1), section 98 (c) and

section 102 of the same Act, the present petition is properly before me firstly for having been filed into Court within the prescribed time-frame of fourteen days after the date on which the result of the subject election was duly declared. This is in accordance with section 100(3) of the EPA. Secondly, for having been commenced in the prescribed manner, namely by way of a petition. This is in accordance with section 97(1) of the EPA. Thirdly, for having been commenced by a person who was a candidate in the election in issue, the Petitioner. This is on the authority of section 98(c) of the EPA. And fourthly, the Petitioner having complied with the requirements of section 102 of the EPA, namely by making a deposit of the security for costs before any further steps could be taken in prosecuting the petition.

- 5.5 Further, the 2nd Respondent has been properly sued in this petition and this is on account of it being the body that was solely and legally charged with the responsibility of implementing the electoral process as envisaged under the Constitution of Zambia; conducting the subject election and to regulate the conduct of candidates. This position is supported by Article 229 (2) (a), (b), (c), and (h) of the Constitution (Amendment) Act No.2 of 2016 (hereinafter referred to as 'Act No. 2. of 2016') as read with Article 291(1) of the same Act, and, the preamble to the EPA which in part reads as follows

An Act to provide...for the conduct of elections by the Electoral Commission of Zambia and empower the

Commission to make regulations in matters relating to elections...

5.6 Article 229(1) of Act No. 2 of 2016 provides for the establishment of the ECZ. Article 229 (2) of the same Act mandates the ECZ in the following terms (quoting only relevant portions):

The Electoral Commission shall—

- (a) implement the electoral process;
- (b) conduct elections and referenda;
- (d) settle minor electoral disputes, as prescribed;
- (e) regulate the conduct of voters and candidates;
- (f) accredit observers and election agents, as prescribed;

5.7 I shall now state the law regarding the burden and standard of proof in this petition. Next, I shall outline the issues not in dispute and thereafter, the issues in dispute and for determination by this Court. A discussion of the issues in dispute shall result into my findings and decision as to whether or not the present petition has merit.

5.8 Turning to the burden and standard of proof, an election petition is a species of a civil action. In terms of burden of proof, the well settled principle that **“he who alleges must prove”**, applies. In this petition therefore, the burden is upon the Petitioner, to prove his allegations against both Respondents.

5.9 The standard of proof in an election petition, is higher than that which is applicable in ordinary civil cases namely “proof on the balance of probabilities”, but lower than “proof beyond reasonable doubt” applicable in criminal matters. As submitted

by the parties and on the basis of the authorities which they cited, in an election petition, the Petitioner must prove his or her allegations to a **“fairly high degree of convincing clarity”**.

The foregoing positions are supported by the following holding of the Supreme Court of Zambia, in the case of **Brelsford James Gondwe v Catherine Namugala (supra)**

the burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions namely fairly high degree of convincing clarity.

5.10 Of relevance to the present petition, the grounds which must be proved by the Petitioner and upon which the election of the 1st Respondent as a Member of Parliament, shall be declared void by this Court have as well been outlined by the parties in their submissions. They are prescribed by sections 97(2) (a) and 97(2)(b) of the EPA and are categorised into two. The first category is contained in section 97(2) (a) of the Act. They relate to the conduct of the petitioned candidate and his election or polling agents. The second category is contained in section 97(2)(b) of the Act. They relate to the ECZ in the manner it conducted the election in issue.

5.11 Concerning the grounds under the first category, the proscribed conduct according to section 97(2)(a) of the EPA is the following: a corrupt practice, illegal practice or other misconduct. The provision contemplates that the said proscribed conduct must

have been committed by the candidate, his election or polling agent or by any other person but with the knowledge and consent or approval of that candidate or his or her election agent or polling agent. Further, the Petitioner must prove that as a result of the proscribed conduct, the majority of the voters in the constituency in issue, were prevented from voting for a candidate they preferred.

5.12 A 'corrupt practice' has been defined under section 2 of the EPA as ***"any conduct which is declared to be a corrupt practice in accordance with section eighty-one"***. I shall discuss the provisions of section 81 of the EPA in the due course.

5.13 Relevant to this petition, ***"illegal practices"*** within the meaning of section 97(2)(a) of the EPA, have been outlined in sections 81, 83, 84, 86 and 87 of the same Act. These are bribery, undue influence, illegal practice of publishing false statements in respect of candidates, illegal practices in respect of public meetings and illegal practices relating to the poll, respectively.

5.14 The term ***"other misconduct"*** in section 97(2) (a) of the EPA has not been defined by the Act. However, the **Electoral Code of Conduct, 2016** which prescribe the manner in which a person or other stakeholders in the electoral process including candidates, must conduct themselves in connection with an election, is part of the Act, by way of a schedule. This position is premised on section 9 of the **Interpretation and General**

Provisions Act, Chapter 2 of the Laws of Zambia. The provision states as follows

Every Schedule to or table in any written law, together with notes thereto, shall be construed and have effect as part of such written law.

5.15 Therefore, electoral offences contained in the said Electoral Code can be a basis or ground, within the meaning of section 97(2)(a) of the EPA, for challenging and nullifying the election of a Member of Parliament if proved to the required standard. The holdings of the Constitutional Court of Zambia in the cases of **Austin C. Liato v Sitwala Sitwala** and **Mbololwa Subulwa v Kaliye Mandandi** cited above, support this position.

5.16 Further, the following holding by the Constitutional Court of Zambia in the petition of **Herbert Shabula and Greyford Monde (29)** at page J34, is insightful and on point about this position

In so far as corrupt and illegal practices are concerned, the Act in section 81 and 95 provide what amounts to corrupt and illegal practices for election avoidance purposes. However, the Act does not define what amounts to 'other misconduct'. That notwithstanding, paragraph 15(1) of the Code of Conduct, 2016 does prescribe conduct considered to be misconduct that can result in an election being declared void within the contemplation of section 97(2)(a) of the Act.

5.17 Quoting only relevant parts, Paragraph or Regulation 15 of the mentioned Code of Conduct prescribes as follows

A person shall not: (a) cause violence or use any language or engage in any conduct which leads or is likely to lead to violence or intimidation during an election campaign or election...

(c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election ...

(e) prevent the reasonable access to voters of any candidate or political party in any manner for the purpose of conducting voter education, fund raising, canvassing membership or soliciting support...

(h) offer any inducement, reward or bribe to any person in consideration of such person – (i) joining or not joining any political part...(v) surrendering that person's voter's card, or national registration card, or both; or (vi) offering or surrender a voter's card or national registration card or both;

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

(k) use Government or parastatal transportation or facilities for campaign purposes...

(m) discriminate against any person on grounds of ...ethnicity...or in any other manner in connection with an election or political activity...

(o) be in possession of a voter's card or national registration card belonging to another person during the campaign period...

(2) A person who contravenes subparagraph (1) commits an offence and is liable, upon conviction, to a fine not

exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

5.18 An election agent and a polling agent have been defined under section 2 of the EPA. Here, an ***'election agent'*** is defined as ***"a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper"***. A ***'polling agent'*** is defined as ***"an agent appointed by a candidate in respect of a polling station"***.

5.19 Section 97(2)(a) of the EPA has been interpreted by the Zambian superior Courts in a plethora of election petitions such as ***Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General*** in which the Constitutional Court of Zambia stated that

In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a) there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent...in addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or

misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

5.20 Turning to the grounds under the second category, the requisite law, section 97(2)(b) of the EPA, empowers the High Court to nullify the election of a petitioned Member of Parliament if the ECZ, in conducting the election in issue, did not comply with the principles contained in the provisions of the EPA relating to the conduct of elections and that such non-compliance, affected the results of the election.

5.21 Section 97(2)(4) of the EPA has a caveat protecting the validity of a parliamentary election in spite of the manner it was conducted by the ECZ. The caveat is such that even though an officer of the ECZ had breached his or her official duty in the manner s/he conducted the election in issue, the High Court shall not nullify the election of the winner if nonetheless, the election was conducted in substantial conformity with the provisions of the EPA and that the officer's breach of his official duty, did not affect the result of that election. This position was further emphasised by the Constitutional Court of Zambia in the petitions of **Christabel Ng'imbu v Prisca Chisengo Kucheka** and **Giles Chomba Yambayamba v Kapembwa Simbao**, cited above.

5.22 The foregoing principles shall be adopted in determining the present petition. With that said, I shall outline the issues not in dispute. These are as follows:

- (i) That the ECZ conducted the subject parliamentary election in the Luapula Constituency on 12th of August 2021. In the mentioned election, the Petitioner was sponsored by the UPND whereas the 1st Respondent was sponsored by the PF;

- (ii) That according to the Registered Voters per Polling Station, 2021, ECZ Register, at the material time, Luapula Constituency was made up of 10 wards and 32 polling stations. The wards are as follows: Nkutila, Ncheta, Chumbwe, Shinga, Lubale, Nsalushi, Mashiba, Itala, Lunga and Mweshi;
- (iii) That according to the said Registered Voters per Polling Station, 2021, ECZ Register, the total number of Registered voters in the Constituency was 17, 353. According to the “Record of Proceedings at the Totalling of the Votes – National Assembly for the Luapula Constituency” (exhibit ‘DC1’ in the affidavit verifying the petition), 13,784 voters voted. And;
- (iv) That at the close of the election, the ECZ, through its Returning Officer, declared the 1st Respondent as the duly elected candidate for Luapula Constituency. The results are outlined in paragraph 1.3, above.

5.23 These are the issues not in dispute. I shall now outline the issues in dispute and for determination. Essentially, these are the issues that have been raised by the Petitioner in his petition and evidence. They are broadly as follows:

- (i) Whether or not the 1st Respondent and/or his agents had engaged themselves in corrupt practices during the campaign period through to the date of the subject election;

- (ii) Whether or not the 1st Respondent and/or his election or polling agents exerted undue influence on voters in the Luapula Constituency to his advantage in the subject election.
- (iii) Whether or not the 1st Respondent and/or his election or polling agents had used government facilities for their campaign purposes leading to the subject election. And;
- (iv) Whether or not officers of the 2nd Respondent committed electoral malpractices in the manner they conducted the subject election.

5.24 Suffice to state that the first, second and third issues in dispute, relate solely to the 1st Respondent. The fourth issue in dispute relate solely to the 2nd Respondent. I shall determine them in the order they have been listed save to add that a determination of each of the issues relating to the 1st Respondent shall involve the following three considerations: firstly, if the alleged wrongful conduct is either a 'corrupt practice', an 'illegal practice' or 'other misconduct' within the meaning of section 97 (2)(a) of the EPA for purposes of nullifying the election of a petitioned candidate. Secondly, if the alleged wrongful conduct happened and if so, whether or not it was committed, approved or consented to by the 1st Respondent and/or his election or polling agent. And thirdly, if the alleged wrongful conduct was widespread and thereby swayed majority voters as to prevent them from voting for their preferred candidate.

5.25 Only after the foregoing questions have been answered in the affirmative, shall the allegation be upheld as a ground for nullifying the 1st Respondent's subject election. The converse entails failure of the allegation.

5.26 As highlighted already, the first issue in dispute is whether or not the 1st Respondent and/or his election or polling agents, committed corrupt acts during their campaigns in the subject election. It cannot be denied that electoral corruption is an express ground for nullifying the election of a Member of Parliament. The requisite law is section 2 read with section 81 (a), (c), (d) and (e) and section 97(2)(a) of the EPA. Section 2 and section 97(2)(a) of the EPA have already been recited. As for section 81, it states as follows

Section 81. (1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly -
(a) give, lend, procure, offer, promise or agree to give... or offer, any money to a voter ...in order to induce that voter to vote... or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election... (c) make any gift... to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election... (d) upon or in consequence of any gift...promise...promise or endeavour to procure, the return of any candidate at any election or the vote of any voter at any election... (e) ... pay or cause to be ...paid any money to or for the use of any other person with the

intent that such money or any part thereof shall be expended in bribery at any election...

5.27 Turning to the Petitioner's evidence, the allegation suggests the following four incidents of corrupt practices: first, that the 1st Respondent and his agents gave an amount of K200.00 to each of the forty-five village headmen who attended the meeting that was convened by the 1st Respondent at Kasoma Lunga Primary School between 1st and 10th May 2021. That the said money was an inducement for the village headmen to persuade their subjects to vote for the 1st Respondent.

5.28 Second, that the District Commissioner for Lunga District gave an amount of K25.00 to each of the 25 village headmen who attended a meeting he convened at his home on 10th August 2021. Similarly, the money was given as an inducement for the village headmen to persuade their subjects to vote for the 1st Respondent. Further, the District Commissioner threatened members of the UPND with punishment by the military and State security personnel. That some of the village headmen conveyed the information to their subjects and fearing the hunger situation in the area and noting that mealie meal in the area was distributed to the people by the Campaign Manager for the PF, their subjects listened.

5.29 Third, that the 1st Respondent and his agents gave an amount of K10.00 to most voters across Lunga District as a way of inducing them to vote for the 1st Respondent.

5.30 And fourth, that PF councillors who were part of the 1st Respondent's campaign team, were caught at Mweshi and Chafye with chitenge and money for distribution and this was outside the designated campaign period.

5.31 These are the incidents constituting the first issue in dispute. I shall determine them in the order they have been listed. Thus, regarding the first incident, there is no evidence suggesting that the Petitioner personally perceived the alleged corrupt practices. Rather, he is relying on a witness who allegedly perceived them. This is PW12.

5.32 Just to repeat, PW12, the Headman for Kalosa Village is the witness who attested to the two meetings where village headmen were allegedly paid the money. Pw12 told the Court that he was part of the two delegations of headmen who attended both meetings and paid the money in the manner outlined above.

5.33 I have no hesitation in finding that the two incidents fit in the definition of a corrupt practice according to section 81 (1) (a) of the EPA and this is on grounds that payment of the money was accompanied by a solicitation for votes. With this finding, the next question is if the two incidents happened and the answer lies in the veracity or lack thereof, of PW12's testimony.

5.34 In evaluating PW12's testimony, I have found helpful, the following holding by Musonda, J (as he then was) in the case of **Simasiku Kalumiana v Lungwangwa Geoffrey and the Electoral Commission of Zambia (30)**

The whole petition turns out of the credibility of witnesses as you have most petitioners' witnesses giving evidence to support allegations contained in the petition, while witnesses for the Respondent dispute those allegations. As I said in the petition of Simasiku Namakando and Eileen Imbwae, the witnesses have to be subjected to strict scrutiny of their integrities.

5.35 In the case of **Simasiku Namakando v Eileen Imbwae** (31) referred to above, Musonda, J, held thus

This case therefore hinges on the credibility of the witnesses and it is imperative to put under strict scrutiny their credibility. To aid such analysis, I will categorise the witnesses into four groups in this petition. The attachment of weight to evidence follows the order. More weight is attached to the fourth, then third, then second and lastly, the first category of witnesses.

- (i) Witnesses who belong to the Petitioner and Respondents' political parties;
- (ii) Witnesses who were electoral officials engaged by the Electoral Commission to conduct the election;
- (iii) Witnesses who belong to the Petitioner or Respondent's party who gave evidence against their own party candidate;
- (iv) Monitors or police officers who are not party to these proceedings nor were they party members.

5.36 The foregoing is supported by the following persuasive but equally useful holding in the Ugandan case of **Nabukeera Hussein Hanifa v Kibule Ronald and Another** (32) cited with approval by Justice Kaoma in the case of **Christopher Kalenga v Annie Munshya and Two Others** (33)

in an election petition just like in an election itself each party is set out to win. Therefore, the Court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny, circumspection. It would be difficult indeed for a court to believe that supporters of one candidate behave in a saintly manner, while of the other candidate were all servants of the devil. In an election contest of this nature, witnesses most of them are motivated by the desire to score victory against their opponents will deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain.

5.37 In the Case of **Mbololwa Subulwa v Kaliye Mandandi (supra)**, the Constitutional Court of Zambia guided that the evidence of partisan witnesses require corroboration. The Court made this guidance in the following terms

as a starting point, we wish to echo here the position we took in *Steven Masumba*, where we made it clear that in terms of the requirement for corroborating evidence in election petitions, witnesses who belong to a candidate's own political party or who are members of the candidate's campaign team, must be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood by such witnesses in an effort to tilt the balance of proof in favour of the candidate that they support.

5.38 According to **Steven H. Gifis., Dictionary of Legal Terms: Definition and Explanations for Non-Lawyers, Third Edition**, corroborative evidence means

evidence complementary to evidence already given and tending to strengthen or confirm it; additional evidence of a different character on the same point.

5.39 Based on the foregoing authorities, I have found that PW12 is a credible witness. This is because there is no evidence suggesting that he is aligned to any of the political parties that contested the subject election. He is therefore a non-partisan witness. On this basis, and further noting that there is no evidence suggesting that he had reason to concoct the stories, I accept his testimony that the two meetings he attested to, took place and that during the said meetings, headmen were paid money by the 1st Respondent and the District Commissioner, respectively by way of tempting them to induce their subjects to vote for the 1st Respondent.

5.40 Similarly, I also accept PW12's evidence that during the second meeting, the District Commissioner told village headmen that members of the UPND would be punished by the military and state security agencies.

5.41 I reject Mr. Soko's submission that PW12's evidence must be corroborated and this is because there is no law that directs for the corroboration of a credible witness' evidence. Further, the absence of the physical evidence of the bribes in issue, does not alter my position firstly because the incidents have been attested to by a credible witness who was himself a recipient of the bribes and secondly because a reasonable explanation justifying the absence of the physical evidence has been tendered, namely that the

witness used the money. The explanation is reasonable considering that a long period of time has lapsed from the time the money was given out and that it was intended for use and not to be kept for purposes of litigation.

5.42 With that said, I shall assess the status of the two incidents.

According to PW12, the first corrupt incident, namely the bribery of headmen with amounts of K200.00 each, took place between 1st and 10th May 2021. Under cross-examination, PW12 conceded that this was before the commencement of campaigns and this aspect is incontrovertible in view of section 2 of the EPA which defines a "campaign period" as **"a period of three months before the holding of an election"**. By this definition, the campaign period should have commenced on 11th May 2021, since the subject General Elections were held on 12th August 2021.

5.43 Further, the fact that the 1st Respondent filed his nomination for the subject election on 17th May 2021, according to his submissions, entails that he was not yet a candidate for the subject election as at the date of the bribe. Therefore, much as the donation of amounts of K200.00 was accompanied by a solicitation for votes in the subject election, the 1st Respondent was nonetheless not yet a candidate. Under the circumstances, the question is if section 97 of the EPA envisages corrupt practices which are committed before the campaign period and by a person who is not yet a candidate.

5.44 My understanding of section 97 of the EPA is that the provision envisages wrongful conduct by a candidate and not a person who is not yet a candidate. And according to section 2 of the EPA, a candidate is a person contesting a presidential, parliamentary or local government election. My further understanding of the two provisions read together, is that for a corrupt act to constitute a ground for nullifying an election of a petitioned Member of Parliament, it should have been committed by a candidate in an election and by Part VII of the EPA, the wrongful conduct complained of, should be committed in contemplation of an election and in my view, this is only possible where the campaign period has commenced because it is only then that an election can be envisaged.

5.45 Based on the foregoing, the corrupt act in issue does not qualify to be a ground for nullifying the subject election because at the time it was committed, the 1st Respondent was not yet a candidate of this election. Further, it was committed before the campaign period commenced. The allegation is accordingly dismissed.

5.46 Turning to the second incident of bribery involving an amount of K25.00 which was given to each village headman by the District Commissioner, I am satisfied that it occurred and my findings are based on the same reasons relating to the bribery of headmen with amounts of K200.00, each. Further, I am satisfied that the corrupt act took place during the campaign period. With this background, the next question is if the act can be attributed to the 1st

Respondent and/ or his election or polling agents as prescribed by section 97(2)(a) of the EPA.

5.47 Here, I firstly note that it is not in dispute that at the material time, the said District Commissioner was not an election or polling agent of the 1st Respondent, within the meaning of section 2 of the EPA. Under the circumstances, the question is if the bribe and intimidation by the District Commissioner were made with the knowledge and consent of the 1st Respondent and/or his election or polling agents.

5.48 PW12's evidence does not indicate that the 1st Respondent and/or his election or polling agents were present during the respective occasion on which the said District Commissioner bribed the headmen and threatened that members of the UPND would be punished by military and security personnel. The witness has also not led evidence to demonstrate that the 1st Respondent and/or his agents consented to the District Commissioner's subject bribery and threats, directly or indirectly. It would appear that through PW12, the Petitioner intends to persuade me to assume that the 1st Respondent consented to the bribery and threats only on grounds that the District Commissioner was campaigning on his behalf. I decline to adopt this view as it is anchored on speculation. A person can be motivated to campaign for the other, for various reasons such as natural affinity and not necessarily because the other person has consented to the campaign.

5.49 As stressed in section 97(2)(a) of the EPA, to hold a candidate responsible for the wrongful conduct of another person, there must be proof, to a fairly high degree of convincing clarity, that the candidate approved or consented to such conduct. The provision does not empower the Court to base its decision on speculation and neither is it the duty of the Judge to fill-out the gaps in the evidence of the petitioner in respect of his allegations in the petition as the Judge is a neutral umpire in the adversarial justice system which we practice in our courts.

5.50 My foregoing view is supported by the holding of the Constitutional Court of Zambia in the Nkandu Luo petition (*supra*) that

That supporters of the PF were implicated in the attack, is not enough to attach responsibility to the 1st Respondent or her duly appointed election agents and to annul the election on the basis of section 97(2)(a)(ii) of the EPA.

5.51 In so holding, the Court affirmed its following holding in the petition of Richwell Siamunene v Sialubalo Gift (*supra*)

Mere proof that the UPND were involved in the said acts does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election...when section 83 is read with section 97, it is clear that violence or threat of violence must be perpetrated by the candidate or with the candidate's knowledge and approval or consent or that of his election or polling agent. In order for the

candidate to be liable for the illegal practice or misconduct, it must be shown to be that of his official agent; there must be proof to the required standard that he had both knowledge of it and approved or consented to it; or that his election or polling agent had knowledge and consented to or approved of it.

5.52 Based on the foregoing, I as well dismiss the subject allegation. For the same reasons, I decline to hold the 1st Respondent liable for the said District Commissioner's threats uttered to the village headmen during the meeting, that members of the UPND would be punished by the military and state security agencies. Although this aspect falls under the heading of 'undue influence', I have decided to determine it here because it arose from the same course of conduct as the subject under discussion. The nature and dynamics of conduct amounting to undue influence shall however be discussed in detail elsewhere.

5.53 The other allegation involving corruption is that the 1st Respondent and/or his agents gave amounts of K10.00 to most voters across Lunga District between 9th and 11th August 2021. The Petitioner did not personally perceive this. Rather, he sought to rely on PW13, in his quest to prove this allegation.

5.54 Pw13 is a member of the UPND. He told the Court that the 1st Respondent, in the company of Andrew Chiboni and John Mulombe held two meetings campaigning for the 1st Respondent. The venues and dates are as follows: one in Mwenda Village on 5th August 2021 and the other, in Mashiba Ward on 7th August 2021.

That during both meetings, the 1st Respondent gave out an amount of K10.00 to each attendant whereas Andrew Chiboni and John Mulombe gave out a chitenge material and T- shirt respectively, by way of soliciting for votes.

5.55 I note that Pw13 is a member of the UPND. Therefore, on the basis of the petition of Mbololwa Subulwa v Kaliya Mandandi (supra), his testimony must be corroborated in order to exclude the danger of falsehood.

5.56 I have combed through the evidence, but did not find corroborative evidence. Under the circumstances, it is not safe for me to accept his evidence. I accordingly dismiss this allegation. For the same reasons, I decline to hold the 1st Respondent liable for Andrew Chiboni and John Mulombe's alleged threats uttered to the audience during the two meetings in issue that the distribution of relief food and social cash shall stop if they voted for the Petitioner and the UPND. Although this aspect falls under the heading of 'undue influence', I have decided to determine it here because it arose from the same course of conduct as the subject under discussion. As undertaken already, the nature and dynamics of conduct amounting to undue influence shall be discussed in detail later.

5.57 The last allegation involving a corrupt act is that PF councillors who were part of the 1st Respondent's campaign team, were caught at Mweshi and Chafye with chitenge and money for distribution, outside the designated campaign period. The Petitioner did not

perceive this incident. He is relying on the evidence of PW14, PW3 and PW11.

5.58 Just to revive, Pw14 was a candidate in Mweshi Ward for the position of councillor contesting on the Socialist Party ticket. He told the Court that on 12th August 2021, while at Mweshi Polling Station where he had gone to cast his vote, he saw a mob of people take Steven Chipulu to the presiding officer. Steven Chipulu was a candidate for the position of councillor contesting on the PF ticket. The mob alleged that he was found in possession of money in the sum of K20 in K5 bank notes.

5.59 The foregoing incident was attested to by Pw3 who told the Court that on 12th August 2021, when she went to Mweshi Polling Station, she found that Steven Chipulu, a PF Councillor, had been brought on an allegation that he was distributing money in denominations of K20 in K5 notes.

5.60 This is PW14 and PW3's evidence and I have believed the two witnesses because they are independent of the parties to this petition. Therefore, according to the principles laid down in the petition of Simasiku Namakando v Eileen Imbwac (supra), they are credible. That notwithstanding, the other pertinent questions which need determination is firstly, the veracity of the allegation that the said Steven Chipulu was caught distributing the money and for what purpose? Secondly, and if he was caught distributing money by way of soliciting for votes, it is if the act was approved or

consented to by the 1st Respondent and or his election or polling agents.

5.61 I note that PW3 and PW14 were not present at the scene when Steven Chipulu was caught by the mob. Therefore, they are not privy to the circumstances leading to his apprehension namely if indeed he was caught distributing money and if so if he was distributing the money by way of soliciting for votes. The right people who could attest to the circumstances under which Steven Chipulu was apprehended are the people who apprehended him but they have not been called to testify albeit for unknown reasons. To accept and assume that PW3 and PW14's evidence confirms that Steven Chipulu was apprehended because he was found bribing voters, would be to accept inadmissible hearsay evidence because the actual people from whom PW3 and PW14 heard these accusations, have not testified. This position is supported by the following statement according to **Steven H. Gifis., Dictionary of Legal Terms: Definition and Explanations for Non-Lawyers, Third Edition,**

a rule that declares not admissible as evidence any statement other than that by a witness while testifying at the hearing and offered into evidence to prove the truth of the matter stated...If, for example, a witness' statement as to what he or she heard another person say is elicited to prove the truth of what that other person said, it is hearsay. If, however, it is elicited to merely show that the words were spoken, it is not hearsay. The witness' answer will be admissible only to show that the other person spoke certain words and not to show the truth of what the other person said. The reason for the hearsay rule is that the credibility of the witness is the key ingredient in

weighing the truth of his or her statement; so when that statement is made out of court, without benefit of cross-examination and without the witness' demeanor being subject to assessment by the trier of fact (judge or jury), there is generally no adequate basis for determining whether the out-of-court statement is true.

5.62 Further, considering that the allegation is about bribery of voters, the right people to have confirmed the bribery, are the recipients of the bribe because for a corrupt act to be a ground for nullifying the election of a candidate in an election, the Court must not only be satisfied that there was bribery but also that it was registered voters who were bribed and for purposes of influencing them not to vote for their preferred candidate.

5.63 In the view that I have taken, I find appropriate and therefore adopt the holding cited above by Mr. Soko in the persuasive *Ugandan case of Ugandan Presidential Election Petition No.1 of 2001 between RTD Dr. Kizza Besigye v Museveni Yoweri Kaguta & EC*.

5.64 Based on the foregoing, much as I am satisfied that PW3 and PW14 indeed saw Steven Chipulu being taken to the presiding officer for Mweshi Polling Station by a mob and that they heard the mob state that they had caught him distributing money, I decline to entertain the suggestion that Steven Chipulu was indeed soliciting for votes by way of distributing money.

5.65 Further, even assuming that Steven Chipulu was indeed caught bribing voters, there would be no basis for me to hold the 1st Respondent liable for the corrupt act because there is no evidence

demonstrating that Steven Chipulu is an appointed agent of the 1st Respondent. Further, there is no evidence demonstrating that the 1st Respondent and/or his election or polling agents had approved or consented to the act. As guided already, it is not enough for the Petitioner to allege that the actor, Steven Chipulu and the 1st Respondent are political affiliates. Rather, to hold the 1st Respondent liable for the other person's wrongful conduct, it must be proved that he directly or indirectly approved such conduct.

5.66 Based on the foregoing, I dismiss this allegation.

5.67 Concerning PW11, he told the Court that he found Mr. Edmond Pongwe a candidate for the position of councillor for Chumbwe Ward, on the PF ticket, attempting to bribe, the headman's wife, Mrs. Mofya, to vote for the 1st Respondent, himself (Mr. Edmond Pongwe) and other PF candidates. Further, the witness saw the money that was intended to be used as a bribe, when it dropped from Mr. Edmond Pongwe's hands when confronted.

5.68 I have found PW11 credible because similarly, there is no evidence suggesting that he is aligned to any of the parties to this petition. He is therefore a non-partisan witness. On this basis, and further noting that there is no evidence suggesting that he had reason to concoct the stories, I accept his testimony that he caught Edmond Pongwe attempting to bribe Mrs. Mofya in order to induce her to vote for the 1st Respondent, among other PF candidates in the election. With this background, the next question is if the act can

be attributed to the 1st Respondent and/ or his election or polling agents as prescribed by section 97(2)(a)(ii) of the EPA.

5.69 Firstly, there is no evidence suggesting that at the material time, Edmond Pongwe was an election or polling agent of the 1st Respondent within the meaning of section 2 of the EPA. Under the circumstances, the question is if the attempted bribe in issue was made with the knowledge and consent of the 1st Respondent and/or his election or polling agents. PW11's evidence does not indicate that the 1st Respondent and/or his election or polling agents were present during the respective occasion on which Edmond Pongwe attempted to bribe Mrs. Mofya. The witness has also not led evidence to demonstrate that the 1st Respondent and/or his agents consented to Edmond Pongwe's subject bribery. As similarly observed earlier, it would appear that the Petitioner is persuading me to hold the 1st Respondent liable based on PW11's evidence firstly because Edmond Pongwe and the 1st Respondent are political party affiliates and secondly because Edmond Pongwe was campaigning for the 1st Respondent, also. I decline to adopt this view because it is anchored on speculation. The 1st Respondent can only be held liable if it has been specifically proved that he and/or his election or political agents, approved or consented to Edmond Pongwe's conduct.

5.70 Based on the foregoing, I dismiss this allegation.

5.71 Of further relevance to this allegation, is the evidence of PW2. Pw2 told the Court that on 12th August, 2021 at around 01:00hrs,

Bowas Mubanga and Justin Kongole approached him at his house to solicit for votes on behalf of the 1st Respondent. That in doing so, they gave PW2's wife two chitenge materials. That when PW2 threatened to report them to relevant authorities, the duo fled leaving behind 18 chitenge materials, 5 T-shirts plus the 2 chitenge materials which they had given to his wife.

5.72 PW2 further told the Court that on 11th and 12th August 2021, the relief food that was taken to Chumbwe ward from Mpata was distributed by members of the PF, who included Marko Chilubi and Mr. Sanshi Mukuta. That Marko Chilubi and Sanshi Mukuta said that members of the UPND would only be given the relief food if they surrendered their voter's cards and NRCs.

5.73 Pw2 did not state if Justine Kangole and Bowas Mubanga were or are PF councillors in line with the allegation. That notwithstanding, I have found his evidence relevant here because it relates to allegations of campaigns that were purportedly conducted on behalf of the 1st Respondent in violation of the electoral law relating to the timeframe within which political campaigns should have been conducted by candidates.

5.74 I have found PW2 credible because similarly, there is no evidence suggesting that he is aligned to any of the political parties that contested the subject election. He is therefore a non-partisan witness. On this basis, and further noting that there is no evidence suggesting that he had reason to concoct the stories, I accept his testimony that he caught Justine Kangole and Bowas Mubanga

attempting to bribe him and his wife by way of soliciting for votes for the 1st Respondent. Similarly however, the question is if their act can be attributed to the 1st Respondent and/ or his election or polling agents as prescribed by section 97(2)(a) of the EPA.

5.75 Firstly, there is no evidence suggesting that at the material time, the duo was election or polling agents of the 1st Respondent, within the meaning of section 2 of the EPA. Under the circumstances, the question is if the attempted bribe in issue was made with the knowledge and consent of the 1st Respondent and/or his election or polling agents.

5.76 And secondly, PW2's evidence does not indicate that the 1st Respondent and/or his election or polling agents were present during the occasion in issue. The witness has also not led evidence to demonstrate that the 1st Respondent and/or his agents approved or consented to the subject bribery. As observed earlier, it would appear that through Pw2, the Petitioner is persuading me to hold the 1st Respondent liable because Justine Kangole and Bowas Mubanga were campaigning for him. I reject this suggestion on the grounds that the view is anchored on speculation. As highlighted already, the 1st Respondent can only be held liable if it has been specifically proved that he and/or his election or political agents, approved or consented to the duo's conduct.

5.77 The allegation is accordingly dismissed. For the same reasons, I dismiss PW2's evidence that on 11th and 12th August 2021, the relief food that was taken to Chumbwe ward from Mpata was

distributed by members of the PF, who included Marko Chilubi and Mr. Sanshi Mukuta who said that members of the UPND would only be given the relief food if they surrendered their voter's cards and NRCs.

5.78 In summation, all allegations involving corrupt practices on the part of the 1st Respondent and/or election or polling agents, have been dismissed.

5.79 I now consider the second issue in dispute namely whether or not the 1st Respondent exerted undue influence on voters in the Luapula Constituency. The alleged undue influence comprises the following acts: threats by the 1st Respondent and/or his agents to exclude members of the UPND or voters who would not vote for the 1st Respondent and other PF candidates, from accessing social cash and relief food; threats by Chief Nsamba to banish UPND supporters and people who would not vote for the PF, from his chieftdom.

5.80 The said acts of undue influence are a species of illegal practices within the meaning of section 97(2)a) of the EPA cited above as read with section 2 and section 83 of the same Act. Therefore, they are a ground upon which the subject election of the 1st Respondent can be nullified, if proven to the required standard.

5.81 Section 2 states as follows: **“illegal practice” means an offence which is declared under this Act to be an illegal practice**”. Part VII of the EPA under which section 83 cited above falls, is entitled: **“corrupt and illegal practices and other election offences”**.

Section 83 is itself entitled: “**undue influence**”. The EPA has not defined the phrase undue influence. The EPA only specifies conduct which amount to ‘undue influence’. It stipulates as follows

83. (1) A person shall not directly or indirectly, by oneself or through any other person—

(a) make use of or threaten to make use of any force, violence

or restraint upon any other person;

(b) inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means, or pretended supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage,

harm or loss upon or against any person;

(c) do or threaten to do anything to the disadvantage of any

person in order to induce or compel any person...(iii) to vote or not to vote for any registered political party or candidate; (iv) to support or not to support any political registered party or candidate; or (v) to attend and participate in, or not to attend and participate in, any political meeting... political event...(g) unlawfully prevent the holding of any political meeting,

... other political event.

(2) Subject to the other provisions of this Act, a person shall

not prevent another person from exercising a right conferred by

this Act... (5) A person who contravenes any of the provisions of

subsections (1) to (4) commits an offence.

(6) A person who, by ...duress ...impedes or prevents the free exercise of the vote of any voter or thereby compels, induces or prevails upon any voter either to give or to refrain from giving the person's vote at any election, commits an offence.

5.82 In terms of the definition of the phrase, I have adopted the following from **Black's Law Dictionary, 8th Edition, Edited by Bryan A. Garner**

...unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that the person will not act in a manner inconsistent with his welfare.

5.83 With that said, I shall now consider the specific allegations. Thus, regarding threats to exclude members or supporters of the UPND from accessing social cash and relief food, the witnesses here are the Petitioner, Pw8 and Pw13. I shall not consider Pw13's allegation because it has already been dealt with under paragraph 5.1.55.

5.84 Turning to the Petitioner, he told the Court that whilst in Kasoma Lunga, he heard, and on one occasion, met Jimmy Bwalya, disseminating threats to people in the villages situated in Kasoma Lunga that those who would not support the PF, would be excluded from accessing social cash and relief food. The Petitioner stated that Jimmy Bwalya was an agent of the 1st Respondent and he was using a

megaphone to disseminate the threats. He experienced these events during the time he was in Kasoma Lunga from 4th to 10th August 2021. Jimmy Bwalya would move around the villages disseminating the threats from 04:00 hrs to 07:00 hrs. That the threats made the people to quit the UPND in favour of the PF so that they could access the relief food and social cash.

5.85 The Petitioner's foregoing evidence (particularly relating to the social cash), was confirmed in material particulars by Pw8, a polling agent for the UPND deployed at Kasoma Lunga Primary School Stream 1 Polling Station. Pw8's said status was disclosed by PW6 who told the Court that he was deployed as a polling agent for the UPND at the said Polling Station, alongside PW8. For the reason that PW8's evidence here is similar to that of the Petitioner, I shall not recite it. Suffice it from the onset to state that threatening to exclude a beneficiary from accessing relief food or social cash, not only has the potential to bear heavily on the targeted individual but also capable of sending a strong message to the others who could be contemplating the conduct which has led to the threat in issue. Bearing this in mind, I have no hesitation in concluding that the subject conduct, amounts to undue influence within the meaning of section 83 of the EPA and therefore an illegal practice within the meaning of section 97(2) (a) read with section 2 of the EPA for purposes of nullifying the election of a petitioned Member of Parliament. With this said, the next question is if the incidents happened and the answer thereof lies in the veracity of the Petitioner and Pw8's evidence.

- 5.86 In evaluating the duo's evidence, I have noted that they are persons with an interest in the outcome of this petition. This is on grounds that the Petitioner is obviously a party to the present petition whereas PW8 was his polling agent. Therefore, on the authority of the petitions of Mbololwa Subulwa v Kaliye Mandandi, their evidence must be corroborated in order to exclude the danger of falsehood or exaggeration.
- 5.87 Having combed through the evidence, I have not found any corroborative evidence. Under the circumstances, the duo's evidence falls short of the threshold required for its admission and it is on this basis that I decline to rely on it.
- 5.88 Further, even assuming that the evidence was corroborated, it would still fail on account of having failed to link the 1st Respondent to the alleged threats. I am of this view because the evidence does not suggest that the 1st Respondent was with Jimmy Bwalya when the latter was uttering the threats. Further, it has not been demonstrated that Jimmy Bwalya was either an election or polling agent of the 1st Respondent within the meaning of section 97(2)(a) of the EPA as read with section 2 of the same Act. There is no evidence either, demonstrating that the 1st Respondent approved or consented to Jimmy Bwalya's alleged threats. Rather, the combined content of the Petitioner and Pw8's evidence, is only that Jimmy Bwalya was issuing the threats in the capacity of member of the PF and, in issuing the threats, he was soliciting for votes for PF candidates who included the 1st Respondent. This appears to be the basis upon which the

Petitioner seeks to persuade me to hold the 1st Respondent liable for Jimmy Bwalya's threats. But as stressed already, this alone, without express proof that the 1st Respondent approved or consented to the threats, is not sufficient to hold a petitioned candidate liable for the acts of another person.

5.89 Further, even if the alleged threats were proved, they would not amount to undue influence for purposes of nullification of the 1st Respondent's subject election and this is because they did not prevent the voters from voting for the Petitioner. I hold this view because it has not been denied that the Petitioner got more votes than the 1st Respondent in Kasoma Lunga Ward, the site of the alleged threats. Whether or not a threat amounts to undue influence is judged by its effect on the threatened person and not by the intention of the person using the threat. In the present petition, the effect of Jimmy Bwalya's threats would be judged by its ability to prevent voters from voting for the Petitioner, which, as already observed, was not the position. My foregoing view is anchored on the passage by the Learned Authors of the **Halbury's Laws of England, 4th Edition, at page 784** quoted above at paragraph 4.2.12.

5.90 Based on the foregoing, the alleged threats would in all respects fail to satisfy the threshold of our electoral law.

5.91 The other allegation involving undue influence is that Chief Nsamba campaigned on behalf of the 1st Respondent, used hate speech against the Petitioner and his political party, the UPND and, threatened to banish supporters of the UPND from his chiefdom. I have no doubt

that this conduct falls within the ambit of section 83 of the EPA. And, read with section 2 and 97(2)(a) of the same Act, it is a ground upon which the subject election of the 1st Respondent, can be nullified if proven to the required standard.

5.92 The first question is if indeed the threats were issued and the witness in perspective on this aspect is the Petitioner and Pw4. The Petitioner told the Court that the Chief campaigned for the PF in the chiefdom during which he used tribal and hate speech against the Petitioner and his political party, the UPND. Further, that the Chief threatened to banish people who would vote for the UPND, from his chiefdom. The Petitioner stated that he personally encountered this incident at Matongo in Nsalushi Ward.

5.93 PW4, a member of the UPND, told the Court that he attended a meeting convened by Chief Nsamba at Chikoti in Kabuli Village, on 9th August 2021. That during the meeting, the Chief instructed the audience to vote for the 1st Respondent and not the Petitioner since the UPND is for Tongas. That the Chief said that the people who will vote for the UPND will not be benefiting from incentives such as relief mealie-meal and social cash. That because of the authority that the Chief wields over his subjects, all the people in the village got scared. Thus, a lot of UPND members left their party and joined the PF although PW4 did not defect to PF.

5.94 This is the evidence supporting the subject allegation. I have no hesitation in finding that the alleged conduct is also a species of conduct amounting to undue influence within the meaning of section

83 of the EPA and an illegal practice for purposes of nullifying the election of a petitioned candidate within the meaning of section 97(2)(a)(b) as read with section 2 of the same Act.

5.95 I must also hasten to state that I have taken judicial notice of the immense influence and power that chiefs in Zambia wield over their subjects. With this hindsight, it can safely be concluded that Chief Nsamba's alleged directives and threats, if at all, had the potential to influence or sway voters who heard them.

5.96 As in the previous allegation however, the question is if the incident happened and the answer is dependent on the veracity of the Petitioner and PW4's evidence. Being persons who are interested in the outcome of the present petition, and on the authority of the petition of Mbololwa Subulwa (supra), the Petitioner and PW4's evidence must be corroborated. Accordingly, I have perused the record but have not found any corroborative evidence yet in my view, independent evidence could have easily been supplied considering that PW4 (particularly), has indicated that the meeting he attended, at which Chief Nsamba uttered the threats, was attended by an audience. This therefore implies that there were other listeners apart from PW4, and at least one of such, should have been called as a witness.

5.97 For want of corroboration, I decline to rely on the Petitioner and PW4's evidence and their allegation would accordingly fail.

5.98 Further, even assuming that the allegation had been proved, it would still fail on account of there being no evidence linking the 1st

Respondent and/or his election or polling agents to Chief Nsamba's conduct. I am of this view because it has not been demonstrated that the Chief was the 1st Respondent's election or polling agent; that the 1st Respondent and/or his election or polling agents were present when the Chief uttered the alleged threats or that they approved or consented to the threats. As in the previous allegation, the Petitioner seem to be persuading me to hold the 1st Respondent liable for the Chief's threats on grounds that the Chief was campaigning for him. As already explained, such a position is not tenable because section 97 (2)(a)(ii) of the EPA demands that for a petitioned candidate to be held liable for the wrongful conduct of another person, the candidate must have approved or consented to the wrongful conduct. This, as noted already, is not the position in the present case as there is no evidence demonstrating that.

- 5.99 Allied to the foregoing are allegations that the 1st Respondent and/or his agents committed acts of violence against the Petitioner and his supporters. There are four incidents that have been alleged here. One is that the 1st Respondent's agent shot at voters at Mweshi Polling Station on the election day. That in the process, one voter (Abraham Bwalya) was shot thereby striking fear in the voters and disrupting the voting process. The other incident alleges that one Andrew Chiboni, acting under the directive of the 1st Respondent, pepper-sprayed a UPND official who was in the Petitioner's company as the Petitioner was asking why the PF had camped at the polling station during the entire campaign period. The other incident is that supporters of the PF

pepper-sprayed Mathew Mwewa, a Campaign Manager for the UPND, at Kasoma Lunga. The last incident alleges that the Petitioner and his agents were not allowed to campaign freely in Lunga District.

5.100 The status of electoral violence in an election petition is settled at law.

Electoral violence is an illegal practice within the meaning of the above-cited provisions namely section 97(2)(a) of the EPA as read with section 2 and section 83(1)(a) of the same Act. Further, the 2016 Code of Conduct, under Regulation 2 requires individuals to promote conditions conducive to the conduct of free and fair elections during an election campaign or election. Additionally, the same Code of Conduct specifically proscribes electoral violence and enacts it in an offence in Paragraph 15(1)(a).

5.101 In view of the foregoing, electoral violence is a ground for nullifying the election of a petitioned candidate under the EPA. Under the circumstances, the first question for determination is if the alleged incidents occurred. Turning to the first incident, I am satisfied that indeed a firearm was discharged at Mweshi Polling Station by a person who was in the company of the 1st Respondent. Further, one voter, Abraham Bwalya, was shot in the process. The Petitioner has himself admitted this aspect except he has alleged that he was not aware that the shooter (his agent), had a firearm on his person. The 1st Respondent also told the Court that the firearm was discharged in self-defence as they were under attack. Further, it was discharged only in order to scare away their attackers.

5.102 I am not persuaded by the 1st Respondent's foregoing assertions and I accordingly reject them. I reject his assertion that he was not aware that Abraham had a firearm on his person and this is because a firearm is a big article and easily noticeable on the person of an individual especially for one who has been in close company with the other as was the position in the present case where the 1st Respondent and Haggai Bwalya had been travelling together. For this reason, I have no doubt that the 1st Respondent saw the firearm on Haggai Bwalya's person and further consented to its use for that is the reasonable expectation of one carrying a firearm. His assertion that he was not aware that Haggai Bwalya was carrying the firearm is an afterthought by which he intends to dissociate himself from the said firearm.

5.103 Further, I am satisfied that the petitioner's team had a hostile encounter with some voters at Mweshi Polling Station. I am of this view based on the undisputed evidence that some voters protested the 1st Respondent's presence at the Polling Station and that was what prompted the 1st Respondent's premature departure from the polling station. That as it may, I reject the 1st Respondent's assertion that his team was under serious danger from the hostile mob. I hold this view because his version and those of his witnesses defy logic. The combined effect of the 1st Respondent and his witnesses (1RW2 and 1RW3)'s evidence, is that the people who shielded the 1st Respondent from the attack were beaten using sticks and stones the entire way from the Polling Station to the harbour where the 1st Respondent and

his team boarded their boat. I note that the 1st Respondent and his witnesses (1RW2 and 1RW3) gave contradicting versions about the distance from Mweshi Polling Station to the harbour. According to the Petitioner, the distance is between 750 and 950 meters. According to 1RW2 the distance is about 300 meters. But whichever is the position, I am of the view that it is a considerable distance so that if one is beaten all along using objects like stones and sticks, the result would be devastating. In the present case, it is surprising that none of the people who allege to have been so beaten, occasioned any provable injury. This position has prompted me to conclude that the severity of the alleged attack (if at all), was exaggerated in order to justify the shooting incident. My finding is that much as there was hostility towards the 1st Respondent, it was not of the magnitude alleged by the 1st Respondent and his witnesses. I thus find that the shooting incident was out of proportion and was intentionally aimed at harming the voters and therefore unjustified. If it was intended simply to disperse the hostile mob, Haggai Bwalya could have aimed in the sky and not at people.

5.104 With that said, the next question is the impact of the shooting incident on the election. As highlighted already, section 97(2)(b) of the EPA contemplates that for wrongful conduct to be a ground of nullifying the election of a petitioned candidate, it must be widespread and capable of affecting majority voters. The same principle applies to the present situation and considering that the incident only happened at one polling station, it entails that majority polling stations (31) were

not affected. In terms of figures obtained from the Registered Voters per Polling Station, 2021 ECZ Register, Mweshi Polling Station has 879 registered voters. Deducted from the total number of registered voters in the Constituency, 16,474 voters were not affected by the shooting incident. Therefore, the allegation has failed to satisfy the majority or widespread principle and is dismissed on that basis.

5.105 By this, I do not suggest that political violence is acceptable. On the contrary, I condemn it in the strongest terms so that the setback in the foregoing allegation only lie in its failure to pass the rigorous threshold prescribed by the EPA for purposes of nullifying an election of a petitioned candidate. In view of this, the said Abraham Bwalya is not precluded from instituting criminal proceedings against the said Haggai Bwalya and I strongly urge him to do so as this may serve as a deterrent measure against political violence. This is my position with respect to all allegations of violence which would be dismissed only on account of having failed to pass the said threshold.

5.106 Turning to the second and third incidents alleging violence, the witnesses are PW7 and PW8, respectively and both are members of the UPND. PW7 spoke to the second incident. He told the Court that PF officials pepper-sprayed one Mathew Mwewa, a UPND Campaign Manager with chemicals in the eyes. Suffice to note that the said Mathew Mwewa was not called to confirm this aspect and the reason for his absence from Court has not been advanced.

5.107 PW8 attested to the third incident. She told the Court that she was pepper-sprayed by Andrew Chiboni who was in the company of the 1st

Respondent and the incident happened in Kasoma Lunga. Suffice to note that PW8's evidence in as far as it is silent on the Petitioner being present during the incident, is at variance with the Petitioner's subject averment in paragraph 20 of the amended petition. According to that paragraph, the Petitioner was present during the incident. This is despite the petitioner having said nothing about the incident, in his evidence.

5.108 With that said, I now evaluate PW7 and PW8's evidence. Being partisan witnesses, PW7 and PW8's evidence need corroboration in order to exclude the possibility of false implication or falsehood. This is on the basis of the petitions which I have already cited. Having combed the through record, I did not find any corroborative evidence. For this reason, I decline to rely on PW7 and PW8's said evidence.

5.109 Further, even assuming that the evidence had been corroborated, the allegations would not suffice to be a ground for nullifying the subject election of the 1st Respondent because it would have failed the majority or widespread threshold prescribed by section 97(2)(b) of the EPA. This is because only two individuals (PW8 and Mathew Mwewa) were allegedly attacked. Secondly, and particularly with regards the incidence relating to Mathew Mwewa in which it has not been established that the 1st Respondent was not present, the evidence would have failed to link the 1st Respondent to the wrongful conduct on account of the absence of evidence demonstrating that Matthew Mwewa's assailants were election or polling agents of the 1st

Respondent or that the 1st Respondent and/or his election or polling agents approved or consented to the attack.

5.110 The third incident involving violence allege that the Petitioner and his agents were not allowed to campaign freely in Lunga District. The witness here is PW5, a candidate for the position of councillor in Shinga Ward, on the UPND ticket. The witness told the Court that three meetings for the UPND were disrupted by drunken members of the PF through malicious noise and singing of incessant loud songs composed of insults or vulgar language. That the same people even blocked them and seized their boat at Mutoni harbour releasing it only after having been satisfied that they had insulted PW5's team, enough.

5.111 That in the same manner, the meeting that was scheduled to have been officiated by the UPND Vice President on 17th July 2021 in Cheta ward, was disrupted by members of the PF. That PW5 was with the Petitioner when these incidents happened. However, the 1st Respondent was not present.

5.112 The witness added that on the same 17th July 2021, as he was going home with his wife from the UPND Vice- President's failed meeting, members of the PF beat both of them at Mutoni harbour using sticks and other objects. Thereby, he sustained an injury on his right eyebrow.

5.113 That the foregoing incidents disadvantaged the UPND particularly the Petitioner as they were not able to freely conduct their campaigns compared to the PF.

5.114 Regulation 4(2)(a) of the 2016 Code of Conduct prohibits a member or supporter of a political party from using language which incites hatred or violence in any form. Sub-paragraph (b) of the same provision proscribes a member or supporter of a political party from disrupting another political party's rally or meeting, among others. Contravening the said provisions is an offence, according to sub-paragraph 3 of the Regulation.

5.115 Further, Regulation 15 (1)(a) of the 2016 Code of conduct, proscribes among others, the use of any language that leads or is likely to lead to violence or intimidation during an election campaign or election. Sub-paragraph (e) of the same provision prohibits people from preventing the reasonable access to voters, of any candidate in any manner for the purpose of canvassing membership and soliciting support, among others.

5.116 I have no doubt that if proven to the required standard, PW5's assertions fit into the foregoing prohibitions and since the Code of Conduct is part of the EPA, the conduct falls within the ambit of 'other misconduct' within the meaning of section 97(2)(a) of the EPA, for purposes of nullifying the election of a petitioned candidate.

5.117 With that said, the question is if the incidents occurred and the answer lies in the veracity or lack thereof, of PW5's evidence. As guided already, being a member of the UPND, PW5's evidence require corroboration because he is a partisan witness. However, the record does not disclose any corroborative evidence and for this reason, I decline to rely on it. Further, it is startling that the Petitioner did not

attest to these events despite PW5 having told the Court that they were together. The silence of the Petitioner on such serious allegations, casts doubt on the credibility of PW5 thereby revitalising the need for his testimony to be corroborated.

5.118 Further, even assuming that it had been corroborated, the allegation would not suffice to nullify the subject election because the incident was not widespread. Also, there is no evidence linking the 1st Respondent to the conduct either by way of an agency relationship with the actors, or by way of approval or consent to the conduct.

5.119 For the same reasons, I dismiss PW5's assertion that members of the PF attacked him and his wife at Mutoni Harbour on 17th July 2021.

5.120 In conclusion here, there is an allegation in paragraph 25 of the amended petition that the 1st Respondent met poll staff in the absence of the Petitioner and other candidates or their agents. A perusal of the record of proceedings, disclose that there was no evidence that was led to prove this allegation. This being the position, I consider the allegation abandoned and I shall not say anything more about it.

5.121 I now turn to the third issue in dispute namely whether or not the 1st Respondent had used government facilities for their campaign purposes leading to the subject election. Regulation 15(1)(k) of the 2016 Code of Conduct, cited above, proscribes the use of Government or parastatal transport or facilities for campaign purposes. And as stated already, the offences or prohibitions contained in the Code of Conduct are a ground for nullifying the election of a parliamentary candidate if proven to a required standard for they amount to 'other

misconduct' within the meaning of section 97(2)(a) of the EPA. Accordingly, using Government transport or facilities for campaign purposes, is a ground for nullifying the election of a petitioned candidate.

5.122 The alleged wrongful conduct is twofold as follows: firstly, that the 1st Respondent and his agents had camped at a government facility (Kasoma Lunga Primary School) during the entire campaign period up to the election day. And secondly, that the 1st Respondent and his agents, on nomination day and during the campaign period, used boats and tents belonging to the DMMU and boats belonging to the Lunga District Council and the District Commissioner. The witnesses here are the Petitioner and PW7.

5.123 The Petitioner told the Court that on 14th May, 2021, the day of nominations, the PF got tents belonging to the DMMU, which were kept by the District Commissioner, to use for their camping purposes at Kasoma Lunga Polling Station. That they camped there during the entire period of the nominations namely from 15th to 19th May and during the entire campaign period up to 11th August 2021.

5.124 Turning to PW7, as noted already, he was a candidate for the position of council chairperson on the UPND ticket in the subject General Elections. He told the Court that on 27th July 2021, he and his campaign team found some members of the PF (namely the 1st Respondent and his PF team) camping at Kasoma Lunga Primary School and they continued camping there even after the campaign period had closed.

5.125 The witness told the Court that the UPND had also used Government property namely Bwalya Mponda Primary School for their political activities but that it was nonetheless wrong for the PF to use Kasoma Lunga Primary School as a camp albeit even beyond the campaign period and the school being a polling station. He also disputed the authenticity of the receipt at page 2 of the 1st Respondent's bundle of document on the basis that it does not show the name of the person who signed it and the name of the school adding that whether or not the facility was paid for, does not alter the fact that use of government property for political purposes, is not allowed.

5.126 This is the evidence concerning the subject allegation. As guided already, being partisan witnesses, the Petitioner and PW7's evidence must be corroborated. From a perusal of the record, corroborative evidence is missing. That notwithstanding, I shall not reject the Petitioner and PW7's evidence in its entirety and this is in view of some admissions made by the 1st Respondent, of some of the said allegations. I shall accordingly accept and rely on the admitted allegations since they amount to corroboration. These are that the 1st Respondent and his agents used three tents belonging to the District Commissioner during the nominations save to add that the 1st Respondent is of the view that the use was justified because it was authorised by the District Commissioner. Further, the tents were equally available for use by the other candidates in the subject elections.

5.127 The 1st Respondent also admitted having used a cargo boat belonging to the Lunga District Council. He added that the use was justified because it was paid for and proof of the payment is a document at page 3 of the 1st Respondent's bundle of documents.

5.128 And lastly, the 1st Respondent admitted that his team had camped at Kasoma Lunga Primary School during the campaign period. However, the camping was similarly justified because they had paid for it and proof of the payment is the receipt at page 2 of the 1st Respondent's bundle of documents. I note that PW7 impugned the authenticity of the said receipt. However, as submitted by Mr. Soko, the objection has come too late as it should have been raised during inspection or discovery. It is accordingly dismissed.

5.129 These are the issues surrounding this allegation. I have examined Regulation 15(1)(k) of the 2016 Code of Conduct cited above where upon I have found that the prohibition it contains is couched in mandatory terms. This implies that apart from the President and Vice President of the Republic, there is no circumstance permitting any other person to use government or parastatal transport or facility. Applied to the present petition, this entails that the payments which the 1st Respondent and his team made for the use of Kasoma Lunga Primary School and the Lunga District Council cargo boat, do not make the use of the said facilities legal because it is not part of the exceptions provided for by the prohibiting Regulation. Similarly, the purported permission granted by the District Commissioner for the use of the tents, did not make the use of the tents legal as that aspect

is not part of the exceptions provided for by the regulation. Both the payment and the authority by the District Commissioner were administrative actions which can not be used to circumvent the law and were accordingly an illegality. Relevant Government operatives are accordingly admonished to stop the practice forthwith.

5.130 In view of the foregoing, I have found that the 1st Respondent and his team's use of the subject tents, Lunga District Council cargo boat and Kasoma Lunga Primary School, was illegal and therefore a misconduct within the meaning of section 97(2)(a) of the EPA for purposes of nullifying the election of a petitioned candidate. This notwithstanding and as already guided, for a wrongful conduct to merit the nullification of an election under the EPA, section 97(2)(b) of the same Act, prescribes that the conduct must have been widespread as to sway majority voters from voting for their preferred candidate. With this hindsight, I have found that the wrongful conduct complained of namely the use of the tents, Lunga District Council cargo boat and Kasoma Lunga Primary School, has not satisfied the widespread principle as they were single or isolated incidents. It is on this basis that I decline to invoke this allegation to nullify the subject election of the 1st Respondent and the allegation is accordingly dismissed.

5.131 I now turn to the last issue in dispute. As highlighted already, this relates to the 2nd Respondent only. The general allegation here is that officers of the 2nd Respondent violated principles governing the electoral process, in the manner they conducted the subject elections. The grievance is anchored on section 97(2)(b) of the EPA which relates

to the manner the ECZ discharges its electoral functions bestowed on it by Article 229(2) of Act No. 2 of 2016, cited above.

5.132 For convenience, I shall reproduce section 97(2)(b) of the EPA. It states as follows

subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election

5.133 Section 97(4) of the EPA referred to by the foregoing subsection provides as follows

An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.

5.134 It is thus certain that section 97(2)(b) addresses acts of non-compliance with the provisions of the EPA in the conduct of elections, which has an effect on the results of the elections. Its effect is made clear by section 97(4) of the same Act, with which it must be read. As stated already section 97(4) of the EPA, introduces a caveat in the nullification of an election based on

the conduct prescribed under section 97 (2) (b) of the EPA. This position is further supported by the holding of the Constitutional Court of Zambia in the petition of **Sibongile Mwamba v Kelvin M. Sampa and ECZ** cited above, at page J34 that

- 5.135 The provision (section 97(2)(b) and (4) is not novel but is a re-enactment of section 93(2)(b) and (4) of the repealed Electoral Act No. 12 of 2016 which provision, was construed by the Supreme Court in the petition of **Webster Chipili v David Nyirenda (34)** as follows

the subsection of paragraph(b) means that once evidence of non-compliance with the Electoral Act of an election is established to the satisfaction of the High Court, which evidence is capable of affecting the results of an election, the lower court is obliged to invoke subsection (4) of section 93 as a matter of course. This is done to enable the lower court review the acts or omissions of the election officers in the conduct of the election in order to determine whether the election was so conducted as to be substantially in accordance with the provisions of the Act and whether such acts or omissions did affect the result of the election.

- 5.136 I have also found helpful, the persuasive Kenyan petition of **Raila Odinga and Five Others v Independent Electoral and Boundaries Commission and Three Others, Kenyan Supreme Court Election Petition (35)**, in addressing this grievance. Here it was held as follows

A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was so devoid of merits and so distorted as to reflect the expression of the people's electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process

5.137 The Learned Authors of **Halsbury's Laws of England, 5th Edition, Volume 38A** at paragraph 667, express a similar view in the following terms

No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal having cognisance of the question that the election was so conducted substantially in accordance with the law as to elections, and that the act or omission did not affect its result. The function of the Court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the result was affected.

5.138 I shall henceforth outline and determine the specific incidents. Thus, there is an allegation that the 2nd Respondent employed an untrained presiding officer in the name of Jeff Nkandu; that the said Jeff Nkandu exhibited incompetence by way of obstructing polling agents from observing the voting process and this resulted from the manner the voting booths were arranged and the overcrowding of voters at

voting tables. Further, the same Jeff Nkandu issued excess ballot papers (seven) to a female voter (Kunda Mwewa) who had multiple voter's cards yet Jeff Nkandu did not even have the authority to issue ballot papers. It is also alleged that resulting from the foregoing, Jeff Nkandu had to step down from the position of presiding officer.

5.139 This is the first incident and the Petitioner's witnesses hereof are PW7, and PW10. PW7 attested to the anomalies outlined above, relating to the discharge of duty by Jeff Nkandu and Jeff Nkandu's eventual stepping down from the position of Presiding Officer. The witness told the Court that this happened at Matipa Polling Station at Mashiba Ward.

5.140 That Jeff Nkandu did not attend the poll staff training, was attested to by PW10 who was one of the course-participants for the poll staff. The witness stated that he neither saw Jeff Nkandu's name on the list of the course-participants nor in any of the classrooms for course-participants. PW10 told the court that the documents at pages 4 – 9 of the 1st Respondent's bundle of documents which tend to show that Jeff Nkandu attended the poll staff training, wrote and passed the examination thereof, are false. Rather, Jeff Nkandu was handpicked.

5.141 To the contrary, Jeff Nkandu told the Court that he was trained as a poll staff, wrote and passed the examinations thereof and proof of this are the said documents at pages 4 – 9 of the 1st Respondent's bundle of documents. He admitted having given excess ballot papers to Kunda Mwewa but dispelled the assertion that this was as a result of incompetence or malice. Rather, it was as a result of human error.

5.142 Jeff Nkandu admitted that he was not positioned at tables at which ballot papers were issued but that he found himself at one of such tables because he was standing-in for a poll staff who had sought permission to visit the toilet. He took-up the position at that table for fear of delaying the voting process if they were to wait until the official visiting the toilet, returned.

5.143 Further, he did not step down from the position of presiding officer due to incompetence but in answer to the demands by the people who suspected him of having been involved in electoral malpractices, a feeling that was triggered by the excess ballot papers which he had issued to Kunda Mwewa.

5.144 These are the issues in this incident. I have considered them. I dismiss all allegations levelled against Jeff Nkandu. These are that he was not trained for the position of presiding officer; that he was involved in electoral malpractices based on his issuance of excess ballot papers to Kunda Mwewa and that he overcrowded voters at the voting tables.

5.145 I have dismissed the allegations because Jeff Nkandu has tendered reasonable explanations in support of his position above. Thus, turning to the allegation that he was not trained as a poll staff, I have found force in Jeff Nkandu's explanation because it is anchored on documentary evidence yet on the contrary, the Petitioner's witness (PW10), sought to rely only on his oral evidence to challenge the authenticity of the said documentary evidence. In any event, PW10's objection as to the authenticity of the said documents has come too

late because it should have been raised at the time of inspection and discovery.

5.146 Based on the foregoing I am satisfied that the said documents are authentic and they confirm that Jeff Nkandu was trained as a poll staff. PW10 either lied to the Court when he said that he never saw Jeff Nkandu among the course-participants or he indeed did not see him and most likely, this is because the duo was in different classes. PW10's assertion that he knew all the 218 course-participants from the introductory parade is, in my view, a fallacy because it is unbelievable that a person can recognise such a multitude in the short interval of an introductory parade. PW10's foregoing assertion further lacks logic because the evidence discloses that Jeff Nkandu attended the class on the second day of the training. Therefore, it is not expected that he had attended the introductory parade which according to PW10, was held on the first day of the training.

5.147 Turning to the issuance of excess ballots, I find Jeff Nkandu's explanation that they were given out of human error reasonable, considering the stress of the moment arising from interrogations by PW7 and Blanco concerning the arrangement of the booths and overcrowding of voters at the voting tables. Human error is not farfetched under such circumstances. Suffice to state that human error is a common occurrence in all human beings and in all professions because human beings are not machines. An error would only be questioned or unacceptable if it is out of proportion or if it cannot be made by a peer faced with similar circumstances. I

accordingly dismiss the assertion that the error was as a result of incompetence or lack of training on the part of Jeff Nkandu.

5.148 Lastly here, I have not found any force in the Petitioner's allegation relating to the arrangement of voting booths and overcrowding of tables firstly because according to PW7, the obstruction and any negative impact arising out of it, affected all candidates equally. In my view therefore, there was nothing to amount to a fraudulent exercise favouring the 1st Respondent.

5.149 Secondly, it is because the anomaly was corrected the moment it was identified. In any event, PW7 has not led evidence suggesting that the said breaches affected the results of the subject election. In other words, the witness has not impeached the outcome of the election as resulting from the said breaches, or at all. Under the circumstances, I am entitled to conclude that the breaches did not affect the results of the election. Thereby, there is no basis for me to invoke these complaints for purposes of nullifying the subject election. Among others, the threshold according to section 97(4) of the EPA is that in order for a breach of official duty by officers of the 2nd Respondent to qualify as a ground for nullifying the election of a petitioned candidate, it should affect the result of that election. A breach of duty by an officer of the 2nd Respondent, which does not affect the results of the election, does not empower the Court to nullify the election of a petitioned candidate and this is the position with the subject complaint.

5.150 The foregoing position is supported by the following holding of the supreme Court of Zambia in the petition of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others**, cited above

We accept that there were flaws, incompetency and dereliction of duty on the part of the Electoral Commission of Zambia. This is exemplified by the late delivery of the election materials and insufficient supply of presidential ballot papers in the complaining constituencies which led to the delays and extension of the gazetted voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st Respondent.

5.151 Based on the foregoing I dismiss the subject allegations. Suffice to add that allied to this, are the following allegations: that the said Kunda Mwewa had multiple voter's cards; that the 2nd Respondent employed poll staff who were supporters of the 1st Respondent and the PF; that at Matipa Polling Station, more than four ballot papers were issued to voters; and, that presiding officers in multiple wards e.g. Mwabachikonde and Chibulu 01 overcrowded tables with voters thereby obstructing the Petitioner's electoral agents from seeing what was happening at the tables.

5.152 Similarly, there is an allegation under paragraph 19 of the amended petition that people below the statutory voting age of 18 years, were allowed to vote at various polling stations and that people who were

not in the voter's register were allowed to vote, according to paragraph 18 of the same petition.

5.153 I have combed through the record of proceedings but did not find evidence supporting these allegations. For this reason, I consider them abandoned and will not say anything more about them.

5.154 The other incident alleges that one of the 1st Respondent's polling agents was issued a whole ballot book and that there were unnecessary and unexplained delays in counting votes at Kasoma Lunga Primary School Polling Station. The Petitioner's witness here is PW6, one of the polling agents for the UPND at Kasoma Lunga Primary School Stream 1 Polling Station, alongside PW8. He complained that the Presiding Officer at that Polling Station, did not announce to the polling agents, the time the voting would start; that the said Presiding Officer illegally gave a PF agent, Musaba George, a ballot book without the knowledge of other polling agents but apologised and withdrew the ballot book when asked; that after finishing conducting the voting, the Presiding officer ordered all the polling agents to leave the polling room and Pw6 was hounded out by a police officer; and that counting of the votes started before Pw6 and PW8 returned to the voting room.

5.155 The witness also stated that when they finished counting presidential ballot papers, the said Presiding Officer ordered all the polling agents to leave the voting room but PW6 resisted. And, that they were the last polling station to finish counting the votes but that however, the

number of the cast votes, was equal to the number of people he saw voting.

5.156 Noting that PW6 is a partisan witness, his evidence need corroboration. However, corroborative evidence is missing. Further, and indeed as submitted by Mr. Soko, it is startling that PW8, who was monitoring the polls together with PW6, on behalf of the Petitioner at Kasoma Lunga Primary School Polling Station, said nothing in her testimony about PW6's foregoing complaints. In the absence of corroboration and further in view of PW8's silence on such serious allegations, the veracity of PW6's complaints, is seriously doubted. I accordingly dismiss this allegation.

5.157 In any event, apart from the foregoing alleged breaches, PW6 has not impeached the results of the election. This, he has confirmed when he told the Court that when the votes were counted, the number of votes cast tallied with the number of people he saw voting. As stated already, breaches by the officers of the 2nd Respondent which do not affect the outcome of the election, cannot be a basis for nullifying an election.

5.158 The last allegation relating to the 2nd Respondent is that the Petitioner's polling agents in some polling stations were denied GEN 20 Forms. The evidence in support of this allegation was led by PW16, a member of the UPND who, on 12th August 2021, was assigned to be at the Totalling Centre at the Civic Centre at Lunga Town Council, to ensure that the results which were brought there from the 32 polling stations in the Luapula Constituency, were correct on behalf of the

UPND. That his role would be made possible if polling agents for the UPND in all the 32 polling stations, obtained GEN 20 Forms from respective presiding officers. However, he did not receive GEN 20 Forms from 18 polling stations and when he asked one of the polling agents who was deployed at Kapama Polling Station, the agent said they had been denied the forms.

5.159 This is the evidence supporting this allegation. As guided already, PW16's foregoing evidence needs corroboration since he is a partisan witness. The record does not disclose the corroborative evidence and it is on this basis that I decline to rely on his evidence that he did not receive the GEN20 Forms from the polling agents of the UPND in some polling stations and that this was because the polling agents had been denied the forms by respective presiding officers.

5.160 Further, I note that PW16's evidence that the polling agents were denied the GEN20 Forms by presiding officers, is inadmissible hearsay evidence because he was only informed about this by a polling agent who did not testify in court. In any event, PW16 was not at the affected polling station to get the information he told the Court first hand. The right people to have told the Court why they were not availed the GEN20 Forms (if at all), are the concerned polling agents and not PW16. Further, the reason why the said agents have not been called to testify, is not known.

5.161 In any event, there is no evidence suggesting that the results which were finally announced at the totalling centre were at variance with the results the polling agents recorded from the polling stations which

allegedly did not avail the GEN20 Forms. My view that PW16 is not impeaching the results of the subject parliamentary election for the Constituency as handed down at the Totalling Centre by the Returning Officer of the 2nd Respondent, is confirmed by the fact that a representative of the UPND (though it is not certain if it is PW16, on account that there is only a signature and not names of the person who signed), signed the documents which shows parliamentary results for all wards in the Luapula Constituency. As highlighted already, the document is entitled "Record of Proceedings at the Totalling of the Votes - National Assembly" and is marked exhibit 'DC1' in the Petitioner's affidavit verifying the petition. The implication of a person signing a legal document such as exhibit "DC1" is that they approve or consent to its contents. Applied to the present petition, the signing of exhibit 'DC1' by a representative of the UPND, implies that the UPND and by extension, the Petitioner, approved or consented to the parliamentary results as disclosed on the document.

5.162 Based on the foregoing, my firm view is that PW16 and the Petitioner are only complaining about the alleged breach namely the absence of the GEN 20 Forms. They are not impeaching the results as being at variance with what their polling agents in all the 32 polling stations, respectively had recorded. This being the case and as already guided, the complaint does not qualify as a ground for nullifying the election.

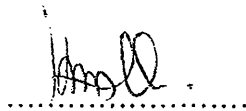
6.0. CONCLUSION

6.1. In conclusion and having considered the entire evidence in this petition, I am not satisfied that the Petitioner has proved his allegations to a 'fairly high degree of convincing clarity' against both Respondents, as to merit the nullification of the subject election of the 1st Respondent. I have accordingly found and do declare that the 1st Respondent (A.B. Chanda Katotobwe) was duly elected Member of Parliament for Luapula Constituency. I thereby dismiss the petition.

6.2. Considering that the petition raised serious questions for determination and which questions have helped develop our electoral jurisprudence, parties shall bear their respective costs.

6.3. Leave to appeal is granted.

DELIVERED AT MANSA ON THIS 22ND DAY OF NOVEMBER 2021



KENNETH MULIFE

HIGH COURT JUDGE