

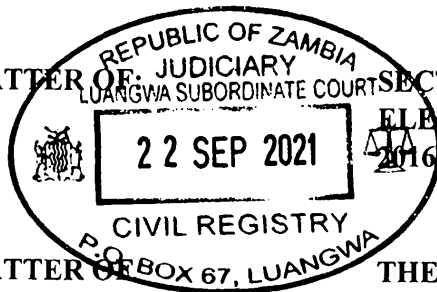
IN THE LOCAL GOVERNMENT ELECTION TRIBUNAL 2021/EP/LWN/LG/001
HOLDEN AT LUANGWA

IN THE MATTER OF A COUNCILOR ELECTION FOR LUANGWA
DISTRICT SITUATE IN THE LUSAKA PROVINCE OF
THE REPUBLIC OF ZAMBIA HELD ON 12 AUGUST,
2021

IN THE MATTER OF: ARTICLE 47(3) 153 (1) AND 159 (3) OF THE) ACT NO. 2
OF CONSTITUTION OF ZAMBIA (AMENDMENT
ACT) NO. 2 OF 2016

AND

IN THE MATTER OF: SECTIONS 83, 97, 98 AND 99, OF THE
ELECTORAL PROCESS ACT NO.35 OF



AND

IN THE MATTER OF THE LOCAL GOVERNMENT ELECTION
TRIBUNAL RULES SI.NO.60 OF 2016

AND IN THE MATTER OF THE ELECTORAL (CODE OF CONDUCT)
REGULATIONS SI. NO. 52 OF 2011

BETWEEN:

KLAUS NJOBVU

PETITIONER

AND

INNOCENT CHUZU

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

CORAM:

HON. MAKALICHA -
CHAIRPERSON

S.N KATEKA-MEMBER

B. MPALO-MEMBER

FOR THE PETITIONER:

IN PERSON

FOR THE 1ST RESPONDENT

N. NAMBAO, MESSRS
MULUNGUSHI CHAMBERS

JUDGMENT

LEGISLATION REFERED TO

1. The Constitution of Zambia, Amendment Act No. 2 of 2016
2. The Electoral Process Act, No. 35 of 2016

CASES REFERED TO

- a. DOREEN SEFUKE MWAMBA VS. NKANDU LUO SELECT JUDGMENT NO.51 OF 2018*
- b. MARGARET MWANAKATWE VS CHARLOTTE SCOTT JUDGMENT NO. 50 OF 2018*
- c. AKASHAMBATWA MBIKUSITA LEWANIKA VS FREDRICK TITUS CHILUBA (1998)ZR 49*
- d. BERELSFORD GONDWE VS CATHERINE NAMUGALA APPEAL NO. 175 OF 2012*

This is the judgment of the Tribunal for the Election Petition filed by Klaus Njobvu who contested the August, 12, 2021 Local Government Elections as Councilor for Chikuma Ward in Luangwa District under the United Party for National Development (UPND). The Respondent also contested the same elections as candidate for then Ruling Party Patriotic Front. There were other candidates from other political parties who contested the elections but are not party to this Petition.

The Petitioner being dissatisfied with the results of the election commenced this Petition.

The Petitioner in his Petition prayed for the following reliefs:

1. A declaration that the election of the 1st Respondent as Councilor for Chikuma Ward be declared null and void.
2. A declaration that the illegal practices committed by the 1st Respondent and his political cadres so affected the election results that the same ought to be nullified.
3. An order that the costs occasioned by the Petitioner be borne by the 1st Respondent.

The Petitioner gave oral evidence and called two other witnesses. It was the Petitioner's evidence that he was one of those who stood in the elections as a candidate on the UPND ticket as Councilor for Chikuma Ward and that after the elections, he got very poor results. PW1 testified that there were reasons for his poor results namely that his opponent whom he had petitioned at the time was breaking the rules and code of conduct that were supposed to be followed during the campaign period.

PW 1 narrated to the Tribunal the alleged the malpractices committed by the 1st Respondent and his supporters as follows:

1. The 1st Respondent who was elected as Councilor took advantage of the government relief food. He was distributing mealie meal and he was very clever as he was telling the people as he was distributing the mealie meal that they should vote for PF which at the time was the ruling party. He was strongly telling the people not to vote for UPND.
2. The 1st Respondent with his group was cheating people with the social cash transfer. He was telling the people to vote for PF. He was threatening them that if they didn't vote for PF, they would be removed from the list of beneficiaries for Social Cash Transfer. PW1 informed the Tribunal that the people in his region were very poor and not educated. Therefore, it easy to lie to them.
3. PW1 further testified that the 1st Respondent continued to take advantage of food programs and diverting them.
4. He also testified that Social cash Transfer money was only given once a month and not every month. That the 1st Respondent took advantage of the campaign period to distribute the money and added people who were not on the list as he added new beneficiaries on the list. Further that Social Cash Transfer money was given to new people on 11 August, 2021
5. PW1 also testified that distribution of DMMU mealie meal was done at awkward time and not at the time prescribed as they were giving mealie even in the night.
6. PW1 informed the Tribunal that one of his witnesses would produce a bag of mealie meal which he was given by the 1st Respondent.

In cross examination, PW1 was asked whether the 2nd Respondent had been to his Ward to sensitize the people about electoral mal practice PW1 responded in the affirmative. Asked what he was supposed to do, PW1 responded that he was supposed to report the malpractice

to either the 2nd Respondent or the Police. PW1 conceded that he did not report the matter to either the 2nd Respondent or the Police.

In further cross examination PW1 was asked what evidence he had that the 1st Respondent was distributing mealie meal and his response was that it was the bag of mealie meal and the 1st Respondent himself. PW1 conceded that the bag of mealie meal was not given to him.

The second witness was Obrian Mumba, PW2 who testified that on 11 August, 2021, between 20 to 20:30 hours, he heard someone at the door. When he went to check, he found that it was the Councilor, the 1st Respondent and his cadres. He informed the Court that the 1st Respondent told him that they had come to ask for his vote and they asked me him if he was aware that the next day was voting day.

PW2 testified that he was reminded by the 1st Respondent to make sure that his vote was uniform from President to councilor by voting for the PF. He testified that the 1st Respondent told him that they had brought some mealie meal. Further that the 1st Respondent also told him that when you go into the polling station, “there are cameras and if you don’t vote for PF we will know.”

That the 1st Respondent’s cadres also added that “if you don’t vote for PF, we know how we do things.” He informed the Tribunal that the cadres said they would beat him and that’s how he got scared to use that bag of mealie meal

PW2 informed the Tribunal that he was given a 12.5 kg bag of mealie which was in a white and green sack written DMMU office of the Vice President..

The bag of mealie meal was produced into evidence as there was no objection.

PW2’s evidence was not controverted in cross examination.

The Petitioner’s third witness was Evelyn Njobvu, **PW3**. She testified that on 9 August, 2021 the 1st Respondent sent his ward chairman from PF, Nickson who told PW3 that he had been sent to ask for a vote from her.

According to PW3, the ward chairman told her that they wanted her to vote for the President as well as MP and that if she didn’t vote for PF, they would know. PW3 testified that she was told that she would be removed from the social cash transfer list if she didn’t vote for the PF.

PW3 testimony was also not controverted in cross examination.

The 1st Respondent testified and did not call any other witness. He testified that he was petitioned by the Petitioner although he was not guilty of any of the allegations.

In cross examination, RW1 conceded that the PF was involved in the distribution of relief food. Asked what role he played in the distribution of mealie meal, RW1 responded that he didn't play any role.

RW1 was further cross examined about his campaign team and he conceded that he had a team going around the ward to campaign for him and that the team did whatever he instructed them to do. RW1 also conceded that the PF Ward chairperson had campaigned for him as he wanted him to win.

The 2nd Respondent was not present at the hearing.

In order for an election of a Councilor to be nullified, the Petitioner has to satisfy the provisions of Section 97 2 (a) and (b) of the Electoral Process Act , No. 35 of 2016 which provide that:

(2) the election of a candidate as Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the high court or a tribunal , as the case may be that:

(a) A corrupt practice, illegal practice or other misconduct has been committed in connection with the election;

(a) By a candidate; or

(b) With the knowledge and consent or approval of a candidate or that candidate's election agent or polling agent; and

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

(c) subject to the provisions of subsection (4), there has been noncompliance 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.

We have looked at several authorities and the relevant law in order to arrive at a just decision. We remind ourselves that the burden of proof lies on the Petitioner and the standard of proof is higher than balance of probability in civil matters but lower than beyond reasonable doubt in criminal matters.

The Supreme Court in the case of **BERELSFORD JAMES GONDWE VS CATHERINE NAMUGALA** APPEAL NO. 175 OF 2012 held that

“the burden of establishing anyone of 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 required standard in election petitions namely a fairly high degree of convincing clarity.”

Furthermore, in the case of **DOREEN SEFUKA MWAMBA AND NKANDU LUO** SELECTED JUDGMENT 51 OF 2018, the Supreme Court held as follows:

“In order for a Petitioner to successfully have an election petition annulled pursuant to Section 97 (2) (a) of the Electoral Process Act, No. 35 of 2016, 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 being nullified 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. Sections 81 to 95 in part VIII of the Act and also relevant provisions of the Electoral Code of Conduct outline the corrupt or illegal practices or misconduct in the election process.

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 wide spread that it swayed or may have swayed the majority of the electorate from electing a candidate of their choice.

Recently, in the Austin Liato case vs. Sitwala Sitwala case, we said

It is not sufficient for a Petitioner to prove only 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 or prevented or may have prevented the majority of voters in the constituency, district or ward to elect a candidate of their choice.

From the above authority, the Petitioner must therefore prove the following in order to succeed in nullifying an election:

1. That the Respondent or his election agent personally committed the offence complained about; and
2. That the electoral malpractice must be so widespread that it prevented the electorate in the area from voting for a candidate of their choice.

The grounds on which the Petitioner's Petition to nullify the election is based are found in paragraph 3 of the Petition and it states as follows:

- 3.1 The electoral malpractices were committed by the said Innocent Chuzu and his political cadres (PF) during the campaign period and during voting on voting day.
- 3.2 The Respondent together with his political cadres (PF) distributed mealie meal to voters and told them to vote for PF Candidates.
- 3.3 The (PF) members were cheating to social cash transfer beneficiaries that each polling station will be equipped with cameras to monitor those who will not vote for PF candidates and they will be removed from the program or from the list for social cash transfer.
- 3.4 The social cash transfer payments were two days before voting as opposed to normal routine of paying beneficiaries at the monthend.
- 3.5 Community Welfare Assistant Committee members were threatening beneficiaries against voting for the UPND.

It is the duty of this Tribunal to determine whether the allegations contained in the Petition have been proved to the required standard and we shall do that by considering each of the allegations listed above.

The first allegation contained in paragraph 3.1 of the Petition is that the electoral malpractices were committed by the said Innocent Chuzu and his political cadres (PF) during the campaign period and during voting on voting day. As has been stated above from the provisions of Section 97 (2) of the Electoral Process Act, the misconduct or illegality must be committed by the candidate or his election agent. Section 2 of the Act defines election agent as

“a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate nomination form”

Paragraph 3.1 and the rest of paragraph 3 refer to political cadres or members of PF. In the case of **AKASHAMBATWA MBIKUSITA LEWANIKA VS FREDRICK TITUS CHILUBA (1998) ZR 48**, the Supreme Court held that

“A candidate is only answerable for those things which are done by his election agent or with knowledge or consent. In this regard, we note that not everyone in one’s political party is his agent. An election agent has to be specifically appointed.”

From the provisions of Section 2 of the Electoral Process Act and the Lewanika case cited above, the 1st Respondent cannot be held responsible for the actions of anyone who is not his duly appointed election agent. Therefore, any allegations against political cadres cannot stand. Furthermore, we shall consider the specific allegations against the 1st Respondent to determine whether they have been established in accordance with the standard of proof for election petitions.

The second allegation contained in paragraph 3.2 of the Petition is that the Respondent together with his political cadres (PF) distributed mealie meal to voters and told them to vote for PF Candidates. We have already determined that the 1st Respondent cannot be held responsible for any allegations against political cadres in accordance with the provisions of Section 97 (2) of the Act and Supreme Court decisions cited. On the allegation against then 1st Respondent that he was distributing mealie meal to the voters, PW1, the Petitioner himself testified to this and his evidence was not controverted in cross examination. This evidence was corroborated by PW2 who testified that he was given a bag of mealie meal by the 1st Respondent and that the 1st Respondent asked him to vote for him and his party in exchange for the mealie meal. The bag of mealie was produced in evidence. PW2’s evidence was also not controverted in cross examination.

We therefore find that the Petitioner has proved to convincing clarity that the 1st Respondent distributed mealie meal to some voters in exchange for their votes on the eve of voting day. However, there was no evidence as to how distribution of mealie meal affected the outcome of the election. Therefore, this ground fails.

The third allegation contained in paragraph 3.3 of the Petition is that the (PF) members were lying to social cash transfer beneficiaries that each polling station would be equipped with cameras to monitor those who would not vote for PF candidates and they would be removed from the program or from the list for social cash transfer. As has been explained above, in order for allegation to held against the Petitioner, it must have been committed by him

personally or his election agent. In this ground the allegation is against PF members. This allegation cannot stand therefore as there is no accusation against the Petitioner or his election agent.

The fourth allegation contained in paragraph 3.4 of the Petition is that social cash transfer payments were made two days before voting as opposed to normal routine of paying beneficiaries at the month end. There was no evidence led that this payment was made either by the Petitioner personally or by his election agent. Furthermore, there was no evidence as to the payment of social cash transfer affected the outcome of the elections. This ground also fails.

The fifth and final allegation contained in paragraph 3.5 of the Petition is that Community Welfare Assistant Committee (CWAC) members were threatening beneficiaries against voting for the UPND. This allegation is not made against the 1st Respondent or his election agent. It therefore does not meet the threshold provided for in Section 97 (2) of the Act.

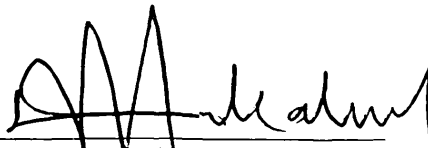
We find that the Petitioner has failed to prove that any of the allegations were committed by the 1st Respondent or his election except for the allegation on distribution of mealie meal. We also find that the Petitioner did not lead any evidence to show how any of the allegations affected the outcome of the election. The Petition therefore fails and we declare that the 1st Respondent was duly elected councilor for Chikuma Ward in Luangwa District.

Each party to bear their own costs. Leave to appeal is granted. The parties are informed of their right to appeal within fourteen days from the date of this Judgement.

Dated at Luangwa this

day of

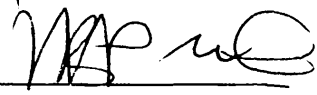
2021



HON. MAKALICHA
CHAIRPERSON



S. N. KATEKA
MEMBER



B.MPALO
MEMBER