

2021/QO/LGET/015

**IN THE LOCAL GOVERNMENT ELECTION TRIBUNAL  
HOLDEN AT MKUSHI  
(Constitutional Jurisdiction)**

**IN THE MATTER OF: THE ELECTORAL PROCESS ACT NO. 35 OF 2016**  
**IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS FOR  
THE MKUSHI NORTH COUNCIL  
CHAIRPERSON HELD ON 12 AUGUST 2012**  
**IN THE MATTER OF: THE ELECTION OF EVANS BWALYA AS CHAIR  
PERSON MKUSHI NORTH DISTRICT COUNCIL**

**BETWEEN:**

**CHILEMU K NELSON**

**PETITIONER**

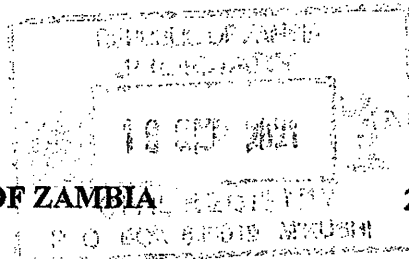
**AND**

**EVANS BWALYA**

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

**ELECTORAL COMMISSION OF ZAMBIA**

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



**BEFORE THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL  
F. KAOMA, N. M. SIMACHELA & C. B. MAIMBO  
ON 19 SEPT 2021**

**FOR THE PETITIONER:**

**IN PERSON**

**FOR THE 1<sup>ST</sup> RESPONDENT:**

**MR. E. KHOSA OF MESSRS BCM LEGAL  
PRACTITIONERS.**

**FOR THE 2<sup>ND</sup> RESPONDENT:**

**NONE ATTENDANCE**

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## **JUDGMENT**

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**CASES CITED:**

1. Nkandu Luo & Another V Doreen Sefuke Mwamba & Another, Selected Judgment No. 51 OF 2018
2. Austin Liato v. Sitwala Sitwala, Selected Judgment No. 23 of 2018.
3. Lewanika and Others v Chiluba (1998) ZR
4. Herbert Shabula v Greyford Monde (Constitutional Court Appeal Number 13 of 2016).

**LEGISLATION REFERRED TO:**

1. The Electoral Process Act No. 35 of 2016

**KAOMA, F delivered the Judgment of the Tribunal**

This matter was commenced on 20<sup>th</sup> August, 2021, by way of petition. In the Petition, the Petitioner sought a declaration that the 1<sup>st</sup> Respondent was not duly elected as Council Chairperson and that his election is null and void. The particulars of the Petition are that the Petitioner was an aspiring candidate for the position of Council Chairperson for Mkushi North.. The election was held on 12<sup>th</sup> August, 2021 wherein the Petitioner and the 1<sup>st</sup> Respondent were candidates and the returning officer on 14<sup>th</sup> August, 2021 declared the 1<sup>st</sup> Respondent as being duly elected. The petitioner alleged the following;

- i. **That the election of the 1<sup>st</sup> Respondent to the office of Council Chairperson was neither free nor fair as the electoral process was marred by intimidation, vote buying, bribery and abuse of government resources to be shown in the subsequent paragraphs.**
- ii. **That the 1<sup>st</sup> Respondent as well as other members of the PF abused government resources, namely; social cash transfer and mealie meal meant for Disaster Mitigation Management Unit (DMMU) for campaign purposes and further to intimidate others and buy votes from the electorates**
- iii. **That between June and July, 2021, the 1<sup>st</sup> Respondent working together with the now elected Member of Parliament for Mkushi North constituency Mr. Christopher Chibuye organised a football tournament in Musakamba ward for the youths, which was meant to entice the youth to vote for the PF as different prizes were given to the winners contrary to the Electoral Process Act No. 35 of 2016.**

- iv. That between July and August, the 1<sup>st</sup> Respondent working with the now elected Member of Parliament for Mkushi North Constituency Mr. Christopher Chibuye organised a Tribal meeting in Itala Compound for the Mambwe, Nyika and Namwanga speaking people and that they should not vote for the Petitioner and the UPND aspiring Member of Parliament that if they did the tribal grouping will be chased from Mkushi
- v. That on 10<sup>th</sup> August, 2021, the first Respondent and Members of the PF were distributing social cash transfer only to people with voter's cards, instead of the Department of Social Welfare and Community Development whilst telling the electorates not to vote for any candidate belonging to the UPND or else they would never receive the funds again.
- vi. That on several occasions mealie meal was distributed to members of the Public such as on 4<sup>th</sup> August, 2021 in Chikanda ward, the first Respondent gave 6 bags of DMMU mealie meal to Mr. Victor Chikumba to distribute at a funeral. On 11<sup>th</sup> August, 2021, the 1<sup>st</sup> Respondent was seen distributing money and 12.5kg bags of mealie meal to households within Chitina ward, Chibefwe ward only to people with NRCs. A member of Chitina ward by the name of Ivy Chiponda was offered a bag of mealie meal in exchange for voting for PF candidate by the PF official by the name of Lenox Kapindula.
- vii. That in Tembwe ward, PF candidates were seen distributing money to the electorates on 11 August, 2021 before the poll day.
- viii. That on poll day a lot of malpractice was done by members of the PF in flagrant violation of the laid down Electoral Rules.
- ix. At Kasokota school polling station, room 4, UPND and other observers were sent out of the room at 18:05 and only allowed to return 40 minutes later. At

Chifuna ward the Councilor ordered the presiding officer to close the polling station at 17:00hrs and thereby blocking others from voting before the stipulated closing time

- x. On poll day money was being distributed by members of the PF all over the Constituency. In FCT area a PF councilor by the name of Joe Ndalama was seen giving out money to the people who were going to vote unfortunately, he escaped before he was taken to police.
- xi. On the polling day, in Chibefwe ward, a prison truck was seen carrying DMMU mealie meal and cooking oil for preparation of food to feed voters on their way to vote. Kitchens were set up along the roads leading to the polling stations where voters were able to stop and eat on their way to vote or after voting. In Nkolongo ward a head of cattle was slaughtered and PF cadres known as Mr. Mushala and Mr. Fumbeshi were seen removing voters from queues and taking them to eat from the PF kitchens.
- xii. That he was ready to call witnesses in support of his petition who witnessed his complaints first hand.

In summing up the Petitioner contended and prayed that it may be determined by this Tribunal that the said EVANS BWALYA of PF was not duly elected as Council Chairperson and that the election was null and void.

The 1<sup>st</sup> Respondent filed his answer to the Petition on 3<sup>rd</sup> September, 2021 where he denied all the allegations. He averred that he did not participate in any malpractice and urged this Tribunal to dismiss the Petition with costs.

The Tribunal set the Petition down for hearing on 13<sup>th</sup> September 2021. At the hearing, the Petitioner called seven witnesses while the Respondent called one witness in addition to his own evidence.

Pursuant to the rules of this Tribunal, we set down this matter for trial on 13<sup>th</sup> September, 2021 and accordingly heard evidence of both parties, viva voce.

### **PETITIONER'S EVIDENCE**

The first witness for the Petitioner was the Petitioner himself a 46 year old Businessman of FTC Compound, Mkushi. His evidence was that he stood as a Council Chairperson on the UPND ticket at the elections that took place on 12<sup>th</sup> August 2021. The 1<sup>st</sup> Respondent was declared winner of the election. He and his Party were not happy with the results so he decided to petition the result because he felt there were a lot of electoral malpractices. He gave the Tribunal 4 reasons why he felt the election was not free and fair namely; intimidation, vote buying, bribery and abuse of Government resources.

According to the Petitioner, the 1<sup>st</sup> Respondent was seen in Musakamba Ward giving out social cash transfer and mealie meal meant for the Disaster Management and Mitigation Unit (DMMU) for campaign purposes. The Petitioner told the Tribunal that in June and July 2021, the 1<sup>st</sup> Respondent and the now elected Member of Parliament Christopher Chibuye organised a football Tournament for the youths in Musakamba ward. The Petitioner testified that this was done during the campaign period and was meant to entice youths to vote for the 1<sup>st</sup> Respondent contrary to the Electoral Processes Act.

The Petitioner, narrated that between July and August the 1<sup>st</sup> Respondent working together with the now Member of Parliament Mr. Chibuye organised a Tribal meeting of the Namwanga, Nyika and Mambwe speaking people in Itala compound at which meeting he urged these tribes not to vote for him but the 1<sup>st</sup> Respondent.

He narrated that on 10<sup>th</sup> August 2021, in Musakamba ward, two days before the elections the 1<sup>st</sup> Respondent was seen distributing social cash transfer funds only to those people with voter's

cards and National Registration Cards regardless of age and that the recipients told not to vote for the Petitioner as a UPND candidate.

It was his evidence that on several occasions mealie meal was distributed to members of the public in different places. He told the Tribunal that on 4<sup>th</sup> August 2021 in Chikanda ward the 1<sup>st</sup> Respondent was seen giving out six bags of DMMU mealie meal. He added that on 11<sup>th</sup> August, the 1<sup>st</sup> Respondent was also seen distributing money and a 12.5kg bag of DMMU mealie meal through his Agent in Chitina Ward. According to the Petitioner, on the poll day 12<sup>th</sup> August 2021, his polling agents were closed out of room 4 at Kasokota polling station at the close of voting around 18:00hrs only to be told to go back after an hour which raised a lot of question and suspicion on his part.

The Petitioner, testified further that on the poll day, the 1<sup>st</sup> Respondent's Agent who was Councillor for Chibefwe Ward, Joe Ndalama, was seen giving out money to those going to vote at FTC polling station. He added that on the same date a prison truck was seen carrying DMMU mealie meal and cooking oil which was meant to feed voters on their way to vote. He summed up by stating that all these incidences made him feel that the election was not free and fair. .

During cross examination he reiterated that both his sponsoring party the UPND y and himself were not happy with the election results. When further cross examined, he conceded that both he and the 1<sup>st</sup> Respondent are not government employees. He testified that the social cash transfer program is administered by the Department of Social Welfare while DMMU falls under the Office of the Vice President. The Petitioner maintained the 1<sup>st</sup> Respondent's agent Joe Ndalama was seen giving money to voters. However, when further cross examined, he stated that Joe Ndalama was a candidate for Chibefwe Ward but maintained that he was

campaigning with the 1<sup>st</sup> Respondent. He also maintained that a prison truck was seen taking mealie meal to kitchens set up on the way to the polling stations.

During further cross examination, he narrated that the political parties were not allowed to hold rallies due to the Covid19 pandemic so the campaigns were done door to door, fliers and road shows. According to the Petitioner the UPND had no camps at all but the PF had feeding camps close to the polling stations. It was also his evidence that out of the 16 wards in Mkushi North he obtained the highest number of votes in 9 wards. When further cross examined, he said that he obtained the lowest number of votes in wards where there were feeding camps. When cross examined on the tribal meeting in Itala Compound, he said that the same was organised by the 1<sup>st</sup> Respondent. However, he conceded that he was not aware that the meeting was organised by the members of that community on how to help each other when there is a funeral. The Petitioner, reiterated that the 1<sup>st</sup> Respondent's Agent Lennox Kapendula was distributing money in Chitina ward. He added that, Lennox was a candidate for Councilor in Chitina ward. He recalled having said that the 1<sup>st</sup> Respondent was distributing mealie meal at Chikanda ward and Mukalaulo Polling station. When cross examined, he stated that the 1<sup>st</sup> Respondent obtained the highest number of votes in Chikanda ward. On the issue of the football tournament

he stated that prizes were given in form of a cash amount of K2000 and two balls. However, he conceded that he did not personally attend the tournament.

In re-examination, the Petitioner stated the three PF candidates for Member of Parliament, Council Chairperson and Councillor were campaigning together and for each other. . On the feeding camps set up by the PF, the Petitioner stated that these camps were not meant for feeding of those campaigning door to door because the food prepared was too much compared to the number of people e campaigning door to door who moved in groups of less than five. .

In the DMMU and social cash transfer he said that the two are distributed by government workers but to his surprise it was the 1<sup>st</sup> Respondent who was distributing.

The second witness who we shall refer to as to as **PW2** was Patrick Chola Muschili a 42 year old businessman of Soweto Compound, Mkushi. He narrated in his evidence that he has worked with the PF for a long time as a leader in the security wing. He added that he was the person the PF was using to take things to the villages in the night . According to PW2, he was having private meetings with the 1<sup>st</sup> Respondent and the District Commissioner. He added that after the 1<sup>st</sup> Respondent would talk to the District Commissioner and the District Commissioner would instruct him to go in the morning and collect a piece of paper to enable him get mealie meal. The witness testified that in the morning, the District Commissioner would communicate with the lady at the sheds and he would collect mealie-meal from there . . He added that he collected different quantities of bags namely 200, 150, 48 and he signed for the bags. It was his evidence that after collecting the mealie meal, he would take it to to the villages. The witness said he would just go and drop the mealie-meal with the person whose details he would be given.

PW2 further narrated that sometime in July 2021, there was also a time he was called to the 1<sup>st</sup> Respondent's house where he was asked to fold chitenge wrappers, put a K50 note inside and then distribute to women. According to PW2, around mid-July 2021, he was a Member of the PF and he is still a member of the PF adding that he has not defected. PW2 described and identified a 12.5kg empty bag of DMMU mealie as the mealie meal he used to collect. PW2 identified the 1<sup>st</sup> Respondent as the person who was instructing him. He further narrated that the chiding wrappers were not meant for PF women only but everyone including men.



During cross examination by the learned counsel, he deposed that the Chiding wrappers were PF branded chidings. He reiterated that he was working for the PF Party but conceded that he was not a registered agent with the Electoral Commission of Zambia. He reiterated that he signed for three quantities of mealie meal; 200, 150 and 48 bags/. He maintained that the District Commissioner used to phone the lady at the Shed adding that it was at the Shed where he used to sign. He named the District Commissioner as s Emmanuel Sinkonde. When further cross examined, he conceded that there was a video on social media of him showering unpalatables on PF and the leaders after losing the elections. According to PW2, he insisted that he was still in good books

with the PF. It was his evidence that he was part of the 1<sup>st</sup> Respondent's campaign team. He added that he used to be given money to hire vehicles to deliver mealie meal to various villages and that this money was given to him by the 1<sup>st</sup> Respondent and not the District Commissioner.

The 3<sup>rd</sup> witness who we shall refer to as PW3 was Victor Chikumba a 38 year old farmer of Mukulaulo in Chikanda ward. PW3 deposed that on 27<sup>th</sup> May 2021, there was a funeral at Mukaulo of one Bright Sanka. . The witness testified that on 28<sup>th</sup> May 2021 around 11:00hrs, he saw two motor vehicles that came to the funeral. The 1<sup>st</sup> Respondent disembarked from one of the 2 vehicles and went inside the funeral house. When he came out, the 1<sup>st</sup> Respondent said that they had brought some things and requested for people to get them from the vehicle. The witness told the Tribunal that he and others went to the vehicle and found ten bags of DMMU mealie meal and a sack of cabbage. He further testified that on the day of burial, the Ruling Party the Patriotic Front was given a chance to address mourners. . The 1<sup>st</sup> Respondent represented the Party and gave his speech. In summing up he said he was not campaigning but requested that mourners present vote for the PF candidates on 12<sup>th</sup> August 2021 because the

party was working. PW3 added that the 1<sup>st</sup> Respondent added that he was the PF candidate for Council Chairman and asked mourners to vote for him. .

During cross examination by the learned counsel, he told the Tribunal that Bright Sanka died on 27<sup>th</sup> May 2021. . He added that the deceased was the Vice Branch Chairman for Mukulaulo Branch, Chikanda ward. PW3 conceded that he did not know the date the candidates filed their nominations with the ECZ. When further cross examined, he stated that he was just a voter in Chikanda ward. According to PW3 it was a normal thing to assist a party member who has a funeral but added that it is not right for people to get things that they are not supposed to touch and take them to a funeral house.

The fourth witness who we shall refer to as PW4 was Shelly Sikalinga a business lady of Upper Lunsemfwa in Mkushi. PW4 narrated that in the last week of July, 2021, a teacher came to the school where she stays and said he had come to register people with voter's cards and National Registration Cards (NRC). The witness told the Tribunal that she gave the teacher her cards. Her evidence was that she asked him why he was getting those names and in response the teacher said that all those who submitted would be given gifts at the end. That is how he left. She testified that after 3 days, the teacher came with the 1<sup>st</sup> Respondent and held a meeting at the school. Within a short period of time they left. After five days she saw a vehicle with a container come to the school. The vehicle had mealie meal and T-shirts and PF branded Chitenge Her evidence was that the head teacher refused to receive these goods and said he was not supposed to be involved in campaign issues. The Head Teacher advised the persons with the truck to take the items to PF members. She testified that the mealie meal was off-loaded at the home of a Teacher named Chilansakata who is a teacher at Upper Lunsemfwa School She further testified that on 8<sup>th</sup> August 2021 she was given a T-shirt and Chitenge material. On 10<sup>th</sup> August 2021, Mr. Chilansakata, who is a neighbour in the school compound

sent a child to bring a her a bag of mealie meal. She further narrated that Mr. Chilansakata was receiving campaign materials from the 1<sup>st</sup> Respondent and campaigning in school for PF. She reiterated that, when Mr, Chilansakata wrote down her NRC number and said she would receive a gift which she received in form of mealie meal, Chitenge material and a T-shirt for PF.

During cross examination by the learned counsel, she stated that Mr. Chilansakata a did not get her actual NRC and Voter's card but only got the details and recorded them. When further cross examined, she stated that Chilansakata did not tell her that he was campaigning for Mr. Bwalya. PW4, told the Tribunal that she did not know if Chilansakata was a registered agent for the 1<sup>st</sup> Respondent. When further cross examined, she stated that the 1<sup>st</sup> Respondent was present in the vehicle when the vehicle brought mealie meal to the School She added that she knew him at the time and also knew that he was contesting the election as Council Chairperson. It was her evidence that she does not have any position in any party adding that she was just a voter. She insisted that it was Chilasankata that gave the child mealie, chitenge and a T-shirt to bring to her

The 5<sup>th</sup> witness who we shall be referring to as PW5 was Iredy Mwansa a 24 years old unemployed youth of Musakamba ward, Mkushi. PW5 began by stating what she knows about social cash transfer which she said to her knowledge is meant for the poor, the lame and the aged. However, in June and July, 2021, the PF sent people to write names of every person as long as they had voters' cards. She told the Tribunal that after the names were written down they were called and advised to meet at a place called DAPP where they registered and went back home. She told the Tribunal that three days later the 1<sup>st</sup> Respondent sent people to call those who had registered to check if their names had gone through. Her evidence was that when she went back to DAPP, she along with others found that their names had gone through. She told the Tribunal that all those who had been registered waited for the money until 1<sup>st</sup>

August, 2021 when the 1<sup>st</sup> Respondent came to have a meeting at Musakamba School Roadside. Her evidence was that the 1<sup>st</sup> Respondent told the meeting that the money would be paid soon and that once they got paid, they should vote for him. She told the Tribunal that the 1<sup>st</sup> Respondent added that there were computers in the voting booth which would tell the PF if the recipients voted for another candidate. The 1<sup>st</sup> Respondent went on to say that if the recipients voted for someone else they would not receive any more money. Her evidence was that a few days later the same people the 1<sup>st</sup> Respondent had sent advised those on the list that the money was ready and that they would be paid that following Monday. According to PW5, she was surprised that most recipients were youths and she saw only twelve the elderly persons. The witness stated that she was also surprised that they were paid three days before the election date. It was her evidence that she could not tell exactly how many people received the money but stated that they were many and each person was paid K300.

During cross examination by the learned counsel, she stated that she did not know the names of the people the 1<sup>st</sup> Respondent sent but could recognise their faces. . It was her evidence that these people were the 1<sup>st</sup> Respondent's registered agents according to what they said. . She reiterated that she received K300 which money came from the Department of Social Welfare. However, she maintained that she did not go to the Department of Social Welfare to register adding that she does not even know where their offices are. When further cross examined she said that the people paying the recipients did not show them their identity cards for social welfare. According to PW5, they were signing somewhere when getting the money. When pressed further, she said she did not read the paper they signed on because they were just told to sign. It was her evidence that her and other recipients received the money from Musakamba school. She added that she was registered under the social cash transfer scheme as a widow. PW5 recounted that she was a registered voter for the August, 2021 elections. However, she stated that she did not work as a polling agent or a monitor for any organization on the election

may. PW5 reiterated that she did not know the names of the people that were sent to register her and other recipients but added that those people told them they had been sent by Mr. Bwalya. .

In re-examination, she told the Tribunal that that she did not register with the Department Social Welfare instead the people who registered her came to the Musakamba area.

The 6<sup>th</sup> witness who we shall refer to as PW6 was Gift Mweemba a 26 years old unemployed youth of Musakamba, Mkushi. PW6 deposed that he was the Top Chairman at a tournament organised by the 1<sup>st</sup> Respondent in Musakamba ward. He told the Tribunal that nine teams participated in the tournament. The 1<sup>st</sup> Respondent attended the official opening of the tournament. The witness told the Tribunal that he gave the opening remarks as Top Chairman after which he handed over to the 1<sup>st</sup> Respondent. . In his speech, the 1<sup>st</sup> Respondent said he was going to give K2000 cash and footballs. He went on to say that since it was an election year, those present should vote for him as Council Chairman. He went on to say that they should not vote for the Petitioner because he had not grown up in the area and was a crook. The witness told the Tribunal that if people voted for the Petitioner they would not benefit. He further told them that the Petitioner was a member of the UPND which is led by a Tonga. The 1<sup>st</sup> Respondent added that Tongas are selfish and discriminatory and all Ministers would be Tongas. The witness told the Tribunal that the 1<sup>st</sup> Respondent then told the organisers to go and collect the money and balls once the tournament reached the semi finals. Thereafter the 1<sup>st</sup> Respondent gave the participants crates of drinks. It was his evidence that the Tournament ended in July, 2021 and the 1<sup>st</sup> Respondent gave the organisers what he promised namely money and balls and the witness collected these from the PF office. PW6 recounted that because it was in the Covid19 era the 1<sup>st</sup> Respondent facilitated a permit from the police and they accordingly obtained a permit which he said was easy because they were coming from the

Ruling Party. It was his evidence that after giving out the prizes one ball remained which he kept in case of future tournaments. PW6 positively identified the 1<sup>st</sup> Respondent as the person who organised the tournament. .

When cross examined by the learned counsel PW6 said that the nine eams came from within Musakamba. When further cross examined, he said he went alone to get a permit at Mkushi police. It was his evidence that that there were ten balls in total. The witness conceded that , he did not have minutes of the meeting he had with the 1<sup>st</sup> Respondent over the tournament. It was his evidence that the winning team Nyamusewa alias Warren got K1000 prize money, the second placed team Musakanda got K800, the 3<sup>rd</sup> Katongola got K200. PW6 conceded that he did not sign anywhere when he got the money from the 1<sup>st</sup> Respondent. It was his evidence that the 1<sup>st</sup> Respondent was not at the tournament during the finals because he said that he had a funeral. He added that the final was in July, 2021 on a day he could not recall.

The 7<sup>th</sup> witness who we shall be referto as PW7 was Chilufya Sinkala a 50 year old a businessman of Itala compound, Mkushi. He testified that between June and July, 2021, they had a meeting for the Namwangas, Mambwes, Tumbukas and the Lambya tribes to discuss how to mourn each other during funerals. His evidence was that when this meeting was in progress, the 1<sup>st</sup> Respondent arrived and brought them mealie meal with eight chickens, 2.5 litters of cooking oil three cases mineral water, cases of drinks and two cases of biscuits. His evidence was that the 1<sup>st</sup> Respondent was given a chance to address the meeting. He told the Tribunal that the 1<sup>st</sup> Respondent told those gathered to vote for him because he helped people and he had even brought them food. He told the meeting that Bembas and Namwanga people were the same.. The 1<sup>st</sup> Respondent went to say that if the voters voted for another tribe there was a risk that they would be chased from the land of the Lala people. According to PW7 because of these words, most of the people did not vote for the Petitioner because they were

scared of being chased. He further stated that those gathered were told that as they go to vote the machine in the polling booth was able to detect who one voted for.

During cross examination by the learned counsel, the witness stated that he had been voting since 1996. When further cross examined, he said that he knows there were no machines in the voting booth but went on to say that it was the elderly residents that believed and were scared. It was his evidence that at this meeting they were about 20 to 30 people. Further he stated that Itala compound is in Chibefwe ward. He however did not know the total number of registered voters in Chibefwe. According to him the 1<sup>st</sup> Respondent gave food stuffs to those who attended the meeting. The witness added that the 1<sup>st</sup> Respondent was not invited to the meeting because he is Bemba and the meeting was for Namwangas.

#### **THE RESPONDENT'S CASE**

The first witness for the defence was the Respondent himself a 42 year old Accountant who is also a politician. His evidence was that in 2016, he was declared winner as Council Chairperson. In 2021, he was adopted by the Patriotic Front Party again and declared winner for the same position. He told the Tribunal that he did file his Answer to the Petition and that he wanted the Tribunal to dismiss the petition because he was the one duly elected for the position of Council Chairperson. He explained to the Tribunal that the PF Party has got structures. At the District level there are twenty-four members. At the same District there are segments that include the Main Body, Youth League and Women League. All the three segments have the chairperson and the vice; the secretary and the vice, The treasurer and the vice as well as the Information and Publicity Secretary and the vice. The composition is the same at the Constituency level as well as the wards, the Branches and the sections. Besides that, they have another structure called the mobilization team also composed of the same positions.. According to the Respondent they used to do what is known as door to door

campaigns. The Party provided bicycles for the structures for easy movement. The Party also appointed the campaign manager Kelvin Mwamba who used to manage them as candidates. He further stated that the Party used to have what they called camps in every ward and each ward could split the camps further and move them closer to polling stations in distances ranging between one to five kilometers from the polling stations. The Respondent added that the main purposes for the camps were to feed the people going out for door to door campaigns. He further explained that Mkushi District has 16 wards and the campaign team had six vehicles in order to reach all the wards. The 1<sup>st</sup> Respondent told the Tribunal that Mkushi had sixteen Wards and gave the number of registered voters for the Mkushi district to be in excess of 54,400. The 1<sup>st</sup> Respondent testified that in their campaigns they were guided by the ECZ calendar which they followed strictly. He added that he did not hear of anyone from the PF appearing before the District Conflict Resolution Committee. According to the 1<sup>st</sup> Respondent in Mkushi there were peaceful campaigns and no fights were recorded.

In terms of election agents, his evidence was that there were officials from the Party structures who used to guide them. The 1<sup>st</sup> Respondent told the Tribunal that he only had two registered agents with ECZ namely Kelvin Mwamba and a Mr. Silwimba. His evidence was that the PF Party also provided two polling agents for each polling station. The 1<sup>st</sup> Respondent testified that during their campaigns, the officials in the wards used to organise meetings. After the meetings, the manager used to organise T-shirts and Chitenge materials specifically for PF members. He added that the party used to help the candidates with money for fuel and resources and as a candidate he used to supplement with his own resources.. It was his evidence that on polling day the party provided lunch, breakfast and supper for all polling agents at polling stations. After voting he was declared winner after amassing 15,005 votes while the Petitioner had 13,995 and another candidate had 2880.



On social cash transfer, the 1<sup>st</sup> Respondent told the Tribunal that he had never seen or handled it. His evidence was that all he knew was that it is a government program under the Ministry of Community Development and administered by social welfare officers.

On distribution of DDMU mealie meal he denied ever distributing DDMU property at any time. Instead he explained that at the district level there is a committee headed by the District Commissioner which he is not a part of.

The 1<sup>st</sup> Respondent also denied ever organising a football tournament in Musakamba ward. However, he recalled a day when the Campaign manager and the candidate for Member of Parliament Christopher Chibuye were informed that there was a football match going on in the same ward at Fibenga School. The two proceeded there and interacted with the spectators and the footballers. According to Respondent he did not know who organised the match. It was his evidence that his campaign team were requested to organise a football tournament but they did not respond and left the place. The 1<sup>st</sup> Respondent told the Tribunal that he could not remember donating K2000 cash and footballs.

Regarding attending a meeting in Itala, the 1<sup>st</sup> Respondent said that he was called by one of the members who said they had a meeting and that as a politician he needed to greet the people there. It was the 1<sup>st</sup> Respondent's evidence that the same person who called him was the same person who had bought some things he wanted to carry to the meeting and asked for transport. He named the person as Elias Silomba. The 1<sup>st</sup> Respondent testified that he was aware that the purpose of the meeting called was how the tribes could help each other during the funerals. According to the Respondent, the only thing he said was to commend the tribes for convening a meeting to discuss such an important issue.

On the allegation where Joe Ndalama was mentioned the 1<sup>st</sup> Respondent stated that Joe Ndalama was a candidate for Chibefwe ward so he did not remember him being his agent. The 1<sup>st</sup> Respondent also told the Tribunal that he could also not remember an incident of a Prisons

Truck carrying mealie meal on the day of voting. Further, he could not remember having meetings with Chola Mushichili and the District Commissioner regarding the collection of DMMU mealie meal. He added that PW 2 was never part of his campaign team or election agent. It was his evidence that PW 2 ceased to be a member of the PF, according to PW 2 himself, two weeks before the elections. To that effect, the 1<sup>st</sup> Respondent played a video of PW2 posted the *Zambian Watchdog* Facebook page apologising to His Excellency President Hakainde Hichilema and the First Lady and stating that he defected from PF to UPND two weeks before the elections.

The 1<sup>st</sup> Respondent further testified that Bright Sanka was a member of the PF and the 1<sup>st</sup> Respondent and Christopher Chibuye visited the funeral house and as per tradition they could not go empty handed. He told the Tribunal that he took some bags of mealie-meal though he could not recall the exact number of bags of mealie meal they carried. They also bought cooking oil and cabbages and a coffin. The 1<sup>st</sup> Respondent admitted to have said some words at the funeral as per their tradition when a party member dies. However, he denied using any political sentiment.

It was his evidence he knows almost all the teachers in the district so he knows the Teacher by the name of Chilansakata like any other teacher and like any other civil servant in the district. However, the 1<sup>st</sup> Respondent's evidence was that he did not know that Mr. Chilansakata was involved in the activity of distributing mealie meal and other material. He further testified that Mr. Chilansakata was not part of his campaign team or his election agent. In summing up, he prayed that the Tribunal dismiss the Petition with costs,

During cross examination, he testified that he knows most of the teachers in Mkushi. When further cross examined, he stated that he does not know the number of the teachers at Upper Lunsefwa School and does not know the names of all the teachers at that school. The 1<sup>st</sup>

Respondent admitted to have attended a meeting in Itala of three to tribal groups between June and July 2021. The 1<sup>st</sup> Respondents reiterated that there were food camps set up a kilometre or two from the polling stations. The 1<sup>st</sup> Respondent refuted the allegation that his party slaughtered a cow before the polling day. He confirmed attending a tournament at Musakamba ward.

When further cross examined, he said that he was aware that the District Commissioner was in charge of DMMU in the district. He admitted that PW 2 said he worked with the District Commissioner. He further admitted to have worked with Joe Ndalama as a fellow candidate. Furthermore, the 1<sup>st</sup> Respondent conceded that he took Mealie meal and cabbages to the funeral in Mukaulo ward.

The second witness who we shall refer to as RW2 was Kelvin Mwamba a 48 years old businessman of plot 1502, High Cost Mkushi. RW2, deposed that he was the campaign manager for Mkushi North Constituency in which the 1<sup>st</sup> Respondent was aspiring Council Chairperson for Mkushi District on the PF ticket.. According to RW2, Mkushi district has only one constituency so he was appointed as campaign manager to manage the campaigns in the District.. Their campaign team comprised of District officials, constituency officials and ward officials. It was his evidence that the Electoral Commission of Zambia came up with a calendar for campaigns in certain wards. His evidence was that the campaign team had vehicles for their campaigns and the mode of campaign was by way of a public address system system and door to door campaigns by their foot soldiers. He also told the Tribunal that the Party also provided bicycles for their ward officials and in the 16 wards they set up camps which were meant to feed foot soldiers. It was his further evidence that the 1<sup>st</sup> Respondent was also accompanying them as they went out for campaigns. According to RW1 at no time did he 1<sup>st</sup> Respondent or himself distribute DMMU mealie Meal or funds under the social cash transfer . He further averred that the program for DMMU was not part of their campaign strategy. It was his

evidence that he never received any complaint as a campaign manager from other candidates. According to RW2, the campaign team accomplished what their mandate was and at the end of the voting his candidate was declared winner of the poll for Mkushi Council Chairperson. It was his further evidence that the 1<sup>st</sup> Respondent had two election agents for the 1<sup>st</sup> Respondent namely himself

and Timothy Silwimba. They also had 194 polling agents.

In cross examination, he reiterated that there were feeding camps in every ward and that most of the time he was with the Respondent. When further cross examined, he stated that mealie meal could have been distributed because at times he was not with the 1<sup>st</sup> Respondent. RW2 averred that he was not there in Chikanda ward when Respondent distributed mealie meal. He admitted to knowing PW 2 just as local resident who drinks from a bar next to the the witness's shop. . According to RW1, he was not a PF official to know all the PF members adding that he was only a PF member who was appointed as manager for Campaign by senior PF officials.

When questioned on whether he had signed for any mealie-meal from the DMMU, he said that it could be that his vehicle was used to carry mealie meal for people and he went and signed.

When RW 2 was shown a copy of a list on phone, he admitted that the name, signature and national registration card number appearing on the list were his. He admitted to having collected 300 bags of mealie meal weighing 12.5kgs each . but denied having distributed them. When further cross examined, he deposed that the District Commissioner had authorised him to carry mealie-meal for the people the District Commissioner wanted to give in Itala compound. He maintained that he did not distribute the mealie-meal but only transported it. .

When cross-examined further, RW2 stated that the District Commissioner was a civil servant in the PF government and that it was only the District Commissioner who knew why he picked on RW 2 as campaign manager to transport the mealie-meal. . When asked where the food that

was being used in the camps was from, his evidence was that it it was bought by the party officials. When further pressed on the issue of mealie-meal, RW 2's evidence was that he took the mealie-meal to the place assigned to him by the District Commissioner. He further told the Tribunal in cross-examination that he took the mealie-meal to Itala compound and left it at the market by the roadside. According to him, the DC authorised him to take the mealie meal so he did not see anything criminal about this act..

In re-examination, he stated that he signed for the collection of the mealie meal in an exercise book at Mkushi Sheds. .

At the close of the evidence, both the Petitioner and the learned counsel elected to give oral submissions in summing up their cases.

### **PETITIONER'S SUBMISSIONS**

The Petitioner submitted that in his petition he has given overwhelming evidence by his witnesses and by confirmation by the 1<sup>st</sup> Respondent and his witness. He therefore contended that the 1<sup>st</sup> Respondent was not duly elected as Council Chairman for Mkushi District in the just ended elections of 12<sup>th</sup> August 2021 and that his election is null and void.

### **RESPONDENT'S SUBMISSIONS**

The learned counsel for the Respondent Mr. E. Khosa submitted on behalf of the 1<sup>st</sup> Respondent. In his submissions, he placed reliance on the following cases; **Nkandu Luo and Another Sefuke Mwamba Musumba & Attorney General SJ No. 51 of 2018, Mubika Mubika v Peniso Nseulu SCZ App No. 114 of 2007 and Jonathan Kapalpi v Newton Samakai SCZ App No. 11 of 2017,**

In the light of the cases the learned counsel referred us to, he submitted that the evidence which has been presented before this Tribunal by the Petitioner and his witnesses has been so

discredited in cross examination thereby rendering it unattainable to satisfy the standard of proof in an election Petition. He further submitted that the Petitioner has lamentably failed to satisfy the tenets contained in section 97 of the Electoral Process Act of 2016. Based on the said provision of the law, counsel submitted that the petition be dismissed with costs given to the Respondent.

We wish to state here that we are indebted to both the Petitioner and the learned counsel for the brief but vital submissions and for the cases cited by the learned counsel. We wish to mention here that we have carefully and anxiously considered the evidence of both parties. We have also given the submissions due regard. It suffices to state at this point that the following facts appear to be common to both parties.

Both the Petitioner and the 1<sup>st</sup> Respondent were candidates for the position of Council Chairperson in Mkushi District in the just ended elections held on 12<sup>th</sup> August 2021. . On 14<sup>th</sup> August 2021 the Respondent was declared winner of the election by the Returning officer. Disenchanted with the outcome, the Petitioner decided to Petition the 1<sup>st</sup> Respondent's election. During the campaign period, the PF party established feeding camps for its members dotted in various wards. During the same period PW2 did collect 200, 150 and 48 x 12.5kg bags of DMMU mealie meal and took it to villages in different parts of the district. It also appears not in dispute that RW2 also at one point did collect from FRA Sheds 300 x 12.5kg bags of DMMU mealie meal that he took to Itala compound market. Further, it appears not in dispute that prior to the elections in June and July, there was a football Tournament in Musakamba ward. Furthermore, in July, 2021, there was a tribal meeting for the Namwanganas, Mambwe and the Nyikas where 1<sup>st</sup> Respondent went and attended and was given audience to say some words. It appears also not in dispute that the 1<sup>st</sup> Respondent with other party official did attend a funeral

on 4<sup>th</sup> August 2021 in Chikanda ward where they took some bags of mealie-meal . We do not hesitate to find these to be facts in this case.

What appears to be in dispute to us is whether or not the football tournament was organised by the 1<sup>st</sup> Respondent herein. Further, whether or not 1<sup>st</sup> Respondent was involved in disbursing social cash transfer to electorate and whether the 1<sup>st</sup> Respondent was involved in the distribution of relief mealie meal from the Disaster Management and Mitigation Unit.. We will resolve these disputed facts as we consider each and every allegation raised by the Petitioner against the 1<sup>st</sup> Respondent

Before considering the allegations herein, we wish to reiterate that the relief the Petitioner seeks from this Tribunal is nullification of the Respondent's election as a Councilor for Matuku Ward of Mkushi North Constituency of the Mkushi District of the Central Province of the Republic of Zambia. We have therefore found it necessary from the outset to state the law upon which this Tribunal may nullify a Local Government Election

#### **GROUND UPON WHICH AN ELECTION RESULT CAN BE NULLIFIED**

The grounds upon which local government election result may be annulled are aptly stated in section 97 (2) of the Electoral Process Act Number 35 of 2016 which is couched in the following language;

**"The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor 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 -**

**(i) by a candidate; or**

- (ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and
- the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred"

This provision was recently given effect by the Constitutional Court in the case of **NKANDU LUO AND ANOTHER v DOREEN SEFUKE MWAMBA AND ANOTHER**, Constitutional Court **SELECTED JUDGMENT NO. 51 OF 2018**. In that case, the Constitutional Court held 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..."**

The Court further said that:

**"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."**

Having identified the ground under which an election result may be annulled, it has now become absolutely necessary to state at this point the standard of proof and standard of that proof in an election petition.

#### **BURDEN AND STANDARD OF PROOF**



The burden of proof in an election petition, just like any other civil matter, lies on the Petitioner who must establish the allegation complained of against the Respondent. However, the standard of proof in an election petition is higher than that required in an ordinary civil action as in an election petition, the Petitioner must establish the issues raised to a fairly high degree of convincing clarity. In our reasoning, we are fortified by the holding in the of **AUSTIN LIATO V. SITWALA SITWALA, Constitutional Court Selected Judgment No. 23 of 2018**. In that case, the Constitutional Court cited with approval the holding of the Supreme Court in the case of **Lewanika and Others v Chiluba (1998) ZR 49** wherein the Supreme Court held *inter alia* that it could not be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probabilities and that it followed that the issues raised were required to be established to a fairly high degree of convincing clarity.

It suffices to mention here that although the holding was based on parliamentary Petitions, the principle extends to Local Government Petition or putting it differently, the standard of proof is the same in Parliamentary Election Petitions and Local Government Election Petitions.

The onus in this case therefore, lies on the Petitioner to prove the allegations to the required degree and the standard of proof which is higher than a mere balance of probabilities but lower than the standard in criminal cases which is beyond reasonable doubt.

Having identified the law as well as the burden and standard of proof we wish now to turn to the allegations raised by the Petition.

We propose to deal with each allegation separately from the other although some appear to be interrelated,

We shall begin by with the following two allegations in the Petition; .

resources, namely; social cash transfer and mealie meal meant for Disaster Mitigation Management Unit (DMMU) for campaign purposes and further to intimidate others and buy votes from the electorates

v. That on 10th August, 2021, the first Respondent and Members of the PF were distributing social cash transfer only to people with voter's cards, instead of the Department of Social Welfare and Community Development whilst telling the electorates not to vote for any candidate belonging to the UPND or else they would never receive the funds again.

On the allegation 1<sup>st</sup> Respondent distributing Social Cash transfer, the Petitioner only called one witness to prove this allegation namely PW5. . The Respondent on the other hand denied ever distributing social cash transfer fund to any person let alone this witness. Instead he explained the Department of Social Welfare is responsible for social cash transfer. Indeed, we do agree with the 1<sup>st</sup> Respondent , that it was not within his province to distribute social cash transfer. However, there is evidence from PW5 of the fact that she was registered for social cash transfer not by the Department of Social Welfare but by PF Party officials. She also told the Tribunal that after she submitted her name she and others attended a meeting the 1<sup>st</sup> Respondent where she other recipients were assured that they would receive the money. The witness confirms having received K300. She also told the Tribunal that the recipients of this money were mostly the youth and that she herself was registered as a widow . We have no reason to doubt the evidence of PW5 because she was not a witness with any possible interest to serve so as to be treated with suspicion. In addition, she answered all the questions in cross examination forthrightly. We do therefore find that 1<sup>st</sup> Respondent committed an act of electoral misconduct by using the social cash transfer government program or facility for campaign purposes.

On the question of relief mealie under the DMMU, there is evidence on Record from PW 2 that he, under the instruction of the 1<sup>st</sup> Respondent and the then District Commissioner Emmanuel Sinkonde, collected various quantities of relief mealie-meal from the Mkushi Sheds. He told the Tribunal that he collected 200 bags on one occasion, 150 bags on another occasion and 48 on his third visit. It was his evidence that he then took these bags into the villages.

Further, we have not lost sight of the fact that a video was played by 1<sup>st</sup> Respondent to show that PW2 was no longer a member of the PF but UPND which he joined 2 weeks before elections thereby trying to suggest that he is a witness with his own interest to serve. The Record shows that, when PW2 was on stand, he was not cross examined on the video for him to answer for himself and as such it is our view that it was brought in as an afterthought, and a convenient way of avoiding the consequences..

Further, we have found the evidence of RW2 in cross examination, who was the 1<sup>st</sup> Respondent's campaign manager and election agent corroborates the evidence of PW2 that PF party officials, including known election agents and campaign managers, who were clearly not employees of the government were permitted to collect large quantities of relief mealie- meal from the Sheds. The question that begs an answer is why this was so? From the evidence on Record, PW 2 collected 398 bags of mealie meal in total whilst RW 2 collected 300 bags. In fact, the Tribunal found the evidence of RW 2 damning because in examination in chief he categorically denied having anything to do with the DMMU mealie-meal. He only conceded when he was shown his signature for the collection. RW 2 was also evasive in cross-examination and did not answer questions put to him in a forthright manner. When confronted with evidence that he collected 300 bags of mealie- meal he, told the Tribunal that he simply collected but did not distribute the mealie-meal and that he left it at the roadside at Itala market. The Tribunal did not find this explanation plausible.

By reason of the matters aforesaid, we find that the 1<sup>st</sup> Respondent and his election agent Kelvin Mwamba who was RW 2 abused the government facility or program of relief maize under the Disaster Management and Mitigation Unit (DMMU) for campaign purposes and therefore committed electoral misconduct.

**That between June and July, 2021, the 1<sup>st</sup> Respondent working together with the now elected Member of Parliament for Mkushi North constituency Mr. Christopher Chibuye organised a football tournament in Musakamba ward for the youths, which was meant to entice the youth to vote for the PF as different prizes were given to the winners contrary to the Electoral Process Act No. 35 of 2016.**

The Petitioner endeavoured to prove this allegation by calling one witness PW6,

The 1<sup>st</sup> Respondent denied ever organising a football tournament in Musakamba ward instead he just went there with the MP after they were invited by the organisers. His evidence was that he requested to organise a similar tournament but they did not respond and left the place. When he was questioned about whether he donated K2,000.00 cash and footballs to any tournament, the 1<sup>st</sup> Respondent's response was that he did not remember doing so. The Respondent did not deny the donation but simply stated he could not remember. We have no reason to doubt the evidence of PW 6 on the subject as he was in the view of the Tribunal, a credible witness. We therefore find as a fact that the 1<sup>st</sup> Respondent did donate Two Thousand Kwacha (K2,000.00) and ten footballs to the football tournament at Musakamba Ward. We also find that this donation was meant to induce the young voters that attended the soccer tournament and we find that the 1<sup>st</sup> Respondent committed a corrupt practice, illegal practice and or electoral misconduct

**That between July and August, the 1<sup>st</sup> Respondent working with the now elected Member of Parliament for Mkushi North Constituency Mr. Christopher Chibuye organised a**

**Tribal meeting in Itala Compound for the Mambwe, Nyika and Namwanga speaking people and that they should not vote for the Petitioner and the UPND aspiring Member of Parliament that if they did the tribal grouping will be chased from Mkushi**

Regarding this allegation, the Petition called to his aid PW7. , We must be quick to point out that this witness testified that between June and July, 2021, they had a meeting for the Namwanga, Mambwe, Tumbuka and the Lambiya to discuss how to mourn each other during funerals. From the evidence of PW 7 himself it was clear that although the 1<sup>st</sup> Respondent attended the meeting, it was not organised by him as alleged by the Petitioner. We therefore do not hesitate to dismiss this allegation.

**That on several occasions mealie meal was distributed to members of the Public such as on 4th August, 2021 in Chikanda ward, the first Respondent gave 6 bags of DMMU mealie meal to Mr. Victor Chikumba to distribute at a funeral. On 11th August, 2021, the 1st Respondent was seen distributing money and 12.5kg bags of mealie meal to households within Chitina ward, Chifwebu ward only to people with NRCs. A member of Chitina ward by the name of Ivy Chipondola was offered a bag of mealie meal in exchange for voting for PF candidate by the PF official by the name of Lenox Kapindula.**

Regarding the allegation of distributing DMMU mealie, PW 3 told the Tribunal that whilst he was attending the funeral of Bright Sanka, the 1<sup>st</sup> Respondent arrived and brought foodstuffs to the funeral. Among these foods was ten bags of mealie-meal, cooking oil and cabbages. The witness told the Tribunal that this mealie meal was relief mealie-meal from DMMU. The 1<sup>st</sup> Respondent on the other hand admitted in cross-examination that he did bring mealie-meal and cabbage to that funeral but that the mealie-meal was not DMMU mealie-meal. We accept the account of PW3 on this matter and find that the 1<sup>st</sup> Respondent was being economical with the truth. This is because both witnesses agreed on what was brought to the funeral but the only

point of departure was whether or not the mealie-meal in question was DMMU mealie-meal. As already discussed, it has been established that the 1<sup>st</sup> Respondent and his team had collect DMMU mealie meal so it is likely that this is the mealie meal that was donated at the funeral. We find as a fact that the 1<sup>st</sup> Respondent did bring ten bags of DMMU mealie to the funeral at Chitina Ward..

**That in Tembwe ward, PF candidates were seen distributing money to the electorates on 11th August, 2021 before the poll day.**

On this allegation, we do not hesitate to dismiss it for the simple reason that a close look at the evidence reveals that no witness testified on it.

**That on poll day a lot of malpractice was done by members of the PF in flagrant violation of the laid down Electoral Rules.**

This is allegation is not only vague but also lacks evidence. We say so because it is generalised consequently, it is dismissed.

**At Kasonka school polling station, room 4, UPND and other observers were sent out of the room at 18:05 and only allowed to return after 40 minutes later. At Chifuna ward the Councilor order that presiding officer to close the polling station at 17:00hrs and thereby blocking others from voting before the stipulated closing time**

Equally on this allegation we find no evidence to establish it and we accordingly dismissed.

**On poll day money was being distributed by members of the PF all over the Constituency.**

**In FCT area a PF councillor by the name of Joe Ndala was seen giving out money to the people who were going to vote unfortunately, he escaped before he was taken to police.**

Equally on this allegation we find no evidence to establish it and we accordingly dismissed.

On the polling day, in Chifwebu ward, a prison truck was seen carrying DMMU mealie meal and cooking oil for preparation of food to feed votes on their way to vote. Kitchens were set up along the roads leading to the polling stations where voters were able to stop and eat on their way to vote or after voting. In Nkolongo ward a head of cattle was slaughtered and PF cadres known as Mr. Mushala and Mr. Fumbeshi were seen removing voters from queues and taking them to eat from the PF kitchens.

The evidence on this allegation was limited to the establishment of kitchens or feeding camps on the roads leading up to polling stations. The evidence of the Petitioner PW 1 was that kitchens or feeding camps were set up along the road to polling stations and these were meant to feed voters on the way to vote. The existence of these feeding camps was confirmed by the testimony of both RW 1 and RW2 who told the Tribunal that feeding camps existed in every ward and there was no ward that did not have a feeding camp. The two witnesses also told the Tribunal that some camps were as close as one kilometre from some polling station. The Petitioner's evidence was that these camps were large and could not have been meant for those PF members doing door to door campaigns only whilst the Respondents maintain that the camps were for PF members only. The question that this Tribunal must ask itself is what the effect of having food on offer at 'PF kitchen' that is situated en route to a polling station is. The view that we take of the evidence on record is that these kitchens or feeding camps were meant to induce voters. Any form of inducement, or reward for voting is a breach of the Electoral Code of Conduct and we find that the 1<sup>st</sup> Respondent did on this account commit an act proscribed by the rules and regulations governing elections. This allegation is proved to the extent explained above.

Having stated our findings of fact, we now turn to consider whether what has been established is sufficient to annul the 1<sup>st</sup> Respondent's election as Council Chairperson.

Before delving into that question, we wish to repeat the ground upon which an election may be nullified by this Tribunal as stated in **Section 97(2) of the Electoral Process Act**. As already alluded to, the first part to be established by the Petitioner is;

**“a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—**

- i. by a candidate; or**
- ii. with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent”**

Going by this provision in its plain and grammatical meaning the Tribunal's considered view is that what is to be proved is either of the three things mentioned above; that is commission of a corrupt practice, illegal practice or other misconduct. Additionally, it must be proved that the act established was committed by the candidate or by another person other than the candidate but with the knowledge and consent or approval of a candidate with his approval or knowledge or of that candidate's election agent or polling agent. We are fortified in our reasoning by the holding in the case of **HERBERT SHABULA V GREYFORD MONDE** (Constitutional Court Appeal Number 13 of 2016). In that case it was held *inter alia* that **section 97(2) (a) (ii) of the Act as stated above is very clear as to when a misconduct can be attributed to a candidate. This is where the candidate has knowledge of the misconduct and consents or approves of it or if the misconduct complained of was done by his election agent or polling agent.**

We further hold the view that the knowledge and consent or approval in the context it is used may be express or by implication.



Reverting acts established in this case, we have found the distribution of DMMU mealie meal to electorates during the campaign period to amount to bribery and a breach of Rule 15 (1) (k) of the Electoral Code of Conduct. In our reasoning we find comfort in the wording of SECTION 81 (1) (d) OF THE ELECTORAL PROCESS ACT which is couched in the following language;

**A person shall not, either directly or indirectly, by oneself or with any other person corruptly—**

**(d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure, the return of any candidate at any election or the vote of any voter at any election**

This provision proscribes the making of any gift to procure the return of any candidate or the vote of any voter at any election and deems any such action as bribery and/or a corrupt practice.

Rule 15 (1) (k) of the Electoral Code of Conduct provides as follows;

A person shall not

*(k) use Government or parastatal transportation or facilities for campaign purposes, except that this paragraph shall not apply to the President and the Vice President in connection with their respective offices*

We find also find that the use of the social cash transfer facility for campaign purposes also offended the provisions cited above. The 1<sup>st</sup> Respondent and his election agent therefore committed a corrupt practice and/or misconduct.

Having made this finding, we now turn to the second question for determination under Section 97 (2) of the Electoral Process Act. This is whether the proven 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. For the avoidance of doubt we repeat the guidance of the Constitutional Court in the *NKANDU LUO* matter cited above where the Court stated that:

**"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."**

The allegations that this Tribunal has found proved are that the 1<sup>st</sup> Respondent used government programs or facilities namely social cash transfer and relief mealie-meal under the DMMU for campaign purposes and secondly that feeding of voters through the feeding camps and kitchens on roads leading to polling stations was a corrupt practice and acted as an inducement to voters.

On the question of social cash transfer, we find that there was no evidence that the practice was widespread. Only one witness testified regarding this allegation and our view is that this was not sufficient to show that all majority of the wards in the district were affected.

Regarding the issue of the distribution of DMMU mealie-meal, we draw an inference from the Record that the number of bags of mealie-meal collected by PW 2 and RW2 from the Sheds lends itself to the conclusion that this mealie-meal was distributed to various places in the district and used to induce voters. This is further confirmed by the appearance of some of these bags of mealie-meal at funerals as confirmed by PW 3. There was also evidence from PW 4 that the 1<sup>st</sup> Respondent was on the containerised truck that brought mealie-meal to Upper Lunsemfwa Ward.

On the question of the kitchens or feedings camps which were situated on the roads to polling stations, we find that the Respondents own witnesses confirmed that the camps existed in every ward.

All these together undeniably is sufficient overwhelming evidence proving that the corrupt act or misconduct was so widespread that it swayed or may have swayed the majority of the electorate in Mkushi District from electing the candidate of their choice.

By the foregoing reasons, we find that the Petitioner has proved his case to the required degree of proof and we accordingly declare that the 1<sup>st</sup> Respondent, Evans Bwalya, was not duly elected as Council Chairperson for Mkushi District and that his election is null and void.

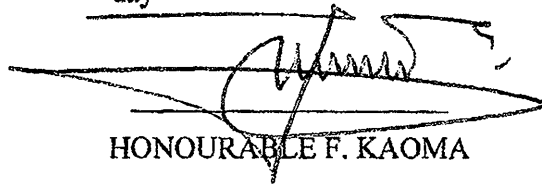
We make no order as to Costs.

The 1<sup>st</sup> Respondent is hereby informed of his right to appeal to the Constitutional Court within fourteen (14) days from the date of this Judgment.

Dated at Mkushi this

day

2021



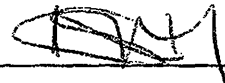
HONOURABLE F. KAOMA

**Tribunal Chairperson**



MRS C.B MAIMBO

**Member**



MRS. N.M SIMACHELA

**Member**