

**IN THE LOCAL GOVERNMENT ELECTION TRIBUNAL 2021/SEO/LGET/014
FOR THE MUCHINGA DISTRICT**

HOLDEN AT ISOKA

(Civil Jurisdiction)

IN THE MATTER OF: ARTICLE 159(3) OF THE CONSTITUTION, CAP 1 OF
THE LAWS OF ZAMBIA.

IN THE MATTER OF: SECTION 106(1)(a) OF THE ELECTRAL PROCESS ACT
NO. 35 OF 2016, OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL
RULES 2016(STATUTORY INSTRUMENT NO.60 OF
2016).

IN THE MATTER OF: LOCAL GOVERNMENT ELECTION PETITION FOR
MAFINGA COUNCIL CHAIRPERSON IN MAFINGA
DISTRICT HELD ON THE 12TH DAY OF AUGUST 2021.

BETWEEN:

KAFUNDA BENJAMIN

PETITIONER

AND

KIRA BORNIFACE

RESPONDENT

Coram: Hon O.Z. Katyamba, Chairperson, Gina Nyalugwe and
Cassandra Soko, members, delivered on 20TH September,
2021.

For the Petitioner: I. Simbeye of Messrs Muyatwa Legal Practitioners.

For the Respondent: E. Siatwambo of Mulungushi Chambers.

JUDGMENT

O.Z. Katyamba, Chairperson, delivered the judgment of the tribunal.

Cases referred to:

1. Abiud Kawangu vs Elijah Muchima, Appeal No. 8 of 2017.

Statutes referred to:

1. The Electoral Process Act.
2. The Local Government Election Tribunal Rules, 2016.
3. The State Proceedings Act Chapter 71 of the Laws of Zambia

The petitioner approached this tribunal by way of a petition dated 25th August, 2021, claiming for the following reliefs.

1. That it may be determined and declared that the declaration of the respondent as Councilor for Luhoka Ward is null and void.
2. That there be an order of injunction to restrain the respondent from registering and being sworn in or taking up the position as Councilor for Luhoka Ward, until after the determination of this matter.
3. That there be an order of injunction to restrain the respondent from receiving any benefits either in form of emoluments or allowances or whatever otherwise meant for the Councilor for Luhoka Ward until after the final determination of this matter.
4. That the petitioner may have such or other reliefs the tribunal shall deem fit; and
5. That the respondent may be ordered to pay costs of and incidental to this petition.

The grounds relied on by the petitioner in support of his petition are that, the petitioner's agents were unable to witness the unpacking and handling of the

ballot boxes and other electoral materials when they arrived in various polling stations. That members of the PF were seen distributing money, mealie meal, fertilizer, and cooking oil to members of the general public. That members of the PF persuaded voters on the poll day to vote for the respondent by preparing food for the voters. That some voters were influenced to vote for the respondent after the PF organized a vehicle which ferried them to and from polling stations on poll day. That the polling station agents for the petitioner stationed in various polling stations had no access to Gen 20A forms and that in certain instances the agents were made to append their signatures on blank Gen 20A forms.

Furthermore, it was averred that polling station agents for the petitioner were not granted access to polling stations. That voters were threatened by the PF on grounds that if they did not vote for the respondent, they would lose their entitlements thereby influencing illiterate voters into voting for the respondent.

By way of the affidavit in support of the petition, the petitioner deposed that heading into the elections, the Patriotic Front Party (PF) coerced the beneficiaries of social cash transfer and the farmer input support programme (FISP) to vote for the respondent and that if they did not, such beneficiaries would lose their entitlements. The petitioner deposed that by reason of the foregoing, many illiterate voters were influenced into voting for the respondent. Furthermore, the petitioner averred that a special organization namely, GGOZA founded by the PF coordinated the PF's illicit activities.

In answer to the petitioner, the respondent filed an answer dated 6th September, 2021. The respondent denied all the allegations leveled against him and he furthermore averred that, the petitioner will be put to strict proof at trial thereof. In connection with paragraph 3(i)(iii)(v)(vi) of the petition, the respondent averred that the same are within the peculiar knowledge of the petitioner.

The respondent asserted that Good Governance Zambia (GGOZA) was not a PF organization. He stated that payment of Social Cash Transfer is a preserve of the Government done through its officers.

At trial, the petitioner testified that on 12th August, 2021, the respondent was declared winner of the councilorship elections for Luhoka Ward. Following that declaration, he felt that the respondent won unfairly because of what transpired during the campaigns leading up to the elections.

The petitioner alleged that the respondent gave out mealie meal to all the villages in the five polling stations of Luhoka Ward. Some of this mealie meal was used to cook nshima for the voters before voting.

Another electoral transgression allegedly committed by the respondent was that during campaigns, the respondent in the company of fellow PF candidates Mr. Chabinga and Mr. Duncane threatened members of the Camp Agricultural Committee (CACs), chairpersons for schools and hospitals that if they continued supporting the UPND Party, they would remove them from their leadership positions. Some of the community leaders such as Sam Gondwe were indeed removed from their positions.

Most of his people ended their campaigns for fear that they would be stopped from receiving fertilizer under CAC. Similarly, the beneficiaries of social cash transfer were also threatened that they would suffer the same fate if they continued supporting the UPND party. In the result, many UPND supporters defected to the PF and they voted for the respondent.

Under cross-examination, he admitted that people have the right to vote for a political party of their choice and that one has a right to defect to another political party. When further cross-examined, he acknowledged that he had no evidence to show that the respondent committed any of the electoral transgression which he alleged.

PW2 was Mwandila Gracious. Apart from corroborating the petitioner's testimony on the alleged electoral malpractice committed by the respondent, he informed the tribunal that 200 people from various villages were addressed by the

respondent and his fellow PF candidates. He also tendered in evidence a bag of mealie meal which was given to him by the PF.

During cross-examination, he clarified that it is not the respondent who gave him the bag of mealie meal and that he never saw him campaigning door to door. He deposed that the respondent is not a member of CAC.

Kennedy Mkandawire was called as PW3. He explained that Luhoka Ward has 5 polling stations, namely, Zumbe, Pemba, Kapakasiya, Jombo and Kasangwa. He also re-echoed the evidenced of the other petitioners witnesses that chairpersons of CAC's were threatened that they would be removed from their positions if they did not support PF. Some teachers who sympathized with the UPND were stopped from working because they were deemed to be opposition party supporters. He narrated how on 7th August, 2021, at Muyombe grounds, the PF gave out money in the sum of ZMW40.00 to each voter so that the voters would vote for PF.

In cross-examination, it was his evidence that the respondent is not the person who gave him ZMW40.00. He intimated to the court that he had no evidence to show that the respondent is in charge of CAC. He also admitted that since the respondent is not the government, he could not terminate the employment contracts of teachers.

The last witness Brian Musukwa testified as PW4. He told the tribunal that on 9th August, 2021, the respondent's agent at the instruction of the respondent distributed chitenge material and t-shirts. He deposed that the PF promised voters that they would give them 2 bags each if they voted for the PF and that UPND supporters would be excluded from this benefit. Consequently, 154 UPND members defected to the PF. These defectors all voted at Jombo Polling Station. By reason of the foregoing, the petitioner lost the elections against the respondent.

In the main, his evidence under cross-examination was that he had no evidence to support the respondent's alleged electoral malpractice which he told the tribunal in examination in chief.

At this point, counsel for the respondent made an application allowing the respondent to file a witness statement as opposed to testifying orally. The petitioner did not object to the application. Consequently, in our ruling we granted the application as prayed.

When he took oath, the respondent intimated to the tribunal that he would rely on his witness statement filed on record. Given that the witness statement is on record, we shall not reproduce its contents seriatim serve to state that in the main, the respondent denied the allegations leveled against him by the petitioner.

When subjected to cross-examination, he deposed that he conducted his campaigns door to door. He also asserted that social cash transfer and farmer input support programme (FISP) are government programmes even though he had no evidence to support his assertion.

At the close of the respondent's case, counsel for the respondent filed written submissions.

Counsel posited that none of the petitioner's witnesses led evidence whether oral or otherwise to prove to the tribunal that the respondent was involved in electoral malpractice. It was submitted that the petitioner must produce strong evidence to prove that the respondent committed an illegal and corrupt practice.

It was submitted that the evidence on record shows that the petitioner did not see the respondent distributing money or mealie-meal, cooking oil and other items to the voters. In counsel's view, there is no evidence on record that the respondent was seen distributing food stuffs or cooking food. Counsel pointed out that the evidence of the petitioner and the petitioner's witnesses was that it the PF members who were cooking and by reason thereof, it meant that the respondent was also one of them.

Counsel further argued that a candidate is liable only for corrupt or illegal act or other misconduct that he or she committed in connection with the election and those committed by his election agent or polling agents or those done with his or her knowledge, approval or consent. In this regard, it was pointed out that the respondent has no control over both the social cash transfer programme and the FISP programme as the same are government programmes.

According to counsel, the testimony of the petitioner and his witnesses are mere allegations and hearsay without corroboration.

In conclusion, counsel posited that there is no evidence warranting the nullification of the respondent's election as the acts of his political party cannot be deemed to be his acts. He therefore, urged the tribunal to uphold the election of the respondent on grounds that the respondent's election was free and fair.

We have considered the evidence on record, the respondent's witness statement and the submissions by counsel for respondent.

In our view, the following issues are common cause. That on 12th August 2021, the respondent was declared as the duly elected councilor for Luhoka Ward in Mafinga District on the PF Party. That the petitioner got 480 votes whereas the respondent, got 552 votes.

The issue for determination as we see it, is for this tribunal to ascertain if the respondent whether by himself, his polling station agent or election agent or by his approval, committed the alleged electoral transgressions, resulting in the majority of voters in Luhoka Ward being denied the opportunity to vote for a candidate of their choice.

From the outset we wish to emphatically state that although the petitioner prayed for two injunctive reliefs, namely, restraining the respondent from registering and being sworn in or taking up the position as Councilor for Luhoka Ward and to restrain the respondent from receiving any benefits either in form of emoluments or allowances or whatever otherwise meant for the Councilor for Luhoka Ward until after the final determination of this matter, the same is not attainable under our laws as this is tantamount to issuing an injunction against the state, contrary to the provisions of section 16(2) of the State Proceedings Act Chapter 71 of the Laws of Zambia.

The starting point in determining the issue in contention is section 97(2) of the Electoral Process Act (EPA). The section puts it thus:

"(2) 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; (b) 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; or (c) the candidate was at the time of the election a person not qualified or a person disqualified for election."

It is discernable from the provisions of section 97(2) of the EPA Act that to succeed in an election petition, the petitioner must establish three elements, namely;

- i. That a corrupt practice or an illegal act or other misconduct was committed during the election.
- ii. That the illegal act or misconduct complained of was committed by the respondent or by his election agent or polling agent or with the respondent's knowledge, consent or approval.
- iii. That as a consequence of the corrupt or illegal act or misconduct committed, the majority of the voters in the district or ward were or may have been prevented from electing a candidate of their choice.

We shall begin by addressing the issue of social cash transfer and FISP. A perusal of rule 20(2) of the Local Government Election Tribunal Rules, 2016 provides that:

"a tribunal may take judicial notice of any fact."

In this connection, we take judicial notice that social cash transfer and FISP are government programmes and by reason thereof, we agree with the respondent that it cannot be said that the respondent had influence on the day to day administration of these programmes and we so find. In any case, under cross examination, one of the petitioners witness admitted that both FISP and social cash transfer are government programmes.

We are alive to the settled principle of law that in matters of this nature, the onus of proof rests on the petitioner, to prove his case beyond the balance of probabilities. It is crystal clear that the standard of proof in election petitions is a high one as it goes beyond that set in ordinary civil matters but it is below the criminal standard of proof.

In support of his case, the petitioner made several allegations prompting him to petition the election of the respondent as councilor in Luhoka Ward. These allegations are that, the respondent and his fellow PF members gave out various food stuffs, cash money and transported voters to and from the various polling stations in the ward on voting day. The petitioner urged this court to nullify the election of the respondent on grounds that electoral malpractice was committed by the respondent during campaigns and on voting day.

In reaction, the respondent denied having been involved in any electoral malpractice as alleged by the petitioner.

A thorough perusal of the record, shows that under cross examination, the petitioner and his witnesses failed to adduce any evidence of means showing that either the respondent or his polling station agent or his election agent or to the respondent's knowledge, consent and approval, committed the electoral transgressions. We are fortified in our finding by the guidance of the Constitutional Court in the case of **Abiud Kawangu vs Elijah Muchima, Appeal No. 8 of 2017**, where in it was held that, an election may be annulled where a petitioner shows that the alleged corrupt or illegal practice or misconduct was committed in connection with the election by the respondent or his election or polling agent.

Given what we have stated above, we find it otiose, to delve into whether the majority of the voters in the Luhoka Ward were or may have been prevented from electing a candidate of their preference.

Consequently, it is our further finding that the petitioner has failed to demonstrate beyond a balance of probabilities that the election of the respondent was not free and fair warranting us to nullify the said election. Accordingly for the

avoidance of doubt, we find that the respondent was the legally elected counselor for Luhoka Ward, in Mafinga District of Muchinga Province.

Given that matters of this nature are in the public interest, we order each party to bear his own cost.

DELIVERED IN OPEN COURT

This 20th day of September, 2021, at Thendele Mafinga District.


OBRIEN ZILINDI KATYAMBA

CHAIRPERSON


GINA NYALUGWE

MEMBER


CASSANDRA SOKO

MEMBER

