

IN THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL 2021/QO/LGET/18
FOR THE MKUSHI DISTRICT
HOLDEN AT MKUSHI
(Civil Jurisdiction)

IN THE MATTER OF: THE ELECTORAL PROCESS ACT NO.35 OF 2016

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS FOR
MUSHIBEMBA WARD COUNCILLOR HELD ON 12TH
AUGUST, 2021

IN THE MATTER OF THE ELECTION OF LEWIS MAYUYA AS
COUNCILLOR CHIKANDA WARD

B E T W E E N:

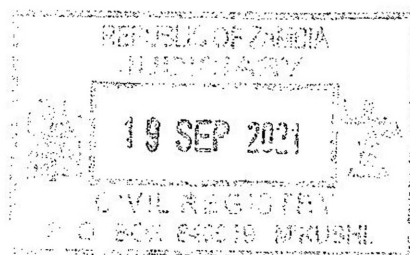
DAVIES MWENYA

AND

LEWIS MAYUYA

AND

ELECTORAL COMMISSION OF ZAMBIA



PETITIONER

1ST RESPONDENT

2ND RESPONDENT

Coram: F. Kaoma, CB. Maimbo, N. Simachela

For the Petitioner: In Person

For the 1st Respondent: Mr. E. Khosa of Messrs BCM Legal Practitioners

For the 2nd respondent: N/A

J U D G M E N T

Maimbo C.B. delivered the Judgment of the Tribunal

Cases Referred to:

1. Nkandu Luo & Another vs Doreen Sefuke Mwamba & Another, Selected Judgment No 51 of 2018
2. Mubika Mubika vs Poniso Nseulu, Selected Judgment No. 114 of 2017

3. Jonathan Kapaipi vs Newton Samakai Constitutional Court Judgment Number 13 of 2017.
4. Michael Mabenga vs Sikota Wina and 2 Others (2003) ZR p.110
5. Steven Masumba vs Elliot Kamondo Selected Judgment No. 53 of 2017)

Legislation and Other Materials Referred to:

1. The Electoral Process Act No. 35 of 2016
2. The Local Government Elections Tribunal Rules, SI No. 60 of 2016

This is the Election Petition of Davies Mwenya who stood as a Councillor, under the United Party for National Development (UPND), for Mushibemba ward of Mkushi Constituency election held on 12th August, 2021. The Petitioner is challenging the election of Lewis Mayuya, who contested the Mushibemba Ward Seat under the Patriotic Front (PF) and was declared duly elected by the Electoral Commission of Zambia and is seeking the following reliefs;

1. A declaration that the 1st Respondent was not duly elected as Ward Councillor and that his election is null and void
2. Costs to be borne by the 1st Respondent
3. Any other relief the Court may deem fit.

The Petition is made pursuant to Sections 97, 98 and 99 of the Electoral Process Act, Number 35 of 2016, and alleges the following:

- a) The Petitioner and other supporters of the United Party for National Development (UPND) were disadvantaged by the 1st Respondent and other members of the ruling party Patriotic Front (PF) prior to the elections by being barred from campaigning freely under the pretext that the UPND were not following COVID 19 guidelines.

- P.F. members were going round giving people money, food and beer in exchange for their N.R.Cs and voter's card numbers three days before the elections and urging them to vote for PF candidates
- c) On 12th August 2021, during elections, PF supporters were dishing out money to the electorate and enticing them to vote for PF candidates.
- d) The members of PF in Mkushi took advantage of the fact that they were the ruling party and abused Social Cash Transfer and mealie meal intended for Disaster Management and Mitigation Unit by distributing them through their campaigns. Social Cash Transfer were being distributed during campaigns and the electorate was told that the money came from the PF party when in fact not and his PF cadres were threatening members of the public that they would be removed from the list if they supported UPND
- e) Tribal remarks were issued against UPND president and its candidates whenever the PF had meetings had people as well as door to door campaigns

The Petitioner began by laying a complaint before the Tribunal. He informed the Tribunal that he had intended to call 7 witnesses but his witnesses had been intimidated and thus turned back on their way to the tribunal whilst others who were already on the premises left. He stated that he knew the people who were intimidating his witnesses and said he had a witness who could attest to this. He named those intimidating his witnesses as Lewis Mayuya (1st Respondent), Binwell Kashika and Peter Banda. He asked that the Tribunal look into his allegations.

The Tribunal inquired into the allegations and heard from a witness Elijah Ngosa who said he was present when the Petitioner's witness Mr. Moses Musonda was threatened by Harry Kashika and Barnabas Tembo. Mr Ngosa stated that as a result of the threat, Mr. Musonda had asked him to inform the Petitioner that he would not be testifying. The two denied the allegation. After the

party parties were cautioned against interfering with witnesses and the Petitioner was told to assure his witnesses that they were under the protection of the tribunal. Subpoenas were issued and the matter was adjourned to the next day. However, on resumption of hearing, the Petitioner informed the Tribunal that he had been unsuccessful with convincing his witnesses to appear and had thus opted to proceed with the one witness that had come.

PETITIONER'S EVIDENCE

The Petitioner testified on his own behalf and called one other witness

PW1 was Davies Mwenya, the Petitioner, who testified that on 27th July 2021, Lewis Mayuya, the 1st respondent, Mr. Mwamba, the campaign manager and Evans Bwalya the candidate for Council Chairperson went to campaign to farm workers in Mushibamba Ward in the Brimagoba area (also known as Chima'ganya). The area is under Farm Block polling station. Mr Mwamba introduced his team and Mr. Christopher Chibuye (candidate for Member of Parliament) addressed the crowd. PW1 informed the Tribunal that Mr Chibuye urged the crowd to vote for the PF party of Edgar Chagwa Lungu is not a party of segregation. That he told the crowd not to dare vote for Hakainde Hichilema as Tongas are bad and stingy people. Mr Chibuye also told the crowd that the things that they had brought the people such as mealie meal, chitenge and money, the people will never see if they voted for UPND. PW1 said at that point they called upon Lewis Mayuya who repeated the same message to the crowd. After the speeches, the campaign team then gave out the things they had brought and promised to come back with some more.

PW1 then testified that some time in the month of July on a date unknown, he went to through the village of Moses Musonda where he met some women who informed him that PF had held a meeting in the village where they were giving out money and chitenge materials in exchange for

card and national registration card numbers. PW1 stated that he went to investigate the issue in the village when he found Headman Moses Musonda. PW1 stated that the 1st Respondent was also there and he got into a vehicle covered in PF campaign stickers and left. PW1 told the tribunal that when he asked Musonda if what transpired was right, he said Moses Musonda told him that people did not take him seriously as he was not giving them anything. Mr Musonda told him that the 1st Respondent had gone through his village and all the villages in Katuba giving out money and mealie meal intended for the Disaster Management and Mitigation Unit (DMMU). PW1 also alleged that Mr Musonda told him that the PF had also promised the People that on polling day, all those that lived far from the polling station would be ferried there and there would be eating and drinking beer after voting. The PF had also told the people that money for Social Cash Transfer would be paid consistently if they voted for PF but if they voted for UPND that would be the end of the Social Cash Transfer and all good things to come under PF. PW1 claimed that such statements caused confusion in people as many are hungry and uneducated and do not know how governments work.

PW1 also testified that on 12th August 2021 he started off early on his motorbike to check on activities around polling stations. He said that when he was near Katuba polling station, he heard persons who were going to vote saying that after voting they would go drink beer and that a cow had been slaughtered. He also heard that the feasting would take place at Eric Yolomona's house. Eric Yolomona is a PF member. As he continued his tour of the polling stations, PW1 said he got to Masebe polling station where he saw a crowd of people standing just a few meters from the Electoral Commission of Zambia (ECZ) boundary line. Amongst them was Elijah Ngosa (PW2) who when he inquired what was happening told them that the PF were giving out money. The voters had been told that the councillor would be coming to the polling station. PW1 stated

that he stood at a distance to see if the Councillor would come. He testified that the councillor did come and he started giving out money. He claimed that when he questioned the polling staff, he was told that the PF had offered him K10, 000 and he was afraid of losing his job. PW1 also stated that when he went inside, he found that his polling agents had been told to stand far away from where the counting was being done and the presiding officer attempted to count a rejected ballot in favour of the 1st Respondent which he disputed.

At this point PW1 requested that records from Food Reserve Agency (FRA) showing disbursement of DMMU mealie meal be subpoenaed. There was no objection from Counsel for the Respondent and the application was granted.

Liz Chansa a marketing assistant a Marketing Assistant from Food Reserve Agency appeared before the Tribunal and stated that the records book was not in the custody of FRA as the District Commissioner Mr. Emmanuel Sinkode had taken the book in order to do retirements and he had been sent on leave. When Mr. Sinkonde was subpoenaed, the Tribunal was informed that all efforts to locate him had failed and all his phones has been switched off. PW1 also expressed concern at the fact that when the Tribunal adjourned to locate the District Commissioner, the 1st Respondent and the witness from FRA left together in her car. This raised suspicion. The tribunal took judicial notice of the Petitioner's complaint and did not interrogate it further as we had witnessed the incident first hand suffice to mention that the incident was regrettable as it pointed towards collusion between the 1st Respondent and FRA.

In cross examination PW1 admitted that he did not find out who arranged the meeting in Mushibemba Ward. He stated that there were two polling stations in the farm block area with more than one thousand registered voters between them. PW1 also admitted that he did not personally hear the tribal utterances by Christopher Chibuye and the 1st Respondent. As regards the issue of

the NRCs and voters cards PW1 stated that they were returned to the voters and only their details were taken.

PW1 stated that there were three polling stations in Mushibemba Ward namely Katuba, Masebe and Farm Block with five polling streams; one in Masebe, two in Farm Block and two in Katuba. He stated that he lost in all the streams. He stated that he had never written a formal complaint to ECZ over his allegations but had several meetings with them. He said ECZ did nothing about his complaints. He also insisted that he had seen the 1st Respondent dip into his pockets at Farm Block. When challenged that FRA had not been included in his Petition, PW1 stated that in Mkushi they are ones that handled the DMMU mealie meal which was in his Petition. He stated that the polling stations were not far from each other but he did not know the exact distance. He also said he did not know the exact number of votes that he received.

PW2 was Elijah Ngosa who testified that the campaign team for 1st Respondent had a meeting with them. He stated that team told them not to make the mistake of voting for Tongas as they would destroy the country by putting it in the hands of the enemy. After they had said what they had to say, they got two bags of DMMU mealie meal to give to the leader in four kilograms of Sugar and told them to brew a local drink called munkoyo. They were told to remember to vote for PF and not the Tongas. PW2 said the 1st Respondent was at the meeting. PW1 also identified the 12.5kg DMMU sack that was tendered in as evidence. He said he could not remember what was said by the crowd at Masebe. **All he remembered was that there were a lot of people passing, going to and from the polling station but he didn't see anything else.**

In cross examination PW2 stated that the meeting on 27th July was held in Brimagoba area and that it was arranged by the 1st Respondent. He told the tribunal he attended the meeting as a citizen who had a right to be there and there were between One Hundred and One Hundred and Twenty

people in attendance. When asked whether he partook of the munkoyo he replied in the affirmative and said it influenced how he voted.

In re examination PW2 stated that about forty people had some munkoyo.

RESPONDENTS EVIDENCE

RW1 was the Lewis Mayuya, the 1st Respondent who informed the Tribunal that he did not observe any malpractice during the campaign and did not utter any tribal remarks as he was also not a local man. He also denied that he engaged in vote buying as he was also struggling with finances. He stated that he had filed an Answer to the petition and asked the Tribunal to admit it as part of the evidence

RW1 stated that they were not allowed to have any meeting during campaigns due to the high prevalence of COVID 19. He stated that he did not know Moses Musonda as they never held a meeting in his area due to the COVID restrictions. The campaigns were limited to door to door campaigns and they had a team of twenty-four ward officials who were assigned to do this in the various villages.

RW1 denied the allegations over the DMMU mealie meal stating that he had never had the mealie meal in his custody or the custody of the other twenty-four members of the ward. He said they never distributed mealie meal or money to anyone.

Regarding the Social Cash Transfer, RW1 stated that this was a government program and can only be handled by Officers from the Ministry of Community Development and Social Services. He stated that he did not know how disaster management operates.

When questioned about the slaughter of a cow **RW1 denied having a cow slaughtered** or providing food and beer to anyone on poll day. He stated that he was not actually in the ward as he voted

from a different ward, Chitina Ward. RW1 stated that he knows Eric Yolomona as he is the Ward Chairman for Mushibemba Ward and he was a polling agent for PF monitoring Katuba polling station. He stated that his election agents were Harry Kashika and Barnabas Tembo.

RW1 concluded by stating that his election was not marred by any malpractice.

In cross examination RW1 affirmed that Harry Kashika and Barnabas Tembo were his election agents. He stated that he also has polling agents but Mr Kashika and Tembo were checking on nominations and other monitoring.

He also confirmed knowing Mr. Yolomona and stated that they worked with all the party chairmen and made plans with them. RW2 admitted that he did have to go campaigning himself as well because there were places where people didn't know him as he did not live in the ward. He denied that he had meetings with Mr. Mwamba as he was campaign manager for the Council chairperson and the Member of Parliament.

Both parties opted to make oral submissions as follows;

PETITIONER'S SUBMISSIONS

The Petitioner submitted that the 1st Respondent abused government resources when he used DMMU mealie meal and gave out money. He also submitted that 1st Respondent contradicted himself when he first said that the ward officials did the door to door campaigning then later admitted that he also went campaigning. This showed his dishonesty as his denials were lies.

He submitted that the elections were not free and fair and asked the Tribunal to nullify the election.

He asked the Tribunal to bear in mind that where there was hunger and a lack of education, people believed what they were told. Taking advantage of people's illiteracy cost him an election and so he was asking to let the people vote again.

RESPONDENT'S SUBMISSIONS

Mr. Khosa on behalf of the Respondent submitted that the Tribunal dismiss the Petitioner's petition owing to lack of merit. The record will show that the evidence led by the petitioner and his witness are cast in generalities with no specific evidence to support the allegations as contained in his petition. It was the 1st respondent's submission that the petitions falls way below the required standards as espoused in Section 97(2) of the Electoral Process Act no. 35 of 2016.

Counsel then called to his aid the cases of **NKANDU LUO, ELECTORAL COMMISSION OF ZAMBIA V DOREEN SEFUKE MWAMBA AND THE ATTORNEY GENERAL SELECTED JUDGMENT NUMBER 51 OF 2008** , **MUBIKA MUBIKA V PONISO NSEULU SELECTED JUDGMENT NUMBER 114 OF 2007** and **JONATHAN KAPAIPI V NEWTON SAMAKAI CONSTITUTIONAL COURT JUDGMENT NUMBER 13 OF 2017**. He urged the Tribunal to dismiss the petition with costs to the Respondent.

We are grateful to the parties for their submissions and have carefully considered the viva voce evidence of all the witnesses that testified in this election petition.

At this point we feel it prudent to give the grounds upon which an election can be annulled. Section 97 (2) of the Electoral Processes Act No. provides as follows;

“(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;

What constitutes illegal and corrupt acts are contained in Part VIII of the same Act in particular sections 81, 83, 84, 85, 86 and 87 as well as The Electoral Code of Conduct. The task at hand for this Tribunal is thus to determine whether the 1st Respondent engaged in these acts and whether the said acts would warrant nullification of the election as provided under Section 97(2).

Having discussed the law we will now remind ourselves of the Petitioner's allegations in order to determine whether the evidence provided by the Petitioner can support a nullification in accordance with Section 97(2). The Petitioner alleged as follows;

- a) The Petitioner and other supporters of the United Party for National Development (UPND) were disadvantaged by the 1st Respondent and other members of the ruling party Patriotic Front (PF) prior to the elections by being barred from campaigning freely under the pretext that the UPND were not following COVID 19 guidelines.
- b) P.F. members were going round giving people money, food and beer in exchange for their N.R.Cs and voter's card numbers three days before the elections and urging them to vote for PF candidates
- c) On 12th August 2021, during elections, PF supporters were dishing out money to the electorate and enticing them to vote for PF candidates.
- d) The members of PF in Mkushi took advantage of the fact that they were the ruling party and abused Social Cash Transfer and mealie meal intended for Disaster Management and

Mitigation Unit by distributing them through their campaigns. Social Cash Transfer were being distributed during campaigns and the electorate was told that the money came from the PF party when in fact not and his PF cadres were threatening members of the public that they would be removed from the list if they supported UPND

- e) Tribal remarks were issued against UPND president and its candidates whenever the PF had meetings had people as well as door to door campaigns.

The Petitioner did not lead any evidence as regards the allegation (a) and it will thus be dismissed. The rest of the allegations will be dealt with together. From the outset, we must state that it was unfortunate that the Petitioner was unable to bring his witnesses before the court as earlier explained in this judgment. However a lack of witnesses then presented us with a dilemma of how much weight can be given to the Petitioner's evidence. The Petitioner is clearly a witness with an interest to serve as he seeks nullification of the election of the 1st Respondent in the Mushibemba Ward elections

In the case of **STEVEN MASUMBA V ELLIOT KAMONDO SELECTED JUDGMENT NO. 53 OF 2017**) the Constitutional Court offered the following guidance on the matter;

Witnesses from a litigant's own political party are partisan witnesses whose evidence should be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood.

The Petitioner's case is clearly one in which we must caution ourselves. This positions is compounded by the fact that from the Petitioner's own evidence the allegations in (b) and (d)

concerning the issues of voters cards and national registration cards as well as DMMU and Social Cash Transfer were told to him by third parties and thus cannot be relied upon.

As regards allegation (c) where Petitioner alleged money was given out on polling day, the Petitioner had hoped to rely on the evidence of PW2 as the Petitioner had stated in his evidence that PW2 was present when this occurred. However, PW2 proved to be an unreliable witness when he stated that he did not remember what happened and only saw people going in and out of the polling station.

With regard to the meeting that occurred on 27th July 2021, where tribal remarks were allegedly uttered PW1 and PW2 gave varying accounts of the incident in terms of what was said and what was given out. PW1 stated that what were given were mealie meal, chitenge material and money whereas PW2 stated that what was given was two 12.5kg bags of mealie meal and 4kg of sugar.

There would thus be no point in delving further into this matter as the evidence before us would not satisfy the standard of proof which was ably explained in the case of **MICHAEL MABENGA V SIKOTA WINA, MAFO WALLACE MAFIYO AND GEORGE SAMULELA** where it was held that:

“proof of an election petition, although a civil matter is higher than balance of probability, but less than beyond all reasonable doubt”

For the foregoing reasons we dismiss this petition and declare that the 1st Respondent, Lewis Mayuya, was duly elected as Councilor for Mushibemba Ward

114

There will be no order to costs

The Petitioner is accordingly informed of his right of appeal to the Constitutional Court within fourteen (14) days of this Judgment.

Dated at Mkushi this

day

2021



HONOURABLE F. KAOMA

Tribunal Chairperson



MRS C.B MAIMBO

Member



MRS. N.M SIMACHELA

Member