

SUPREME COURT

Appeal No. 131/2002

Coram: Sakala, CJ, Lewanika, DCJ, Chirwa, Mambilima and Chitengi, JJS

On 12th December, 2002 and 19th March, 2004

Flynote

Parliamentary election petition-effect of misdescriptions and errors in election documents standard of proof in election petitions, election judgment to be based on matters pleaded by parties.

Headnote

The petitioner challenged the election of the Respondent as Member of Parliament for Isoka East Constituency on the ground that he did not campaign in some polling areas as the Electoral Commission documents showed that the areas were in another constituency.

Held:

- i. For an election to be nullified on account of non compliance with election laws it must be established that the non compliance affected the election results and the winner is partially favoured through the non-compliance.
- ii. Misdescription of boundaries does not warrant nullification of results.
- iii. Election petition must be proved beyond the balance of probabilities but not beyond reasonable doubt as required in criminal cases.

For the Petitioner: Dr. J.M. Mulwila of Messrs Ituna Partners

For the 1st Respondent: Hon. Silwamba of Messrs Eric Silwamba & Company Mr. Hakasenke of Messrs Hakasenke & Company

2nd Respondent: Mr. Jalasi Principal State Advocate

Cases referred to:-

1. Waghorn Vs Wimpey & Company Limited (1969) 1 WLR 1761
2. Akashambatwa Mbikusita Liwanika and Others Vs Fredrick Jacob Titus Chiluba SCZ/8/EP/3/96 (unreported).
3. Harry Sinkala Vs Electoral Commission of Zambia and Daudi M. Mukwasa Appeal No 18 of 2002 (Unreported)

Legislation referred to:-

1. Electoral Act Chapter 13 of the Laws of Zambia Section; 18(2)(b), 19, 20, 30 and 37.

#### JUDGMENT

Chitengi, JS, delivered the Judgment of the Court.

When we heard this appeal we dismissed it and intimated that we shall give our reasons later. We now give the reasons.

In this Judgment, we shall refer to the first Appellant and the second Appellant as the first and second Respondent and the Respondent as the Petitioner, which is what the parties were in the court below.

The facts of this case can be briefly stated. The Petitioner, who stood for Parliamentary election for the Isoka East Parliamentary Constituency on the ticket of the United National Independent Party (hereinafter referred to as UNIP), lost the seat to the first Respondent who stood on the ticket of another political party called the Movement for Multi-Party Democracy (hereinafter referred to as MMD).

As a result of his loss, the Petitioner brought this Petition pursuant to Sections 18(c), 19 and 20 of the Electoral Act, Cap 13 of the Laws of Zambia(1) challenging the election of the first Respondent. The grounds which stimulated the petition are contained in Paragraphs 7 to 10 of the Petition. These allegations read as follows:-

"7. Your Petitioner states that Catherine Namugala was not duly elected as the election was not fairly conducted and was done in violation of the Electoral (General) Regulation 1991.

8. Your Petitioner states that the Returning Officer gave secret briefing to the MMD candidate and her agents.

9. Your Petitioner further states that his supporters were confused because the Returning Officer told them that although Mpungu Ward was designated under Isoka West Constituency, theregistered voters in that Ward would be voting for the Parliamentary and Presidential candidates under Isoka East Constituency but the Councillor under Isoka West Constituency.

10. Your Petitioner states that many voters were disenfranchised because voting did not start until 13:00 hours and closed at 17:00 hours. A lot of people who had been waiting from early in the morning either had left when voting started or were unable to vote by 17:00 hours as time was too short."

According to the Petitioner, the first Respondent was not duly elected Member of Parliament for the Isoka East Parliamentary Constituency because the second Respondent conducted the elections in an irregular manner. The Petitioner averred that the Returning Officer had promised to call a meeting at which he would brief all the polling agents but this was not done; instead a meeting was arranged, in collaboration with some NGOs like FORDEP and the Office of the President, for the Petitioner and her

polling agents only. The petitioner and his witnesses came to know of this meeting when they went to Muyombe Secondary School, where the meeting was held, for other business.

The Petitioner and his witnesses alleged that on the voting day, voting started late in a number of polling stations. For example, at Kalyanani polling station voting had not began by 12:00 hours. The petitioner then complained about what happened in Mpungu ward which has 1845 registered voters and six polling stations. He testified that according to the documents issued by the second Respondent, Mpungu ward is in Isoka West Parliamentary Constituency with six polling stations, namely Nzoche, Kanyala, Kasoba, Mwenimpangala, Chuba and Nachisitu. Despite these polling stations falling under Isoka West Parliamentary Constituency, the candidates in Isoka East Parliamentary Constituency were to campaign in Mpungu ward. The Petitioner complained that this caused confusion. The Petitioner said there was also confusion as to the number of Isoka East Parliamentary Constituency and Isoka West Parliamentary Constituency. One document issued by the second Respondent refers to Isoka East Parliamentary Constituency as number 85 and Isoka West Parliamentary Constituency is numbered 86. In yet another document, issued by the second Respondent, Isoka East Parliamentary Constituency is numbered 85. This second document shows that four of the six polling stations in Mpungu ward are in Constituency 86. On the voting day, Kasoba, Mwenimpangala, Chuba and Nachisitu, though under Isoka West Parliamentary Constituency, were placed under Isoka East Parliamentary Constituency. Only Kanyala and Nzoche remained in Isoka West Parliamentary Constituency.

The first Respondent denied the allegations levelled against her. According to the first Respondent and her witness, Royd Munkondya (PW1), who was also her Campaign Manager and MMD District Vice Chairman, Campaign Camps were established in the Isoka East Parliamentary Constituency manned by Constituency officials. Officers from the Office of the President were not involved in the first Respondent's campaign.

Before the elections, the second Respondent organized a briefing for interested parties at Muyombe. DW1 did not attend this briefing.

According to Robert Posa Mwenya, (RW3), the Returning Officer for the Isoka East Parliamentary Constituency, the briefing was held at Kampumbu, Muyombe, Thendere and Mulekatembo. Invitations to these meetings, where the briefings were to be given, were made through written advertisements. RW3 did not brief the MMD candidate and her agents secretly. On the polling stations in Mpungu ward, RW3 testified that, for purposes of Presidential and Parliamentary elections, Kasoba, Mwenimpangala, Chuba and Nachisitu polling stations, belonged to Isoka East Parliamentary Constituency. Only Nzoche and Kanyala belonged to Isoka West Parliamentary Constituency. The electorate were verbally told of the



arrangement relating to the polling stations in Mpungu ward. There were no complaints of voting beginning late in the Isoka East Parliamentary Constituency. All voters were allowed to vote.

When dealing with the allegations levelled against the first Respondent, the learned trial Judge did not deal with them seriatim. He dealt with allegation number 8 first, then 10 and lastly 7 and 9 together because, according to the learned trial Judge, they were more or less inter related.

The learned trial Judge found allegation number 8, to the effect that the first Respondent and her agents had a secret briefing with the Returning Officer (RW3), not proved. The learned trial Judge also found allegation number 10, to the effect that voters were disenfranchised, not proved.

However, the learned trial Judge found the allegation relating to non-compliance with Electoral Regulations and confusion caused by the Returning officer proved. The learned trial Judge discounted evidence by Mr. Munkondya (RW3) that for purposes of Presidential and Parliamentary elections voters in Kasoba, Mwenimpangala, Chuba and Nachisitu, though registered in Mpungu ward which is in Isoka West Parliamentary Constituency, voted in Isoka East Parliamentary Constituency. The learned trial Judge found that voters registered in the four polling stations we have referred to above voted in a different constituency in which they were not registered. As a consequence, the learned trial Judge held that the second Respondent breached Section 6 of the Electoral Act by allowing voters registered in Isoka West Parliamentary Constituency. Section 6(1) of the Electoral Act reads:-

"Subject to the provisions of this Section and Section seven, every person who is registered in a register of voters for constituency shall be entitled to vote at a direct election in that Constituency."

Section 7 of the Electoral Act enumerates situations when a person shall be disqualified from voting. And for the purpose of determining this appeal, it is not necessary for us to reproduce the provisions of Section 7 of the Electoral Act.

Because the second Respondent breached Section 6 of the Electoral Act by allowing voters registered in Isoka West Parliamentary Constituency to vote in Isoka East Parliamentary Constituency, the learned trial Judge held that the election of the first Respondent, though she was not at fault herself, could be nullified under Section 18(2)(b) of the Electoral Act and did in fact nullify the first Respondent's election and declare that the first Respondent was not duly elected as Member of Parliament for the Isoka Parliamentary Constituency.

The Respondents now appeal to this court against the Judgment of the court below.

The first Respondent filed a Memorandum of Appeal with seven grounds of appeal but after considering the grounds of appeal we are of the view that in fact the grounds of appeal are only grounds (1)(2) and (4). Grounds (3)(5)(6) and (7) are basically elaborations of grounds (1)(2) and (4).

Ground (1) of Appeal reads:-

The learned trial Judge erred in Law and in fact misdirected himself in finding that he was convinced that the provisions of Section 18 of the Electoral Act Cap 13 under which this petition is based is Section 18(2)(b), and that the Petitioner's (Respondent's) case was in summary alleging that there was non-compliance in this case with the provisions of the said Section 18(2)(b) of the Act for non-compliance with the Law by the Electoral Commission of Zambia, when Section 18(2) was never pleaded by the Petitioner (Respondent) who brought his petition under Section 18(c), 19 and 20 of the Act.

Ground (2) of Appeal reads:-

The learned trial Judge erred in Law and in fact and misdirected himself when he held that the provisions of Section 18(2)(b) of the Act had been proved in that there was a breach in the conduct of the elections by the Electoral Commission of Zambia in that Section 6 of the Act was not complied with because voters registered under Isoka West Parliamentary Constituency were allowed to vote in Isaka East Parliamentary Constituency, without regard to the provisions of Section 18(4) of the Act to consider whether this breach in the conduct of the election affected the results of that election.

Ground (4) of Appeal reads:-

The learned trial Judge erred in Law and in fact and misdirected himself in holding that the petitioner may not have fully campaigned in Mpungu ward and that this must have affected the outcome or result of the elections in the whole Isoka East Parliamentary Constituency when he found as a fact that if he were to disregard all the votes from Mpungu ward, the first Appellant would still win the election by 568 votes.

Mr. Jalasi filed heads of argument on behalf of the second Respondent with two grounds of appeal.

The two grounds of appeal are these:-

1. The learned Trial Judge erred in law when he held that the non-compliance of the law by the Electoral Commission of Zambia by allowing four of Mpungu Ward polling stations under Isoka East rendered the election null and void despite provisions of Section 18(4) of the Electoral Act Cap 13 and of Section 37 Cap 13.
2. The learned Trial Judge erred in law when he held it was incumbent upon the Petitioner to prove his case on a balance of probabilities.

When we heard this appeal we asked the Petitioner's counsel to speak first in opposing the appeal.

Dr. Mulwila, learned counsel for the Petitioner, filed heads of argument which he augmented with oral submissions.

The sum and substance of Dr. Mulwila's submissions on ground of appeal number (1) was that the learned trial Judge was on firm ground when he invoked Section 18(2)(b) of the Electoral Act because Paragraphs 7 to 10 of petition all point to non compliance of the law by the second Respondent. Dr. Mulwila pointed out that the contention by the first Respondent was that Section 18(2)(b) was not specifically pleaded and not that Section 18 of the Electoral Act was not pleaded. Dr. Mulwila then submitted that failure to specifically plead Section 18(2)(b) cannot be fatal. Dr. Mulwila referred us to the case of Waghorn Vs Wimpy & Co Limited(1) which it was held that:-

~~"Where a Plaintiff's version of the facts was not just a variation of the pleadings but was something new, separate, and distinct and not merely a technicality, there had been so radical a departure from the pleaded case as to disentitle the Plaintiff to succeed."~~

~~It was Dr. Mulwila's submission that in this case, there was no radical departure from the pleadings and no new allegations from those contained in the petition were introduced during trial. He argued that the first Respondent in her answer addressed all the allegations made by the petitioners and she cannot now argue that she had no notice of the case she was required to answer. Dr. Mulwila further argued that the issue that Section 18(c), which was a typographical error for Section 18(2) had been pleaded, is a mere technicality which did not affect the first Respondent in the preparation of her Answer.~~

In arguing ground of appeal number (2), Dr. Mulwila submitted that the breach of Section 6 of the Electoral Act is not in dispute and the learned trial Judge cannot, therefore, be criticized for making a finding that there was a breach in the conduct of the elections. It was Dr. Mulwila's submission that the learned trial Judge was not required to have regard to the provisions of Section 18(4) of the Electoral Act for him to make a finding that there was non compliance of the law under Section 18(2)(b). Further, Dr. Mulwila submitted that, in any case, the learned trial Judge, in his judgment, was alive to the provisions of Section 18(4) of the Electoral but found that the non compliance with the law affected the outcome or result of the election in the whole of Isoka East Parliamentary Constituency.

When arguing ground of appeal number (4), Dr. Mulwila relied on his submissions in grounds of appeal number (2) and (3). It was Dr. Mulwila's submission that the fact that voters registered to vote in four polling stations in Mpungu ward in Isoka West Parliamentary Constituency had their votes counted for Isoka East Parliamentary Constituency was sufficient justification to find that the elections were irregular and not conducted in compliance with the law. It was Dr. Mulwila's submission that the election was not carried out in substantial conformity with the law. Dr. Mulwila ended by pointing out that what happened in this case is not new and urged that these irregularities must be stopped.

Hon. Silwamba and Mr. Hakasenke, learned counsel for the first Respondent, files said of argument with seven grounds of appeal. As we have already said the main grounds of appeal are grounds numbers (1)(2) and (4) as the import of the other grounds of appeal is the same as that of grounds numbers (1)(2) and (4).

Hon. Silwamba, who argued the appeal on behalf of the first Respondent informed us that he was heavily relying on the heads of argument. He supplemented the written heads of argument with brief oral submissions.

In ground of appeal number (1), the heads of argument contain detailed submissions, which referred us to many decided cases. But in the view we take of this appeal, it is so necessary for us to recite the submissions in some detail and review the cases cited. Suffice it to say that we have carefully considered these submissions and the cases cited. The burden of the submissions and the cases cited in this ground of appeal is brief, and that is that, Section 18(2)(b) which the learned trial Judge relied upon to nullify the first Respondent's election was never pleaded.

by the second Respondent by allowing four polling stations in Mpungu ward to vote in the Isoka East parliamentary Constituency. It was Mr. Jalasi's submission that in making this finding the learned trial Judge fell into grave error because the finding was against Section 18(4) of the Electoral Act. Further, Mr. Jalasi observed that the evidence on record was that there were 54 polling stations in the Isoka East parliamentary Constituency and there was no evidence of irregularities or non compliance with the law in any of these 54 polling stations and yet the learned trial Judge nullified the election on the basis of four polling stations in the Isoka East Parliamentary Constituency. It was Mr. Jalasi's submission that had the learned trial Judge taken into consideration Section 18(4) of the Electoral Act, he would not have nullified the election. On this ground of appeal, Mr. Jalasi ended by repeating Hon. Silwamba's submissions in respect of Section 37 of the Electoral Act and the status of Mpungu ward.

In ground of appeal number (2) Mr. Jalasi, citing the Lewanika case we have already referred to, submitted that the learned trial Judge misdirected himself when he stated that the Petitioner had to prove his case on a balance of probability contrary to the standard of proof set in the Lewanika case. The other arguments in this ground of appeal are a repeat of the arguments and submissions on behalf of the first Respondent.

Mr. Jalasi's reaction to this was that the costs should abide the event. The second Respondent cannot pay the costs because the second Respondent was not heard on costs in the court below in terms of Section 30 of the Electoral Act. However, Mr. Jalasi conceded that the mess in this election was caused by the ineptitude of the second Respondent.

We have anxiously considered the evidence that was before the learned trial Judge, the Judgment of the learned trial Judge and the submissions of counsel.

As we see it, the determination of this appeal turns on the question whether the Petitioner pleaded non compliance with the Electoral laws for the learned trial Judge to nullify the election under the provisions of Section 18(2)(b) of the Electoral Act. The Petition was brought under Section 18(c), 19 and 20 of the Electoral Act.

According to the learned trial Judge, by the Returning officer allowing voters registered in four of the six polling stations in Mpungu ward in Isoka West Parliamentary Constituency, the second Respondent violated Section 6(1) of the Electoral Act which reads:-



"6(1) Subject to the provisions of this Section and of Section Seven, every person who is registered in a register of voters for a Constituency shall be entitled to have at a direct election held in that Constituency."

The Respondents do not dispute that voters in the four disputed polling stations in Mpungu ward in Isoka West Parliamentary Constituency voted in Isoka East Parliamentary Constituency or that votes cast in these four polling stations were counted together with votes cast in Isoka East Parliamentary Constituency. The most that the Respondent did was to justify what happened by referring to the past arrangement and practice. The learned trial Judge would have none of this.

According to the submissions on behalf of the first Respondents the learned trial Judge had no basis upon which he could invoke the provisions of Section 18(2)(b) of the Electoral Act because Section 18(2)(b) was not pleaded by the Petitioner. This is the kernel of the first ground of appeal.

Hon. Silwamba, learned counsel for the first Respondent, submitted that the Petitioner having not pleaded Section 18(2)(b), the learned trial Judge could not rely upon it to nullify the first Respondent's election and by relying on Section 18(2)(b) of the Electoral Act the learned trial Judge misdirected himself.

Dr. Mulwila, learned counsel for the Petitioner, argued and submitted that the learned trial Judge was on firm ground to invoke Section 18(2)(b) of the Electoral Act because paragraphs 7 to 10 of the Petition point to non compliance of the Electoral law by the second Respondent. According to Dr. Mulwila, the contention by the first Respondent was that Section 18(2)(b) was not specifically pleaded Section 18(2)(b) was not fatal. Dr. Mulwila then referred us to a passage in the case of Waghorn dealing with pleadings and submitted that in this case there was no radical departure from the pleading and that no new matter was introduced during the trial. It was Dr. Mulwila's submission that the first Respondent in her Answer addressed all the allegations made by the Petitioner and the first Respondent cannot now argue that she had no notice of the case she was required to answer.

Finally Dr. Mulwila submitted that Section 18(c) was a typographical error for Section 18(2): Dr. Mulwila characterized this error as a mere technicality which did not affect the first Respondent in preparation of her answer.



We accept that the passage from the case of Waghorn correctly states the law on pleadings. But we do not find this case helpful to the Petitioner. In the Waghorn case, the cause of action was alleged negligence on the part of the employer. The Petitioner pleaded and called evidence to show that the alleged negligence caused the accident while he was crossing over the bank and that the slope was dangerously slippery; but it was found that the accident had happened by side of the caravan and not where near the bank. Quite properly, the court found that there was a radical departure from the pleaded case as to disentitle the Plaintiff to succeed.

In this case, non compliance with the Electoral Laws was not pleaded at all. As we have already indicated above, the Petition was anchored on Section 18(c), 19 and 20 of the electoral Act. Section 18(c) does not exist in the Electoral Act and we are not idle to accept that there was a typographical error which could not be corrected. Section 19 deals with who may present an election Petition. Section 20 deals with reliefs which may be claimed in an election petition.

We have, therefore, no basis upon which we can consider whether in this case, there has been a radical departure from the pleadings or what the Petitioner said at the trial was within the pleadings.

As we said in the case of Harry Sinkala Vs Electoral Commission of Zambia and Daudi M. Mukwasa(3) (unreported) Section 18(2) having not been pleaded by the Petitioner and there being no amendment to the Petition, it would be drastic departure from the practice governing pleading to consider it now.

We must, therefore, reject Dr. Mulwila's submissions on this ground of appeal, though forceful and ingenious. We accept Hon. Silwamba's submissions that the learned trial Judge fell into error when he invoked the provisions of Section 18(2)(b) when it was not pleaded. This ground of appeal succeeds.

Though the appeal could be determined and dismissed on this ground alone, we have, nevertheless considered whether, if Section 18(2) was pleaded the election could be nullified under the provision of this section as the learned trial Judge did.

This is the issue we have to deal with in the second ground of appeal.

On behalf of the first Respondent, Hon. Silwamba submitted that the learned trial Judge having found that the first Respondent was not in anyway at fault during the conduct of the elections and that the

non compliance with the Electoral Laws was committed by the second Respondent, the learned trial Judge fell into error by not considering the provisions of Section 18(4) of the Electoral Act. It was Hon. Silwamba's submission that the finding by the learned trial Judge that even discarding all the votes from the four polling stations in Mpungu ward the first Respondent would still have won, must have led to the conclusion that inclusion or otherwise of the Mpungu ward did not affect the result of the election. Further, Hon. Silwamba submitted that it was, therefore, a misdirection on the part of the learned trial Judge to find that the failure by the Petitioner to campaign fully in Mpungu ward affected the outcome or results of the elections in the whole of Isoka East Parliamentary Constituency. Furthermore, Hon. Silwamba submitted that the findings that failure by the Petitioner to fully campaign in Mpungu ward affected the outcome or result of the election in the whole of Isoka East Parliamentary Constituency was based on assumptions. Hon. Silwamba argued that this meant that the petition was proved below the standard we set in the Lewanika Case.

Mr. Jalasi's arguments and submissions on ground one can be properly considered under this ground. Mr. Jalasi argued ground one as if Section 18(2) of the Electoral Act had been pleaded. It was, therefore, difficult to fit these arguments and submissions in ground one. Be that as it may, it was Mr. Jalasi's submission that on the evidence on record there was no non-compliance in any of the 54 polling stations in Isoka East Parliamentary Constituency.

It was Mr. Jalasi's submission that the learned trial Judge nullified the election under the provisions of Section 18(2)(b) of the Electoral Act on the ground of non compliance with the Electoral law by the second Respondent by allowing four of polling stations in Mpungu ward in the Isoka West Parliamentary Constituency to vote in Isoka East Parliamentary Constituency but without considering the provisions of Section 18(4) of the Electoral Act. It was Mr. Jalasi's submission that had the learned trial Judge taken into consideration the provisions of Section 18(4) of the Electoral Act, he would not have nullified the election.

Dr. Mulwila, learned counsel for the Petitioner, submitted that there was breach of Section 6 of the Electoral Act which was not disputed; that the learned trial Judge was not required to have regard to the provisions of Section 18(4) of the Electoral Act for him to make a finding under Section 18(2)(b) of the Electoral Act. Further, Dr. Mulwila submitted that, in any case, the learned trial Judge considered the provisions of Section 18(4) of the Electoral Act and found that the non compliance with the Electoral law affected the outcome or result of the election in the whole of the Isoka East Parliamentary Constituency.

We have considered these submissions. Since the arguments and submissions centre on the combined operation of the Sub Section (2) (b) and (4) of Section 18 of the Electoral Act, it is necessary to reproduce these sections in full.

Starting with Sub Section (1), the relevant provisions read as follows:-

18(1) No election of a candidate as a member of the National Assembly shall be questioned except by an election petition presented under this part.

(2) The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say:-

(a).....

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

(c).....

(d).....

(3).....

(4) No election shall be declared void by reason of any act or omission by an election officer in breach of his official duty in connection with an election if it appears to the High Court that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.

properly read, it is clear to us that the operation of the provisions of Sub Section (2)(b) is subject to Sub Section (4). Sub Section (4) reveals to us that the Legislature never intended that the nullification of an election should be taken lightly, as the learned trial Judge did. As it was rightly argued and submitted by Hon. Silwamba and Mr. Jalasi, it is not enough for a Petitioner to prove that there was a non-compliance with the Electoral Laws. It must also be shown that the election was not so conducted as to be substantially in accordance with the provisions of the Electoral Act and that the act or omission complained of affected the result.

The act complained of was the allowing of voters in four of six polling stations in Mpungu ward in Isoka West Parliamentary Constituency to vote for Parliamentary candidates in Isoka East Parliamentary Constituency. On the evidence that was before the learned trial Judge, and as Mr. Jalasi rightly submitted, there was no irregularities reported and proved, from all the polling stations in Isoka East Parliamentary Constituency. As Hon. Silwamba rightly submitted, there was, therefore, no basis upon which the learned trial Judge could find that the mess that took place in Mpungu ward affected the outcome or result of the election in the whole Isoka East Parliamentary Constituency. We, therefore, accept the submission that this finding was based on assumptions.

Even assuming that there was evidence to support the learned trial Judge's finding that there was non compliance of the Election Laws in the whole of Isoka East Parliamentary Constituency, the learned trial Judge could not end there. He was obliged to Sub Section 4 to consider whether in this particular petition there was no substantial compliance with the Electoral laws and whether that non compliance affected the results in the whole of Isoka East Parliamentary Constituency. Failure by the learned trial Judge to consider the provisions of Sub Section (4) was, as counsel for the Respondents rightly submitted, a misdirection

We do not, therefore, accept Dr. Mulwila's submissions that the learned trial Judge was not obliged to consider Sub Section (4) when making a finding under Sub Section 18(2)(b). About the submission that the learned trial Judge was alive to the provisions of Sub Section (4) but found that the non compliance with the Electoral Law affected the outcome or result of the election in the whole Isoka East Parliamentary Constituency, the simple answer is that that finding is unsupported because it is against the evidence on record. This ground of appeal also succeeds:

What remains is for us to consider the second Respondent's second ground of appeal that the learned trial Judge misdirected himself when he said that the Plaintiff must prove his case on a balance of probabilities. Without even going into arguments, we agree that the learned trial Judge misdirected

himself as to the standard of proof. We set the standard of proof in parliamentary election in the Lewanika case. We repeat what we said in that case.

..... Parliamentary petitions have generally long been required to be proved on a standard higher than a mere balance of probability ..... this must be done to a fair high degree of convincing clarity."

In this case, even assuming that Section 18 of the Electoral Act was properly pleaded, it cannot be said that the petitioner proved his petition to the standard required.

About costs. There can be no doubt, and it is admitted by Mr. Jalasi for the second Respondent, that all the confusion in Mpungu ward was caused by the second Respondent. It is only fair that in this case the second Respondent bares the costs of this petition in this court and in the court below. Mr. Jalasi argued that the Attorney-General was not given an opportunity to be heard on costs in the court below as required by Section 30 of the Electoral Act. That may well be so. But in this appeal the Attorney-General was represented throughout by Mr. Jalasi, Principle State Advocate, and we heard Mr. Jalasi on costs and it is our considered view that the second Respondent should bare the costs of this petition both in the court below and in this court.

The result of our judgment is that this appeal has succeeded and we declare that the first Respondent Catherine Namugala was duly elected Member of Parliament for the Isoka East Parliamentary Constituency.

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E.L. SAKALA

CHIEF JUSTICE

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D.M. LEWANIKA

DEPUTY CHIEF JUSTICE

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D.K. CHIRWA

SUPREME COURT JUDGE

.....

I.C. MAMBILIMA

SUPREME COURT JUDGE

.....

PETER CHITENGI

SUPREME COURT JUDGE