IN THE SUPREME COURT OF ZAMBIA **Appeal No. 114/2007**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

IN THE MATTER OF:	AN ELECTION PETITION BY PENISO NJEULU
	AND
IN THE MATTER OF:	ARTICLE 71 OF THE CONSTITUTION OF ZAMBIA
	AND
IN THE MATTER OF:	REGULATIONS MADE PURSUANT TO THE ELECTORALL ACT NO. 12 OF 2006
IN THE MATTER OF:	THE SINJEMBELA PARLIAMENTARY ELECTIONS HELD ON THE 28TH SEPTEMBER 2006

BETWEEN:

MUBIKA MUBIKA **APPELLANT**

AND

PONISO NJEULU **RESPONDENT**

Coram: **Mumba, Chitengi, Silomba, Mushabati, JJS**
Kabalata, A/JS
On 10th October 2007 and 22nd May 2008

For the Appellant: Mr K. Shepande of Messrs Shepande and Company

For the Respondent: Hon. Sakwiba Sikota of Central Chambers

JUDGMENT

Mumba, JS., delivered the Judgment of the court.

Cases Referred to:

1. **Emmanuel Phiri and Others Vs The People, (1978) ZR 79**
2. **Mushemi Mushemi Vs The People, (1982) Z.R 71**

3. **The Attorney General Vs Marcus Kampamba Achiume, (1983) Z.R 1**
4. **Gilbert Arnold Chizu Vs The People, (1979) Z.R 225**
5. **Jack Maulla and Asukile Mwapuki Vs The People, (1980) Z.R 119**
6. **Akashambatwa Mbikusita Lewanika and Others Vs Frederick Jacob Titus Chiluba, (1998) ZR 79**
7. **Anderson Kambela Mazoka and Others Vs Levy Patrick Mwanawasa SC and the Attorney General, (2005) ZR 138**
8. **Zambia Consolidated Copper Mines Limited Vs Matale, (1995-1997) Z.R 149**
9. **Mlewa Vs Wightman, (1995-97) Z.R 171**
10. **Sikota Wina and Others Vs Michael Mabenga, (2003) Z.R 110**

Legislation referred to:

1. **Section 93 of the Electoral Act No. 12 of 2006**

This is an appeal against the judgment of the High Court delivered on 26th June 2007, whereby the election of Mubika Mubika as Member of Parliament for the Sinjembela contituency was nullified at the instance of the election petition by Poniso Njeulu.

The respondent, Mr Poniso Njeulu, was a candidate for parliamentary elections in the Sinjembela Constituency in

September 2006. He stood as a candidate for the United Liberal Party, (ULP). The appellant, Mubika Mubika, was also a candidate in the same constituency for the Movement for Multi-party Democracy (MMD). Another candidate in the same constituency was one, Liyungu Paul, who contested as an independent candidate, he is not a party to these proceedings. After the elections, the poll results were announced as follows:

(i) Mubika Mubika 11,754 votes

(ii) Njeulu Poniso 7,894 votes

(iii) Liyungu Paul 1,347 votes

There were 653 rejected ballot papers. There were 64 polling stations in the constituency. Having got the highest number of votes, the appellant was declared the duly elected Member of Parliament for the Sinjembela Constituency.

The respondent alleged that the appellant was not validly elected because during the campaign the appellant was engaged in malpractices and offered inducements or bribes to the electorate for votes in the constituency; that the appellant vilified the character of the respondent by making false

allegations that the respondent was a thief and a cheat. Other allegations were against the electoral officers to the effect that they did not conduct the elections in compliance with the law.

The respondent petitioned the High Court and sought relief as follows:

"

1. **That it may be determined and declared that the respondent was not duly elected as a Member of Parliament for the Sinjembela Constituency.**

2. **That it may be determined and declared that the Electoral Commission willfully neglected its Statutory Duty to superintend the election process thereby legitimizing a fraudulent exercise favouring the said Mubika Mubika.**

3. **That it may be determined and declared that the electoral process was not free and fair and that the election was rigged and therefore null and void.**

4. **That it may be determined that the corrupt practices and electoral regulations breaches so**

affected the election result that they ought to be annulled.

5. **That it be ordered that a scrutiny, verification and recount be conducted of the parliamentary ballot papers.**
6. **That the petitioner may have such further or other relief as may be just.**

7. **That the respondent be condemned in the costs of and occasioned by this petition. "**

The respondent filed an affidavit verifying the allegations in the petition. Beside affidavit evidence, the respondent gave oral evidence and called 12 witnesses.

The appellant denied the allegations; he gave evidence and called 17 witnesses.

The Electoral Commission of Zambia, which is not a party to this appeal, appeared as 2nd respondent in the court below and succeeded in defending all allegations against it.

The learned trial Judge analysed the evidence adduced by the parties. He found that only two allegations were proven sufficiently. The allegations found proved were those of providing bags of sorghum for purposes of brewing beer as an inducement for voters to vote for the appellant and of vilifying the reputation of the respondent. Upon these two allegations the learned trial Judge nullified the election of the appellant as Member of Parliament for Sinjembela Constituency.

The appellant filed four grounds of appeal:-

The first ground of appeal was that the learned trial Judge erred in law and misdirected himself in finding that the appellant engaged in an illegal practice of bribing Headman Sihupa, PW12, with 2 x 50kg bags of sorghum and disbelieving the evidence of the appellant and his witnesses, RW10 and RW13, on this allegation; that there was no evidence linking the appellant to Headman Sihupa and that the incriminating evidence of PW12 was not corroborated.

The second ground of appeal was that the learned trial Judge erred in law and misdirected himself by holding that the appellant engaged in an illegal practice of publishing false statements in respect of the respondent and by disbelieving the evidence of the appellant and his witnesses denying this allegation; that the evidence on this allegation was contradictory. PW1 said the meeting at Natukoma was held on 10th September 2006 whereas PW10 said it was held on 16th September 2006. There was no evidence on record that the appellant held a meeting at Mambolomoka.

The third ground of appeal was that the learned trial Judge erred in law and misdirected himself in holding that these two alleged practices prevented the majority of voters in Sinjambela Constituency from voting for a candidate of their choice and thereby declaring the election of the appellant null and void.

The fourth ground of appeal was that the learned trial Judge erred in law and misdirected himself in holding that the

appellant was not duly elected and in declaring the election of the appellant as Member of Parliament for Sinjembela Constituency, null and void.

Written heads of argument were filed by both parties. At the hearing, Counsel augmented the written heads of argument with oral arguments.

On the first ground of appeal, Mr Shepande, learned Counsel for the appellant, submitted that the evidence as to the source of the sorghum was available on record. He said that the evidence of RW13 at page 216 of the record of appeal in part, was that, **"... the programme ended in June 2006. In Kapulangi village, wife of PW12 received 1 x 50 Kg bag of sorghum in April. There was another bag in May 2006."** Further, Mr Shepande said that the evidence of RW13 shows that the appellant was not involved in the distribution of sorghum; that it was the respondent, instead, who was involved as the record of appeal, at page 217, showed. It was pointed out that RW10 denied giving any sorghum to PW12 and that

she did not even know PW12 as per her evidence at page 211 of the record of appeal. It was argued that the evidence of PW12 required corroboration because it was contrary to the evidence of PW1 who stated in his evidence that it was Kabukabu and Kalimbwe who gave 2 bags of sorghum to the village headman in Simu ward. It was submitted that there was no evidence on record linking the appellant to PW12. It was submitted further that the evidence of PW12 was not weighty and cogent as was found by the learned trial Judge. In support of this ground of appeal, the appellant cited the cases of **Emmanuel Phiri and Others Vs the People(1)** and **Mushemi Vs the People(2),** on the need for corroboration to support less weighty and less cogent evidence.

Hon Sakwiba Sikota, learned Counsel for the respondent, summarized the submissions of the respondent on the first ground of appeal by first stating that this ground of appeal was on fact and that such an appeal could not be sustained unless the appellant were to show that there was something special in order for this court to interfere with the findings of fact by the

lower court. Learned Counsel submitted that the respondent had filed written heads of argument on which he relied. It was submitted that the finding of the learned trial Judge that PW12 was given sorghum for purposes of brewing beer in his village for the people to drink as an inducement for them to vote for the appellant, was based on the evidence of the respondent, PW12 and RW13.

It was argued that the official distribution of sorghum ended about June 2006 and that that was not the distribution upon which the finding was based as the learned trial Judge had actually pointed out that it was not the official distribution that mattered. It was submitted that the sorghum that was given to PW12 by Kalimbwe and RW10 was the one that was at issue. PW12 was given direct instructions by RW10 to use the sorghum specifically to brew beer because the sorghum had been given to the appellant by RW13 to boost his campaign. It was submitted that the learned trial Judge chose to rely on the evidence of PW12 as he found the witness reliable. It was also submitted that the only point of law which was raised was

against the conclusion by the learned trial Judge that the appellant by providing the sorghum for purposes of inducing the voters, had contravened the Electoral Act in that the activity of bribing the headman, PW12, with bags of sorghum was illegal. It was submitted that on the facts found by the learned trial Judge this court could not interfere because the findings of fact could not be said to be either perverse or having been made in the absence of relevant evidence or upon a misapprehension of the facts or that there were findings of fact which, on a proper view of the evidence, no trial court acting correctly, could reasonably make. In support of these submissions, the respondent cited the case of **The Attorney General Vs Marcus K. Achiume(3).**

On corroboration for the evidence of PW12, it was submitted that where evidence of a single witness was sufficient, the court was entitled to accept it and make a finding of guilt as long as the witness was competent. The respondent cited the cases of **Gilbert Arnold Chizu Vs the People(4)** and **Jack Maulla and Asukile Mwapuki Vs the People(5).** It was

submitted that the learned trial Judge had occasion to observe the demeanor of the witnesses and he believed PW12.

In support of the second ground of appeal, it was submitted that the learned trial Judge did not evaluate the evidence to the required standard of proof on the allegation of vilification of the respondent by the appellant during the campaign period. In particular, it was pointed out that the learned trial Judge's findings at page 36 of the record of appeal, paragraphs 5 to 20, to the effect that, **"nonetheless the testimonies of both PW10 and PW11 that at the rallies RW1 addressed at Natukoma Primary School on 16/09/06 and at Mambolomoka Basic School respectively, he vilified PW1 as poor, grade 9, classified daily employee, who was a cordon line Guard, who stole K500,000.00 of Mutomena and GRZ battery at Natukoma",** was not supported by the evidence because there were contradictions on dates and places where the appellant addressed rallies in person and where his agents addressed rallies in the absence of the appellant.

It was argued that the evidence of the respondent who was, PW1, at page 127 of the record of appeal, shows that the public meeting at Natukoma was held on 10th September 2006 whereas PW10 at page 173 of the record of appeal, testified that the said meeting was on 16th September 2006. It was submitted that the evidence of PW10 was not corroborated by any other witness since it was contradicted by the evidence of the appellant who stated, at page 189 of the record of appeal, that PW10 never attended the appellant's rally.

Further, it was argued that the learned trial Judge made a finding that the appellant addressed the rally at Mambolomoka Basic School when the evidence shows that the appellant did not address that rally, it was addressed by Andrew Mbwainga, who was said to be an agent of the appellant, that was in accordance with the evidence of PW11 at page 178 of the record of appeal. It was contended that the final conclusion by the learned trial Judge was made without evaluating the evidence to the required standard of proof. In particular, it was submitted that the passage **"be that as it may, it is evident that**

vilification became a sing-song at other rallies hence its repetition at Natukoma Primary School and Mambolomoka Basic School by RW1" was a wrong conclusion by the learned trial Judge. In support of these submissions, **Akashambatwa Mbikusita Lewanika and others Vs Frederick Jacob Titus Chiluba(6)** was cited with reference to the direction of the court on the standard of proof required in election petitions was cited thus, at page 169, **"...parliamentary election petitions have generally long required to be proved by a standard higher than on a mere balance of probability."**

In response to the second ground of appeal, Hon Sakwiba Sikota conceded that at Mambolomoka, the appellant did not address the meeting, it was his agent who spoke the words of vilification but Counsel pointed out that the appellant could not run away from the acts of his agents. Hon. Sakwiba Sikota submitted further that even if that particular meeting was to be set aside, there were still other meetings at Natukoma where words of vilification were uttered by the appellant. Learned Counsel submitted that the learned trial Judge went further

and made a finding that words of vilification of the respondent became a singsong of the campaign. It was argued that there was evidence of vilification at two places and that would suffice for purposes of nullifying the election. Counsel submitted that the Judge was able to see the witnesses and observe their demeanor whereas the appellate court could only second-guess on that. It was submitted that as the actual words of vilification were not challenged or disputed, the learned trial Judge was therefore entitled to make the finding as he did.

In the written heads of argument, it was also argued that the appellant did not disassociate himself from the words complained of and uttered by his agents. It was submitted that regardless of the contradictions on the dates of the rallies, the evidence was sufficient that rallies were held and that in some cases, it was the appellant himself and in others it was his agents who uttered words of vilification against the respondent. After pointing out the various paragraphs of evidence in the record of appeal, it was submitted that the higher standard of

proof required in the case of **Akashambatwa Mbikusita and Others Vs Titus Chiluba(6)** was met.

In support of ground three, it was submitted that according to the evidence on record both by the appellant and 2RW6 there were 64 polling stations in the Sinjembela Constituency. It was, therefore, erroneous to conclude that the two allegations found proved, by the learned trial Judge, which finding was contested by the appellant, did prevent the majority of the voters in the constituency from voting for a candidate of their choice. In support of this ground of appeal, the case of **Anderson Mazoka and Others Vs Levy Patrick Mwanawasa SC and Others(7)** was cited with reference to this court's statement that **" It follows that for the Petitioner to succeed in the present Petition he must adduce evidence establishing the issues raised to a fairly high degree of convincing clarity in that proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred, or that the election was so flawed that the defects seriously**

affected the result which can no longer reasonably be said to represent the true and free choice and will of the majority voters." The gist of the submission on this ground being that the findings of the learned trial Judge on the allegations fell short of the required standard of proof in an election petition.

On the third ground of appeal, the respondent submitted that the ground was based on an erroneous interpretation of the provisions of **Section 93 (2) of the Electoral Act No. 12 of 2006**. After citing the subsection, it was submitted that the tenor of that law was to provide alternative grounds on which an election could be voided and that the same could be done under **Section 93 (2) (a), (b) or (c),** and that the respondent only had to prove either that the majority of the electorates were avoided from electing a candidate they preferred or that there was no compliance with the provisions of the Act relating to the conduct of the elections or that a corrupt or illegal practice was committed in connection with the election. It was submitted that the evidence in this case showed that both the appellant

and his agents uttered the words complained of and where the appellant's agents did so, the appellant did not show any disapproval and that the evidence was sufficient to invoke **Section 93 (2) (c)**.

In support of ground four, it was submitted on behalf of the appellant that the court can interfere with the decision of the lower court and can draw its own conclusion or, the court can reverse a trial Judge's findings of fact or law or, of a mixed law and fact. In support of this submission the case of **Zambia Consolidated Copper Mines Limited Vs. Matale(8)** was cited with reference to situations when this court can vary findings of fact by the court below. It was contended that upon the **Matale case**, this court can interfere with findings of the court below and declare the appellant as duly elected Member of Parliament for Sinjembela constituency, thus, allow the appeal with **costs**.

In response to the fourth ground of appeal, it was repeated that ground one and two were against findings of fact. These grounds of appeal would have amounted to points of law if the

learned trial Judge had made findings against the grain of the evidence on record. It was submitted that **Section 93 (3) (a) of the Electoral Act** required the appellant to prove that no illegal practice was committed with his knowledge and consent or approval, in order to avoid his election being declared null and void and that when he failed to challenge the evidence against him, he implicitly admitted uttering the words complained of himself or through his agents and he could not have recourse to the provisions of the said **subsection 3**. It was submitted that the two misdeeds found by the learned trial Judge were against **Sections 79 (1) (c) and 83 (2) of the Electoral Act No. 12 of 2006**.

The respondent also submitted that by **Section 15 (1) of the Supreme Court of Zambia Act, Chapter 25 of the Laws**, the court could dismiss an appeal where allegations committed are of a criminal nature even if it considered that no miscarriage of justice actually occurred. It was finally submitted that the learned trial Judge was on firm ground when he held that the appellant was guilty of corrupt practices.

The respondent urged the court to dismiss the appeal with costs here and below.

We are grateful to Counsel for their submissions and the authorities cited. We have considered them all.

The evidence on the allegation of sorghum distribution was mainly from PW12, Emmanuel Sihupa Kambukwe and RW13, Mubonayi Kumayiba. The evidence of the respondent was based on reports which he received from those in the field.

RW13, testificd that he was a civil servant in Shangombo district. In January 2005, there was a Programme for Urban Self Help known as 'PUSH' whereby government departments worked together with the World Food Programme to provide essential services and commodities to the population in the district. RW13, was the Project Food Aid Monitor for 'PUSH' in the district. He, together with other officers used to distribute sorghum, cooking oil, beans, maize, rice, peas, herbs and bulga wheat. Beneficiaries for the commodities were identified

through village headmen in the district. PW12 was village headman for Kapengele village; he identified the vulnerable villagers for purposes of food distribution. The programme distributed one 50kg bag of sorghum to the wife of PW12, in April 2006 and another bag in May 2006. RW13 distributed about five bags of sorghum in each village in the district. RW1 testified that other people were involved in the programme, including the respondent, who was responsible in monitoring the distribution at Natukoma and other nearby points, which included five stations. This witness testified that RW10 never distributed sorghum as she was not a member of the committee responsible for such services in the community. He also said that RW1 in the court below, the appellant herein, was never involved in food relief distribution. According to RW13, food was never distributed in August 2006.

PW12, whose particulars were given as a farmer of Ngunye village testified that he was a village headman. On 16th August 2006, one, Kalimbwe Litenga Chipipa, invited him to his village in Kapengela, where upon arrival, PW12 was referred to RW10

who gave him two bags of sorghum and told him that the sorghum came from the appellant and was for purposes of brewing beer by him as village headman. PW12 said that RW10 informed him that sorghum came from RW13, who gave the sorghum to the appellant to boost his campaign. PW12 was given two 50kg bags of sorghum which he, in turn, distributed to the people in his village in his capacity as headman. He told the people to brew beer, to drink and celebrate so that they could vote for the appellant. This witness testified that RW10 was an agent for the appellant whereas Kalimbwe Litenga Chipipa was the MMD branch chairman. On 26th August 2006, the beer was ready and was drunk by the villagers. On 28th August 2006, the respondent complained to him, PW12, on the beer brewing.

RW10 denied ever having distributed sorghum saying that she did not even know PW12. She also said that she was not a member of the committee which distributed sorghum.

The learned trial Judge stated that he had no reason to disbelieve PW12, and accepted his evidence. He found that indeed, sorghum was distributed for purposes of brewing beer as an inducement to voters.

We have examined the evidence, we cannot fault the learned trial Judge when he accepted the evidence of PW12 as he had observed the witnesses. The learned trial Judge did point out in his judgment that what was at issue was not sorghum distribution which was conducted officially during the PUSH programme, it was the sorghum which was given to PW12 with instructions that beer should be brewed for people to drink as an inducement for them to vote for the appellant. The learned trial Judge found that that was an illegal practice. However, he did not go further to discuss whether the said beer brewing was widespread or that it went beyond Ngunye village so as to affect most of the registered voters in the constituency.

Had the learned trial Judge approached the evidence correctly, we cannot say he would have nullified the election of the appellant.

Upon perusal of the record, it is clear that PW12 was a village headman for only Ngunye village. No statistics were given as to how many litres of beer were brewed and how many villagers partook of the beer. The evidence shows that only villagers in Ngunye village enjoyed the beer. A perusal of the record does not show that villagers from other villages trekked to Ngunye village for the beer. We have not come across any evidence that the majority of registered voters inhabited Ngunye village at the material time. No statistics of beer drinkers were given. We therefore cannot tell how widespread the beer drinking was for us to be able to determine whether large numbers of registered voters in the constituency were affected, thus the levels of influence of the beer on the voters cannot be determined. Had the learned trial Judge analysed the evidence properly, he would not have come to the conclusion that he came to. Clearly, the evidence did not support widespread

inducement of registered voters with beer in the constituency. It was therefore a misdirection to base the nullification of the elections on this allegation.

On the allegation of vilification of the respondent by the appellant during political rallies held before polling day, the learned trial Judge found that indeed the appellant vilified the reputation of the respondent at the rallies addressed at Natukoma Primary School and at Mambolomoka Basic School. The vilification was that the respondent was a mere grade 9, a classified daily employee who was a guard; that he stole K500,000 from the Mutomena project, he also stole a GRZ battery at Natukoma. The learned trial Judge found that the respondent uttered the words complained of because the whole story blew-up when RW17 queried the appellant about the piggery and poultry project which RW17 and other women club members had paid for. The learned trial Judge found that the vilification became a singsong at other rallies and was repeated at Natukoma Primary School and at Mambolomoka Basic School by the appellant.

For purposes of this appeal, the relevant evidence on vilification of the respondent came from witnesses who included PW10, Pelekelo Sikange, PW11, Francis Kapama and PW13, Lawrence Mboma and, to some extent, PW2, Kapopa Lambi and PW4, Boster Putelo Shonge.

PW10, a farmer of Mbumba Village in Shangombo, was the UDA ward chairman for Mulonga Ward. On 16th September 2006, he attended a meeting addressed by the appellant at Natukoma Primary School where appellant informed the meeting that respondent was of grade 9 educational qualifications whereas he, appellant, was of grade 12 level, therefore people should vote for him. Appellant said that respondent was a thief who had stolen K500,000 from Mutomena poultry and piggery project and a government battery at Natukoma; that the respondent was not a veterinary doctor but a mere guard. PW10 went on to say that the rally was attended by well over 70 people who included school children of Natukoma Primary School which went up to grade 9 level.

PW11, a farmer of Makonko village in Shangombo, was the polling agent for the respondent on the ULP ticket. He testified that one, Andrew Mbwainga, who identified himself as agent for the appellant, held a rally at Mambolomoka Basic School on 20th September 2006. Mambolomoka Basic School was a polling station for elections. PW11 testified that the respondent's reputation was vilified as he was referred to as a mere grade 9, a thief who stole K500,000 from Mutomena project and a government battery at Natukoma. This witness stated that the appellant was absent from that meeting. The witness reported the vilification to the police but no action was taken.

PW13, a farmer of Lifelo village, was Ward chairman for the Mulonga Ward for ULP. On 3rd September 2006, he went to Natukoma police post where one, Jones Mubika, said to be the agent of the appellant, told a gathering of people there that they should not vote for the respondent who was a thief and urged people to vote for the appellant who was his son (Jones

Mubika's son). Upon reporting him to the police, the police stopped Jones Mubika from proceeding with his address but he became hostile, in the end police applied tear gas canisters and dispersed the crowd. PW13 narrated other events which, for purposes of this appeal, are not relevant.

PW2, a farmer of Kangolola village also testified that on 19th S eptember 2006, the appellant addressed a meeting in Kapengela village where he said that respondent was a mere grade 9 and not a veterinary doctor but just a guard who was poor, a thief who stole K500,000 from Mutomena project and also stole a government battery from Natukoma.

PW4, a farmer of Mulele village, gave evidence that appellant vilified the respondent at a meeting on 10th September 2006 in similar vein as narrated by PW2.

Most of the evidence on rallies or public meetings shows that appellant's agents uttered words of vilification, the appellant did so too at other rallies. However, the appellant did

not disassociate himself from his agents' activities. We agree that indeed the appellant did describe the respondent in derogatory terms. While we uphold this finding by the learned trial Judge that the appellant did vilify the respondent in the course of his election campaign, we are at pains to verify the extent of influence on registered voters in the whole constituency.

The public meetings where the vilification took place were of modest attendance, there is no evidence that all those people who attended the meetings were registered voters. As for the meeting at Natukoma School, according to PW10, those addressed by the appellant included school children at the school which went up to grade 9. No evidence was adduced as to how many of those school going children were in fact registered voters. Even though the learned trial Judge found that the vilification was repeated at various rallies, other than the evidence of PW2, PW4, PW10, PW11 and PW13, there is no evidence indicating other places where the meetings took place for us to be able to say whether or not a large part of the

constituency was covered. We are unable to locate evidence which shows the level of influence in the whole constituency which had about 64 polling stations. Even if one were to compute the numbers of registered voters by adding recorded votes to the rejected ballot papers, one would still find that the numbers given for the rallies held were too few for one to conclude that the majority of the voters were influenced. The evidence, therefore, does not indicate widespread vilification of the respondent, neither does it indicate that the majority of the registered voters were influenced against the respondent. In this type of allegation, statistics of registered voters who attended the rallies should have been given to assist the trial court on the extent of influence in the constituency.

In the final analysis, we find that it was not proved that the majority of voters in the constituency were or might have been prevented from voting for their preferred candidate.

Having dealt with the first and second grounds of appeal, we do not find it necessary to discuss the third and fourth

grounds of appeal as points raised are contained in the first and second grounds of appeal. However, we find the respondent's submission on the application of **Section 93 of the Electoral Act**, rather strange. We cannot accept that construction of a straightforward section should be approached from such a distorted angle.

The relevant parts of **Section 93 of the Electoral Act, No. 12 of 2006**, read:-

"

93(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) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred;

(b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions 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 provision and that such non-compliance affected the result of the election;

(c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of that candidate's election agent or polling agent; or

(d) that the candidate was at the time of the election a person not qualified or a person disqualified for election.

(3) Notwithstanding the provisions of subsection (2), where, upon the trial of an election petition, the High Court finds that any corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court further finds such candidate has proved that-

(a) no corrupt practice or illegal practice was committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;

(b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidates election agent's;

the High Court shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

(4) No election shall be declared void by reason of any act or omission by an election officer in breach of that officer's 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 the election. "

The provision for declaring an election of a member of parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or, might have been prevented from electing a candidate of their choice.

It is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate.

In the case of **Sikota Wina and 2 Others Vs Michael Mabenga(10)**, we said that: **"As an appellate Court, we have to look at the evidence supporting each allegation and see if, properly directing himself, the learned trial Judge would have found the allegations proved to a degree higher than on the balance of probability."**

In conclusion, we wish to point out that the principle laid down in the cases of **Akashambatwa Mbikusita Lewanika and Others Vs Frederick Jacob Titus Chiluba(6), Mlewa Vs**

Wightman(9) and Anderson Kambela Mazoka and Others Vs Levy Patrick Mwanawas SC and the Attorney General(7), is galvanized in **Section 93 (2) (a) of the Electoral Act**, this is that an election petition requires a higher standard of proof than an ordinary civil claim. The petition herein was not proved to the required standard.

We do not appreciate the reference to Section 15(1) of the Supreme Court Act, Chapter 25 of the Laws by the respondent as the Section applies to Criminal appeals only.

This appeal, therefore, succeeds, we allow it. We set aside the declarations of the court below. We declare that Mubika Mubika was duly elected as Member of Parliament for Sinjembela Constituency in the September, 2006 general elections. Costs to the appellant here and below, to be taxed in default of agreement.

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F.N.M. MUMBA
SUPREME COURT JUDGE

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P. CHITENGI
SPREME COURT JUDGE

.....

S.S. SILOMBA
SUPREME COURT JUDGE

.....

C.S. MUSHABATI
SUPREME COURT JUDGE

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T.A. KABALATA
ACTING SUPREME COURT JUDGE