

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

19  
APPEAL NO. 108/2007

SCZ/8/90/2007

**BETWEEN:**

IN THE MATTER OF: ARTICLE 72 (1)(a) OF THE CONSTITUTION  
OF THE REPUBLIC OF ZAMBIA

AND IN THE MATTER OF: SECTION 93(1) OF THE ELECTORAL  
ACT NO. 12 OF 2006

AND IN THE MATTER OF: AN ELECTION PETITION

**BETWEEN:**

SIMASIKU NAMAKANDO

APPELLANT

**AND**

EILEEN IMBWAE

RESPONDENT

Coram: CHIRWA, MUMBA, CHITENGI, SILOMBA, JJS AND  
KABALATA, AJS

On 22<sup>nd</sup> November 2007, 26<sup>th</sup> February, 2008 and 11<sup>th</sup> February,  
2009

For the Appellant:

Mr. K. Shepande, Shepande and  
Company

Mr. R. Mainza, Mainza and Company

For the Respondent:

Mr. S. Sikota, Central Chambers

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**JUDGMENT**

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Kabalata, AJS, delivered the judgment of the court.

*Cases referred to:*

1. *Alex Cadman Luhila vs. Batuke Imenda*  
2002/HP/EP/0017
2. *R. vs. Rowe, Ex parte Mainwaring*
3. *Akashambatwa Lewanika and Others vs. FJT Chiluba*  
SCZ 1998 p. 5
4. *Michael Mabenga vs. Sikota Wina* SCZ No. 15 of 2003
5. *Mlewa vs. Weighman (1995-97)* ZR 171
6. *GDC Hauliers (Zambia) Limited vs. Trans-Carriers*  
*Limited (2001)* ZR 497
7. *Anderson Mazoka vs. Levy Patrick Mwanawasa and*  
*Another* SCZ/EP/01/02/03/2002

This is an appeal against the judgment of the High Court dated 30<sup>th</sup>, March, 2007, in an Election Petition in which the High Court declared the Respondent Eileen Imbwae to have been duly elected as member of Parliament of Lukulu West Constituency.

For convenience, we shall refer to the Appellant as the petitioner, and the Respondent as the Respondent, respectively, which designations they were in the Court below.

The salient facts in the appeal, which are not in dispute, are that the petitioner and the Respondent contested the Elections held on 28<sup>th</sup> and 29<sup>th</sup> September 2006. The petitioner stood on the ticket of



the Movement for Multiparty Democracy (MMD) while the Respondent stood on the ticket of the United Liberal Party (ULP). There were also other candidates, who stood on different tickets in the same election.

The respondent, Eileen Imbwae, was declared duly elected member of Parliament for the Lukulu West Constituency by the Returning Officer. The Petitioner petitioned the High Court praying for the following declarations:

- (i) That the election of the Respondent as Member of The National Assembly for Lukulu West Parliamentary Constituency is void.**
- (ii) That the illegal practices so affected the election result that the same ought to be annulled.**
- (iii) An order that a scrutiny of the Ballot Papers be carried out by the Court.**
- (iv) That the costs occasioned by this petition be borne by the Respondent.**

The petitioner gave oral evidence on oath in support of the Petition and called 17 witnesses. The evidence as laid by the Petitioner was



that he was a candidate in Lukulu West Constituency under the Movement for Multi-party Democracy ticket. The other candidates were that Respondent, Vincent Kamuthi and Peter Kazhila. The respondent polled 3400 votes while he polled 3354, Vincent Kamuthi 231 and Kazhila 133 votes. On 18<sup>th</sup> August he was informed by his agents Alfred Lungu, Mr. Chinyamba, Mr. Kambo PW3 and Mrs. Kutemba that a meeting at Dixons Village the Respondent told the audience that he had been disqualified as a candidate and he should not be voted for as that will be a waste of time. He was told that she further told audience that he had been stealing constituency Development Fund herein called CDF amounting to K60,000,000 every year and the youth fund in the same amount.

At Kakuyu, apart from the Respondent alleging that he was disqualified, she went on and said he was sick and repeated the chieving allegations. She made these allegations while accompanied by the Chief Akabati, who told the audience that he had been sent by the senior chief to solicit for votes for the Respondent and those who would not comply with the directive would loose fish ponds and



fields. His informers were Mr. Iseka, Mr. Progress Sitali, Mr. Mbambo and Mr. Sibuleki PW11. These allegations were repeated at Mutaba. On another date, Induna Kabotana took a letter to villagers directing them to vote for the Respondent or else the village registers and fields will be confiscated.

He was informed that by the presiding officer, Sitambi Sitali PW8 Alex Kamana PW9, Patrick Nosiku and Sitali Wasamunu that during voting day Morgan Chilemu, George Wayota and Machile were campaigning for the Respondent while voting was going on. They made sure everyone voted for the Respondent. At Chiyaka allegation of the Petitioner stealing CDF was repeated. He was informed by a Mr. Mutoshi and Kakamba. It was his contention that the allegations of stealing constituency funds, youth fund, being disqualified and being sick were patently false.

At Mbao and Mambungo polling stations voters voted on 29<sup>th</sup> September. He was informed by Mr. Lipoko, Mr. Kalaluka and Dennis Mwangule, that while voting was underway George Wayota who was Respondents' agent urged people to vote for Respondent as Petitioner was stealing constituency funds. They further told him



that Chief said unless they voted for the Respondents their fish ponds and fields will be repossessed.

The support Chief Akabati rendered to the Respondent was unprecedented and this disadvantaged him. The evidence by the petitioner was hearsay, but admissible as it was intended to show that such reports were made to him but not to establish their truthfulness.

PW2 was Kelvin Sitali Wasamunu a peasant farmer who testified that on 28<sup>th</sup> September 2006 he went to cast his vote at Kakulanda polling station. Where he was coming from, there was noise, there were people at the windows of the polling station. He knew one Kalaluka Nakubiana who was showing the voters the symbols of the Respondent stretched hands, which was United Liberal Party symbol herein called ULP, which was stretched hands.

~~PW3 was Chinyemba Kaimo a fisherman. According to him he attended a meeting addressed by the Respondent at Mutete. In her company was Chief Akabati, Muyuka Nyalenga, DW6, who was introducing the visitor. After DW6 introduced chief Akabati, he knelt and called the Respondent and said, "this is the candidate we~~



hae brought and the Respondent started speaking. She said petitioner was not allowed to stand by the President. She told the meeting that petitioner had received K60,000,000 Constituency Development Funds and K60,000,000 Youth Fund and people were asked if they saw that money when the audience answered that they don't know. She asked, 'where does the money go.' The people were annoyed. She further asked them whether a constituency office had been built from the K630,000,000 sent by the government and people answered in the negative.

PW4 was Alfred Libingi, a peasant farmer. He testified that he was on the bridge when he found the respondent who was on the other side. There were a lot of people from Lukulu West and petitioner told them 'they should elect her as petitioner has been rejected by President Mwanawasa because he is a thief-she said he was being given CDF and Youth fund in the sum of K60,000,000 respectively.

~~He sent his brother Fabian Chinyama to go and inform petitioner what they had heard from the Respondent. The witness attended a meeting at Dickson village and he found that the message was the same. At that meeting Respondent said petitioner was given~~



K630,000,000 to build a constituency office and asked the audience to point out to her where the office was. She went on that such a person was a thief and asked the audience to vote for her and remove after three years if she is not performing. Chief Akabati at the same meeting said he had brought Respondent a child of the palace, they should vote for her.

PW5 was Kakusa Monde, a housewife she testified that on 18<sup>th</sup> August 2006 Respondent called them for a meeting in Mutete Dickson area. She knew Respondent before. When she arrived at the meeting she found chief Akabati and Nyalenga who said, they had brought Respondent a child of a chief so that we can vote for her. Respondent told the meeting that petitioner had been rejected by President Mwanawasa, she alleged that petitioner was misappropriating Constituency Development funds and youth funds in the sum of K60,000,000 respectively.

PW7 was Davies Lipoko, Community Health worker. According to him, he attended a meeting at Chinonwe Basic School on 13<sup>th</sup> September 2006. The meeting was addressed by Yalenga, Monge Muyunda, Chibunda Machile, Sundila Nasilele, respondent and



chief Akabati. Respondent said petitioner was stealing money for development of the area up to K60,000,000 and a similar amount for youth funds. The sum of K630,000,000 for the construction of a constituency office has also been misappropriated by petitioner. Yalenga introduced respondent as the person to vote for as a woman must rule.

PW8 was Sitambi Sitali, a Local Court Officer-in-Charge, who was also presiding officer of Kakulunda polling station. He stated that they opened the polling station late at 0630 hours. At 0800 hours voters came in large numbers. ULP cadres started campaigning through windows as the classrooms they were using had no glass panes. He engaged PW9 a neighbourhood person to help identify some of those people. The voters could be told to vote for Respondent or get out. He moved one of his officers a lady to that window but they insulted her. He tried to intervene they asked him to mind his business. The group was so unruly that they threatened to beat a policeman. He identified George Wayoya as one of those people.



PW9 was Kamana Alex a peasant farmer and also a neighbourhood watch member. He testified that he went to participate in elections at Kakulunda polling station. He initially went at 0630 hours and later at 0900-1000 hours, he found so much noise, the presiding officer called him and asked him to assist. There were canvassing for the Respondent. They threatened him with violence and they threatened the policeman as well. They were showing palms which is a symbol of ULP. Later PW8 told the people that elections were not free and fair.

PW10 was Mwangala Sitali unemployed who testified that he voted at Mbao, polling station on 29<sup>th</sup> September, 2006. The polling station opened at 0800 hours and closed at 1600 hours. They heard before they voted that Respondent had won. It appeared that upon hearing that respondent had won everyone voted for Respondent.

PW12 was Edwin Simasiku Mukelenga a farmer and MMD Councillor, who testified that he was a traditional Induna under the Jurisdiction of Chief Akabati. Chief Akabati was senior to him and he produced the National registration Card as evidence that the



chief indorsed on it was Akabati. Chief Akabati repossessed a pond namely Lwatembo on 31<sup>st</sup> August 2006 because he did not support the Respondent, which fish pond was given to Kandumba who was a Respondent's supporter.

Since he could not sue the chief he took the matter to the senior chief and they met on the 16<sup>th</sup> November 2006, but they found that the senior chief had left for Lusaka. They were given 6<sup>th</sup> February 2007 that is when his appeal will be heard. The fish pond was repossessed from him during the election period.

PW13 was Florence Namakando, unemployed. She testified that she was a registered voter at Mataba polling station. She never attended any meeting. A letter was brought at the village by Namate written by Anakene coming from the Senior Chief Ananganya, Anakene is an Induna in Namyula Kabotana is an Induna in his village. The Letter read:

**"My subjects of Mataba area, you are going to see chief Akabati who will bring Imbwae, you should vote for her do not disgrace me."**



She was surprised that a chief can engage himself in campaigns. She asked Namate how the chief can participate in campaigns as she had never seen it since she was born, later on in September chief Akabati, the respondent and others addressed a meeting and the chief asked if they had seen his letter, that is before he proceeded to address the meeting. They answered in the affirmative.

PW14 was Kanjengo Musangu, a peasant farmer who testified that Akabati on 2<sup>nd</sup> September told the meeting that he brought the respondent, his young sister to stand, and they should vote for her whoever does not vote for her he will chase him from his land and that he had been sent by the senior chief. He also threatened that if they voted for another party he will grab village registers, and fields. When the witness heard that PW12's fish pond had been grabbed, they were afraid that is why they voted for the Respondent.

PW15 was Kabombo Mutafela a council secretary, who was also the District electoral Officer. He testified that he received a complaint during campaign period from the petitioner, but both parties were difficult to contact.



PW16 was Collins Kwalombota a court clerk at Kashishi local court who testified that he was polling Assistant at Chiyaka polling station. Later on after polling opened some young men came who were saying they were going to vote for a lady and they were shouting that Zambia was for all of us. After the voters had voted they were not going away. They were saying vote for ULP. The young men were about 50 metres away.

PW17 was Kayilu Bumbo unemployed who testified that Akabati brought Respondent to be voted for by the people of Kankuyu. He further said petitioner had been stopped from standing. In a nutshell that was the petitioners case.

The first witness for the Respondent was Respondent herself.

Respondent testified that she has an NRC bearing the date of birth as 21<sup>st</sup> August 1947, village Namwati Chief Mwenda, which

she got on 20<sup>th</sup> May 1966. She denied that Akabati was a chief, he

is an Induna of Nyala she said Akabati accompanied her, as he did

not want her to be moving alone, though there other places Akabati

who is her blood brother did not accompany her. i.e, in Nyala ward

which he oversees. Her brother only thanked the people who



attended her meetings, he never said he was going to grab ponds nor did the brother say that petitioner had withdrawn on the account of illness.

She said her brother could not have spoken at Sibungana which is in Nyala as he was not with her in Nyala nor did the brother make any threats to withdraw village registers or allege that petitioner had been disqualified nor did she say so or anybody she was travelling with she denied having addressed a meeting on the 18<sup>th</sup> of August but 19<sup>th</sup> of August. On the 18<sup>th</sup> August she addressed a meeting at Katebe and Mukuma. She could not have addressed three meeting she was at Mutete on the 19<sup>th</sup> August 2006.

She said the constituency chairman was setting the agenda and he spoke something about her and the elections, while she spoke about her background and what she intended to do. She denied ever saying petitioner stole constituency funds of K60 million since 1991 and none of those in her entourage said so. The issue of constituency Development Fund came after questioning and this was in response to a question as to where she was going to get funds for development as she was not in a suit, meaning she did



not have a presidential candidate. She answered that government disburses constituency and youth fund to constituencies without discrimination. She went on that she had been involved in the local government support programme from 1994-1997 when these funds were introduced by the ODA after the councils sold houses and she discussed Zamsif as well.

She denied ever calling petitioner a thief or having engaged George Wayota or Morgan Chilemu as her agents nor did she tell Machile who was a candidate for local government elections to campaign for her on polling day. She was not aware her supporters solicited for votes on polling day. It was her testimony that through out the campaign period she started by talking about her educational background and work experience after question time the brother thanked the people and the meetings closed with a prayer and opened with one.

~~She wound up her testimony by denying that she told people that petitioner was not going to stand and that she was not a traditional authority to threaten people that she was going to grab fields.~~



KW2 was Benson Kawilila, a peasant farmer who was a polling agent of United Liberal Party, who did not perform his duties because the oath form was not delivered to him by Machile. He went to the polling at 0600 hours, that was Kakulunda polling station and he voted at 1100 hours. He saw nothing peculiar until he went home. He went back to hear the results at 2100 hours and the presiding officer PW8 Sitali Sitambi told them that the voting had gone on well.

RW3 was Brave Samweye, a fisherman, who was United Liberal Party polling agent at Mambungo. The voting started late because the ballots arrived late. He witnessed voting from 0600 - 1800 hours and saw nothing sinister. President Mwanawasa got 196, respondent got 123. The elections were on 28<sup>th</sup> September not 29<sup>th</sup> September 2006.

RW4 was Nakene Kabotana who is an Induna, who testified that the attributes of a chief is that he has a palace built by members of the public. His yard is called Lyankamba and a smaller yard called Mutala and within the Mutala there is a Kashando where the chief meets visitors while Indunas have their homes within their villages.



The chief has a government flag hoisted at his palace and the chief has messengers. He denied having been given a letter by chief Ananyanga Imwiko to decampaign the petitioner and that those voting for him will have village registers and fields grabbed from them. He said neither himself, other Indunas nor the chief knew about such a letter.

He went on to say that Chief Ananganga was enraged and asked, **"since when did petitioner find the chief campaigning,"** the chiefs were attached to government. The chief delegated the witness to travel to this court and hear the matter. He said the Indunas do not have symbols and there is no chief among them. He knew Inuna Akabati RW 24, he is a Silalo Induna whose jurisdiction ends in Nyala ward, he has no jurisdiction in other wards. He went on that RW 24 Induna Akabati had been summoned by Mukelenga who sued him over some ponds in Lwatembo and the matter was coming up on 6<sup>th</sup> February 2007. It was the pond for Imbwaë and Wilson Kandumba was taking care of it. Imbwaë is the father of Akabati. The complaint from Mukelenga was that Akabati had grabbed the pond from him.



RW5 was Musole Paseko a canoe paddler who testified that he stays in Namamayula and on 28<sup>th</sup> September, 2006 he went to vote at Mambungu polling station. But before he could vote he was asked to go and ferry people to come and vote later he voted and went home, later he learnt that Respondent had won.

RW6 was Muyuka Nyalenga who was ULP's constituency chairman and was accompanying Respondent on her campaign trails. He was the master of ceremonies at meetings addressed by the Respondent. He introduced the entourage and urged people to vote for the right candidate who would represent them. He would tell the people that government has been giving CDF, but we have not seen that money. The District chairlady would also say she has not also seen the CDF. According to him the Respondent only spoke about her education and work back ground she explained about ZAMSIF. Later on he called Induna Akabati who thanked the people. This format was replicated at all meetings. The audience questioned Respondent where she was going to develop the area when she did not have a President. Respondent responded that Government does not discriminate when disbursing CDF.



He went on that Sitali Situmbi said at Mutete where he took the results that the voting at Kakulunda had gone on very well. In a nutshell the witness denied that Respondent called petitioner a thief and that Induna Akabati threatened they would be voters to vote for Respondent.

RW7 was Brighton Sapato Chikesu a peasant farmer who testified that voting went on well and he voted at 1200 hours. There was some delay at Kakulunda as they had to wait for the police officer. According to him he knew George Wayota and Morgan Chelemu who were among the first to vote and they left and they did not come back to school.

RW8 was Charles Likonge Kasonde, a Carpenter who was United Democratic Alliance polling agent at Kakulunda polling station. He also said voting started late as they had to wait for a policeman. He

too concurred with RW7 that all was well and that George Wayota and Morgan Chelemu voted around 0700 hours and left.

RW 9, this witnesses's testimony was substantially the same as that of RW7 and RW 8. RW 10 Edwin Machile, dealt with the delivery of Oaths. He also stated that he was a candidate for councillorship for



Chinonwe ward. He denied that he was at Kakulunda polling station as he had a breakdown and could not vote on 28<sup>th</sup> September, 2006.

RW 11 was Sitali Sepiso a peasant farmer. He was a polling agent for United Democratic Alliance. He was informed that there was going to be Respondent's meeting on 13<sup>th</sup> September, 2006. He attended the meeting at Chinonwe. A prayer was said Kapa Chipwila introduced Respondent as a candidate and asked the gathering to vote for her despite being a lady and RW6 said the same, Respondent thanked the Indunas, Headmaster of the school and said she had come to ask for a vote and she cannot disparage those that stood as members of parliament.

The questioners complained about petitioner's performance, as he made them gather stones for the school for nothing after sending councilor Kakamba.

RW12 was Harris Kalumbwana Kapaya a businessman of Lukulu who testified that he attended a meeting addressed by respondent on 19<sup>th</sup> August in her usual entourage, there was a prayer and national anthem. As usual she spoke about her background asked



for a vote. When asked how she could develop the area having no presidential candidate. She also gave the usual answer that the disbursement of CDF is not discriminative. He testified that PW3 and PW4 were not at the meeting as PW4 was moving with petitioner and he knew them very well nor was Kutemba there she shifted across the Zambezi after the death of her mother in July 2006. He knew Kakubu Simenda, PW5 wife to PW4, they were not at the meeting because the petitioner had stopped MMD members from attending opposition meetings. Petitioner did not win at Mutete in 1991 and 2006 Parliamentary elections.

RW 13 was Jeff Muyanika, a United Liberal Party representative in the District Conflict Management committee, whose evidence testified about matters that were brought to their attention and petitioners matter was not one of them. RW14 was Fredrick Kasweka Kasweka, a peasant farmer, who testified to the proceedings of Respondent's 25<sup>th</sup> August meeting at Kakunyu school and the same routine of a prayer, the respondent being introduced by DW6, her talking about her background and soliciting for a vote was followed. He further testified that he knew



PW11 who was a cousin and he is also related to them and they live together. Thereafter RW24 Induna Akabati thanked the people. RW15 was Getrude Mwangu, a peasant farmer who testified that on 29<sup>th</sup> September 2006 she went to vote at Mbao and she stood in queue and nothing happened she later heard Respondent had won. In 2001 it was Victor Kachaka who won at that polling station while 1996 it was Mutelo.

RW 16 Kapalu Kapalu, a peasant farmer, was a witness who attended a meeting at Chinonwe and gave similar evidence to DW11. RW 17, Steven Mutonda, testified that there was Respondent's meeting on 19<sup>th</sup> August and this meeting followed a similar pattern already alluded to by other witnesses.

RW 18 was Ituna Chipewa a peasant farmer who attended a meeting addressed by Respondent at Chiyaka and he too testified to the usual pattern Respondent's meetings took. He was also polling agent for ULP. According to him voting went on very well. In 1996 Mutelo won at that polling station and in 2001 Kachaka won at that polling station. He did not see Mutoshi on 7<sup>th</sup> September. He knew



Kakamba the MMD councilor he was not at Respondent's meeting of the 7<sup>th</sup> September, 2006.

RW 19 was Morgan Chelemu who was alleged to have been campaigning for Respondent within the prohibited area on 28<sup>th</sup> September, 2006. He testified that he voted at 0700 hours as they were waiting for a police officer DW 26 voted first and the second was mother to Inonge and he was third. He was campaign manager for DW 26 who was an independent candidate in local government elections. After that he left for home and he went to sleep as he was feeling unwell and where votes were being counted he was not there.

RW 20 was Geoffrey Mutakela Mamunuyma a peasant farmer, the chairman of the Mwanamwanga village who is also MMD chairman.

He testified that the meeting took the usual pattern that DW 26 was not at that meeting and no questions were asked at that meeting.

In the village there is no Sianga nor was there Nyambe. RW 21 was Kenneth Akakuluhele Sitali who attended the 19<sup>th</sup> September 2006

meeting addressed by the Respondent and the meeting took the usual pattern of Respondent's meeting alluded to.



RW 22 was Ssiku Malesu, who was ULP agent at Mbao polling station on 29<sup>th</sup> September 2006 there were MMD and UDA agents. He observed voters entering polling station and he saw nothing sinister and it was agreed by election officers, agents that all went well. In 1996 and 2001, it was Mutelo and Kachaka who won at that polling station, petitioner has never won at that polling station.

RW23 was Dan Kalale, the Director of Elections who was subpoenaed to bring diaries for presiding officers and results for Chinonwe, Kakulinda, Chiyaka Kakunju, Mbao and Mambungo polling stations. He could not find them. He stated that he never received the letters of complaint from petitioner.

RW 24 was Peter Longe a Registry Supervisor at Electoral Commission who testified that he never received correspondence written by the petitioner. RW 25 was Mumba Admson a Constable in the Zambia Police who was in-charge of security at Kakulunda polling station. He testified that everything went on well and the elections were free and fair. His main duty was to maintain law and order. His evidence discounted that PW 9, who said he was threatened with violence.



RW 26 was George Mulonda Wayoya a farmer who was an independent candidate as councilor for Chinonwe ward. He had election agents but they were not allowed to go into the polling station because they had no papers. He was the first one to vote at Kakalunda polling station second was the mother of Inonge and third was PW 19. After voting he went home and went back in the evening to hear the results. It took 40 minutes to walk to his home.

RW 27 was Francis Muke Mutakela who is also Silalo Induna Akabati. He testified that he became a Silato Induna on 18<sup>th</sup> November 2001. In 1966 he was in the Zambia Police in Ndola. Prior to him becoming a Silalo Induna for Nyala. He was escorting Respondent who is his sister for security reasons because she is a widow. He played the role of thanking the attendees of meetings addressed by the Respondent. He said he does not have a palace or a fly whisk which are symbols of being a chief in Western Province.

He has jurisdiction from Sibungana up to Mutaba and there is no overlapping jurisdiction. He does have jurisdiction in Kakulunda, Mitete, Chinonwe, chiyaka, Kakunyu, Mbao, Mambungo, Mbangweta. He did not attend meetings in Sibungana, Mutaba and



Mwambweta. He knew Mukelenga PW 12 who alleged that he had grabbed the fish pond from him for not supporting the candidature of the Respondent

He stated that he owns the Lwatembo fish ponds which are in his area and he inherited them from his father. However, upon his father's death in 1996 PW 12 immediately went in and claimed the fish ponds and that is when the dispute arose. He used to write him letters and later reported to the police. Kandumba used to have the control of fish ponds until his death. After his death he told his son Mwenda to take over that was in late nineties, but PW 12 approached Mwenda telling him that the pond was his.

He does not have power to take a fish pond from the owner and he has never threatened to take fish ponds. He was claiming to be the owner of Lwatembo fish ponds, because the pond belonged to his father who also inherited it from his father Luchanana. In a nutshell that was the respondent's case.

It was argued by the petitioner that evidence through PW3, PW4 and PW5 was sufficient to meet the grounds laid down in



section 93(2)(a)(b) and (c) of the Electoral Act in that it has been established that

- (a) by reason of any corruption or illegal practice committed or by reason of other misconduct the majority of the voters were prevented in electing the candidate of their choice.
- (b) There has been non-compliance with the provisions of the Electoral Act
- (c) That a corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent of the candidate or his agent.

There was a publication of falsehood that petitioner had stolen K60 million constituency funds at meetings at Chinonwe. There was publication at Mitete Basic School to the electorate to the effect that petitioner had been disqualified from contesting the 28<sup>th</sup> September, 2006 parliamentary election contrary to Section 83(1)(2). The evidence of PW7 and PW 6 was said to be supportive of the



allegations. The respondent's Agents did campaign at kakulunda, Mbao, Chiyaka polling stations on the polling day and by doing so induced voters to vote for the Respondent in breach of Section 82(1)(a)(c) of the Electoral Act. The voters were intimidated by Chief Akabati at Mutaba thereby inducing voters to vote for the Respondent.

It was argued that the case of **Alex Cadman Luhila vs. Batuke Imenda**<sup>1</sup> was at all fours with the present case in which Judge Munthali said:

**"Those who think can find their way to parliament on the platform of lies and calumnies intended to defame the characters of opponents, those who think they can find their way to parliament on the platform of illegal practices of various shades, those who think they can find their way to parliament on the platform of bribery and corruption the message in this: The courts will not hesitate to show them the door and eject them from Parliament."**

The gravamen of Mr. Sikota's submission was that in election petitions because the allegations are of a criminal nature proof



must be beyond all reasonable doubt and he cited **R vs. Rowe, Exparte Mainwaring.**<sup>2</sup> However he conceded that our Supreme Court in **Lewanika and Others vs. FJT Chiluba**<sup>3</sup> has put the standard between the balance of probability and beyond all reasonable doubt.

The learned trial judge stated that he agreed with the petitioner that if sufficiently proved and by 'sufficiently proved,' he mean above the 'Balance of Probability' and below, 'Beyond reasonable Doubt' an illegal practice can nullify an election **Michael Mabenga vs. Sikota Wina and Others**<sup>4</sup> and **Mlewa vs. Wightman**<sup>5</sup> are cases supportive of that statement of the law.

The learned trial judge then stated that the case therefore hinges on the credibility of the witnesses and it is therefore imperative to put under strict scrutiny their credibility. To aid such analysis he categorized the witnesses into four groups in this petition. The attachment of weight to evidence follows that order. More weight is attached to the fourth, then third, then second and lastly the first category of witnesses;



- (i) Were witnesses who belonged to the Petitioner and respondents political parties;
- (ii) Witnesses who were electoral officials engaged by the Electoral Commission in the conduct of the elections;
- (iii) Witness or witnesses belonging to the petitioner's or Respondent's party who gave evidence against their own party candidate;
- (iv) Monitors or police officers who are not party to these proceedings nor were they party members.

After considering all the evidence adduced in the case, the submissions of Counsel and authorities cited therein, the learned trial judge found the following facts:

- (1) That there were no falsehoods about the petitioner being called a thief of constituency funds, or funds for building a constituency office at any of the polling stations.
- (2) That DW. 27 is a mere Judence having jurisdiction only in his silalo. He has no power to grab land from any subject even under his jurisdiction nor did he



induce voters to vote for his sister, he merely accompanied her for security reasons.

- (3) That there was no campaigning within the precincts of the polling stations in the constituency
- (4) That the petitioner has lost election on two occasions in some of these polling stations
- (5) That the Respondent's evidence is more credible as she produced witnesses in category one who may be suspect witnesses, in category two less suspect, category three and four were independent witnesses who had no interest to serve.

The learned trial judge then went on to say that the petitioner was defeated by a narrow margin of 46 votes, which meant that even in polling stations where he lost in 1996 and 2001 elections to Mutelo and Kachaka respectively, this time he had performed better. The learned trial judge then went on to say given the facts, would his court say that the electors, or voters in the constituency did not exercise their "free will" to elect a candidate of their own choice, he thought not.



Citing Mazoka and Others vs. Levy Patrick Mwanawasa and Another<sup>7</sup> where we said;

*“it follows that for the petitioner to succeed in the present petition, the petitioner must adduce evidence establishing the issues raised to a fairly high degree of convincing clarity in that the proven facts 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 no longer can reasonably be said to represent the true and free choice and free will of the majority of voters”*

The learned trial judge then concluded that the petitioner had lamentably failed to adduce evidence to prove the allegations even on the balance of probability though the required standard is higher.

He then said that for the aforesaid reasons and pursuant to Article 72(1) he determined that the election was free and fair and declared



the Respondent Eileen Imbwae to have been duly elected as member of parliament of Lukulu West Constituency.

Dissatisfied with these findings, the petitioner has now appealed to this court.

The petitioner has advanced 13 grounds of appeal namely:

- 1. The Learned Trial Judge misdirected himself in law and in fact when he held that there were no falsehoods about the Petitioner being called a thief of constituency funds and funds for building a constituency office at any of the polling stations.**
- 2. The Learned trial Judge misdirected himself in law and in fact when he held that RW 27 was a mere Induna having jurisdiction only in his silalo.**
- 3. The Learned Trial Judge misdirected himself in law and in fact when he held that RW 27 did not induce voters to vote for his sister and that DW 27 merely accompanied the Respondent for security reasons.**
- 4. The holding by the Learned Trial Judge that there was no campaigning within the precincts of the polling**



stations in the constituency is against the weight of the evidence.

5. The Learned trial Judge misdirected himself in law when he placed the witnesses into four (4) categories and made findings of fact based on the said categories.

6. The evaluation of the evidence by the Learned Trial judge was unbalanced in that he concentrated more on the flaws of the Petitioner's evidence and his witnesses while ignoring the flaws in the respondent's evidence and that of her witnesses.

7. The Learned Trial judge misdirected himself in law and in fact when he held that voters at Mbao Polling station could not have been swayed by false hood simply because the petitioner had never won an election at Mbao in 1996 and 2001.

8. That having found as a fact that PW 8 Sitambi Sitali's evidence that there was campaigning at the Polling Station by the Respondent's supporters was corroborated (concurred) by PW 9, the Learned Trial



judge ought to have nullified the election of the Respondent.

9. The Learned Trial Judge misdirected himself in law and in fact when he held that evidence of PW8 and PW9, the learned Trial judge ought to have nullified the election of the Respondent.

10. The Learned Trial Judge misdirected himself in law and in fact when he accepted the evidence of RW 20 simply on the basis that he testified against his own party.

11. The Learned Trial judge was wrong in holding that the Petitioner had failed lamentably to adduce evidence to prove allegations even on the balance of probability.

12. The Learned Trial judge misdirected himself in law and in fact when he held that the voters in the constituency did exercise their free will to elect a candidate of their own choice.

13. The Learned Trial Judge misdirected in law and in fact when he held that the Respondent was the paragon of personal integrity and that she was not the kind of a



person who would concoct falsehoods about the  
Petitioner.

These grounds of appeal were supported in the appeal by detailed written heads of argument and authorities which were relied upon at the hearing of the appeal. The respondent also filed detailed heads of arguments and relied on them at the hearing of the appeal.

We have carefully considered the evidence that was adduced before the lower court, the judgment of the learned trial judge and the submissions and arguments canvassed before this court. In the view we take of this appeal, we do not intend to repeat the submissions made by Counsel in extensio as they are on record.

In considering this case, the learned trial judge boldly said at p. 28 of the record of appeal that:

**“The case therefore hinges on the credibility of the witnesses and it is therefore imperative to put under strict scrutiny their credibility.....”**

The lower court then made a number of findings of fact which we have reproduced above and pursuant to our decision in **Nkhata**<sup>4</sup>




and *Achiume*<sup>5</sup> cases, this court does not lightly interfere with judgments of the lower court based on findings of fact. The Judge's findings of fact were based on its observation of the parties and came to the conclusions as he did.

The court below therefore did not import any new facts in arriving at its conclusion neither did it misapply the evidence before it to arrive at the findings of fact complained of. We wish to reaffirm what we said in **GDC Hauliers Zambia Limited vs. Trans-Carriers Limited**<sup>6</sup> that findings of credibility are not to be interfered with by an appellate court which did not see and hear the witnesses at first hand. Accordingly, we find no cogent reasons to disturb the judge's findings with regard to the evidence that was adduced before him.

We wish to observe that, as did the learned trial judge that, the petitioner lost the election by a narrow margin of 46. The alleged falsehoods, campaign irregularities took place at one polling station and therefore it cannot be said that the election was so flawed that the defects seriously affected the result which no longer can reasonably be said to represent the true and free choice and free will of the majority of voters.

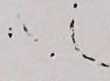


In our considered view therefore, this appeal fails in its entirety and it is therefore dismissed with costs to be taxed in default of agreement.



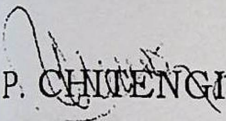
D.K. CHIRWA

**SUPREME COURT JUDGE**



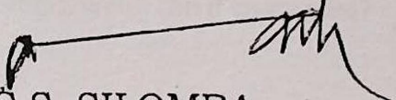
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**SUPREME COURT JUDGE**



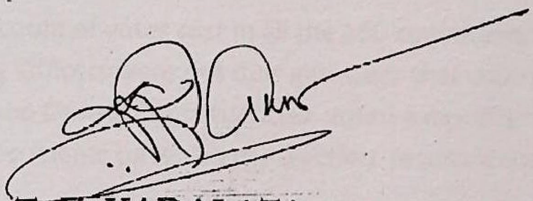
P. CHITENGI

**SUPREME COURT JUDGE**



S.S. SIOMBA

**SUPREME COURT JUDGE**



T.A. KABALATA

**ACTING SUPREME COURT JUDGE**