

IN THE SUPREME COURT OF ZAMBIA
No.115/12
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal

IN THE MATTER OF: AN ELECTION PETITION

AND

IN THE MATTER OF: AN APPLICATION UNDER ARTICLE 72 (1) OF THE
CONSTITUTION OF THE REPUBLIC OF ZAMBIA

AND

IN THE MATTER OF: REGULATION 15 OF THE ELECTORAL ACT

AND

IN THE MATTER OF: LUFWANYAMA PARLIAMENT ELECTIONS HELD IN
ZAMBIA ON 20TH SEPTEMBER, 2011

BETWEEN:

CHRISTOPHER KALENGE

APPELLANT

AND

ANNIE MUNSHYA

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND

RESPONDENT

ATTORNEY GENERAL

3RD

RESPONDENT

**Coram: Mwanamwambwa, Phiri, Wanki, Muyovwe and Musonda,
JJS**

On the 17th October, 2012 and 25th July, 2013

For the Appellants: Mr. B.C. Mutale, S.C., and Mr. T.Chabu of Messrs Ellis
and Company

For the 1st Respondent: Major C.A. Lisita of Messrs Central Chambers

For the 2nd and 3rd Respondent: Ms. T.P. Lungu in-House Counsel/State
Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

- 1. Josephat Mlewa v. Eric Wightman (1995/1997) Z.R. 171**
- 2. Liambo v Mututwa 1974/HP/EP/2 unreported**
- 3. Jere v Ngoma (1969) Z.R. 106**
- 4. Lusaka v. Cheelo (1979) Z.R 99**
- 5. Wisamba v Makai (1979) Z.R. 295**
- 6. Victor Chibvumbu Kachaka v Simasiku Namakando and Electoral Commission of Zambia Appeal No. 163/2002**
- 7. Michael Mabenga v Sikota Wina and 2 Others (2003) Z.R. 110**
- 8. Webster Chipili v. David Nyirenda Appeal No. 35 of 2003**
- 9. Mubita Mwangala v Inonge Mutukwa Wina Appeal No. 80 of 2007**
- 10. Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v. Levy Patrick Mwansawasa, the Electoral Commission of Zambia, The Attorney General (2005) Z.R. 138**
- 11. Mike Kaira v Catherine Namugala and Electoral Commission of Zambia SCZ No. 31/2002**
- 12. Akashambata Mbikusita Lewanika v Fredrick Titus Chiluba SCZ No. 14/1998**
- 13. Mubika Mubika v Poniso Njeulu Appeal No. 114/2007**
- 14. Leonard Banda vs. Dora Siliya Appeal No. 95/2012**
- 15. Reuben Mtolo Phiri vs. Lameck Mangani SCZ No. 2/2013**

When we heard this appeal, Judge Dr. Musonda sat with us. He has since resigned and, therefore, this Judgment is by the majority.

This is an appeal against the judgment of the High Court in which it was held that the respondent was duly elected as a Member of Parliament. The appellant's petition was dismissed with costs to the respondents.

The facts of this case are that the appellant and the 1st respondent were candidates in the Parliamentary General Elections held on 20th September, 2011 for the Lufwanyama Constituency. The appellant stood on the Patriotic Front ticket (hereinafter referred to as “PF”) while the respondent stood on the ticket of the Movement for Multiparty Democracy (hereinafter referred to as “MMD”). The appellant polled 2,336 votes while the 1st respondent 5,716 votes. There were two other contestants who did not petition. The 1st respondent was declared winner and duly elected Member of Parliament for Lufwanyama Constituency.

The appellant who called fifteen (15) witness during trial, petitioned the High Court to declare the election as null and void on the ground that the 2nd respondent failed to comply with its statutory duty to superintend the election process thereby legitimizing the use of bribery, gifts, threats, intimidation, vote-buying and actual violence in favour of the 1st respondent and that the electoral process was not free and fair. In his petition, the appellant stated, inter alia, that the MMD continued campaigning even after the closure of the campaign period and even on polling day itself. That the 1st respondent’s agents ferried people from Mafuta and Kabanga sections to two

polling stations namely, Shibuchinga and Lufwanyama. It was alleged that the ferrying of people also took place at Luswishi where James Chileshe, a Councillor for MMD ferried people to Mashinka polling station and dared the eye witnesses to go and report wherever they wanted and that he was using truck Reg. No. ALC 6667 and ALC 6652. It was also alleged that at various polling stations there were many PF marred ballot papers rejected on grounds that they were not officially marked.

That failing to account for ballot papers, for example at St. Joseph 350 ballot papers were not accounted for as required by the Electoral Regulations and that they were missing.

In response to the allegations, the 1st respondent called four witnesses. In her answer to the petition, she denied ferrying voters to polling stations. In relation to the allegation that after closure of the campaigns and on polling day, MMD continued campaigning, she stated that the appellant should have reported the allegation to the 2nd respondent and that to her knowledge the appellant never raised these complaints even at the time of the verification exercise which he attended and that this established that his allegations were not true. She denied using any government resources during the campaign or on polling day as she had her own vehicles. That

the final election results were a true and accurate reflection of the votes cast and that the electorate elected a candidate of their choice.

In their answer, the 2nd and 3rd respondents denied that PF marked ballots were rejected during verification at the totalling centre on the grounds that they were not properly stamped. That during the count all stakeholders including all the polling agents agreed as to which ballot papers were rejected. It was also denied that ballot papers were missing at St. Joseph and Kampinde polling stations. It was stated that the 2nd respondent complied with the electoral procedures relating to the conduct of the elections in Lufwanyama Constituency. That the appellant was, therefore, not entitled to any of the reliefs sought.

The learned trial Judge after analyzing the evidence examined the provisions of Section 93(2) of the Act and found that there was no evidence that any corrupt practice or illegal practice or election offence connected with the election was committed by or with the knowledge and consent or approval of the 1st respondent or her election agent or polling agents. The learned Judge was also not satisfied that the 2nd respondent failed to comply with its statutory duty to superintend the

election process, thereby legitimizing the use of bribery, gifts, threats, intimidation, vote buying and actual violence in favour of the 1st respondent, as alleged by the appellant. According to the learned Judge, she was satisfied that the election was conducted in substantial conformity with the law and that the actions complained of did not affect the result of the whole constituency. That the appellant failed to prove his case to the required standard and dismissed the petition with costs to the respondents.

Dissatisfied with the judgment the appellant appealed to this Court advancing the following grounds of appeal:-

- 1. The Learned High Court Judge erred in law and fact when she found as a fact that trucks Registration Numbers ALC 6667 and ALC 6652 ferried people from Mafuta and Kabangwe Sections to Shibuchinga and Mushinka Polling Stations to vote but held that voters may be transported to Polling Stations but not by Government transport or resources.**
- 2. The Learned High Court Judge erred in law and fact when she found as a fact that there was a campaign message attached to the transportation of voters to vote on the clock but held that there was no evidence that the trucks were campaigning for the 1st Respondent or that she benefited from the campaign message.**
- 3. The Learned High Court Judge erred in law and fact when she held that 647 ballot papers were accounted for and results for St. Joseph were correct and that the alleged unaccounted for ballot papers did not affect result.**

4. The Learned High Court Judge erred in law and fact when she found as a fact that there was a failure at Shibuchinga Polling Station by election officials to comply with the provisions of the law under Regulation 31(b)(iii) of the Electoral (General) Regulations but held that the election was conducted in substantial conformity with the law and that the actions complained of did not affect the result of the whole constituency.

5. The Learned High Court Judge erred in law and fact when she dismissed the Petition with costs to the three Respondents.

At the hearing of the appeal, State Counsel Mr. Mutale abandoned grounds three and four and relied on the filed Heads of Argument.

In tackling ground one, Counsel addressed the issues that need to be examined in declaring the election of a member of parliament null and void and in doing so they examined **Section 93 (2) of the Electoral Act No. 12 of 2006** (hereinafter referred to as the "Act", formerly **Section 18(2) of Electoral Act Chapter 13** of the Laws of Zambia.

Counsel cited **Section 93 (2) of the Act** which provides that:

(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: or

(b) subject to the provision of subsection (4), that there has been 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 provisions 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 his election agent or of his polling agents.”

It was submitted that interpretation of Section 93 (2) of the Act, arose in the case of **Josephat Mlewa v. Eric Wightman**¹ where the Supreme Court said:

“After a very careful examination of the whole Section 18 (2) and in particular paragraphs (a) and (c) we have no hesitation in agreeing with the submission by Mr. Sikatana. Subsection (2) of Section 18 in our view sets out four clear grounds upon which an election of a candidate as a member of the National Assembly shall be held void once each is independently proved to the satisfaction of the High Court. Proof of one of the grounds is enough for a Court to nullify an election. We are satisfied that subsection 2 of Section 18 sets out four independent and separate grounds which if any of

them is proved to the satisfaction of the High Court then the election of a candidate as a member of the National Assembly shall be nullified.”

And that the Court looked at the application of the then Section 18 (a) and (c) of the Act and said:

“On a consideration of the whole Section we are satisfied that the respondent missed the point of difference between the two distinct and separate situations as at paragraphs (a) and (c). The question of personal knowledge is quite irrelevant and inapplicable under paragraph (a) where it does not matter who the wrong doer is and the scheme of the law appears designed to protect the electorate and the system itself by providing for nullification whenever there is wrong doing which the Court feels satisfied, perhaps because of the scale or type of wrong doing which the Court feels satisfied, perhaps because of the scale or type of wrong doing, has adversely affected and probably affected the election. In other words the conduct complained of has to affect the election.

In contrast paragraph (c) penalises the candidate. Even one or two proven instances are enough and even if they could not conceivably have prevented the electorate from choosing their preferred candidate.”

Counsel submitted that in the same case, the cases of **Liambo v Mututwa**²; **Jere v Ngoma**³; **Lusaka v. Cheelo**⁴ and **Wisamba v Makai**⁵ were cited with approval and that the said cases were reaffirmed by the Supreme Court in **Victor Chibvumbu Kachaka v Simasiku Namakando and Electoral Commission of Zambia**⁶ where this Court said at page 17-18:

“Section 18 (2) in our view sets out clear grounds upon which any election of a candidate to the National Assembly can be nullified if each is independently established to the satisfaction of the High Court-Lusaka v. Cheelo (6). According to Lusaka case, nullification can be ordered even when an agent is one who is held blameworthy personally and not the candidate.”

They submitted that it is clear from the decided cases cited that the grounds for nullification of an election of a Member of Parliament are independent and are not qualified by any provision under the Act.

Counsel proceeded to examine what is meant by the term “corrupt practice or illegal practice” under Section 93(2)(a). It was argued that this was interpreted in the case of **Michael Mabenga v Sikota Wina and 2 Others** and that at page 111 the Supreme Court said:

“In order to render the election void, any corrupt practice or illegal practice proved is sufficient if proved to the satisfaction of the Court. Mlewa v. Wightman (1). The corrupt and illegal practices and election offences are contained in Part IV of the Electoral (General) Regulations.”

Counsel pointed out that in the **Mabenga** case, the use of government transport for campaign purposes was held contrary to Regulation 7(1) of the Electoral (Conduct) Regulations 1996 and, therefore, it is an illegal practice. That

in **Webster Chipili v. David Nyirenda** further guidance on what amounts to “corrupt practice” or “illegal practice” was given at page 23 where we said:

“In Regulation 51 the offence of bribery is criminalized and so is the offence of treating under Regulation 53. If such is proved to the satisfaction of the trial Court, the relevant Section of the Electoral Act under which an election can be avoided is Section 18 (2) (a)...

The offences of bribery and treating come under Part iv of the Electoral (General) (Regulations, under the sub-heading “Corrupt and illegal practices and election offences.” So, we can safely say that bribery and treating are corrupt or illegal offences under Section 51 and 53 in relation to an election, which if allowed to take root during political campaigns are capable of swaying the electorate away from a candidate of their choice.”

Counsel also examined the phrase in Section 93(2) (a) which talks of the ‘majority of voters and whether they were or may have been prevented from electing a candidate of their choice’. Reliance was placed on the case of **Mubita Mwangala v Inonge Mutukwa Wina**⁹, where this Court said:

“in order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct it must be shown that a majority of the voters in a constituency were or may have been prevented from electing the candidate in that

constituency whom they preferred See Section 93(2) (a) of the Electoral Act No. 12 of 2006...

It is clear to us that the corrupt practice or illegal practice or indeed any misconduct must affect the majority of the voters in a constituency. In other words, the corrupt practice or illegal practice or misconduct must be wide spread in the constituency so as to affect the majority of voters... according to PW3, RW10 gave the whole K70,000 to the co-wife of PW3 who was not called as a witness. One voter, therefore, cannot affect the majority of voters in a constituency.. But in the present case, this one bribery act as found by the learned trial Judge cannot be said to have prevented the majority of voters voting for their preferred candidate. We did indicate in the case of Mlewa v Wightman (4) that the Court must be satisfied about the scale or type of wrongdoing. By scale, it is meant wide spread as to influence the majority of voters in the constituency not to vote for their preferred candidate.”

Learned Counsel addressed their minds to the pleadings and evidence on the issue of the 1st respondent ferrying voters on polling day using the trucks registration numbers ALC 6667 and ALC 6652. They submitted that in support of this allegation, the appellant’s evidence was corroborated by PW3, PW4, PW7, PW8, PW9, PW10, PW14, and PW15. Counsel referred us to page 48 lines 4-12 of the Record of Appeal and stated that the trial Judge found as the fact that the ferrying of voters to polling stations took place. However, they argued that the trial Judge fell into grave error as she addressed the question whether

transporting voters to polling stations was an offence. That the transportation of voters to polling stations in trucks with the message to vote on the clock (MMD) amounted to a corrupt practice or illegal practice in terms of Section 93 (2 (a) of the Act on the ground that it amounts to bribery as defined under Section 79 (1) (c) of the Act which provides as follows:

“79 (1) Any person who corruptly either directly or indirectly by oneself or any other person-

(c) makes any gift, loan, offer, promise, procurement or agreement to or for any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election... shall be e guilty of the offence of bribery.”

Further, that the ferrying of voters to polling stations amounted to bribery in terms of **Section 81 of the Act** which provides as follows:

“81 Any person who corruptly by oneself or by any person either before, during or after an election, directly or indirectly gives or provides or pays, wholly or in part, the expenses of, any food, drink, entertainment, lodging or provisions to, or for, any person for the purpose of corruptly influencing that person or any other person or give or refrain from giving that person’s vote at an election shall be guilty of the offence of treating.”

It was pointed out that the Court below found that there was a campaign message attached to the transportation and people were told to vote for Rupiah Banda of MMD and/or to vote on the clock.

According to Counsel, the corrupt practice or illegal practice may have prevented the majority of voters from electing the candidate of their choice as the two trucks with the campaign message to vote on the clock was spotted at Fumbwe, St. Mary's Basic School, Mafuta, Funda Basic School, Kabanga, Shibuchinga, Kapilamikwa, Kabanyama, Luswishi Ward, Kabunda Ward, Lufwanyama ward and Chakama and this is according to the testimony of the appellant PW3 PW4, PW7, PW8, PW9, PW10, PW14, and PW15. It was further argued that according to PW14 who the Court found to be an independent and non-partisan witness who impounded the truck in St. Mary's he said that St. Mary's is a big area. It was, therefore, submitted that the ferrying of voters from various areas to polling stations influenced the outcome of the election results for Lufwanyama Constituency and this justified the nullification of the election of the 1st respondent as Member of Parliament.

Turning to ground two, it was submitted that the learned trial Judge misdirected herself at law when she concluded, after

evaluating the evidence, that the ground under Section 93 (2) (a) of the Act is an independent and separate ground for nullification of the election of a Member Parliament which is not dependant of who the wrong doer is. That this was affirmed in the cases of **Mlewa vs. Wightman**¹; **Liambo v Mututwa**²; **Jere v Ngoma**³; **Lusaka v Cheelo**⁸⁸ and **Wisamba v Makai**⁹.

Alternatively, it was submitted that the 1st respondent derived a benefit by implication as she had contested on the MMD ticket whose symbol was on the trucks that was ferrying people to various polling stations.

Turning to ground five, it was submitted that the trial Court erred in law and fact when she dismissed the petition with costs to the three respondents. Counsel submitted that the petition raised issues of public importance in a democratic society and that this should have compelled the trial Judge to order each party to bear their own costs. The case of **Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v. Levy Patrick Mwansawasa, the Electoral Commission of Zambia, The Attorney General**¹⁹ was cited where this Court said:

“As we have always said on costs in matters of this nature, it is in the interest of the proper functioning of our democracy that challenges to the election of the President, which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.”

Further, it was submitted that the lower Court should not have ordered costs to the three respondents as the 3rd respondent never filed any process in the Court below and was never represented.

On behalf of the 1st respondent Major Lisita also relied on his heads of Argument filed herein. As grounds three and four were abandoned, we have confined ourselves to the response to grounds one, two and five

In response to ground one, it was submitted that for a Parliamentary election to be declared null and void, first of all such an act must fall under one or several of the prohibited heads of corrupt or illegal practice as described under Regulation 7 (1) of Electoral (code of conduct) Regulations 2006. And that secondly, once the act is so classified, it remains to be determined if such prohibition falls under the provision of Part VII of Electoral Act No. 12 of 2006 under which

corruption and illegal practice and election offences are created and provided for.

That lastly, once such a prohibited act is deemed to be corrupt, an illegal practice or election offence, the provisions of Section 93 of the Act may then be invoked and an Election declared null and void. Referring to Regulation 7 (1) (R) and (I) of the Electoral (General) Regulations and Regulation 21 (K) and (I) of the Electoral (Code of Conduct) Regulations 2011 under Part III, Counsel argued that what is prohibited is the use of government resources. He submitted that there is nothing in the provisions above cited prohibiting against ferrying voters to polling stations using private resources. He contended that by implication, ferrying voters to polling stations using private resources is allowed. And that, therefore, the learned trial Judge cannot be faulted in holding as she did in her judgment. That if it was the intention of the legislature to penalise the transportation of voters to polling stations using private resources, Parliament would have expressly stated so as it has done in relation to the use of government resources. It was submitted that it was not shown at trial that the vehicles in question were government or parastatal vehicles or that they belonged to the 1st respondent. That the appellant's evidence

established that the two vehicles in question belonged to a company in Lusaka called African Strategic Transportation Limited and the appellant said that he would not know if they belonged to the 1st respondent. Counsel agreed with the appellant's reliance on the cases of **Josephat Mlewa v Eric Wightman**¹; **Liambo v Mututwa**²; **Jere v Ngoma**³; **Lusaka v Cheelo**⁸⁸ and **Wisamba v Makai**⁹ that one act proven to the satisfaction of the Court can void an election. That the question, however, was; does any act of misconduct, corruption or illegal practice trigger this principle in all cases? Counsel disagreed and submitted that there is a misinterpretation of the principle itself and of **Section 93 of the Act**. Counsel examined the case of **Mlewa**¹ and found that in that case there was widespread intimidation and violence and that the majority of voters in the constituency were or might have been dissuaded from electing a candidate of their choice and that, therefore, the test was the scale or the type of offence, and how widely it affected the entire election. But in the **Mlewa**¹ case the test was passed by the petitioner in that he showed that the prohibited conduct had been on a wide scale, rampant and affected the whole constituency. Looking at the cases of **Liambo v Mututwa**² and **Jere vs. Ngoma**³ it was argued that

in these cases the act complained of was widespread and affected the whole constituency.

Counsel submitted that in the **Mabenga case** which approved the **Mlewa case**¹ the Court found that the respondent had engaged in criminal acts across the whole constituency such that the majority of voters were influenced or probably influenced to vote for him and not the Respondents. Citing the case of **Mubita Mwangala**⁹ where this Court said:

“in order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct it must be shown that a majority of the voters in a constituency were or may have been prevented from voting for the candidate in that constituency whom they preferred. See Section 93 (2) of the Electoral Act No. 12 of 2006...”

Further, that in the case of **Mubika Mubika v Poniso Njeulu**¹³, this Court exhaustively and clearly propounded the grounds for declaring an election null and void on account of misconduct, corruption or illegal activity when it said at pages J33-J34 that:-

“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 or 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.”

Counsel submitted that in this case it was not shown during trial that the majority of voters in the constituency were so influenced. Further, it was submitted that the appellant did not prove his case to a fairly high degree of convincing clarity as guided in the cases of **Akashambatwa Mbikusita Lewanika and Others vs. Frederick Jacob Titus Chiluba¹²; Michael Mabenga vs. Sikota Wina and Others¹³; Anderson Kambela Mazoka, Lietenant General Christon Sifapi Tembo, Brigadier General Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, The Electoral Commission of Zambia and The Attorney General¹⁹**. It was submitted that the learned Judge correctly directed herself when she held that the majority of voters in the constituency were not prevented from electing the candidate of their choice. That the wrongful conduct in one or two polling stations in one ward out of ten

wards can hardly comprise the majority of voters in that constituency. Further, that this case is distinguishable from the **Mlewa case**¹.

In response to ground two, it was submitted that the appellant should also fail under Section 93 (2) (a) of Electoral Act for the same reasons as submitted in ground one. Counsel submitted that the **Mlewa case**¹ is definitely distinguishable from the present case because in that case the misconduct was not only widespread but powerful and highly influential personalities in the communities of the constituency were used in the campaign which affected the elections. It was argued that in the current case it was not shown whether places where the alleged ferrying of voters took place were in one ward or in several wards and if so how many these wards were out of the total number of wards in the constituency. That there was no evidence to show that anyone had ferried voters to polling stations on behalf of the 1st respondent and there was no evidence on which the learned trial Judge could have inferred that the 1st respondent benefited from the presidential campaign messages. Further, that the standard of proof fell short in this case. That the learned trial Judge was on firm

ground when she declined to attribute the alleged misconduct to the 1st Respondent.

Counsel contended that the learned trial judge was on firm ground when she followed the case of **Webster Chipili**. Further, that there was no person who was positively identified as an agent of the 1st respondent. That RW2 and RW3 and the mysterious woman in one of the trucks were not linked to the 1st respondent and neither was it shown at trial that the 1st respondent knew and consented or approved such misconduct. And that, therefore, without proof, the provisions of Section 93 (2) (c) of the Electoral Act cannot be invoked as an alternative to Section 93 (2) (a). Counsel submitted that this ground should be dismissed.

In response to ground five which relates to the question of costs awarded to the respondents, it was submitted that the learned trial Judge was on firm ground in awarding costs to the respondents because costs ordinarily follow the event. That Section 105 (1) of the Electoral Act is not binding on the Court and that it is apparent from the appellant's failure to prove even a single allegation in his petition that his allegations were frivolous and vexatious and, therefore, lacked merit. The learned trial Judge was on firm ground in awarding costs

against him and that this appeal should be dismissed for lack of merit.

Mrs. Lungu on behalf of the 2nd and 3rd Respondents relied on the heads of argument filed herein which basically addressed grounds three, four and five as they were not affected by the first two grounds. Since the appellant abandoned grounds three and four, we shall confine ourselves to the submissions relating to ground five in the 2nd and 3rd respondents' heads of arguments.

It was submitted that it is trite that costs are within the discretion of the Court and that costs are awarded judiciously and that the Judge was on firm ground when she awarded costs to the respondents. Counsel urged this Court to dismiss all the grounds against the 2nd and 3rd respondents for lack of evidence with costs.

We have considered the evidence in the Court below, the judgment of the lower Court and the submissions by learned Counsel.

We shall deal with grounds one and two together. It is common cause that trucks Registration No. ALC 6667 and ALC 6652 ferried people from Mafuta and Kabangwe Sections to

Shibuchinga and Mushinka Polling Stations to vote. This was a finding of fact by the learned trial Judge. Indeed, there was evidence that the two trucks ferried voters to various polling stations and that at St. Mary's, PW14, the officer in charge of Lufwanyama Police Post, saw these trucks after receiving reports from the appellant, Minever Mutesa and the Council Secretary. The learned Judge held that voters may be transported to polling stations but not by Government transport or resources. The argument by learned Counsel for the appellant while relying on the **Mabenga case** is that the use of government transport is an illegal practice. We agree. However, in this case the transport used was private transport and it is settled that the use of private transport to ferry voters is not an offence under our Electoral Laws. Indeed, as the learned Judge found, there was no evidence to show that the two trucks were government vehicles or that they had been hired by the 1st respondent. There was also no evidence to show that the persons who were on the trucks were agents of the 1st respondent. We have given due consideration to the authorities cited by Counsel for the appellant herein such as the cases of **Webster Chipili** and **Victor Kachaka**⁶ which in our view cannot assist the appellant. To argue that the use of

private transport which had a message to vote on the clock to ferry voters amounted to a “corrupt practice or illegal practice” in terms of Section 93 (2) (a) of the Act; that it amounted to bribery as defined under Section 79(1)(c) of the Act and that it amounted to treating as defined under Section 81 of the Act is casting the net too wide. In fact Counsel in their argument appear to have mixed up the application of Section 93(2)(a) with Section 93(2)(c). The law must apply to the facts at hand. It also appears that Counsel misapprehended the **Mlewa case**¹. In our recent decision in **Leonard Banda vs. Dora Siliya**¹⁸⁸ we said in relation to Section 93(2)(a) and (c) at Page J35 that:

“A distinction must be drawn between paragraph (a) and paragraph (c). Under paragraph (a), it does not matter who the wrong doer is. The election will be nullified if there is wrongdoing of the type and scale which satisfies the Court that the electorate were or could have been prevented from electing the candidate whom they preferred. The essential element which must be proved under paragraph (a) is **that the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.**”

We referred to the case of **Lwiimbo**² which is quite instructive on the application of Section 93 (2) (a) of the Act.

We said further in the **Leonard Banda case**¹⁸⁸ that:

“On the other hand under paragraph (c) there is no requirement that a petitioner should prove that as a result of the corrupt practice or illegal practice the **majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.** All that paragraph (c) requires is proof that a **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.”**

We used the case of **Reuben Mtolo Phiri vs. Lameck Mangani**¹ as an illustration.

We do not agree that because the trucks in question had a message to vote on the clock – this amounted to a corrupt practice or bribery. This, in our view, would be overstretching the definition of corrupt practice, bribery or treating.

As the learned Judge found, there was no evidence to establish that the trucks were campaigning for the 1st respondent or that she benefitted from the campaign message. We do not see how these acts can be interpreted to be illegal practices or bribery attributed to the 1st respondent. We are not persuaded that the ferrying of voters and the message on the trucks influenced the outcome of the election results to the extent that the majority of voters were or may have been prevented from electing a candidate of their choice and that this justified the nullification of the election of the 1st

respondent. Indeed, as we have stated herein, the attempt by Counsel to apply Section 93(2)(a); Section 79(1)(c) and Section 81 of the Act as well as the Regulation 7(1) of the Electoral (Conduct) Regulations of 1996 to this case cannot succeed.

Further, we emphasized in the case of **Leonard Banda**¹ that the paragraphs of Section 93(2) of the Act constitute separate grounds upon which a parliamentary election can be nullified. Therefore, the learned Judge cannot be faulted for holding that Section 93(2)(a) of the Act is an independent and separate ground for nullification of election of a Member of Parliament which is not dependant on who the wrong doer is. And this is what the **Mlewa case**¹ says - that the election will be nullified if there is wrongdoing of the type and scale which satisfies the Court that it has adversely affected or may have affected the election.

Looking at the facts of this case, we cannot fault the learned Judge in her conclusion that the appellant failed to prove his case to a fairly high degree of convincing clarity. Ground one and two must, therefore, fail.

With regard to ground five which is on the question of costs,

we have stated in a plethora of cases that although ordinarily costs follow the event, in cases of this nature parties need not be hampered with the issue of costs. We agree with Counsel for the appellant that the learned Judge erred in awarding costs against the appellant. The order of the lower Court as to costs is hereby set aside. Ground five, therefore, succeeds.

In conclusion, we uphold the judgment of the lower Court and declare that the 1st respondent was duly elected as Member of Parliament for Lufwanyama Constituency. We accordingly dismiss the appeal. We order that parties bear their own costs.

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M.S. MWANAMWAMBWA
SUPREME COURT JUDGE

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G.S. PHIRI
SUPREME COURT JUDGE

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M.E. WANKI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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P. MUSONDA
SUPREME COURT JUDGE