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

APPEAL NO. 162 OF 2012

IN THE MATTER OF: **ARTICLES 72(1) (A) OF THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA**

AND

IN THE MATTER OF: **SECTION 93 OF THE ELECTORAL ACT. 12 OF 2006**

IN THE MATTER OF **KAOMA CENTRAL CONSTITUENCY ELECTIONS HELD IN ZAMBIA ON THE 20TH SEPTEMBER, 2011**

AND

B E T W E E N:

ENOCK MASEKA KALEKA APPELLANT

AND

CARLOS JOSE ANTONIO 1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA 2ND RESPONDENT

CORAM: **MWANAMWAMBWA, PHIRI, WANKI, MUYOVWE AND MUSONDA, JSS**

On 29th January, 2013 and 28th May, 2013

For the Appellant: Mr. M.Z. Mwandenga of Messrs. M.Z. Mwandenga and Company

For the 1st Respondent: Mr. M. Katolo of Messrs. Milner Katolo and Associates

For the 2nd Respondent: N/A

J U D G M E N T

WANKI, JS, delivered the Judgment of Court.

CASES REFERRED TO:-

1. **Mlewa -Vs- Wightman (1995 - 1997) ZR 171.**

2. **Michael Mabenga -Vs- Sikota Wina, Wallace Mafiyo and George Samulela, (2003) ZR 110.**

3. **Akashambatwa Mbikusita Lewanika, Everisto Hichuunga Kambaila, Dean Namulya Mung'omba, Sebastian Saizi Zulu and Jennipher Mwaba Phiri -Vs- Frederick Titus Chiluba, (1998) ZR 79.**

4. **Kenmuir -Vs- Hattingh, (1974) ZR 62.**

5. **Nkhata and Four Others -Vs- Attorney General of Zambia, (1966) ZR 124.**

6. **Eastern Co-operative Union Limited -Vs- Yamene Transport Limited, (1988 - 1989) ZR 126.**

STATUTES REFERRED TO:-

7. **Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 72.**

8. **Electoral Act, Chapter 13 of the Laws of Zambia, Section 18(2).**

9. **Electoral Act No. 12 of 2006 of the Laws of Zambia, Sections 93, 109.**

10. **The Electoral (Code of Conduct) Regulations, 2011, Regulation 21.**

This is an appeal against the judgment of the High Court delivered on 4th May, 2012 whereby the petition by the appellant against the election of the 1st respondent, Carlos Jose Antonio was dismissed and the 1st respondent declared as having been duly elected as Member of Parliament for Kaoma Central

Constituency on the 20th September, 2011 Parliamentary Elections.

The appellant, Mr. Enock Maseka Kaleka, was a candidate for the parliamentary elections in the Kaoma Central Constituency on 20th September, 2011. He stood as a candidate for the Patriotic Party (PF). The 1st respondent Carlos Jose Antonio was also a candidate in the same Constituency for the United Party for National Development (UPND).

Other candidates in the same Constituency were Austin Liato who contested for Movement for Multiparty Democracy (MMD); Mushimba Namushi who contested for ADD; and Nyambe Godfrey who contested for FDD. They are not parties to these proceedings. After the elections the poll results were announced as follows:-

(a)	**Antonio Jose Carlos**	**7485 Votes**
(b)	**Austin Liato**	**4987 Votes**
(c)	**Enock Maseka Kaleka**	**3175 Votes**
(d)	**Mushumba Namushi**	**585 Votes**
(e)	**Nyambe Godfrey**	**69 Votes**

There were 7 Wards in the Constituency. Having got the highest number of votes, the 1st respondent was declared the duly

elected Member of Parliament for the Kaoma Central Constituency.

The appellant alleged that the 1st respondent was not validly elected because during the campaign the 1st respondent was engaged in malpractices and offered inducements or bribes to the electorate for votes in the Constituency; that the 1st respondent did base his campaigns on peddling malice and falsehood that the petitioner's Presidential Candidate if elected would legalise and promote (homo) sexuality and lesbianism in Zambia; that the 1st respondent also falsely and maliciously did tell the electorate that the appellant and the appellant's Presidential Candidate if elected into Office would deport all Luvale speaking people to Angola; and that as a consequence of the aforesaid illegal practices committed by the said respondent or with his knowledge and his agents, the majority of the voters in the affected areas and/or Polling Stations were prevented or enticed to avoid electing the candidate in the Constituency whom they preferred.

The appellant petitioned the High Court and sought the relief as follows:-

1. **A declaration the election of the 1st respondent as a Member of the National Assembly for Kaoma Central Constituency is void.**

2. **A declaration that the illegal practices committed by the 1st respondent and/or his agents so affected the election result that the same ought to be nullified.**

3. **An order that the costs occasioned by the appellant be borne by the respondent.**

The appellant filed an affidavit verifying the allegations in the petition. Besides himself the appellant called other 7 witnesses.

The 1st respondent filed an answer in which he denied the allegations and urged the Court to uphold his election as a Member of Parliament for Kaoma Central; he gave evidence and called 3 other witnesses.

The Electoral Commission of Zambia, the 2nd respondent filed an answer and successfully defended all allegations against it.

The learned trial Judge analysed the evidence adduced by the parties and found that the appellant had failed to prove his case against the respondents in accordance with the required standard of proof and that his election petition lacked merit in many respects; and found that it would be unsafe for the Court to

rely on it and its allegations. The learned trial Judge accordingly declared the 1st respondent Carlos Jose Antonio the incumbent UPND Member of Parliament for Kaoma Central Constituency in the Western Province of Zambia as having been duly elected on the 20th September, 2011 Parliamentary elections and dismissed the petition with costs.

The appellant filed two grounds of appeal. The first ground of appeal was that the Honourable learned Judge misdirected herself by failing to consider the implications or consequences of the "Serial Killer tag" that was attached to the appellant during the campaigns for the 20th September, 2011 elections viz the issue of whether or not the 1st respondent was duly elected.

The second ground of appeal was that the Honourable learned Judge misdirected herself when in connection with paragraph 3 (vii) of the appellant's petition she concluded that, "further the petitioner failed to adduce evidence relating to these allegations of character assassination. Surely if the alleged utterances were being made at campaign rallies and meeting he would have produced proper evidence other (than) that of PW2 and PW3 who I find to be unreliable because of their inconsistent

evidence." The appellant filed List of Authorities and Amended heads of arguments on which Mr. Mwandenga solely relied at the hearing of the appeal.

In support of ground one of the appeal, Mr. Mwandenga pointed out that the election petition in the Court below was *inter alia* anchored on the fact that there were certain falsehoods and character assassination that were leveled against appellant and his Presidential Candidate at the behest of the 1st respondent and/or his agents during the run-up to the 20th September, 2011 Presidential and General Elections. Counsel contended that one that stood and still stands today is the allegation that the appellant was a "Serial Killer."

It was further contended that evidence was led in the Court below that showed that the appellant had indeed been given a tag of being a "Serial Killer" during the run-up to the 20th September, 2011 Presidential and General Elections. Mr. Mwandenga argued that no iota of evidence was led showing or tending to show that the appellant was indeed a "Serial Killer' as alleged or as insinuated. According to Counsel without doubt this allegation was false.

Mr. Mwandenga pointed out that the trial Judge took note of this evidence on page 73 of the Record of Appeal. Counsel argued that the trial Judge fell in error by failing to consider the implications or consequences of the "Serial Killer tag" that was attached to the appellant during the campaigns for the 20th September, 2011 Presidential and General Elections viz the issue of whether or not the 1st respondent was duly elected; that she failed to do so is made certain when the Court takes into consideration what she said on this issue, the trial Judge had this to say:-

> **"... This Court observed and even Counsel for the 1st respondent pointed out that the petitioner admitted in cross-examination that the allegations of him being a Serial Killer were there even in 2001 and 2006 when he stood and lost as a Parliamentary candidate in Kaoma Central Constituency and, therefore, I am of the considered view that this trend has merely continued from the past when the 1st respondent was not even a candidate.."**

Mr. Mwandenga submitted that being cognizant of the "Serial Killer tag" the appellant had before the 20th September, 2011 Presidential and General Elections and also which tag the 1st respondent exploited to his advantage as they argue under 1.8 of the heads of arguments and authorities the learned trial Judge ought to have considered whether the playing field was level for

all the candidates particularly the appellant. According to Counsel clearly with the "Serial Killer tag" on him, the playing field was uneven.

Mr. Mwandenga pointed out that **Section 93** of the **Electoral Act** (9) deals with matters concerning the avoidance of elections, **Subsection (2)** thereof provides thus:-

> **"The election of a candidate as a Member of the National Assembly shall be void on any of the following grounds which if proved to the satisfaction of the High Court upon the trial of an election –**
>
> **(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 their Constituency whom they preferred;**
>
> **(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;**

Counsel submitted that **Section 93(2)** of the **Electoral Act, 2006** (9) aforesaid sets out four grounds upon which an election of candidate as a Member of National Assembly shall be held to be void once any of them is proved to the satisfaction of the High Court.

The case of ***MLEWA -VS- WIGHTMAN*** [1] was cited where **Section 18(2)** of the **ELECTORAL ACT 1973** [8] (since repealed) but which is on all fours with **Section 93 (2)** of the **Electoral Act 2006** [9] had this to say:-

> **"... 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 such ground 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 provided to the satisfaction of the High Court then the election of a candidate as a Member of the National Assembly shall be nullified."**

Mr. Mwandenga argued that the labeling of the appellant with the "Serial Killer tag" in connection with the 20th September, 2011 was an illegal practice in connection with that election under the **Electoral (Code of Conduct) Regulations, 2011** [10] which is a Statutory Instrument made under **Section 109** of the **Electoral Act, 2006**. [9]

Counsel submitted that it is common knowledge that the 20th September, 2011 Presidential and Parliamentary Elections were held at the time when the **Code of Conduct** had come into operation; the spirit of this Code was to ensure that elections in Zambia were and/or are conducted in a free and fair manner. It

was pointed out that it is trite that all participants in the electoral process in Zambia are bound by the **Code of Conduct**; under this **Code of Conduct** it is an offence for a person to 'make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election." Counsel contended that the labeling at the material time of the appellant with the "Serial Killer tag" which was and/or is false, defamatory or inflammatory was an offence under the **Code of Conduct**."

Mr. Mwandenga pointed out that from the answers in cross-examination in the Court below it is clear that the 1st respondent indeed took full advantage of the "Serial Killer tag" that was attached to the appellant as per page 209 of the Record of Appeal; and this "Serial Killer tag" Counsel argued, may have greatly assisted the 1st respondent to win the Kaoma Central Constituency in the 20th September, 2011 Elections. In the circumstances, it was submitted that the appellant went into this election as an under dog because of "the Serial Killer tag." Counsel contended this election was, therefore, not free and fair.

It was argued that the "Serial Killer tag" in terms of **Section 93(2) (a)** may have indeed prevented the majority of the voters in

the Kaoma Central Constituency from choosing the appellant as their preferred candidate. Counsel contended that on this score alone this election merits nullification under **Section 93(2) (a)**. It was submitted that under this limb of **Section 93(2) (a)** it is not necessary to argue that the majority of the electorate were prevented from electing their preferred candidate; it is enough to argue that the majority of the electorate may have been prevented from electing their preferred candidate and so Counsel argued, and this was because **Section 93(2) (a)** is wide as to embrace their argument in this regard; for easy of reference it provides that:-

> **"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 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."**

Mr. Mwandenga submitted that with the foregoing matters in mind the election of the 1st respondent in the 20th September, 2011 Kaoma Central Constituency elections merits nullification otherwise the 1st respondent will benefit from an electoral process

that was marred by an illegal practice as they have endeavoured to demonstrate under this ground.

In support of ground two of the appeal, Mr. Mwandenga submitted that this ground is anchored on the back drop of the fact that the learned trial Judge in one breath took cognizance of the fact that the appellant had been labeled a "Serial Killer" before and during the campaigns for the 20th September, 2011 Elections and yet in another breath she says that the appellant failed to prove the allegations of character assassination.

Counsel argued that to be falsely labeled a "Serial Killer" is one of the worst forms of character assassination that can be labeled against any person in general but in particular a person aspiring to be a Member of Parliament.

Mr. Mwandenga submitted that having found as she did concerning the allegation of the appellant as "Serial Killer," the learned trial Judge did not need any further evidence on that allegation or other allegations.

Counsel contended that evidence adduced in the Court below was of sufficient weight for the trial Judge to have accepted that the appellant had indeed been labeled a "Serial Killer" before

and during the campaigns for the 20th September, 2011 without further testimony from other witnesses. It was submitted that proof of that one allegation of a falsehood as having been made against the appellant was all that was needed. Counsel argued that the failure to prove other allegations cannot and should not affect the one that was proved satisfactorily; this is on account of the fact that it is not necessary for one to prove a number of corrupt or illegal practices or misconducts for an election to be nullified. Reliance was placed on the case of ***MICHAEL MABENGA -VS- SIKOTA WINA, WALLACE MAFIYO AND GEORGE SAMULELA*** (2) where this Court *inter alia* held that:-

> **"Satisfactory proof of any one corrupt or illegal or misconduct in an election petition is sufficient to nullify any election."**

Mr. Mwandenga submitted that satisfactory proof of one wrong doing in the run-up to an election is enough ground for nullification of that election.

Counsel argued that under this issue it would appear that the learned trial Judge would have preferred other witnesses other than PW2 and PW3 to testify in favour of the appellant

because she found the duo to be "unreliable because of their inconsistent evidence."

Mr. Mwandenga submitted that the inconsistent evidence "can be explained by the fact that the duo were testifying on different aspects of the appellant's case in the Court below consequently therefore their evidence cannot be "consistent" or could not have been "consistent."

Counsel pointed out that it should be noted that at the beginning of these proceedings the trial Judge had given some advice on the witnesses to be called. To this end the Court was invited to refer to lines 12-17 on page 197 of the Record of Appeal which reads:-

> **"Mr. Siame - We expect to call 12 witnesses but the number could come down to 8**
>
> **Court - You have to consider what we discussed in the meeting that you don't need a long list of witnesses to prove a point..."**

Counsel submitted that if conjecture is anything to go by, Counsel who had conduct of this matter in the Court below may have seriously taken the trial Court's advice when he proceeded with PW2 and PW3 only to prove the points that he wanted them to prove.

It was contended that from the evidence adduced in the Court below, the appellant discharged the requisite burden of proof hence the learned trial Judge taking cognizance of the "Serial Killer tag." The case of ***MICHAEL MABENGA -VS- SIKOTA WINA, WALLACE MAFIYO AND GEORGE SAMULELA*** (2) was cited where this Court also held *inter alia* that:-

> **"An election petition is like any civil claim depends on the pleadings and the burden of proof is on the challenger to prove to a standard higher than a mere balance of probability."**

Further the case of ***AKASHAMBATWA MBIKUSITA LEWANIKA AND EVERISTO HICHUUNGA KAMBAILA, DEAN NAMULYA MUNG'OMBA, SEBASTIAN SAIZI ZULU AND JENNIPHER MWABA PHIRI -VS- FREDERICK JACOB TITUS CHILUBA*** (3) was cited where this Court said this higher standard required issues to be established to fairly high degree of convincing clarity.

Mr. Mwandenga argued that had the appellant not discharged this requisite standard of proof by establishing to a fairly high degree of convincing clarity that he had been labeled with "Serial Killer tag", the learned trial Judge would most

certainly not have taken cognizance of the "Serial Killer tag" that was attached to the appellant in the judgment complained of.

Counsel prayed that the appeal be allowed and consequently the election of the 1st respondent be nullified at the pain of the 1st respondent paying the costs (here and below).

In response the 1st respondent filed heads of argument on which Mr. Katolo relied at the appeal hearing.

In response to ground one of the appeal, Counsel argued that the issue to be determined in this ground of appeal is whether the appellant had adduced sufficient evidence in relation to the allegation of being a "Serial Killer" to warrant nullification of the 1st respondent's election as Member of Parliament for Kaoma Central Constituency?

Mr. Katolo contended that there was no specific evidence adduced to show that either the 1st respondent or any of his agents with the 1st respondent's consent were involved in calling the appellant a "Serial Killer."

It was pointed out on the contrary the appellant's own evidence in cross-examination as appears at page 209 lines 10-11

stated that **"I don't know my Lady who started the allegation of one being a "Serial Killer.""**

Counsel argued that if the person who started the "Serial Killer" allegation is not known, is it fair to nullify the 1st respondent's election for an allegation that is not attributable to him?

Mr. Katolo further pointed out that at page 209 lines 5 to 9 the appellant clearly exonerated the 1st respondent when he said that in 2006, it was not the 1st respondent who was accusing the appellant of being a "Serial Killer."

Counsel submitted that the "Serial Killer tag" had no bearing on the results of the election as the same tag had been in existent as far back as 2001 when the 1st respondent was not anywhere near the elections.

It was contended that the real reason why the appellant petitioned is made clear at page 207 lines 15 to 20 where the appellant said that he was surprised that the 1st respondent who was participating in an election for the first time could be declared a winner.

Mr. Katolo pointed out that the Court found as a fact that evidence of character assassination was based on the evidence of PW2 and PW3. According to Counsel the trial Court observed at page 73 lines 10-14 that the petitioner failed to adduce proper evidence relating to the allegation of character assassination.

It was argued that this is a finding of fact made by the trial Court after listening to the evidence and observing the demeanour of witnesses.

Mr. Katolo pointed out that the trial Court also found PW2 and PW3 to be unreliable witnesses because of their inconsistent evidence; the credibility of PW2 and PW3 were doubted by the Court. The case of ***KENMUIR -VS- HATTINGH*** (4) was cited where it was held that:-

> **"Where questions of credibility are involved an Appellate Court which has not had the advantage of seeing and hearing the witnesses will not interfere with the findings of fact made by the trial Judge unless it is clearly shown that he has fallen into error."**

Counsel further pointed out that the case of ***NKHATA AND FOUR OTHERS -VS- THE ATTORNEY GENERAL OF ZAMBIA*** (5) sets out the principles on which findings of fact by a trial Judge can be reversed on appeal. It was held in that case that:-

(i) **The Judge erred in accepting evidence;**

(ii) **The Judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered; or**

(iii) **The Judge did not take proper advantage of having seen and heard witnesses;**

(iv) **External evidence demonstrates that the Judge erred in assessing the manner and demeanour of witnesses.**

It was submitted that none of the above facts exist in this case to warrant this Court to disturb the findings of fact made by the Court below.

Mr. Katolo pointed out that the conclusions by the trial Court are well documented at page 75 line 13 to page 77 line 12; the trial Judge cannot in anyway be faltered.

It was argued that upon examination of the pages referred to above the Court will agree with the sentiments expressed in the case of ***EASTERN CO-OPERATIVE UNION LIMITED -VS- YAMENE TRANSPORT LIMITED*** (6) where Ngulube DCJ as he was then opined that:-

> **"We examined the passages complained of in the judgment and we find that the learned trial Commissioner, who had the advantage of seeing and hearing the witnesses, was entitled to assess the**

> **credibility of the parties with reference to the consistency or otherwise of their evidence on other points. In any case, we find that no grounds have been demonstrated to this Court to enable us to interfere with the findings based on an issue of credibility. For the reasons which we have endeavoured to adumbrate, the appeal cannot succeed on the question of liability."**

It was submitted that even in this case the Court will reach the unavoidable conclusion that there is no basis to interfere with the findings of the Court below.

In response to ground two of the appeal, it was submitted that the election of the 1st respondent as duly elected Member of Parliament can only be nullified if there is proof that falls within the ambit of **Section 93(2) (c)** of the **Electoral Act No. 12 of 2006**. (9)

It must be proved to the satisfaction of the Court and to the required standard that:-

> **"The corrupt or illegal practice was committed in connection with the election by or with the knowledge and consent of the candidate or of that candidate's election agent or polling agent."**

It was contended that there was no evidence led by the appellant to show that the "Serial Killer tag" was perpetrated by the 1st respondent or with the knowledge and consent of the 1st respondent or by the 1st respondent's election or polling agents.

Counsel pointed out that the appellant himself admitted in cross-examination at page 207 lines 3 to 11 that the "Serial Killer tag" was there in 2001 and 2006 elections when the 1st respondent was not a candidate in those elections. It was further pointed out that at pages 209 lines 10 to 11, the appellant did not even know who started accusing him of being a "Serial Killer."

It was argued that the question that begs an honest answer is, "would it be fair, just and equitable to nullify the election of the 1st respondent based on an allegation of "Serial Killer" that is not attributable to the 1st respondent?" It was submitted and very respectively so that it would not be fair and just.

Counsel contended that the appellant failed to bring any evidence to demonstrate (if any) how such an allegation of being a "Serial Killer" affected the election results in Kaoma Central.

It was pointed out that PW7 Roy Machayi stated at page 226 lines 10 to 12 that as an adult male aged 55 years, he had already made up his mind who he would vote for. Counsel argued that this clearly demonstrates that the "Serial Killer tag" did not affect the voters at all. It was submitted that no witness testified in the Court below that they were prevented from electing the

appellant by reason of being called a "Serial Killer." It was argued that that is the type of evidence that the Lower Court was looking for but, which the appellant lamentably failed to produce. Mr. Katolo submitted that in the absence of such direct evidence, this Court cannot be called upon to make inspired and intelligent guesses about the effect (if any), that the "Serial Killer tag" had on the elections in Kaoma Central.

In the premises Counsel respectfully urged this Court to dismiss the appeal with costs.

The 2nd respondent filed heads of argument. In the preamble the 2nd respondent pointed out that the Court would note that in the Court below the appellant had raised only one allegation against the 2nd respondent.

It was further pointed out that at page 87 and 88 of the Record of Appeal, the appellant stated as follows at paragraph 3 (iii) of his petition:-

> **"On the 20th August, 2011, the 2nd respondent did cause to be published in the Daily Mail Newspaper and the Post Newspaper wrong names of the Petitioner as a Parliamentary Candidate namely being KALEKA E. MAKASA instead of Kaleka E. Maseka."**

It was submitted that the Court will also note that during cross-examination as shown at pages 209 and 210 of the Record of Appeal, the appellant admitted that in spite of the misspelling of his name, he was campaigning as Kaleka E. Maseka, that he was one of the leading business people in Kaoma and that he is well known, that even prior to the September 20th, 2011 elections he had contested elections in 2006 as a candidate under the names Enock Kaleka Maseka and that, his picture bearing the correct names and symbol of his political party were correctly reflected on the ballot papers and that there was no mistake of identity as to which candidate was contesting the Parliamentary election for Kaoma Central Constituency under the Patriotic Front.

It was further submitted that the 2nd respondent filed into Court written submissions as appears at pages 182 to 187 of the Record of Appeal. Counsel pointed out that the Court below subsequently rendered its judgment and held as follows at page 71 of the record lines 11-17:-

> **"I am satisfied that the Petitioner campaigned using his correct names before and after the publication and as Counsel for the 2nd respondent rightly observed, the portrait or photograph of the Petitioner reflected his correct names**

and particulars so that he was clearly identified and he was the only Patriotic Front Candidate. In the circumstances from all this evidence and revelations it is clear that the clerical errors had not negatively influenced the voters as they were capable of identifying the Petitioner."

It was contended that the appellant's grounds of appeal and Heads of Arguments have not challenged or impugned the learned trial Court's finding on the allegations against the 2nd respondent. In the premises, the 2nd respondent humbly prayed that the trial Court's findings in the Court below with respect to the 2nd respondent be upheld and that the appeal against the 2nd respondent be dismissed with costs in this Court and below.

We have considered the grounds of appeal; the heads of argument on behalf of the parties; the evidence that was adduced before the Court below; and indeed the judgment of the Court below which is the subject of this appeal.

In ground one of the appeal the appellant has challenged the trial Judge for misdirecting herself by failing to consider the implications or consequences of the "Serial Killer tag" that was attached to the appellant during the campaigns for the 20th September, 2011 elections viz the issue of whether or not the 1st respondent was duly elected.

It was argued in support that the election petition in the Court below was *inter alia* anchored on the fact that there were certain falsehoods and character assassination that were leveled against the appellant and his Presidential Candidate at the behest of the respondent and/or his agents during the run-up to the 20th September, 2011 Presidential and General Elections. One that stands to-day is the allegation that the appellant was a "Serial Killer."

It was pointed out that evidence was led in the Court below that showed that the appellant had indeed been given a tag of being a "Serial Killer" during the run-up to the 20th September, 2011 Presidential and General Elections. It was submitted that however, no iota of evidence was led showing or tending to show that the appellant was indeed a "Serial Killer" as alleged or as insinuated. It was argued that so without doubt this allegation was false.

In response it was argued on behalf of the respondent that the issue to be determined in this ground of appeal is whether the appellant had adduced sufficient evidence in relation to the allegation of being a "Serial Killer" to warrant nullification of the

respondent's election as Member of Parliament for Kaoma Central Constituency.

It was contended that there was no specific evidence adduced to show that either the respondent or any of his agents with the respondent's consent were involved in calling the appellant a "Serial Killer."

The evidence in support of the allegation that the respondent accused the appellant at his meetings as a "Serial Killer" came from the appellant who in his evidence at page 199 of the Record of Appeal stated that **"during the campaign, especially at Shambelamena Basic School where I went to address a rally, we found over 500 people gathered and when I started addressing the electoral Joseph Mbangu stood up and asked me "Carlos Antonio was here and he told us that you are a killer and you kill people and he said you should not be voted for ..."**

Later in his evidence the appellant stated that, **"I continued touring the Constituency and then I went into Lutoya Ward and in Lutoya Ward after addressing a campaign rally, Nyambe stood up and asked me a question, "- he also told me**

that" you are a killer, you kill people .." **"Then I said that I don't kill people and I have never been taken to Court for killing people ..."**

In cross-examination the appellant stated that, **"even the persons are, that word "Serial Killer" was there 2001 (first attempt) - a "Serial Killer" (this accusation was there even in 2006) -, I don't know who started the allegation of me being a "Serial Killer."**

In re-examination he stated that **"they were saying I am a "Serial Killer" (in 2011) that is why they did not vote for me."**

In his evidence Joseph Mbangu PW2, stated that on 19th August, 2011 he attended a meeting addressed by the respondent at Shambelamena Community School in Nkeyema Ward. He said that Maseka, my opponent in Kaoma, he is not a person, he is, a criminal.

Nyambe Shomenu, PW3 stated that on 26th August, 2011 he attended a meeting at Nalumino Mundia School in Lutoya Ward. At that meeting the respondent said that Maseka is just cheating

you and that the symbol for Sata and Maseka was to raise a hand and that they may bring war.

In his evidence the respondent denied saying what he was alleged to have said at Shambelemena Community School and Nalumino Mundia School.

The Court below after considering the evidence relating to paragraph 3 (vii) of the petition concerning the respondent's falsehood and character assassination of the appellant - found that the appellant failed to adduce evidence relating to these allegations of character assassination.

We have considered the evidence relating to ground one of the appeal and the relevant portion of the judgment of the Court below. We have found that the Court below cannot be faulted for finding as it did. The appellant's evidence relating to what he was told as to what was allegedly said at Shambelemena Community School and Nalumino Mundia School by PW2 and PW3 respectively was hearsay.

Further PW2 and PW3 in their respective evidence did not state what they were alleged to have told the appellant. The

appellant's evidence therefore was at variance with the evidence of PW2 and PW3.

In our view the appellant had not adduced sufficient evidence in relation to the allegation of being a "Serial Killer." He did not therefore prove on the standard required of him that the respondent labeled him as "Serial Killer" at his campaign meetings held at Shambelemena Community School and Nalumino Mundia School respectively. We therefore find no merit in ground one of the appeal. It is accordingly dismissed.

In ground two of the appeal, the appellant has attacked the learned Judge in the Court below when in connection with paragraph 3 (vii) of the appellant's petition she concluded that **"Further the petitioner failed to adduce evidence relating to these allegations of character assassination**.

Surely if the alleged utterances were being made at campaign rallies and meetings he would have produced proper evidence other than that of PW2 and PW3 who I find to be unreliable because of their inconsistent evidence."

It was submitted in support that this ground is anchored on the back drop of the fact that the learned trial Judge in one

breath took cognizance of the fact that the appellant had been labeled a "Serial Killer" before and during the campaigns for the 20th September, 2011 Elections and yet in another breath she says that the appellant failed to adduce evidence to prove the allegations of character assassination.

It was argued that to be falsely labeled a "Serial Killer" is one of the worst forms of character assassination that can be leveled against any person in general but in particular a person aspiring to be a Member of Parliament.

In response it was argued that the election of the respondent as duly elected Member of Parliament can only be nullified if there is proof that falls within the ambit of **Section 93(2) (c)** of the **Electoral Act**. (9)

It was submitted that there was no evidence led by the appellant to show that the "Serial Killer tag" was perpetrated by the respondent or by his election or polling agents.

Ground two of the appeal is a repetition of ground one of the appeal. Therefore what we have discussed in relation to ground one will apply to ground two of the appeal.

In the circumstances, we find no merit in ground two of the appeal. We accordingly dismiss ground two of the appeal.

We have noted that the appellant in the two grounds of the appeal has challenged findings of fact by the trial Judge. We have held in a plethora of cases before and we repeat that this Court will not interfere in findings of facts made by a trial Court, unless and except if such findings are perverse; the trial Court ignored or failed to take into account something which he/she should have considered; the trial Judge did not take proper advantage of having seen and heard the witnesses and external evidence demonstrates that the Judge erred in assessing manner and demeanour of witnesses. The trial Judge properly observed inconsistencies in the appellant's witnesses.

The two grounds having failed, we dismiss the appeal for want of merit. We accordingly uphold the election of the respondent Antonio Carlos Jose as Member of Parliament for Kaoma Central Constituency.

We order no 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

.....
E.N.C. Muyovwe,
SUPREME COURT JUDGE

.....
P. Musonda,
SUPREME COURT JUDGE