THE SUPREME COURT OF ZAMBIA **Appeal No. 223/2012**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: A PARLIAMENTARY ELECTION PETITION FOR MANGANGO CONSTITUENCY NUMBER 139 SITUATE IN THE KAOMA DISTRICT NUMBER 902 OF THE WESTERN PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THE 20TH SEPTEMBER 2011

IN THE MATTER OF: SECTION 81 OF THE ELECTORAL ACT NO. 12 OF 2006

AND

IN THE MATTER OF: SECTION 93 OF THE ELECTORAL ACT NO.12 OF 2006

AND

IN THE MATTER: THE ELECTORAL PETITION RULES STATUTORY INSTRUMENT NO. 426 OF 1968
(As amended)

B E T W E E N:

ROBERT TAUNDI CHISEKE **APPELLANT**

AND

RICHARD TIMBA SIMBULA **RESPONDENT**

THE ATTORNEY-GENERAL **INTERESTED PARTY**

Coram: Mumba Ag. DCJ, Mwanamwambwa, Phiri, Wanki and Muyovwe JJS, on the 21st May 2013, 16th January 2014 and 19th May, 2014.

For the Appellant: Mr. R.K. Malipenga, Messrs Robson Malipenga & Company

For the Respondent: Ms. B. Bulaya-Kearns, Messrs KBF & Partners

For the Interested Party: Mr. J. Simachela, Deputy Chief State Advocate

---

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Kalyoto Muhalyo Paluku vs. Granny's Bakery Limited Ishaq Musa, Attorney General and Lusaka City Council (2006) Z.R. 119**
2. **Josephine Limata Mwiya vs. Musangu Muzaza Appeal No. 75/2012**
3. **Swallow and Pearson (a firm) vs. Middlesex County (1953) ALL ER 580**
4. **Lewanika and Others vs. F.T.J Chiluba (1998) Z.R. 79**
5. **Charles Banda vs. Nicholas Banda (2006) HP/E/007**
6. **Mabenga vs. Wina and Others (2003) Z.R. 10**
7. **Mushili vs. Zambezi SCZ No. 46 of 2008**
8. **Match Corporation Limited vs. Development Bank of Zambia and the Attorney General (1999) Z.R. 13**
9. **Josephat Mlewa vs. Wightman (1995-1997) Z.R. 171**
10. **Mohammed vs. The Attorney General (1982) Z.R. 49**
11. **Mazoka and Others vs. Mwanawasa and Others (2005) Z.R. 138**
12. **Attorney General and Marcus Kapumba Achiume (1983) Z.R. 1**
13. **Shamwana and 7 Others vs. The People (1985) Z.R. 41**
14. **Kasote vs. The People (1977) Z.R. 75**
15. **Paton vs. Attorney General and Others (1968) Z.R. 185**
16. **Abel Banda vs. The People (1986) Z.R. 105**
17. **Albert Mulenga vs. The People (1977) Z.R. 106**
18. **Levison Achitenji Mumba vs. Peter Daka SCZ/8/2008**
19. **Wilson Masauso Zulu vs. Avondale Housing Project Limited (1982) Z.R. 172**
20. **Matilda Macarius Mutale vs. Sebio Mukuka and Electoral Commission of Zambia Appeal No. 45/2003**

Other Materials:

1. **Black's Law Dictionary by Bryan A. Garner, 2004, (Eighth Edition) West Publishing Co.**
2. **Halsbury's Laws of England Volume 15 (4th Edition) Butterworth & Co. (Publishers) Limited 1977**
3. **The Law of Evidence in Zambia: Cases and Materials, S. Hatchard, and M. Ndulo, (1991). (Multimedia Publications) Lusaka**

When we heard this appeal, Hon. Mrs. Justice Mumba sat with us. She has since retired. Therefore, this judgment is by the majority.

This is an appeal against the judgment of the Lusaka High Court which found in favour of the respondent and declared that the appellant was not duly elected as Member of Parliament (hereinafter referred to as "MP") for Mangango Constituency.

The brief background is that the appellant and the respondent were candidates in the September 2011 tripartite elections. The appellant stood on the ticket of the Movement for Multiparty Democracy (hereinafter referred to as "the MMD") while the respondent stood on the ticket of the Patriotic Front (hereinafter referred to as "the PF.") The appellant got 3136 votes while the respondent got 770 votes. The appellant was declared duly elected Member of Parliament for Mangango Constituency. The respondent petitioned the High Court, challenging the election of the appellant. In sum, the learned trial Judge found that the appellant's campaign was characterised by illegal and corrupt practices under **Section 79, 81 and 93 of the Electoral Act** and nullified the election of the appellant as Member of Parliament. The appellant being dissatisfied with the decision of the lower Court appealed to this Court.

We will return to the grounds and arguments in the main appeal shortly.

We heard this appeal on 25th January, 2013 and judgment was reserved. However, before judgment could be delivered the parties filed a Consent Order on the 2nd December, 2013 couched in the following terms:

CONSENT ORDER

BY CONSENT of the parties through their respective Advocates:

IT IS hereby AGREED and ORDERED as follows:

1. **That this Appeal be allowed**
2. **The judgment by the lower Court be set aside.**
3. **Each party bears its own cost in this application**

Dated at Lusaka this day of 2013.

Upon considering the Consent Order filed herein, we in turn made the following Order on the 5th December 2013:

INTERLOCUTORY ORDER

The Appellant and the Respondent having filed a Consent Order, IT IS HEREBY ORDERED as follows:

1. **The Attorney-General shall appear as an Interested Party and shall make submissions.**
2. **The appellant and the respondent shall make submissions, at the hearing to determine the validity or otherwise of the consent Order, to be held on Thursday 16th January, 2014 at 0900 hours.**

We are grateful to the parties and the learned Attorney-General for their submissions on this important matter which we consider novel and significant. We will start by considering the validity of the Consent Order entered into by the parties before proceeding to consider the main appeal.

The gist of the submissions by Counsel for the parties as they are both on the same wave length is that **Order 42 Rule 5A** of the White Book allows parties, in a matter such as this one, to enter into a Consent Order/Judgment. That **Order 42 Rule 5A/2/b/1** provides, inter alia, that:

> **"(2) This Rule applies to any Judgment or Order which consist of one or more of the following:**
>
> **(b) Any Order for-**
>
> **(i) The dismissal, discontinuance or withdraw of any proceedings, wholly or in part."**

It was submitted that the parties through their Counsel have drawn, signed and filed the Consent Judgment/Order which in effect discontinues and withdraws the proceedings in the terms agreed by the parties. They also relied on the case of **Kalyoto Muhalyo Paluku V. Granny's Bakery Limited Ishaq Musa, Attorney General and Lusaka City Council**[1] where the Supreme Court held that:

> **"Where all the parties to a cause or matter are agreed upon the terms in which judgment should be given or an order should be made, a judgment or order in such terms may be given effect as a judgment or order of the Court."**

It was submitted that this Court's hands are tied going by the effect of Order 42/5A/2 which states as follows:

> **"Rule 5A extends the consent procedure to the making of orders and the entry of judgments without such orders and judgment being made or given by any judicial officer, whether Judge or Master as it is generally, required by r.1(3) but this "Consent" procedure will only apply to the classes of orders and judgments specified in this rule and only subject to the procedure laid down in the rule being strictly followed."**

It was submitted that after the Consent Order has been filed, this Court cannot make orders and judgments and that this consent procedure must be strictly followed. Further, that this Court signed a Consent Order in similar circumstances in the

case of **Josephine Limata Mwiya vs. Musangu Muzaza**[2] in the matter of the Lwampa Constituency Election Petition. That a Consent Order was filed in Court and this Court allowed it even though it was filed before the appeal was heard. Further, it was argued that the law does not prevent a Consent Order from being entered into at this stage as the judgment of this Court has not been delivered. That if the judgment of this Court had been delivered and perfected, then the Consent Order in issue would not have been proper. It was submitted that if this Court will take the view that a valid Consent Judgment can only be allowed before the appeal is heard, this will amount to restricting the liberty of the parties and also making new rules.

It was submitted that the law cited herein is very specific and clear in that the only requirement that ought to be fulfilled is that all the parties to a matter must agree upon the terms in which a judgment should be given. That in this case, the parties have agreed to the terms in the Consent Order filed before this Court on 2nd December, 2013. That, therefore, the parties have met the requirement of the law under Order 42/5A/1 and also Order 42/5A/2 and that this Court must give effect to the Consent Order as guided by the law cited herein.

On the issue of public interest, it was submitted, inter alia, that granting the Consent Order is in the public interest as the same will result in avoiding a by-election. It was submitted that in agreeing to enter into this Consent Order, the parties considered the effects of conducting a by-election which would result in vast sums of tax payer's money being expended instead of applying the same towards improvement of the economy and development of the country. That the parties have agreed to work together for the benefit or interest of the public in the Constituency in order to save time, money and resources by entering into the Consent Order. It was submitted that the Consent Order before this Court is proper, valid and in the public interest for the aforesaid reasons. Further, that this Court should allow the Consent Order whether reluctantly or with reservations for the above stated reasons.

On behalf of the Attorney General, it was submitted that the issue for determination is as follows:

> **"Whether parties to litigation, in which findings of breaches of the law have been judicially established, can by agreement between them set aside those findings and thereby circumvent the consequences of such breaches of the law OR whether it is fair, reasonable and in public interest, for the Court to reject a consent judgment whose effect is to allow parties come up with an amicable settlement of their dispute."**

In addressing the law, it was submitted that the starting point is to first acknowledge that the facts and circumstances emanating herein are of a public nature. It was submitted that any electoral malpractice by a candidate or his agents in an election goes beyond the interests of the parties who actually participated as candidates in the election in question. That the interests of the individuals resident in the subject constituency are also taken into consideration during an election petition. To buttress this argument the case of **Swallow and Pearson (a firm) vs. Middlesex County Council**[3] was cited at page 582 where Parker J stated as follows:

> **"There is no doubt that a man is entitled to waive or to agree to waive the advantage of a law or rule made solely for his benefit and protection. It is equally clear that no person can waive a provision or a requirement of the law which is not solely for his benefit, but is for the public benefit."**

The learned Attorney General conceded that parties to litigation were at liberty to conclude their dispute by way of ex-curia settlement at any time before the matter is concluded by any Court. It was submitted that in matters of a private nature such as contractual obligations, the parties may consent to a variation of the judgment of the High Court as a consequential

effect of doing so is restricted to the parties and not to the public. That in the case of an election petition, the judicial decision therein is of a public nature and cannot be overturned by the consent of the parties as this would trump on the rights of individuals affected by the judicial decision. We were referred to **Article 72 of the Constitution** which provides as follows:

> **"(1) the High Court has the power to hear and determine any question whether-**
>
> > **(a) Any person has been validly elected or nominated as a member of the National Assembly or the seat of any member has become vacant...**
>
> **(2) An appeal from the determination of the High Court under this Article shall lie to the Supreme Court..."**

It was pointed out that the High Court is mandated to determine an election petition and once a decision is made, an aggrieved party may appeal to the Supreme Court. It was submitted that a perusal of the Electoral Act reveals that there is no provision for an amicable settlement of an election petition after its determination by the High Court. However, that **Section 93(2)** provides the circumstances in which the election of a candidate as a Member of the National Assembly shall be void.

It was argued that an appeal to the Supreme Court can be withdrawn by consent of the parties and the effect will be to

maintain the status quo in line with the High Court decision. However, in this case, the parties intend to consent to the appeal being allowed and set aside the judgment of the Court below. The learned Attorney-General found difficulty in appreciating the procedural justification of doing so as the consequential effect would be to disregard a finding of fact by the High Court outside the adjudication process of **Article 72(2) of the Constitution of Zambia**. It was contended that the procedure being proposed by the parties is, therefore, in conflict with **Article 72** of the Constitution and or **Article 93(2)** of the **Electoral Act.**

We have considered the submissions of learned Counsel for the parties and those of the learned Attorney–General on the validity or legality of the Consent Order entered into between the appellant and the respondent.

From the outset, we wish to state that we agree with the Attorney–General that election petitions are constitutional matters and by their very nature they are taken out of the private sphere. **Article 72 of the Constitution** gives the High Court the jurisdiction to adjudicate on matters relating to the election of a Member of Parliament.

Counsel for the parties have brought to our attention the fact that we signed the Consent Judgment in the case of **Josephine Limata Mwiya**[2] which is on all fours with the present case. It is on all fours because the Consent Order read exactly the same and the appellants in both cases were nullified by the High Court.

It has been the practice of our courts to sign Consent Orders drawn by the parties on their own terms but approved by the Court. We are aware that not all Consent Orders or Judgments are approved by the Court as they have to conform to the rules of Court or indeed to the law applicable in each case. Otherwise why should there be provision for the Court to sign, if the same does not require the approval of the Court? We are alive to the Consent Judgment in the case of **Josephine Limata Mwiya vs. Musangu Muzaza**[2] which was signed by this Court. Indeed, the Consent Judgment was couched in the same terms as the one under consideration. In that case, the Consent Judgment was entered into before the appeal was heard. In the present case, the Consent Judgment was filed pending the Judgment of this Court. However, in both cases this Court was being requested to allow the appeal and set aside the Judgment

of the Court below. The effect of the Consent Judgment in both cases was/is to reinstate into Parliament, the party whose seat was nullified by the High Court.

It is not correct as alluded to by Counsel for the parties that our hands are tied and that we are obliged to sign the Consent Order. Certainly, it is not a question of mere filing of the Consent Order but whether such an Order is valid to the extent that the Court is in a position to sign it and thereby give credence to it. We have examined **Order 42/5A.** A closer perusal of the said Order reveals that it is not applicable to the Consent Order filed by the parties in this case. We take the view that the crucial question which begs the answer is – what is the effect of the Consent Order filed by the parties herein or in the words of the learned Attorney-General: Can parties to a litigation in which findings of breaches of the law have been judicially established enter into an agreement to set aside the findings of the Court and circumvent the consequences of such breaches of the law?

It was submitted that as both parties have agreed to the terms of the Consent Order and in effect satisfied the requirements of the law then, this Court ought to sign the Order.

A person becomes a member of the National Assembly or Parliament either by election or nomination as provided under **Article 63 (2)** and **Article 68 of the Constitution**. The election of a Member of Parliament can be challenged in the High Court as provided under **Article 72 of the Constitution** which provides that:

> **(1) The High Court shall have power to hear and determine any question whether-**
>
> **(a) any person has been validly elected or nominated as a member of the National Assembly or the seat of any member has become vacant;**
>
> **(b) any person has been validly elected as Speaker or Deputy Speaker of the National Assembly or, having been so elected, has vacated the office of Speaker or Deputy Speaker.**
>
> **(2) An appeal from the determination of the High Court under this Article shall lie to the Supreme Court:**
>
> **Provided that an appeal shall lie to the Supreme Court from any determination of the High Court on any question of law including the interpretation of this Constitution.**

Further, under the provisions of **Section 93 (1)** and **93 (2) (a)** to **(d)** of the **Electoral Act No. 12 of 2006** a person ceases to be a Member of Parliament if his election is nullified under any of the said provisions. It is, therefore, clear that there is no provision in our electoral law for an ex-curia settlement of this magnitude to be entered into after an election has been nullified

or determined by the High Court. First of all, the parties have agreed that this appeal be allowed – meaning it should be in favour of the appellant whose election was nullified by the High Court.

Secondly, they have agreed that the judgment of the lower court be set aside – meaning that the parties will revert to their original position before the High Court Judgment was passed. This is in spite of the parties having subjected themselves to the legal process in the High Court in accordance with **Article 72 of the Constitution** and **Section 81** and **93 of the Act.** The High Court made a decision nullifying the election of the appellant as Member of Parliament on ground of electoral malpractice. And before the Supreme Court could render its judgment on appeal, the parties have decided to enter into a Consent Order.

It has been argued that this Consent Order is in the public interest as it will save the country the much – needed financial resources for development. We take the view that this argument cannot be sustained as the Consent Order filed before us is unlawful for the simple reason that it has no legal leg to stand on. Clearly, by entering into a Consent Order, the parties seem to be saying "we do not accept the High Court judgment". If this

is so, as pointed out by the State, the parties should not have subjected themselves to the process in the first place. As matters stand, we agree with the Attorney-General that the Consent order proposed by the parties is in conflict with **Article 72 of the Constitution and Section 93 (2) of the Act.**

In view of the above provisions in our law, as much as we acknowledge that there is agreement between the parties in this case,we cannot be swayed by issues of the financial implications of holding a by-election as our role in the main appeal is to determine the appeal on its merits after considering the grounds of appeal and the heads of argument from both parties.

It is noteworthy that even withdrawal of an election petition can only be by leave of the court (see **Section 99 of the Electoral Act**). The public nature of an election petition cannot be underscored, for example, according to the learned authors of **Atkins Court Forms Vol. 18 (1996 Issue**) at Page 171 they state that:

> **"An election petition may not be withdrawn without leave of the election court or an election divisional court. Notice of motion for leave stating the ground on which the application is made and stating that any person who might have been a petitioner may apply to be substituted as petitioner, must be served on the respondent and on the returning officer, who must publish it in the constituency and on the Director of Public Prosecutions, and**

the petitioner must publish it in at least one newspaper circulating in the constituency. Before leave for the withdrawal of an election petition is granted, affidavits by the parties to the petition, by their solicitors and by the election agents of all the parties who were candidates at the election are required, but the judge may dispense with the affidavit of any particular person on special grounds being shown."

Such provisions as are provided in the European laws demonstrate that there can be no private agreement between the parties in matters relating to elections as the same will ultimately affect the electorate and the public at large who in this age of advanced technology will have obviously followed the events in the constituency concerned.

And even when it comes to costs, in an election petition the Supreme Court has recognised the public nature of these petitions and has in most cases, maintained that costs will be borne by each party.

Indeed, if we allowed this Consent Order to stand, we would be setting a bad precedent and also sending a wrong message – that parties to election petitions can ignore court judgments and instead enter into "ex-curia" settlements to circumvent the effect of the judgment of the Court.

Simply put, we are averse to allowing the continued presence of the appellant in Parliament on the basis of the Consent Order after his election was nullified by the High Court. And as we have stated herein, this will be the effect of the Consent Order if it is signed by this Court. The same cannot be allowed for lack of legal backing.

For reasons given above, we disallow the Consent Order signed and entered into by the parties.

Now, we turn to the main appeal, as against the Judgment of the High Court which nullified the appellant's election as MP.

In her judgment the learned trial Judge examined the pleadings by both parties as well as the evidence adduced. She acknowledged that the respondent, in his petition contended that the campaigns in the said elections were characterized by treating contrary to **Section 81 of the Act** and undue influence contrary to **Section 82 of the Act** which resulted into corruptly influencing voters to vote for MMD as a result of threats to life and inducement or interference.

In relation to the allegation of treating under **Section 81 of the Act** the particulars were that:-

1) **During the campaigns MMD and the respondent (appellant herein) were paying the electorate money, bicycles, mealie meal, salt, sugar, soap and chitenge materials that had no party symbols in order to entice them to vote for their candidate.**

2) **On 18th and 19th September, the MMD campaigned and distributed campaign materials at night in Namafulo of Mangango Constituency, even though ECZ had decreed that there should be no campaigns on those days.**

3) **The MMD ferried electorates in Shikombwe and Kapili Ward to polling stations and paid them money, and canter light truck Registration No. ABE 4168 was used.**

4) **The MMD campaign team distributed eight hammer mills during the campaign time at Namalazi and Kanjombo areas.**

5) **The MDD team strategically took 200 bags of fertilizer and seeds to Luambuwa ward for the first time and people were told to vote for MMD for them to benefit from the consignment.**

On the contravention under **Section 82 of the Act** which is undue influence, it was alleged that:

6) **The MMD and its candidates threatened the Luvales, Mbundas, Chokwes and all tribes whose origin is from Angola that they would be deported to Angola if they voted for PF. That this was a serious threat because the constituency hosts a lot of these tribes because of Mayukwayukwa Refugee Camp.**

7) **Voters were told by the MMD campaign team that the PF symbol, the boat, means "Canoes shall be used to ferry them back", AND "Don't Kubeba" was interpreted that this ethnic group must not be toldthat they shall be deported. It was alleged that this happened throughout the constituency and it disadvantaged the PF candidates as many Refugees in the constituency are suspected to have acquired National Registration Cards illegally.**

8) **The MMD campaign team told the electorate that PF was going to promote and even force homosexuality, confine people living with HIV/AIDs in prison, and killing them as they were a burden to the society. This made people insecure and as it was coming from the ruling party, the illiterate majority of voters believed and voted for the MMD.**

9) **The MMD filed in a candidate, Taundi Robert Chiseke, a refugee of Angolan origin, who lived in camp 9 in Mayukwayukwa refugee Camp.**

The respondent prayed for:

i. **A declaration that the election was null and void ab initio,**
ii. **A declaration that the appellant was not duly elected**
iii. **Costs**
iv. **Such declaration and orders as the Court may deem fit.**

In his Answer, the appellant denied all the allegations against him and prayed for:-

i. **A declaration that he was duly elected as a Member of the National Assembly for Mangango Constituency**

ii. **A declaration that he never committed any electoral malpractices against the Electoral Code of Conduct**

iii. **A declaration that the election was not null and void ab initio**

iv. **An Order that the petition be dismissed.**

In her judgment, the learned trial Judge found that the 1st and 2nd allegation were proved and this was that the MMD and the appellant were paying the electorate money, bicycles, mealie meal, soap, chitenge materials etc. to induce voters to vote for the MMD and its candidates. Further, she found that on 18th and 19th September 2011, the MMD campaign team continued campaigning in the night in Namafulo Ward and this was after closure of the campaign period to the disadvantage of opposition parties. The learned Judge referred to the case of **Lewanika vs. Chiluba**[4] and also relied on the case of **Charles Banda vs. Nicholas Banda**[5] on the issue of an election agent. The learned Judge in the Court below relied on the case of **Charles Banda**[5] where Justice Nyambe held that:

> **"person shall be deemed to be an apparent election agent if the person conducts himself or herself as an election agent, though not specifically appointed as such."**

With regard to the 3rd allegation which alleged, inter alia, that the MMD ferried the electorate in Shikombwe and Kapili Wards to polling stations and paid them money, the learned

Judge found that on the evidence of PW1, PW4, PW7, RW9, RW10 it could not be a coincidence that RW9 Kenny Ndumba and the motor vehicle in question were featuring prominently during the campaign period and on election day. She rejected RW9's evidence that he was merely an election agent for the MMD Presidential candidate. The learned trial Judge found that he was not a credible witness.

Further, the learned trial Judge found that the 4th allegation which is to the effect that the MMD campaign team distributed 8 hammer mills during the campaign period to entice the electorate to vote for the MMD at Namalazi and Kanjombo area was proved. The evidence before her was that the hammer mills which were distributed to the women's clubs were distributed on a large scale to the extent that it disadvantaged the other political parties and the electorate were prevented from exercising their right to vote for a candidate of their choice.

The learned Judge found that allegation 5, 6, 7, and 9 were not proved.

The learned Judge found that the allegation relating to the issue of homosexuality where it was alleged that the PF Government would promote homosexuality, confine people living

with HIV/AIDS and eliminating them was proved. The learned Judge found as a fact from the evidence of PW1, PW2, PW5 and PW8 that the MMD went round de-campaigning the PF through such utterances with full knowledge that there was no substance to the allegations and that this exerted undue influence on the electorate contrary to **Section 82 of the Act**. According to the learned Judge, the MMD's false allegations under this head were bound to make people insecure, especially in a rural setting where educational levels were low and more so that the utterances came from the ruling party. The learned trial Judge concluded that because issues of homosexuality are a taboo in this country, such utterances had an effect on the electorate to the extent that most people were prevented from electing a candidate of their choice. After considering the allegations set out by the respondent in his appeal, the Judge found that out of the 9 allegations, 6 were successfully proven. She relied on the cases of **Mabenga vs. Wina and Others**[6] and **Mushili vs. Zambezi.**[7]

The learned trial Judge found that the respondent's campaign was characterised by illegal and corrupt practices under **Section 79, 81** and **82 of the Act** and declared that the

appellant was not duly elected as Member of Parliament for Mangango Constituency and that the election was void and ordered costs to be taxed in default of agreement.

As we have stated earlier, the learned Judge concluded that the appellant's campaign was characterised by illegal and corrupt practices under **Section 79, 81** and **93 of the Act** and nullified the election.

In his appeal, the appellant advanced the following grounds:-

1. **The Honourable trial Judge erred and misdirected herself by extending the categories of persons for whose electoral misdeeds a candidate can be answerable by introducing a category of *"an apparent election agent"* at pages J32-33 as suggested by her fellow High Court Judge and in the teeth of the Electoral Act and numerous Supreme Court decisions which is in breach of the principle of stare decisis.**

2. **The Honourable trial Judge erred in Law and misdirected herself when she penalized the candidate, the Appellant, for actions and utterances of named persons belonging to the same political party, but who were not his authorized and designated agents and others who had their own campaigns as Local Government candidates.**

3. **The Honourable trial Judge erred in Law and misdirected herself when she did not heed the provisions of Section 93(3) of the Electoral Act No. 12 of**

2006 that an election should not be nullified even if there was wrong doings where the candidate and his lawful agents are personally blameless.

4. **The Honourable trial Judge erred in Law and misdirected herself when she upheld five allegations which were directed at the MMD as a political party which did not warrant nullification of an election, as a result the Appellant was penalised for the alleged misdeed by his political party.**

5. ...

6. **The Honourable trial Judge misdirected herself when resolving issues of credibility and came to adverse conclusions which were not warranted and the Supreme Court should interfere with the findings for the following good reasons:**

(a)The lower Court reversed the onus of who bore the burden of proof on page J34 by indicating that she nevertheless expected the appellant to call named persons to rebut the other side's allegation.

(b)The lower Court unbalanced the evaluation of the evidence at page J37 where she expected the Appellant to have adduced more evidence to rebut an allegation against the MMD Party.

(c)The lower Court's findings against RW9's credibility have wrongly been used against the Appellant.

(d)The lower Court ignored and wrongly discounted the evidence of RW2 the Kaoma Council Secretary which showed that the area had all along been MMD stronghold as evidenced on page J38 to 40.

(e) **The Lower Court holding that the majority of voters may have been prevented by MMD's dirty campaign against PF based on false threats regarding war deportations, AIDS and homosexuality was unrealistic (Page J48 to 49)**

(f) **There was no justification for assuming that voters in rural areas are any less intelligent than those elsewhere or towns and no such unfair conclusion can be drawn if we examine the countrywide voting patterns.**

7. **The Honourable Trial Judge erred in fact and Law by finding and holding against the Appellant that distribution of Government hammer mills was campaign gimmick by the MMD when the appellant did not participate in the procurement and distribution of hammer mills as he was not MP or Councillor then.**

8. **The Honourable Trial Judge failed to take Judicial Notice of failed petitions where Hammer mills were subject of complaint and that other Judges correctly held that this was a Government project as every MP was tasked to distribute Hammer mills and in some instances Councils purchased hammer mills using Constituency Development Fund (CDF) (just as she did by following another High Court Judge when she expanded the list of agents instead of following Supreme Court decisions). The Electoral Act nor the Code of Conduct does not forbid Public philanthropic activity of this kind and the same had no impact on the voters.**

9. **The Honourable Trial Judge erred in fact to find that a customary gift to a Chief during a courtesy call transformed into an electoral bribe by reason of the presence of the candidate's campaign agents.**

Counsel for the appellant filed Heads of Argument and at the hearing of the appeal, she relied entirely on the same.

In support of ground one and two which were argued together it was submitted, inter alia, that our electoral law recognises only election agents and polling agents. Counsel referred us to **Section 35 and 36** of the **Act** which provides for appointment of agents. Counsel also relied on the **Electoral (General Regulations) Statutory Instrument No. 92 of 2006** which provide for election and polling agents under **Regulations 50 and 51.** Further, we were referred to the case of **Lewanika and Others vs. Chiluba**[4] where we said:

> **"We are also mindful of the provisions in the Electoral Act so that a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since under Regulation 67 of the Electoral (General) Regulation, an election agent has to be specifically so appointed".**

It was submitted that the learned trial Judge ignored the Supreme Court decision and instead chose to rely on the High Court decision of her elder sister, Judge Nyambe SC in the case of **Charles Banda vs. Nicholas Banda.**[5] According to Counsel, in that case, it was held that a person shall be deemed to be 'an

apparent election agent' if he conducts himself or herself as an election agent, though not specifically appointed as such.

Counsel contended that the learned trial Judge breached the principle of stare decisis deliberately when she ignored to follow the numerous Supreme Court decisions and rather opted to follow the High Court decision of her elder sister, Judge Nyambe because the so called 'apparent election agents' namely, Kenny Ndumba, David Nchengu, Austin Liato and others were not the appellant's electoral agents or polling agents. That their utterances and actions were not authorised by the appellant and that in fact some of these people had their own campaign and that these cannot be used to penalize the appellant as this was unjust and against the law. Counsel further relied on the case of **Match Corporation Limited vs. Development Bank of Zambia and the Attorney-General.**[8]

Turning to ground three, it was submitted that the learned trial Judge erred in law and misdirected herself by ignoring the provisions of **Section 93(3) of the Act.** It was submitted that the trial Judge did not find any blame worth on the appellant and his election agents or polling agents save what the trial Judge called 'apparent election agents' whom she blamed.

In support of ground four, it was submitted that the learned trial Judge erroneously penalised the appellant for the alleged misdeeds of MMD as a party. Counsel submitted that the trial Judge found that the MMD went round de-campaigning the PF through utterances, knowing well that there was no substance to those allegations, and this exerted undue influence on the electorate.

Counsel submitted that there is no electoral law that supports the nullification of election results because of the wrongs or misdeeds of political parties save for wide spread violence and intimidation. It was submitted that the learned trial Judge misapplied the case of **Josephat Mlewa vs. Wightman.**[9] In that case, the activities complained of were widespread violence, fear and intimidation which was not so in the Mangango Constituency. That widespread violence, fear and intimidation were not pleaded and no witness testified about them and as a result the free will and choice of the electorate as demonstrated by the election results were overturned. Counsel pointed out that the appellant got 3136 votes while the Respondent got 770 votes.

At this stage, we note that although the appellant indicated it had nine grounds, there was no ground five.

We shall still refer to the next ground as ground six as per the Memorandum of Appeal filed herein to avoid confusion. In support of ground six, it was submitted that this Court should interfere with the findings of the learned trial Judge as she misdirected herself in resolving issues of credibility and that she came to adverse conclusions as follows:

1. **That the lower Court reversed the onus of who bore the burden of proof on Page J34 by indicating that she expected the appellant to call named persons to rebut the other side's allegation.**

Counsel cited the case of **Mohammed vs. The Attorney-General**[10] and **Mazoka and Others vs. Mwanawasa and Others**[11] to support this argument.

2. **That the learned Judge expected the appellant to have adduced more evidence to rebut an allegation against the MMD party. And that the appellant was not the MMD National Secretary to defend the party.**

3. **That learned trial Judge's findings against RW9's credibility were used wrongly against the appellant.**

4. **The lower Court ignored and wrongly discounted the evidence of RW2 the Kaoma Council Secretary which**

showed that the area had all along been MMD stronghold as evidenced on Page J38 to 40

We note that point number four (4) was left out by learned Counsel in his submissions and we shall not, therefore, consider it.

5. **The lower Court held that the majority of voters may have been prevented by the MMD's dirty campaign against PF based on false threats regarding war, deportation, AIDS and homosexuality was unrealistic looking at the evidence on pages (J48 to J49).**

6. **That there was no justification to assuming that the voters in rural areas are less intelligent than those in towns or cities or elsewhere and no such unfair conclusion can be drawn if we examine the countrywide voting patterns.**

Counsel argued that in politics there are strongholds for political parties.

Counsel relied on the case of the **Attorney-General and Marcus Kapumba Achiume**[12] to support his arguments on this ground and urged us to reverse the findings of the trial Court.

With regard to ground seven and eight, it was submitted that the Appellant did not participate in the procurement and distribution of the hammer mills as he was not a Member of Parliament or Councillor at that time. That the distribution of

hammer mills was a government project which was effected using the Constituency Development Fund through the Council.

It was submitted that the trial Court should have taken judicial notice in this regard of other judgments on this issue, after perusing the records of other petition judgments just as she followed the judgment of another High Court Judge when she expanded the list of agents to 'apparent election agent'. Counsel relied on the case of **Shamwana and 7 Others vs. The People**[13] where according to Counsel, it was held that a Judge can take judicial notice after looking at the records of other judges. He argued that had the trial judge taken judicial notice of the records of other High Court judgments on the issue of hammer mills, she would not have come to the adverse conclusion that it was an MMD campaign gimmick to distribute hammer mills when all Members of Parliament were given hammer mills to distribute. It was further argued that neither the Electoral Act nor Code of Conduct forbids public philanthropic activities of this kind.

In support of ground nine, it was argued that it is part of Zambian tradition to present gifts to Chiefs whether one is a politician or not. It was pointed out by Counsel that Chief Mufaya

denied that he was corrupted when he accepted K150,000.00 from the appellant which was given to him as homage. That the Chief told the Court that he did not tell the electorate to vote for MMD simply because he was given K150,000.00. And that further, the Chief actually stated that he refused to go and vote for MMD and that he did not contribute to the appellant's victory because he went and voted for PF. Counsel argued that, therefore, there was no electoral corruption.

Counsel urged us to allow the appeal and declare that the appellant was duly elected as Member of Parliament for Mangango Constituency.

Counsel for the respondent also filed Heads of Argument which she relied on.

In response to ground one and two, it was submitted that the doctrine of stare decisis does not put a restriction on the lower courts to only follow the prior decisions of the superior Courts and neither does it make it mandatory to only follow the decisions of the superior Courts. It was submitted that the doctrine allows lower Courts to only follow their prior decisions and those of the superior Courts. Counsel submitted that in the

case in casu, the learned trial Judge opted to follow a prior decision passed by another High Court Judge as the doctrine of *stare decisis* permits a Court of equal standing to follow the decision of another Court of the same standing in hierarchy.

It was pointed out that in her judgment the learned trial Judge acknowledged the case of **Lewanika vs. Chiluba**[4] which was referred to by Counsel for the appellant. According to Counsel, the case of **Lewanika vs. Chiluba**[4] discloses a third category of people who can act with the candidate's consent. Counsel argued that this is how the issue of 'apparent election' agent arose which category was referred to in the **Charles Banda case.**[5] It was submitted that there is no other term which can be given to people who act with the consent of the candidate other than that of 'apparent election agent.'

It was submitted that the learned trial judge opted to rely on the case of **Charles Banda**[5] because it is on all fours with the present case and that this did not amount to ignoring the case of **Lewanika vs. Chiluba**[4]. Counsel also cited **Kasote vs. The People,**[14] **Paton vs. Attorney General and Others,**[15] **Abel Banda vs. The People**[16] and **Match Corporation Ltd v Development Bank of Zambia and The Attorney General.**[8] It

was submitted that these cases categorically stated that the principle of stare decisis requires that a Court should abide by its ratio decidendi in past cases. It was argued that going by the authorities cited, the learned trial judge did not err by considering the case of **Charles Banda**[5] as it suited the facts of the case at hand and that this Court should uphold the decision of the lower Court and dismiss the appeal.

Counsel argued that RW8's conduct and utterances placed him in a situation that when people listened to him during campaign meetings they took him to be the agent of the candidate. It was submitted that it would be unreasonable to exclude the third category of people, that is, 'apparent election agents' simply because the **Electoral Act** under its definition section does not define an 'apparent election agent.' Counsel contended that though not expressly defined, the **Electoral Act** under **Section 79, 81,** and **82** recognises that other people may act on behalf of the candidate with or without his consent and such people are agents as defined under the law of agency. It was pointed out that RW8 and others conducted themselves in a manner that showed that the appellant consented to their actions. And that the learned Judge who saw the witnesses was

able to make inferences on judicially tested facts and that those facts cannot be faulted and that, therefore, the appellant has no real ground to base his appeal.

Turning to ground three, it was submitted that the learned trial Judge rightly found that the appellant's apparent election agents acted wrongly. The gist of the respondent's argument on this ground is that the learned trial Judge dealt with **Section 93 (3) of the Act** in accordance with the importance attached to it by the appellant. It was submitted that since the appellant in his submission did not attach any importance to **Section 93 (3)** it is not expected that the trial Judge could have addressed it in the manner that suited the appellant. It was submitted that the record will show that all the other subsections which the appellant addressed were considered by the trial Judge. Counsel submitted that **Section 93 (3)** still reveals a third category of people who can be found wanting, and not only the candidate and duly appointed agents. Counsel argued that the appellant in arguing **Section 93 (3)** decided to use the proviso which was more favourable to him. It was submitted that the interpretation of the wording of the whole **Section 93 (3)** reveals that there is a third category of people who had been referred to under that

section who can act in an election and,that is, the candidate himself; his agents and people who act with the consent of the candidate. We were invited to consider this third category of people as the learned trial Judge did. It was submitted that this is why the blame was attached to RW8 and others in accordance with the said provision in accordance with the **Charles Banda case.**[5] It was submitted that once this category of people is found wanting, as rightly found by the trial Judge, their acts can lead to an election being nullified. It was submitted that with regard to **Section 79, 81 and 82** of the **Electoral Act** the wording used in those sections is general and that the words "*Any Other Person*" encompass all the persons who may act on instruction of the candidate or with his consent as provided under **Section 93 (3) (a)**. That the sections alluded to cover people who act with the consent of the candidate or his agent. That the agents are persons whom the learned trial judge termed as 'apparent election agents' and that, therefore, the learned trial judge did not ignore **Section 93 (3)** as the section was addressed and that this Court should uphold her findings and dismiss this appeal.

It was submitted in relation to ground four and five that the appellant cannot disassociate himself from the MMD. That the only time the appellant could disassociate himself from the MMD is if he stood as an independent candidate and hence the actions of MMD as a party, and his own actions are one and the same.

We were referred to the **Josephat Mlewa case**[9] where according to Counsel, the Court further found that "**in politics, it is the parties which mount the campaigns for their candidates and that the consequences of any illegal dealings will inevitably affect the candidates so that a defence of not being personally involved would not be upheld if shown that the illegal acts complained of affected the results of the election.**"

We must point out that this citation is incorrect as in fact the above cited portion was a submission by Counsel for the appellant, Counsel mislead us by attributing the sentiments to the Court.

Counsel submitted that in this case MMD as a party mounted the campaigns for its candidate, (the appellant) and they acted together and their actions resulted in illegal dealings and that the dealings thereafter affected the appellant and the

respondent and which in turn resulted in affecting the election results as found by the Court below.

It was conceded by Counsel that our electoral law makes no provision for nullification of election results based on the wrong doing of the political party. However, Counsel referred us again to the **Josephat Mlewa case**[9] where we said:

> **"the distribution of exercise books and the T-shirtshad been done on a large scalethat many voters in the constituency were bribed to vote for UNIP and that this had affected the outcome of the election."**

It was submitted that in the **Josephat Mlewa case**[9] the evidence referred to allegation of corruption and bribery. That in this case the allegation of bribery and corruption were pleaded by the respondent and proved and that the trial Judge found as a fact that this adversely affected the election results as the respondent obtained 770 while the appellant obtained 3136 as a result of his misdeeds. It was argued that the learned trial Judge correctly applied the case of **Josephat Mlewa.**[9] That, therefore, the misdeeds of a political party are the misdeeds of a candidate as demonstrated above.

In response to Ground six, Counsel urged this Court to uphold all the findings of the trial Court with regard to the issues raised.

(a) It was submitted that the burden of proof was on the respondent and that this burden cannot be revised. However, Counsel disagreed with the appellant's argument that the learned trial Judge shifted the burden of proof to the appellant when she stated that the appellant should have brought witnesses to rebut the allegations in the petition. That the MMD and the appellant were dishing out money, bicycles, mealie meal, etc. to the electorate in order to entice them to voice for their candidate. That the respondent adduced evidence to support the allegations and the appellant had the opportunity to bring witnesses to disprove the allegations but chose not to. It was submitted that the appellant called Kenny Ndumba and David Nchenga who only gave bare denials. It was argued that the appellant only brought the two witnesses because they were election agents and not anybody else. Counsel cited the **Mazoka case**[11] in support of this argument. It was submitted that the trial Court acknowledged that there was

some evidence which remained unchallenged due to the fact that the appellant did not bring witnesses to rebut the same. Counsel submitted that rebuttal is merely disproving the allegations levelled against someone. That in her judgment, the learned trial Judge categorically stated that it would have been of assistance had the appellant brought the witnesses but that did not mean that the burden of proof shifted. The case of **Mohamed vs. The Attorney General**[10] was relied on. Further, Counsel submitted that the learned Judge only acknowledged the fact that the evidence of the respondent was not challenged and that, therefore, she was obliged to consider the evidence.

(b) It was submitted that, as argued earlier, the appellant could not disassociate himself from the MMD as he was part of the Party, and that he should have adduced evidence to challenge the allegations levelled against the Party on whose ticket he stood. That the defence of not being personally involved cannot be upheld.

(c) It was submitted that the trial Judge's findings on war, deportations, AIDS and homosexuality were not unrealistic. That the evidence adduced was not challenged by the

appellant as he only denied being at the gathering not that the said threats were issued. It was pointed out that RW10 and RW8 failed to explain to the trial Court where they were on the day that the threats were issued and that this was because they were at the meetings and they did issue the threats.

In response to grounds seven and eight, it was submitted that whether a Court is at liberty to take judicial notice of another court's record will depend on the circumstances of the particular case before it as held in the case of **Albert Mulenga vs. The People.**[17] It was submitted that the learned Judge did not have to look at another Court record in order to arrive at the finding regarding the hammer mills. We were referred to the **Law of Evidence by John Harchard and Muna Ndulo** on taking judicial notice of another court's record.

It was argued that the law on judicial notice requires a Judge to take Judicial notice of a matter that is so notorious that no evidence need to be adduced on the same. According to Counsel, the main issue was the time of distribution and he relied on the case of **Levision Achitenji Mumba vs. Peter Daka**[18] where it was held that:

"The delivery of an ambulance, medical personnel and medicines to Mwanika Clinic which the Appellant reopened a day or so before election was clearly intended to boost his chances of being elected as member of parliament for the area at the expense of other parliamentary candidates."

Counsel for the respondent urged us to dismiss the appeal.

We have considered the evidence in the Court below, the judgment appealed against and the submissions by learned Counsel for the parties.

Turning to ground one and two which were argued together, The gist of the appellant's argument is that the learned Judge contradicted herself by introducing a new category of agents, that is, 'apparent election agent' which is not covered by the Electoral Act. That the learned Judge defied the principle of stare decisis by not following the Supreme Court decision but followed that of her learned sister in the case of **Charles Banda.**[5] Further, that the learned Judge should not have penalized the appellant for acts done by other persons who were not his authorised persons.

On the other hand, Counsel for the respondent argued that the principle of stare decisis does not make it mandatory for lower courts to only follow decisions of superior courts. That the

principle allows courts of the same standing to follow each other's decisions. That the case of **Lewanika vs. Chiluba**[4] disclosed a third category of persons who can act with the consent of the candidates – and that these are the persons referred to as apparent election agents.

First of all, according to **Section 2 of the Act** "election agent" means:

> "**an agent of a Candidate for the purpose of that election who has been specified by the Candidate in that Candidate's nomination paper.**"

Going by the above definition, it is obvious that apparent electoral agent does not exist. However, our understanding of the term 'apparent electoral agent' as it was used by Judge Nyambe and indeed the learned trial Judge is that it referred to persons who clearly acted with the consent of the candidate. In this case, the appellant. We are, however, hesitant to agree with Counsel for the respondent that although the term is not defined in our electoral laws, we should nonetheless adopt it. Indeed, if the learned Judge meant that an 'apparent electoral agent' is an agent who acts with the consent of the candidate- this should have been made explicit. This is to avoid creating another category called 'apparent electoral agent' which is non-existent in

our laws. What the two Judges meant was that people like Kenny Ndumba, David Nchengu and others acted as though they were election agents.

We take the view that what was crucial was for the learned Judge to establish whether the acts done by Kenny Ndumba, David Nchengu, Austin Liato and others were done on behalf of the appellant and with the consent of the appellant. And precisely, this was not a finding by the learned Judge that the named persons campaigned on behalf of the appellant with his consent as MMD Member and candidate. Although the Learned Judge misdirected herself in following the decision of the **Charles Banda case,**[5] there was sufficient evidence to show that the named persons were part of the appellant's campaign team as members of MMD.

In the case of **Kasote vs. The People**[14] we dealt with the principle of stare decisis and we emphasised that in our legal system a decision of one High Court Judge is not binding on another. We also stressed that the principle of stare decisis demands that our lower Courts be bound by the latest decision of this Court. That, if there is any conflict in our decisions, the latest decision should prevail.

It is trite that the principle of stare decisis does not allow a court on the same hierarchy to follow a wrong decision of another judge of the same level. We agree with Counsel for the appellant that the learned trial Judge should have followed our decision in the case of **Lewanika**[4] which she in fact referred to in her judgment.

Therefore, although the learned Judge wrongly followed the **Charles Banda case,**[5] we take the view that had she correctly applied herself, she would still have arrived at the correct conclusion, as she rightly did, that the named persons were campaigning for MMD and the appellant as a Member of the MMD could not divorce himself from the acts done by his party. What we said in the case of **Lewanika vs. Chiluba**[4] was that a candidate will be answerable for acts that he had done or those done by his electoral agents or those done with his consent. And therefore, the appellant cannot escape the net. The learned Judge was on firm ground in her conclusion. Ground one and two, therefore, fail.

We now turn to ground three.

The gist of the appellant's arguments on this ground was that the learned trial Judge erred in law and misdirected herself by ignoring the provisions of **Section 93(3) of the Act.** That the learned trial Judge did not find any fault on the part of the appellant or his election agents or polling agents except for those she termed 'apparent election agents.' Further that the election of the appellant should not have been nullified had the learned Judge correctly applied **Section 93(3) of the Act**.

On the other hand, Counsel for the respondent argued that his learned friend did not adequately address the issue relating to **Section 93(3) of the Act** in the Court below. According to Counsel, **Section 93(3) of the Act** discloses a third category of people who can be found wanting apart from the candidate and his duly appointed agents.

Section 93 (3) provides that:

> **(3) Notwithstanding the provisions of subsection (2)where, upon the trial of an election petition, the High Court finds that any corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court further finds that such candidate has proved that—**
>
> **(a) no corrupt practice or illegal practice was committed by the candidate personally or by that candidate's election**

agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;

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

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

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

We find that the arguments advanced by the appellant on this ground cannot be sustained and in our view this section did not come into play. It seems to us that Counsel for the appellant misapprehended the facts of the case. Further, this ground in our view is against findings of fact. The learned trial Judge found that some of the people in the MMD campaign team were Austin Liato, David Nchengu, Kenny Ndumba and that they were among those who induced voters to vote for the MMD candidates for President, Member of Parliament and Councillors. Clearly, they were also campaigning for the appellant. The respondent found the appellant distributing t-shirts, bales of chitenge and caps on 18th and 19th September, 2011 when the campaign period had closed. The learned Judge accepted the respondent's evidence that the MMD campaign tactic of distributing money, bicycles

and foodstuffs affected the electorate to the extent that they did not vote for a candidate of their choice. In our view, it is not correct that the appellant was not blameworthy because there were witnesses who included the respondent who testified that the appellant was distributing items to the electorate which was against our electoral code of conduct. We also agree with Counsel for the respondent that **Section 93 (3)** and the related argument was not brought to the attention of the learned Judge. Therefore, the appellant cannot now be heard to complain that this issue was not addressed. And simply because the learned Judge referred to Austin Liato, David Nchengu and Kenny Ndumba as 'apparent election agents' which we have found was an error, cannot take away the fact that the mentioned people played a role on behalf of the MMD campaign team and that their actions affected the result of the election. We find no reason to reverse the findings of fact as they are not perverse or based on a misapprehension of facts. Ground three, therefore, fails.

Turning to ground four, we have considered the arguments by learned Counsel for the parties. The gist of Counsel for the appellant's argument is that the learned Judge heaped blame on the appellant for the wrongs of MMD as a party. That she

misapplied the case of **Josephat Mlewa**[9] to this case. We do not agree with this submission. In the **Josephat Mlewa case,**[9] we made the following observations as regards the findings of the Court below:

> **"It is common cause that the court did not find the respondent guilty of any corrupt or illegal practices committed in connection with the election in the Mkaika constituency or that such practices were with his knowledge and consent or approval. There was also no finding of corrupt or illegal practices made against the respondent's agent or polling agents. On the facts of the petitioner's case as pleaded the issue of non-compliance with the provisions of the Electoral Act did not apply. Paragraph (b) was therefore not in issue. Furthermore paragraph (d) was also not an issue because the question of whether the Respondent was not qualified or a person disqualified for election did not arise. On the other hand the court found that the distribution of the exercise books and the T-shirts in the Constituency done on a large scale amounted to bribery by UNIP and this affected the outcome of the election. The court also found that the evidence of undue influence, threats and violence to life and property during the campaigns was overwhelming and was perpetrated against MMD supporters by the local leadership of UNIP, chiefs and their Headmen. The court concluded that the elections were held in an atmosphere which was not free and fair because of the rampant acts of intimidation and violence."** (*emphasis ours).*

In the **Josephat Mlewa case,**[9] we upheld the lower Court's judgment and dismissed the appeal. In the present case, the learned Judge found that the appellant's campaign was characterised by illegal and corrupt practices. That the MMD

and the appellant were guilty of treating and undue influence contrary to **Section 81 and 82 of the Act.** This was because it was not just his campaign alone but it was an MMD campaign of which he was a part, designed to ensure victory for the party and its candidates at all costs to the detriment of other candidates as the playing field was not levelled. Contrary to Counsel for the appellant's assertions, in the **Josephat Mlewa case,**[9] the court found that apart from intimidation and violence, undue influence was exerted on the electorate to vote for UNIP and also that the distribution of t-shirts amounted to bribery. And so although the **Josephat Mlewa case**[9] can be distinguished from the present case, for reasons we have given above, we find that the learned trial Judge was on firm ground when she relied on the **Josephat Mlewa case**[9] in line with the pleadings and the evidence before her. Ground four, therefore, fails.

As we indicated earlier, although the appellant listed nine grounds of appeal, ground five was omitted.

And so we turn to ground six.

We have considered the arguments on this ground which is attacking the findings of fact by the learned trial Judge. Counsel for the appellant invited us to reverse findings of fact as

according to him, the learned Judge misdirected herself in resolving issues of credibility, as enumerated by Counsel for the appellant as follows:

(a) Under this point, the learned Counsel argued that the lower Court shifted the burden of proof to the appellant and referred us to page J34 of the record of appeal. We have perused the judgment on Page J34 where the Judge said:

> **"Further the respondent said he had his own agents, (Liwoyo and Lumayi). He did not bring these people to testify on his behalf and yet he managed to bring Ndumba and Nchengu. I am aware that the onus is on the petitioner. However, it would have been of assistance had he brought them in the same manner he brought the other witnesses to rebut the allegations."**

On this argument, we agree with Counsel for the respondent that what the learned trial Judge was addressing here was the fact that the respondent's evidence remained unchallenged. Quite obviously, the learned trial Judge was merely commenting that it would have helped the appellant's case if he brought the named persons. We find that the burden did not shift to the appellant at all. We decline to reverse the finding by the learned trial Judge.

(b) Counsel for the appellant submitted that the learned trial Judge's evaluation of the evidence was unbalanced. The

allegation related to issues of the MMD ferrying voters and paying them money to induce them to vote for MMD and its candidates. The argument by Counsel for the appellant is that the appellant was not the MMD National Secretary to defend the party.

Our view is that, it was incumbent on the appellant to adduce evidence in rebuttal, having regard to the evidence adduced by the other side. What we note on Page J37 and other pages, is that the learned Judge evaluated RW9's evidence which she found unreliable and unconvincing. The learned Judge had the opportunity to see the witnesses and we cannot interfere with her evaluation of the credibility of a witness or witnesses who testified before her. We find no reason to interfere with the findings of fact.

(c) On this limb of ground six, Counsel argued that the findings of RW9's credibility were used wrongly against the appellant.

We find this argument unsustainable as this was the appellant's own witness and his evidence must affect him in one way or another. Further, Counsel did not amplify further on this argument.

(d) Regarding the finding by the learned trial Judge that the majority of voters may have been prevented from voting for candidates of their choice because of the MMD's dirty campaign against PF on false threats of war, deportation etc., our perusal of evidence reveals that the finding was based on the evidence presented before the learned trial Judge and which she believed against that of the appellant. Therefore, we cannot fault her and cannot reverse the findings of fact.

(e) The last point related to the following paragraph in the learned Judge's judgment at page J48 where the Judge said:

"On the evidence before me, I find that the MMD went round de-campaigning the PF through such utterances, knowing well that there was no substance to those allegations and this exerted undue influence on the electorate contrary to Section 82 of the Act. Further, I find that the MMD mounted a dirty campaign through their threats that the PF would promote homosexuality, would confine people living with HIV/AIDS in prison or wire fence, and even killing them because they are a burden to society. Such utterances were bound to make people insecure especially that this is a rural setting where educational levels may not be that high, and

especially that it came from the ruling party, so it was taken to be the gospel truth."

We do not think that the learned Judge was insinuating that people in rural areas are less intelligent as argued by Counsel for the appellant. This is far from the truth and we find no basis for the argument advanced and we will not disturb the lower court's findings that the MMD campaign affected the electorate who were prevented from electing a candidate of their choice.

Having stated the above, we are not in a position to reverse the findings of fact by the learned trial Judge as they were neither perverse nor made in the absence of any relevant evidence or upon misapprehension of the facts. (See **Wilson Masauso Zulu vs. Avondale Housing Project Limited.**[19]) Therefore, ground six fails.

Coming to grounds seven and eight which were argued together and which are inter-related, we have considered the arguments and authorities advanced by both parties. In this case, the learned trial Judge on the evidence before her found that the timing of the distribution of hammer mills was bad and worked to the disadvantage of the other candidates. Armed with

the overwhelming evidence before her, the learned trial judge had no reason to turn to the petitions dealt with by other judges. It was definitely appropriate for the learned trial Judge to rely on the case of **Matilda Macarius Mutale vs. Sebio Mukuka and Electoral Commission of Zambia**[20] which as rightly submitted by Counsel for the respondent was properly distinguished by the learned Judge. And so the question of the hammer mills having been procured using CDF was neither here nor there.

Further, it was argued that the learned Judge should have taken judicial notice of the judgments of other judges on this issue of hammer mills. This was especially in view of the fact that the hammer mills were bought out of CDF funds. Also, it was argued that at the time of distribution, the appellant was neither an MP nor Councillor. On the other hand, the respondent argued that although the appellant was not an MP at the time the hammer mills were purchased that did not preclude him from taking the responsibility as personal knowledge was irrelevant as per the holding in the **Josephat Mlewa case.**[9] It was argued that a court is at liberty to take judicial notice of another court's record and that this depends on the circumstances of the particular case.

We looked at the definition in **Black's Law Dictionary** and at Page 863 the learned author defines **Judicial notice** as:

> **"A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact, the court's power."**

Certainly, in this case, we do not agree with Counsel for the appellant that the learned Judge ought to have looked at other Court records. We agree with Counsel for the respondent that this is necessary in specific circumstances and in particular cases depending on the facts. In this case, it was not necessary to take judicial notice of the judgments of other courts. And it was entirely up to Counsel for the appellant to bring the cases before other High Court Judges which may have had similar facts to the attention of the learned Judge but did not do so and, therefore, he cannot be heard to raise the issue here. Grounds seven and eight, therefore, fail.

In relation to ground nine which attacks the learned Judge's finding that the appellant's gift to Chief Mufaya was a bribe intended to make him exert pressure on the electorate in his area to vote for the appellant. According to the learned author of

Halsbury's Laws of England Volume 15 (4th Edition) at page 422 para 774:

> **"The imminence of an election is an important factor to be taken into consideration in deciding whether a particular act of charity amounts to bribery. A charitable design may be unobjectionable so long as no election is in prospect, but if an election becomes imminent the danger of the gift being regarded as bribery is increased. It has been said that charity at election times ought to be kept in the background by politicians."**

In the present case, there was evidence to the effect that the appellant had visited the Chief on three other occasions but he did not give the Chief money. However, on this visit, three days before the elections, he gave the Chief K150,000. It is the timing of the visit and the payment at such a late hour that removes any trace of the genuineness of the gift. While we agree, that Zambians do honour their traditional leaders by giving them gifts when they pay homage, it appears that this particular 'gift' was not in the category of the ordinary gift. Indeed, as argued by Counsel for the respondent, if the appellant had paid homage to the Chief before the campaign period, the K150,000 would not be

considered a bribe and the visit would be a normal courtesy call on the Chief. We find no reason, therefore, to disturb the findings of fact by the learned trial Judge. Ground nine, therefore, fails.

Earlier in our Judgement, we did mention that we would give reasons as to why we signed the Consent Order in the **Josephine Limata Mwiya case,**[2] which we now do.

Our decision to sign the Consent Judgment in the **Josephine Limata Mwiya case**[2] was based on the fact that had the appeal been heard, the consensus of this Court was that the appeal would have been allowed and we would definitely have reversed the decision of the lower Court, because the nullification of the seat was wrong. We want to believe that this is the more reason the parties entered into a Consent Judgment in that case. And for that particular case, indeed tax payers' money was not expended in a parliamentary by-election.

In conclusion, coming back to the main appeal, we find that the appeal has no merit. Therefore, we dismiss it and uphold the decision of the Court below and the election of the appellant is declared null and void.

As this matter is of a constitutional nature, we order that each party bears his costs.

RETIRED

.....

F.N.M. MUMBA
ACTING DEPUTY CHIEF JUSTICE

.....

M.S. MWANAMWAMBWA
SUPREME COURT JUDGE

.....

G.S. PHIRI
SUPREME COURT JUDGE

.....

M.E. WANKI
SUPREME COURT JUDGE

.....

E.N.C. MUYOVWE
SUPREME COURT JUDGE