IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

APPEAL NO. 13 OF 2016
2016/CC/A032

IN THE MATTER OF:	**PARLIAMENTARY ELECTION PETITION ITEZHI-TEZHI CONSTITUENCY NUMBER 5 SITUATE IN THE ITEZHI-TEZHI DISTRICT NUMBER 004 OF THE CENTRAL PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THE 11TH DAY OF AUGUST, 2016**
AND	
IN THE MATTER OF:	**ARTICLE 73 (1) OF THE CONSTITUTION OF ZAMBIA (Amendment) ACT NO.2 OF 2016**
AND	
IN THE MATTER OF:	**SECTION 83 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**
AND	
IN THE MATTER OF:	**SECTION 89 (1) OF THE ELECTORAL ACT NO. 35 OF 2016**
AND	
IN THE MATTER OF:	**SECTION 15(1) (a), (b), (c) OF THE CODE OF CONDUCT OF THE ELECTORAL ACT NO. 35 OF 2016**
AND	
IN THE MATTER OF:	**THE ELECTORAL PETITION RULES STATUTORY INSTRUMENT NO. 426 OF 1968 (As amended)**

BETWEEN:

HERBERT SHABULA	**APPELLANT**
AND	
GREYFORD MONDE	**RESPONDENT**

Coram: **Sitali, Mulenga, Mulembe, Mulonda and Munalula JJC. On 15th June, 2017 and on 20th June, 2018**

For the Appellant: Mr. M.M. H. Haimbe of Messrs Malambo & Company
Mr. K. Mweemba and Mr. S. Mbewe of Messrs Keith Mweemba Advocates
Mr. G. Phiri of Messrs PNP Advocates

For the Respondent: Mr. L. E. Eyaa, Mr. J. Tembo and Ms. D. Mwewa of Messrs KBF & Partners

---

J U D G M E N T

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:

1. **Michael Mabenga v Sikota Wina and Others (2003) Z.R. 110**
2. **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Chiluba (1998) Z.R. 79**
3. **Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014**
4. **Attorney General and Others v Kaboiron (1995) 2 L.R.C. 757**
5. **Alex Cadman Luhila v Batuke Imenda 2002/HP/EP/0017**
6. **Simon Malambo Choka v The People (1978) Z.R. 243**
7. **Attorney General and Another v Akashambatwa Mbikusita Lewanika and Others (1993-1994) Z.R. 164**
8. **Josephat Mlewa v Eric Wightman (1995-1997) Z.R. 171**
9. **Costa Tembo v Hybrid Poultry Farm (Z) Limited SCZ Judgment No. 13 of 2003**
10. **YB and F Transport Limited v Supersonic Motors Limited SCZ Judgment No. 3 of 2000**
11. **Nkhata and Four Others v Attorney General (1966) Z.R. 124**
12. **Antonio Ventriglia and Another v PTA Bank SCZ Judgment No. 1 of 2010**
13. **Justin Chansa v Lusaka City Council (2007) Z.R. 256**
14. **Wesley Mulungushi v Catherine Bwale Mizi Chomba (2004) Z.R. 96**
15. **Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114 of 2007**
16. **Brelsford James Gondwe v Catherine Namungala Appeal No. 175 of 2012**
17. **Austin Milambo v Machila Jamba CCZ Appeal No. 6 of 2016**

Legislation referred to:

1. **The Electoral Process Act No. 35 of 2016**

2. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
3. **The Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016**
4. **The Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia.**

Other Works referred to:

1. **Black's Law Dictionary 9th Edition (2009) Bryan Garner, Ed, USA, Thompson West**
2. **Black's Law Dictionary, 8th Edition (2004) Bryan Garner, Ed, USA, Thompson West**
3. **Garner's Dictionary of Legal Usage 3rd Edition (2009) Bryan A. Garner, Oxford University Press.**

This is an appeal against the Judgment of the High Court dated 24th November, 2016 in which the learned trial Judge, following a petition by the Respondent, Greyford Monde, nullified the election of the Appellant, Herbert Shabula, as Member of Parliament for Itezhi-tezhi Constituency. The brief facts of this matter are that both the Appellant and the Respondent were Parliamentary candidates during the 11th August, 2016 elections for Itezhi-tezhi Constituency in Itezhi-tezhi District in the Central Province of the Republic of Zambia. The Appellant, who emerged winner, stood on the United Party for National Development (UPND) ticket and polled a total of 21,018 votes. The Respondent stood on the Patriotic Front (PF) ticket and polled a total of 2,727 votes. The rest of the votes numbering 1,936 were shared between candidates from the Forum

for Democracy and Development (FDD) and the Rainbow Party. The Respondent challenged the election of the Appellant as Member of Parliament for Itezhi-tezhi Constituency.

It was alleged that the Appellant was not validly elected as Member of Parliament for Itezhi-tezhi Constituency as the election was characterized by undue influence and other electoral offences contrary to the Electoral Process Act No. 35 of 2016 (hereinafter referred to as the Act) and the attendant Electoral Code of Conduct, 2016. It was contended that the provisions of paragraph 15 (1) (a), (b) and (c) of the Electoral Code of Conduct, 2016 were violated when the UPND party members used threats and violence at their party rally on 14th July, 2016. Further, it was alleged that falsehoods and defamatory remarks were used during a radio interview aired on Itezhi-tezhi Radio on 10th August, 2016 which worked to the disadvantage of the Respondent. That as a result of the undue influence and interference with the voters, the electorate were compelled to vote for the Appellant.

The Respondent sought in the court below by way of relief, a declaration that the election was void and that the Appellant was

not duly elected and that costs be for the Respondent. The trial Judge proceeded to evaluate and analyze evidence from both parties after hearing their witnesses at trial. According to the trial Judge, the Respondent sought to have the Appellant's election nullified pursuant to sections 83 and 89 (1) (e) of the Act read together with paragraph15 (1) (a), (b) and (c) of the Electoral Code of Conduct, 2016.

The learned trial Judge found as a fact that on 10th August, 2016 the Appellant featured on a live radio interview, which was aired on Itezhi-tezhi Community Radio at around 16:00 hours. She found that the said interview which was attended by Mr. Oliver Sitengu (RW7), Mr. Godfrey Beene, Mr. Gift Chilando Luyako and the Appellant, was meant to be a summation of the seventy (70) campaign meetings that the UPND conducted in Itezhi-tezhi Constituency.

The trial Judge further found as a fact that on the Poll day, there was an isolated report of violence at Shamabala polling station and that violence did ensue at Mbila polling station which resulted in injuries. According to the trial Judge, the basis for the petition to

nullify the Appellant's election was due to the allegation that the people of Itezhi-tezhi were prevented from voting for a candidate of their choice owing to the undue influence that characterized the elections in form of violence, publication of defamatory statements against the Respondent and contravention of the Electoral Code of Conduct, 2016.

The trial Judge found that the election of the Appellant was void on account of misconduct by the Appellant and his agents in form of publicizing a false statement against the Respondent that he had misappropriated Council funds for the purchase of a water drill rig and grader. She found that the Respondent had proved the same allegation to the required standard of proof for election petitions. The trial Judge based her decision on the strength of the authority of **Michael Mabenga v Sikota Wina and Others**[1] which set out the required standard of proof for election petitions as being higher than that of a balance of probabilities.

She further found that the misconduct by the Appellant and his agents prevented the majority of the electorate in that area from voting for a candidate of their choice as envisaged under the law.

Lastly, the trial Judge found merit in the allegation that the words uttered by the Appellant and his team during the radio interview were likely to cause violence and intimidation. Therefore, the Judge nullified the election of the Appellant as Member of Parliament for Itezhi-tezhi Constituency on account of misconduct and awarded costs to the Respondent.

The Appellant, being dissatisfied with the Judgment of the trial Court, now appeals to this Court advancing eight (8) grounds of Appeal as follows:

1. **The learned trial Judge erred in law and in fact when she held that the words uttered by Gift Chilombo Luyako on Itezhi-tezhi Community Radio Station on 10th August, 2016 were contrary to the provisions of paragraph 15 of the Electoral Code of Conduct 2016 ("the Code") and when she subsequently held that the words uttered were likely to cause violence and intimidation without having due regard to the import of the words used and the context in which they were uttered.**
2. **The learned Court below erred in both law and fact when it held that the appellant condoned the words uttered by Gift Chilombo Luyako on Itezhi-tezhi Community Radio Station on 10th August, 2016.**
3. **The learned Court below misdirected itself in both law and fact when it assumed Gift Chilombo Luyako to have been the Appellant's agent.**
4. **The learned trial Judge misdirected herself when she failed to consider that a matter in dispute can be proved on the evidence of a single witness and subsequently when she dismissed the evidence of RW5 relating to the misappropriation of funds by the Respondent.**

5. **The learned Court below gravely misdirected itself in both law and fact when it held that the Appellant did defame the Respondent and/or engaged in a calculated scheme to defame the Respondent by publishing a false statement against the Respondent during a Radio Programme on Itezhi-tezhi Community Radio Station on 10th August, 2016.**

6. **The learned trial Judge misdirected herself when she found that the Respondent had successfully proven the allegation of misconduct, by the Appellant, of publishing false statements without having due regard to the provisions of Section 97 of the Electoral Process Act Number 35 of 2016 ("the Act") and judicial precedent which stipulate that the misconduct complained of must be attributable to the appellant and or his electoral or polling agent.**

7. **The learned trial Judge erred in law and in fact when she held, in the absence of any cogent evidence as to the impact on the electorate of the Programme aired on Itezhi-tezhi Community Radio Station on 10th August, 2016, that it prevented the majority of voters from electing a candidate of their choice and when she failed to consider the import of the wide margin between the Appellant and the Respondent in arriving at that conclusion.**

8. **The Court below erred in law and in fact when it upheld the petition and when it awarded costs to the Respondent in so doing.**

Counsel for the Appellant filed detailed heads of argument which they relied on and supplemented with brief oral submissions. Grounds 1, 2 and 3 were argued together. A brief background of the matter was given as it was contended that the disputed results represented a wide margin of difference in votes obtained between the Appellant and the Respondent of about 18,291 votes. It was submitted that in the circumstances, even the slightest

disadvantage suffered by either party was not capable of tipping the outcome of the election in the Respondent's favor.

In arguing the first three grounds of the appeal, the Appellant contended that the words uttered by Gift Chilombo Luyako on Itezhi-tezhi Radio were not contrary to the provisions of paragraph 15(1) (a) of the Code of Conduct, 2016 and that they were incapable of causing or likely to cause violence and intimidation such that the electorate were prevented from voting for a candidate of their choice. That the Court below closed its mind to the import of the words complained of or used as well as the context in which the same were allegedly uttered. It was further submitted that the Court below erred in holding that the Appellant condoned the words uttered by Gift Chilombo Luyako on Itezhi tezhi Radio on 10th August, 2016 and for assuming that he was the Appellant's authorized or appointed agent when in fact not._It was submitted that Mr. Luyako should have been made accountable for his utterances as he was also contesting as candidate for Council Chairperson.

It was contended that the utterances had no influence on the outcome of the election going by the wide margin in votes of 18,291 between the Appellant and the Respondent. It was further submitted that the period between the utterances and the voting was too short for one to assume that voters were influenced positively or negatively to the detriment of the Respondent.

Submitting orally, Mr. Haimbe relied on the authority of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Titus Jacob Chiluba**[2] to support the above argument on accountability of Mr. Luyako's actions. Also submitting orally, co-counsel for the Appellant Mr. Mweemba augmented the same position by stating that the Appellant had no obligation in law to disassociate himself from the words of Mr. Luyako who was expressing his freedom of expression under Article 20 of the Constitution of Zambia. In concluding on these grounds, it was submitted that the trial Judge erred in her determination of the matter as a whole when she closed her mind to the narrow import and context of the words uttered by Mr. Luyako.

In arguing ground 4 of the appeal, it was submitted that the learned trial Judge misdirected herself when she failed to consider that a matter in dispute could be proved on the evidence of a single witness and subsequently when she dismissed the evidence of RW5 relating to the misappropriation of funds by the Respondent.

Counsel argued that the lower Court fell into grave error when it dismissed the cogent evidence of RW5 which revealed that the Respondent failed to account for funds released by the government for the purchase of a drilling rig and a grader. That the evidence of RW5 substantially went unchallenged despite his failure to produce the Auditor General's report and the relevant Council minutes. It was submitted that the evidence of that single witness was sufficient to prove a matter in dispute. It was pointed out that the final determination of the matter as a whole was erroneous as the lower Court closed its mind to the narrow import and context of the evidence of RW5 when she dismissed the said evidence.

In arguing grounds 5, 6 and 7, it was contended that the Court below misdirected itself when it held that the Appellant did defame the Respondent by publishing a false statement against the

Respondent during a radio Programme on Itezhi-tezhi Community Radio station on 10th August, 2016. It was also contended that the lower Court further misdirected itself in holding that the Respondent had successfully proven the allegation of misconduct without having due regard to the provisions of section 97 of the Act. It was further contended that the lower Court misdirected itself when it held, in the absence of cogent evidence, that as a result of the radio programme on 10th August, 2016, the electorate were prevented from electing a candidate of their choice. It was argued that the lower Court erred when it failed to consider the import of the wide margin of votes between the Appellant and the Respondent in arriving at its decision.

We were referred to various parts of the Judgment appearing at pages 125 and 126 of the record of appeal where the lower Court determined the issues in the three grounds. In support of their position, counsel for the Appellant adopted their earlier arguments in respect of grounds 1, 2 and 3 in as far as the alleged words of Mr. Luyako were attributed to the Appellant. Section 97 (2) of the Act was cited which prohibits corrupt and illegal practices in an

election by a candidate or his agent with his knowledge, consent or approval. It was submitted that no evidence was led in the Court below to show that the Appellant uttered words likely to lead to violence or intimidation as per section 97 (2) of the Act. It was argued that this was contrary to the trial Judge's assertion that the Appellant condoned the words of Mr. Luyako when he took no action to retract or dispel the said utterances.

It was further submitted that attributing the words of Mr. Luyako to the Appellant was a clear misapplication of the provisions of paragraph 15 (1) (a) of the Electoral Code of Conduct, 2016 which states that a person shall not cause violence by the use of language or conduct which would lead to violence or intimidation. Counsel emphasized that there was no evidence on record to show that the Appellant personally ever caused, used language or engaged in conduct likely to lead to violence or intimidation during the elections in August, 2016, a fact that would have been proved by the correct application of paragraph 15 of the Electoral Code of Conduct.

It was submitted that the majority of voters were in fact not prevented from voting for their preferred candidate as demonstrated by the wide margin of difference in votes obtained between the Appellant and the Respondent amounting to 18,291. Counsel prayed that the election of the Appellant, be upheld and the decision of the Court below be quashed.

In advancing submissions on ground eight of the appeal, it was argued that the Court below erred when it upheld the Petition and awarded costs to the Respondent. We were again referred to various parts of the Judgment appearing at page 131 of the Record of Appeal. In advancing their argument on costs, counsel cited section 109 of the Act which reads in part as follows:

> **"(1) Subject to the provisions of this section, costs, charges and expenses of, and incidental to, the presentation and trial of an election petition shall be borne in such manner and in such proportions as the High Court or a tribunal may order and in particular, any costs which in the opinion of the High Court or a tribunal have been caused by any vexatious conduct or by any frivolous or vexatious allegations or objections on the part of the petitioner or the respondent, may be ordered to be paid by the party by whom such costs have been caused."**

Counsel contended that despite the legal principle that costs are in the discretion of the Court, the Court below failed to exercise its

discretion judiciously in awarding costs to the Respondent who only succeeded in proving one of three allegations raised for determination in the Petition. It was counsel's submission that the costs ought to have been awarded in such a manner and in such proportions as to the vexatious and frivolous nature of the two allegations raised by the Respondent and which were subsequently dismissed.

In concluding their submissions, counsel for the Appellant submitted that the election of the Appellant was free and fair as it was conducted in accordance with the electoral laws. Counsel prayed that the appeal be allowed, that the election of the Appellant as Member of Parliament for Itezhi-tezhi Constituency be upheld and that the decision of the Court below be quashed.

In opposing the appeal, counsel for the Respondent filed written submissions together with a list of authorities. These were augmented by oral submissions. In responding to grounds 1, 2 and 3 of the appeal, counsel submitted that the trial Judge gave a proper interpretation of paragraph 15 of the Electoral Code of Conduct, 2016 when it stated that the said paragraph did not entail

that the language used ought to actually cause violence or intimidation but that it was enough that the language used was likely to cause violence or intimidation.

We were referred to the evidence of PW7, Oliver Sitengu, who testified that he was part of the radio interview held on 10th August, 2016 which interview was a summation of the seventy (70) campaign meetings in an attempt to convince people to vote for the UPND. He further testified that the people of Itezhi-tezhi commonly listened to this particular radio station.

It was submitted that the Appellant confirmed his presence at the radio interview on 10th August, 2016 together with Mr. Gift Chilombo Luyako, Godfrey Beene and PW7. That the Appellant admitted that:

> **"...the people who were on this program were carefully selected according to their responsibilities."**

It was submitted that the four people that attended the radio interview did so as a team with a common purpose and message in favour of the UPND. It was argued that the Appellant could not therefore distance himself from the utterances of Mr. Luyako who

defamed the Respondent and encouraged the electorate of Itezhi-tezhi to become the *'army'* of the UPND. As a result, it was submitted that the trial Judge was on firm ground in holding that the utterances of Mr. Luyako, a member of the Appellant's team and in his presence during the radio interview, were contrary to the provisions of paragraph 15 of the Electoral Code of Conduct, 2016 as they were likely to lead to violence or intimidation.

It was further submitted that the trial Judge was on firm ground when she held that the Appellant not only heard and condoned the words of Mr. Luyako, but that he did not do anything to have the words retracted or dispelled. It was pointed out that the defamatory words used against the Respondent appear at page 373 of the record of appeal where the Respondent was accused of taking money meant for drilling boreholes. It was submitted that in an attempt to distance himself from the utterances of Mr. Luyako, the Appellant stated at page 376 of the record that:-

> **"...if you vote for the PF candidate who is on the ticket for five years we will be their dogs."**

Counsel submitted that despite the Appellant's contention that the words uttered were not capable of inciting violence, the Appellant

himself admitted that the message aired on radio was intended for the electorate of Itezhi-tezhi and was a summation of the seventy (70) campaign meetings of the UPND. Counsel submitted that the Appellant admitted that the message aired on the radio interview was agreed beforehand by all the participants. Counsel cited section 97 (2) of the Act and submitted that the illegal practice or misconduct need not be done by the candidate himself but that it is sufficient if the said activities are committed with the knowledge, consent or approval of the candidate.

Further, Counsel argued that according to Section 97 (2) (a) (ii) of the Act, a petitioner only needed to demonstrate that the act complained of 'may' have prevented the majority of voters from voting for a candidate of their choice, and not to provide statistics to show that the majority of voters were prevented from so doing. It was pointed out that according to **Black's Law Dictionary, 9th Edition (2009)** at page 1068, the word 'may' referred to a possibility. That therefore, the Appellant's submissions on grounds 1, 2 and 3 were without merit.

With regard to the defamatory remarks, Counsel submitted that the Appellant assassinated the character of the Respondent without evidence in an attempt to decampaign him and cited the case of **Saul Zulu v Victoria Kalima**[3] in support where the Supreme Court approved the holding in the case of **Attorney General and Others v Kaboiron**[4]. In the **Kaboiron**[4] case, it was held that presidential and parliamentary elections were to be conducted in conformity with the Constitution and electoral laws, but with due observance of the general laws. It was also held that false, defamatory or inflammatory statements against a political party or that party's presidential candidate affected the parliamentary candidate contesting elections on that party's ticket.

It was submitted that the trial Judge correctly applied the authority of **Alex Cadman Luhila v Batuke Imenda**[5] where the Supreme Court frowned upon candidates who engaged in electoral malpractices. It was pointed out that the campaigns of the Appellant and his team were typified by back stabbing and character assassination which acts are proscribed under the Act.

Therefore, it was prayed that grounds 1, 2 and 3 be dismissed for lack of merit.

In response to ground 4, Counsel submitted that the said ground was merely a fishing expedition by the Appellant as the court below was on firm ground in rejecting the evidence of RW5 relating to the misappropriation of funds by the Respondent. It was submitted that the evidence of RW5, Mr. Fanwell Sitongwa, who was the UPND District Chairperson, ought to have been taken with caution as he had an interest to serve. Submitting orally, Mr. Eyaa argued that RW5, apart from being a witness with his own interest to serve as a former UPND District Youth Chairperson, gave evidence and allegations which were not substantiated throughout cross-examination when he testified that the Respondent had stolen some constituency funds.

Counsel cited the case of **Simon Malambo Choka v The People**[6] where the Court cautioned against the evidence of a witness with a possible interest to serve. We were referred to the evidence of RW5 who said that he did not have any evidence to substantiate his claims of misappropriation of funds by the Respondent and that the

Respondent was never a signatory to the Council account for Itezhi-tezhi District. It was also submitted that the trial Judge correctly observed that there was no evidence or proof produced by either the Appellant or RW5 in relation to the alleged misappropriation of funds. Therefore, Counsel prayed that ground 4 of the appeal be dismissed for lack of merit.

In responding to grounds 5, 6 and 7 of the appeal, it was submitted that the learned trial Judge was on firm ground when she held that the Appellant defamed the Respondent by publishing a false statement against the Respondent on Itezhi-tezhi Community Radio station on 10th August, 2016. That she was also on firm ground when she found that the Respondent had successfully proven the allegations of misconduct by the Appellant of publishing the false statements and when she held that the said statements prevented the majority of voters from electing a candidate of their choice.

Counsel submitted that the record reveals that the alleged misconduct was attributable to the Appellant and that the evidence of the Appellant and that of RW7, his campaign manager, showed that the message to be delivered on the radio programme on 10th

August, 2016 was agreed upon by all the participants and that the panel was carefully selected.

With regard to the Appellant's argument that the trial Judge misapplied the provisions of paragraph 15 (1) of the Electoral Code of Conduct, 2016 on publishing of false statements in elections, it was submitted that the Appellant was attempting to give the said regulation a very narrow and limited interpretation. It was argued that to suggest that paragraph 15 was limited to "*a person*" and did not include "*persons*" was a misapprehension of the law. Further, that a literal interpretation of the said paragraph led to an absurdity and did not reflect the intention of the legislature as the use of the words "*a person*" would allow for the Appellant to be present while allowing other people to use words of inciting violence on his behalf as long as the words did not come from the Appellant's mouth.

In orally augmenting on this point, Mr. Eyaa pointed out that in defining "*a person*", in paragraph 15 of the Electoral Code of Conduct, 2016 ought to be read together with the Act as envisaged by section 2 of the Interpretation and General Provisions Act, Cap 2

of the Laws of Zambia. He submitted that the effect of section 2 is that a person includes persons and that it was erroneous to assume that *'a person'* meant one person. Counsel further submitted that the Appellant, his two campaign managers, and others who were UPND team members all fell within the definition of 'a person' under paragraph15 of the Electoral Code of Conduct, 2016.

Counsel urged us to use the purposive approach to interpret paragraph15 of the Electoral Code of Conduct, 2016 in accordance with the case of **Attorney General and Another v Akashambatwa Mbikusita Lewanika and Others**[7]**.** Mr. Eyaa further submitted that the provisions of paragraph15 of the Electoral Code of Conduct, 2016 ought to be read together with section 97 (2) of the Act and not in isolation. He argued that according to section 97 (2) (a) (ii) of the Act, it was enough for an electoral offence to be committed if words inciting violence or defamatory remarks were uttered with the knowledge and consent of the Appellant, and not that the Appellant ought to have actually uttered the words.

He submitted that Mr. Luyako with the knowledge and consent of the Appellant, used words that were intended to cause violence and

intimidation. That he did so when he advised the people of Itezhi-tezhi to become the *'army'* for the UPND and to beat any person suspected of carrying pre-marked ballot papers as the people in Itezhi-tezhi had resolved to vote for Hakainde Hichilema of the UPND.

Further, in response to the Appellant's submission that this Court ought to consider the wide margin of votes obtained by the parties herein and find in favour of the Appellant, it was submitted that the said wide margin was as a result of the widespread illegalities committed by the Appellant and that therefore the Appellant's assertion had no place in the Act. In support of this submission, we were referred to the case of **Josephat Mlewa v Eric Wightman**[8] where it was held that proof of one ground was enough to nullify an election. Mr. Eyaa argued that grounds 5, 6 and 7 were misplaced and ought to be dismissed for lack of merit.

Lastly, in response to ground 8 on the award of costs, it was submitted that the said ground had no merit and ought to be dismissed because the Appellant knew very well that it was common at law that a successful litigant was entitled to be awarded

costs at the discretion of the court. The cases of **Costa Tembo v Hybrid Poultry Farm (Z) Limited**[9] and **YB and F Transport Limited v Supersonic Motors Limited**[10] where it was held that costs should follow the event were cited in support of the submission. Counsel submitted that the trial Judge was within her powers when she made an order as to costs in accordance with section 109 of the Act. In sum, Counsel argued that the entire appeal had no merit and ought to be dismissed.

On 7th June, 2017, the Appellant filed a detailed reply to the Respondent's submissions. However, we note from the record that we only granted leave to the Appellant to file a reply to the Respondent's heads of argument if he so wished and not to file supplementary submissions as he did dated 7th June, 2017. We will therefore only consider the reply to the issues raised by the Respondent in the interest of justice because to allow the Appellant to raise new issues at this point would be unjust to the Respondent who will not have the opportunity to respond. In reply Counsel argued grounds 1, 2, 3, 5, 6 and 7 together as they related to the

radio programme of 10th August, 2016 while grounds 4 and 8 were also argued together.

In reply to the Respondent's submissions under grounds 1, 2, 3, 5, 6 and 7, Counsel reiterated the Appellant's earlier position relating to the utterances by Mr. Luyako that were alleged to have incited violence. It was argued that the court below failed to address its mind to the evidence before it which showed that Mr. Luyako was a candidate in his own right and was speaking on his own behalf during the radio programme. Further, that there was no law that placed a duty on a candidate to censure other candidates in the manner of their campaign and that under section 97 (2) (a) (ii) of the Act, there was no requirement for a candidate to redeem himself by having words retracted.

With regard to the defamatory words uttered in relation to misappropriation of funds by the Respondent, counsel for the Appellant submitted that the court below had assumed that all the participants on the radio programme were campaigning on behalf of the Appellant or were the Appellant's agents, a fact which was contrary to the evidence on record. It was argued that in finding

that the Appellant had consented to the defamatory words spoken by Mr. Luyako, the court below ignored crucial evidence of RW7 and ignored evidence relating to the number of people that may have listened to the radio programme in view of the time of day at which it was broadcast.

In view of the above, it was submitted that the findings of fact made by the trial Judge should be reversed in accordance with the principle laid down in the case of **Nkhata and Four Others v Attorney General**[11]. It was contended that the trial Judge fell into grave error when she arrived at the decision to nullify the Appellant's election without correctly assessing the evidence before her. We were invited to consider whether or not the provisions of section 97 (2) (a) of the Act had been satisfied in nullifying the election of the Appellant. It was submitted that the Appellant himself had not uttered any defamatory remarks or words construed to incite violence. It was further submitted that the Respondent's counsel did confirm in their submissions that the Respondent only took issue with the Appellant's utterances that the

electorate would be dogs for the next 5 years if they voted for the PF candidate.

It was contended that the said words did not offend the provisions of the Act or the Electoral Code of Conduct, 2016 to warrant our upholding of the decision of the lower Court and that the trial Judge never found as a fact that the said words were offensive in any way as a basis to annul the election and that this was a new issue brought up on appeal by the Respondent in an attempt to attribute the defamatory words to the Appellant, a position not tenable at law.

It was also submitted that the said words could not amount to defamation as they were not directed at the Respondent in any way and that the definition of defamation according to **Black's Law Dictionary, 8th Edition (2004) Bryan Garner, Ed, USA, Thompson West**, is:

> **"...the act of harming the reputation of another by making false statements to a third person."**

With regard to the trial Judge's finding that the words of Mr. Luyako on the radio programme were a summation of the 70

campaign meetings of the Appellant, Counsel submitted that the Respondent ought to have led evidence of what transpired during those meetings and that the absence of such evidence made the finding purely speculative and of no merit.

In reply to the Respondent's contention that Mr. Luyako was an agent of the Appellant, the Appellant reiterated his earlier position that Mr. Luyako was not his agent as defined by section 2 of the Act.

We were invited to consider the unchallenged evidence of the Appellant during cross-examination where he expressly stated that Mr. Luyako appeared on the radio programme as a candidate in his own right and not as an agent of the Appellant, and that Mr. Luyako also introduced himself as a candidate in his own right at the outset of the programme.

The Appellant contended that the trial Judge inadequately dealt with the question of the role of Mr. Luyako with respect to the Appellant thereby resulting in an erroneous judgment and miscarriage of justice. In support of this submission, counsel cited the case of **Antonio Ventriglia and Another v PTA Bank**[12] where it

was held that the failure by a trial Judge to adequately deal with evidence amounted to a miscarriage of justice. Counsel argued that this was a proper case for us to interfere with the findings of fact in view of the manner in which the trial Court dealt with the role of Mr. Luyako. Further, it was submitted that ignoring evidence without disclosing the reason amounts to a gross misdirection which renders the judgment of the trial Court amenable to reversal as held in the case of **Justin Chansa v Lusaka City Council.**[13]

Further, the authority of **Wesley Mulungushi v Catherine Bwale Mizi Chomba**[14] was cited in support of the submission that where a trial court relied on evidence that was not before it, that amounted to a misdirection on the part of the court. Counsel emphasized that there was no evidence on record to show that Mr. Luyako was part of the Appellant's campaign team.

Submitting orally, Mr. Mweemba argued that the law under section 97 (2) (a) of the Act was very specific and that what counsel for the Respondent was suggesting regarding Mr. Luyako's comments was collective responsibility did not apply to elections. Counsel further argued that in the realm of constitutional law, collective

responsibility only applies to decisions of the cabinet which is bound by that principle.

Mr. Mweemba further submitted that what the Appellant and others agreed to discuss on the radio programme were broad themes and not the specific words uttered by Mr. Luyako, and that this was corroborated by the evidence of RW7. Counsel therefore prayed that the decision of the lower court to nullify the Appellant's election be quashed.

Counsel also submitted that the final requirement of section 97 (2) (a) (ii) of the Act to the effect that it should be proved that the majority of the electorate were or may have been prevented from electing the Respondent on account of the words uttered was not satisfied in order for the trial Court to nullify the election of the Appellant. Counsel contended that it was incumbent upon the Respondent to prove to the requisite standard of proof that the words uttered had or may have had the effect of swaying the electorate in such a way as to prevent them from voting for the Respondent.

In response to the submission that the language used by Mr. Luyako was likely to lead to violence contrary to paragraph 15 (1) (a) of the Electoral Code of Conduct, 2016, it was submitted that it was not possible for the said words to have the effect of inciting violence. It was further submitted that by dismissing the claim that the election was marred by violence, the lower court effectively dispelled any suggestion that the words uttered incited violence. Counsel contended that, that being the case, the requirements of section 97 (2) (a) (ii) of the Act were not met and that the Court below therefore should not have concluded that Mr. Luyako's words affected the outcome of the election without any evidence to support that finding. That doing so was contrary to the holding of **Wesley Mulungushi v Catherine Bwale Mizi Chomba.**[14]

In reply to the Respondent's arguments in opposition to grounds 4 and 8, Counsel reiterated the initial arguments in their heads of argument and urged us to allow the appeal and award the Appellant the costs of the appeal.

We have carefully reviewed the Judgment of the trial Court, the heads of argument and authorities cited together with the oral submissions made by both parties.

Before we consider the grounds of appeal and the issues they raise, we wish to state the law as it applies to Parliamentary election petitions and the circumstances under which an election of a Member of Parliament may be declared void. The relevant provision, in the current Appeal is section 97(2) (a) of the Act which provides that-

> **"The election of a candidate as a Member of Parliament, Mayor, Council Chairperson or Councilor shall be void if on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election:-**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**
>
> **the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;"**

The above provision clearly states that an election of a Member of Parliament will be voided if it is proved to the satisfaction of the

High Court that a corrupt practice, illegal practice or other misconduct has been committed in connection with the election by a candidate or with a candidate's knowledge and consent or approval or that of the candidate's election agent or polling agent. Secondly, that as a result of the proven corrupt practice, illegal practice or 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.

In so far as corrupt and illegal practices are concerned, the Act in sections 81 to 95 provides what amounts to corrupt and illegal practices for election avoidance purposes. However, the Act does not define what amounts to other misconduct. That notwithstanding, paragraph 15(1) of the Code of Conduct, 2016 does proscribe conduct considered to be misconduct that can result in an election being declared void within the contemplation of section 97 (2) (a) of the Act.

In respect of the requirement that the corrupt practice, illegal practice or other misconduct must affect the majority of voters such that they are prevented from electing their preferred candidate, the

Supreme Court of Zambia had occasion to pronounce itself on what amounts to an act being widespread. In the case of **Mubika Mubika v Poniso Njeulu**[15] it was stated that:-

> **"The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of the wrongful conduct the majority of voters in a constituency were or might have been prevented from electing a candidate of their choice. It is clear that when facts alleging misconduct are proved and fall in the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency, only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate".**

It follows therefore, that in order for the proscribed act which is committed to result in the nullification of an election, it must not only be proved but must be widespread within the constituency so as to affect the majority of voters in their choice of a candidate to vote for.

As an established principle of law, in an election petition like in any other civil matter, the burden of proof lies with the petitioner to prove any of the malpractices alleged to have been committed. This was reiterated in the case of **Brelsford James Gondwe v Catherine Namungala**[16] by the Supreme Court where it was stated that:

> **"The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions namely fairly high degree of convincing clarity."**

In addition, election petitions require that the alleged malpractices are proved to a standard higher than on a balance of probabilities as pronounced in the case of **Akashabatwa Mbikusita Lewanika and others v Frederick Jacob Chiluba**[2] where the Supreme Court stated that:-

> **"Parliamentary election petitions are required to be proven to a standard higher than on a mere balance of probabilities."**

We shall proceed to determine this appeal with the above principles of law in mind.

The Appellant in grounds 1, 2 and 3 challenges the trial Court's findings that Gift Chilombo Luyako was the Appellant's agent and that the words he uttered were contrary to paragraph 15 of the Electoral Code of Conduct, 2016 and were likely to lead to violence or intimidation; and further that the Appellant condoned the words uttered by Luyako. It was submitted that Mr. Luyako was not the Appellant's authorized or appointed agent and that he campaigned

in his own right as a candidate in the Council Chairperson elections. That it was Mr. Luyako's constitutional right to freely express himself and associate under Articles 20 and 21 of the Constitution of Zambia respectively for which he was personally accountable and that the Appellant was under no obligation whatsoever at law to either seek retraction of the words used or disassociate himself. The Appellant further submitted that he could not be held accountable for someone else's utterances merely because they belonged to the same political party the UPND. That, in any case, the words uttered were incapable of causing violence and intimidation to the electorate so that they failed to vote for a candidate of their choice. That the words in question had no influence on the outcome of the elections especially when the huge gap of 18,291 votes between the Appellant and the Respondent's votes was taken into account. The Appellant submitted that the period between the uttering of the alleged words and actual voting was just too short to influence the voters either negatively or positively. The Appellant contended that the trial Judge closed her mind to the context of the words uttered by Mr. Luyako and constructed them widely to include the Appellant.

In response to ground 1, the Respondent submitted that the learned trial Judge gave a correct interpretation of paragraph 15 of the Code of Conduct, 2016 in that the language used need not cause violence or intimidation but that its being likely to cause violence or intimidation was sufficient. The Respondent referred to the evidence of PW7, Oliver Sitengu, who admitted that the radio interview was a summary of 70 campaign meetings held in the Constituency intended to convince people to vote for UPND. He submitted that the people of Itezhi-tezhi commonly listen to the radio station and that the Appellant testified that he alongside three others, namely Gift Chilombo Luyako, Oliver Sitengu and Godfrey Beene were carefully selected to deliver an agreed upon message on Itezhi-tezhi Community Radio. That the Appellant, under the circumstances, could not distance himself from the utterances of his colleague and that the trial Judge could not be faulted for reaching the conclusion she reached in her decision. That the Appellant condoned the words spoken by Luyako as he did nothing to have those words retracted or dispelled having heard the words spoken in his presence. It was submitted that though the Appellant stated that the words uttered were not capable of causing violence

or likely to cause violence, the Appellant admitted that the message aired on 10th August, 2016 was intended for the electorate and was a summary of the message given to the people of Itezhi-tezhi.

Our attention was drawn to section 97(2) (a) (ii) which provides that the misconduct need not be committed by the candidate himself but that it is sufficient if the said misconduct was committed with the knowledge and consent or approval of the candidate.

The words uttered by Mr. Luyako that were translated from Ila to English and are relevant to ground 1 of this appeal read as follows:-

> **"..... all my relatives of Itezhi tezhi, I want you to be the soldiers of UPND. This area, people agreed that it is Hikainde Hachilema in this area. If you see those people who bring mealie meal, get the mealie meal then beat them and do something. Even those who will bring ballot papers, if you will find them, catch them and do something to them...."**

Paragraph 15(1) (a) of the Electoral Code of Conduct, 2016 provides that:-

> **"A person shall not:-**
>
> **(a) cause violence or use any language or engage in any conduct which leads or is likely to lead to violence or intimidation during an election campaign or election;"**

We have carefully considered the words uttered and the import of paragraph 15(1) (a) of the Electoral Code of Conduct, 2016. It is

clear that the words referred specifically to persons who would be found distributing mealie meal and ballot papers. It is apparent that such persons were to be beaten if found distributing mealie meal and that something was to be done to those persons found with ballot papers. We can only infer that *'doing something'* to those persons fell in the category of beating. It is our firm view that the use of such language had the likelihood of inciting violence in so far as it encouraged people to take the law into their own hands. The trial Judge therefore cannot be faulted for finding as she did that the words uttered offended paragraph 15(1) (a) of the Electoral Code of Conduct, 2016. In ground 2, the Appellant submitted that the word condone was used by the trial Judge who at page 123 of the Record of Appeal stated that the Appellant, having heard the offensive words, did nothing to have them retracted or dispelled. It was further argued that the Appellant was under no obligation to disassociate himself or seek retraction of the words.

We have considered the above submissions. Section 97(2) (a) (ii) of the Act as stated above is very clear as to when a misconduct can be attributed to a candidate. This is where the candidate has

knowledge of the misconduct and consents or approves it or if the misconduct complained of was done by his election agent or polling agent. The Appellant was one of the panelists on the radio interview together with Mr. Luyako when the latter uttered the offensive words. It is at that point that the Appellant had knowledge of the offensive words. However, what calls for determination is whether the Appellant consented or approved of the uttered words. **Garner's Dictionary of Legal Usage, Third Edition** defines 'to approve' as follows:

> **"To approve, apart from the legal sense of giving official sanction, is to consider right or to have a favorable attitude toward. The verb conveys an attitude or thought".**

The argument that the Appellant was under no obligation to disassociate himself from the words uttered by Mr. Luyako is not tenable because, having knowledge of the utterances, he was required to disapprove of them in order not to be caught up within the provisions of section 97(2) (a) (ii) of the Act. We further find the contention that Mr. Luyako uttered the words in his own capacity as a candidate, untenable considering the evidence of PW1, Ackim Maunga, who introduced the panelists as the UPND Campaign team and the Appellant's own admission that the team was carefully

selected for the interview to deliver a message to the electorate in Itezhi-tezhi Constituency. The Appellant therefore should have dissociated himself from what was stated by Mr. Luyako, if the uttered words went against the message agreed upon by the UPND campaign team.

Regarding the Appellant's argument that the words spoken by Mr. Luyako could not be attributed to him as he was not his agent, we have this to say: the Act in section 2 defines an election agent as a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper. There is no evidence on record that shows that Gift Chilombo Luyako was an appointed agent of the Appellant. We agree with Mr. Haimbe that the Act is very clear on who is an election agent. Mr. Luyako certainly did not fit this description in so far as the Appellant was concerned. However, what we see as the trial Judge's position in her judgment at page 123 of the Record of Appeal is not a question of agency but that of approval of misconduct concerning the election, sufficiently brought to the Appellant's knowledge as envisaged under section 97(2) (a) (ii) of the

Act. The trial Judge was thus on firm ground when she found the Appellant in breach of section 97(2) (a) (ii) of the Act specifically for not disassociating himself from the uttered words. We therefore, find no merit in grounds 1, 2 and 3 and dismiss them accordingly.

In ground 4, the Appellant wants us to fault the trial Judge for dismissing the evidence of RW5, Fanwell Sitangwa, relating to the allegation of misappropriation of funds by the Respondent. It was submitted that the trial Judge fell into grave error in dismissing the cogent evidence of RW5 that the Respondent failed to account for funds released for the purchase of a drilling rig from the Constituency Development Fund (CDF) and a grader from funds released by Government. It was further submitted that the evidence of the witness substantially went unchallenged. That by failing to consider that a matter in dispute can be proved on the evidence of a single witness, the trial Judge's final determination of the matter as a whole was erroneous.

In response to ground 4, the Respondent submitted that the ground was a mere fishing expedition by the Appellant as the trial Judge was on firm ground in rejecting the evidence of RW5 as he was first

and foremost a witness with an interest to serve having served as UPND District Chairperson. But more importantly, that RW5 had no evidence to substantiate the allegation of misappropriation of funds on his part. We were referred to RW5's evidence in cross-examination which the Respondent contends established that RW5 had no proof before the lower Court to substantiate his allegations of misappropriation of funds against the Respondent.

We have considered the evidence on record and we agree with the trial Judge that no evidence was adduced by RW5 to show that the Respondent misappropriated funds. We find no merit in ground 4 and we dismiss it accordingly.

In grounds 5 and 6, we were urged to fault the trial Judge's finding that the Appellant defamed the Respondent and or engaged in a calculated scheme to defame the Respondent by publishing defamatory statements during the radio programme on Itezhi-tezhi Community Radio on 10th August, 2016. The Appellant submitted that no evidence was led by the Respondent to prove that the Appellant uttered the offensive words or that Gift Chilombo Luyako was the Appellant's appointed agent. That attributing the words of

Gift Chilombo Luyako to the Appellant was a clear misapplication of paragraph 15(1) (a) of the Electoral Code of Conduct, 2016. It was submitted that the language proscribing the misconduct under regulation 15 was in the form of a *'person'* as an individual and not *'persons'* as in the plural sense. That the Appellant as a *'person'* never caused violence or used any language or engaged in any conduct which led or was likely to lead to violence or intimidation. That the fact that the disputed results represent a very wide margin of difference in votes of 18,291 between the Appellant and Respondent, demonstrates that the majority of voters were not actually prevented from voting for their preferred candidate.

In response to grounds 5 and 6, the Respondent submitted that the trial Judge was on firm ground when she held that the Appellant defamed the Respondent and engaged in a calculated scheme to defame him. That the testimonies of the Appellant and RW7 confirmed this fact when they stated that the message to be delivered on Itezhi-tezhi Community Radio Station was agreed upon by all the participants and that the panel was carefully selected. It was further submitted that the trial Judge correctly applied the

provisions of paragraph 15(1) of the Electoral Code of Conduct, 2016 and that the Appellant had given the provision a very narrow and limited interpretation.

The Respondent argued that to suggest that paragraph 15(1) of the Electoral Code of Conduct, 2016 in its definition of person does not include persons was a misapprehension of the law. That the literal interpretation of paragraph 15(1) (a) of the Electoral Code of Conduct, 2016 by the Appellant leads to an absurdity and does not reflect the intent of Parliament. We were urged to use the purposive approach to interpretation in line with the holding in the case of the **Attorney General and Another v Lewanika and Others**[7] that the trend was now to move away from the literal to the purposive approach. That section 97(2)(a) (ii) of the Act read with paragraph 15 of the Electoral Code of Conduct, 2016 shows that a misconduct committed by another person with the knowledge and consent or approval of the candidate does not provide refuge to the candidate simply because the candidate did not engage in the misconduct personally. That the wide margin in votes obtained by the Appellant and by the Respondent was due to the widespread

illegalities by the Appellant and not anything else. The Respondent urged that grounds 5, 6 and 7 ought to be dismissed for lack of merit.

In determining this allegation, the trial Judge referred to paragraph 15 (1) (c) of the Code of Conduct, 2016 which proscribes the making of false, defamatory or inflammatory allegations concerning any person or political party in connection with an election. The trial Judge found as a fact that the Appellant and his team made false allegations during the radio interview which were not substantiated. Regarding the argument that paragraph 15 of the Code of Conduct is in the singular so that the conduct of Gift Luyako could not be attributed to any other person except himself, we note that section 4(3) of the Interpretation and General Provisions Act states that words and expressions in a written law in the singular include the plural and words and expressions in the plural include the singular.

It follows that a group of persons such as the panelists that constituted the UPND campaign team on Itezhi-tezhi Community Radio falls within the definition of person and within the

contemplation of paragraph 15 (1) (c) of the Electoral Code of Conduct, 2016. The Appellant's argument is thus untenable at law.

As regards the publication of false, defamatory or inflammatory statements against the Respondent, we have combed the Record of Appeal and find no cogent testimony to support the allegations that the Respondent was a thief who misappropriated funds meant for a drilling rig and grader. RW5, Fanwell Sitongwa's testimony that the Respondent and an acting Planning Officer did not account for the balance of money left after purchase of a drilling rig was discounted in cross- examination as there was no proof to show that the sum of ZMW1,040,000 meant for the drilling rig was actually released to the Council by Government. Further, no evidence in the form of the Auditor-General's Report was produced in evidence to demonstrate that there had been embezzlement of funds at Itezhi-tezhi Council. Under the circumstances, considering the fact that evidence graced the record that what was to be said was agreed upon by all panelists beforehand, it was incumbent upon the Appellant to disassociate himself from the uttered words for not doing so brought him within the provisions of section 97 (2) (a) (ii) of the Act.

We are of the firm view that the Appellant's conduct amounted to a breach of section 97 (2) (a) (ii) of the Act and find no reason to fault the trial Judge on her finding. Grounds 5 and 6 lack merit and we dismiss them accordingly.

In ground 7 the Appellant challenges the finding by the trial Judge that the programme aired on Itezhi tezhi Community Radio Station on 10th August, 2016, impacted the electorate to the extent where the majority of voters may have been prevented from electing a candidate of their choice. The Appellant argued that the wide margin in the votes obtained by the parties herein demonstrated that the majority of voters were not in any way prevented from voting for their preferred candidate. On the other hand, the Respondent submitted that it was actually the wide spread illegalities committed by the Appellant that resulted in the wide margin between the Appellant and the Respondent.

The trial Judge found that the defamatory statements were a calculated scheme on the part of the Appellant and his team meant to discredit the Respondent in the public eye and thereby disadvantaging him in the election. The trial Judge found the issue

of defaming the Respondent significant considering that the message was agreed to before going on air and that the radio programme, which was listened to by many people as confirmed by RW7, targeted the electorate. It was the trial Judge's view that being branded a thief on a widely listened to platform by the electorate was injurious and could certainly influence the electorate to withhold their vote against a person so accused. She therefore nullified the election of the Appellant on account of this misconduct by the Appellant and or other persons with the Appellant's knowledge and consent or approval.

We have carefully considered the second limb of section 97(2) (a) (ii) of the Act. As stated above, in addition to proving that an electoral offence was committed by a candidate or with his knowledge and consent or approval, or that of his election or polling agent, the party alleging must demonstrate that as a result of the proven proscribed conduct, the majority of voters were or may have been prevented from electing a candidate they preferred. In the case at hand, it was necessary to establish whether the defamatory statements made on Itezhi-tezhi Community Radio were so

widespread that the majority of the electorate heard them and as a result changed their choice or may have changed their choice of candidate as a result. The Appellant has argued that the trial Judge made her conclusion in the absence of any cogent evidence as to the impact on the electorate of the programme aired on Itezhi tezhi Community Radio Station on 10th August, 2016.

PW1, Ackim Maunga, who alluded to the radio station coverage stated that it covered a radius of 120 kilometers which included parts of Lusaka West, some parts of Mazabuka, Monze, Choma, Kalomo, Namwala and some parts of Kaoma. In cross-examination, PW1 stated that the listenership is roughly 48,000 which includes Itezhi-tezhi and all the surrounding areas. The witness further stated that based on the last census, Itezhi-tezhi had a population of about 48,000 which includes youth who are not registered.

The witness, PW1, stated that the entire 120 km radius had a listenership of 48,000 but never gave the listenership for Itezhi-tezhi Constituency apart from stating that there were between 30,000 to 40,000 registered voters. Further, in his testimony, he was not sure of the number of people who were listening to the

radio interview as it was a working day. Apart from this witness, PW7, Oliver Sitengu, stated that people of Itezhi-tezhi commonly listened to this particular radio station. No witness was called to testify to the widespread nature of the broadcast or that they listened to the programme and as a result they were or may have been prevented from electing their preferred candidate. We wish to restate what we said in the case of **Austin Milambo v Machila Jamba**[17] at J67. This is that:

> **"It would, in our view be unsafe to assume that because the statement was made at two meetings the majority of the electorate were exposed to it especially that no attempt was made to demonstrate that this was the case..... With regard to the radio broadcast, apart from the Appellant's testimony, no other witnesses were called to testify that the radio broadcast reached them and affected them in their choice of a candidate. We are of the view that to take the radio station coverage area as a measure of the approximate number of listeners in the absence of other supporting evidence regarding listenership would be, in our view, lowering the majority threshold requirement of section 97(2) (a) ....."**

We repeat our observations here.

The record of appeal, in this case, does not contain any evidence to support the position that the proven illegalities were widespread within the contemplation of section 97 (2) (a) of the Act and as such this aspect was not proved to the required standard.

The Supreme Court in the case of **Lewanika and Others v Chiluba[2],** stated concerning the standard of proof in election petitions that:

> **"As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that Parliamentary election petitions have generally been required to be proved to a standard higher than on a mere balance of probability. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."**

It is therefore our considered view that it was a misdirection on the part of the trial Judge to hold that the majority of voters in the Constituency may have been influenced by the radio broadcast of 10th August, 2016 in the absence of cogent evidence that this was the case. The evidence on record does not in our view, attain the standard of proof set for election petitions as envisaged in the authority cited above. Ground 7 therefore succeeds.

In ground 8, the Appellant urges us to fault the trial Judge for upholding the petition and for awarding costs to the Respondent.

The Appellant submitted that the Court below failed to exercise its discretion judiciously in awarding costs to the Respondent considering that the Respondent only succeeded in one of the three issues raised for determination by the Court. That under the

circumstances of this case, the Court ought to have awarded costs in a manner and in such proportion as would reflect the vexatious nature and frivolousness of the two issues raised by the Respondent in the Court below which the Court dismissed.

The Respondent in response argued that a successful litigant is entitled to an award of costs and that it was trite that costs should follow the event. That the Electoral Process Act, 2016 gives the trial Judge discretion to make orders as to costs and that the trial Judge was within her powers when she made an order as to costs.

It is not in dispute that costs are within the discretion of the Court and that ordinarily they follow the event. We as a Court have had occasion to address this issue in a number of our decisions. In this case, the trial Court having found that the Petition had succeeded in the main resulting in the nullification of the Appellant's election, it was in its discretion to award the costs as it did. However, in light of the success of ground 7 of this appeal which warrants the reversal of the nullification, it is our position that each party bears their own costs in the Court below. We therefore reverse the award of costs awarded in the Court below.

Lastly, the Appellant prays that this appeal be allowed and his election as Member of Parliament for Itezhi-tezhi Constituency be upheld. Having allowed ground 7 of the Appeal, we hereby reverse and set aside the decision of the lower Court to nullify the election of the Appellant and declare the Appellant as the duly elected Member of Parliament for Itezhi tezhi Constituency.

In summing up, this appeal having succeeded to the extent stated, we order that each party shall bear their own costs.

As we conclude, we feel duty bound as a Court to say the following. The incidents of violence on polling day in four (4) of the thirteen (13) wards of Itezhi-tezhi Constituency, as the record of appeal shows, make sad reading. Violence negates the very essence of democratic elections. This is why an election may be nullified where it is proved to the satisfaction of the Court that a candidate or his election or polling agent or another person with the knowledge and consent or approval of the candidate or his election or polling agent engaged in violence and that as a result, the majority of voters were or may have been prevented from electing a

candidate of their choice. However, in this case this was not proved against the Appellant in terms of section 97(2) (a) of the Act.

A.M. Sitali
Judge
CONSTITUTIONAL COURT

M.S. Mulenga
Judge
CONSTITUTIONAL COURT

E. Mulembe
Judge
CONSTITUTIONAL COURT

P. Mulonda
Judge
CONSTITUTIONAL COURT

M.M. Munalula
Judge
CONSTITUTIONAL COURT