SELECTED JUDGMENT NO.13 OF 2018

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

APPEAL NO. 18 of 2017
2016/CC/A009

IN THE MATTER OF: THE LOCAL GOVERNMENT TO MULONGA WARD ELECTION HELD IN ZAMBIA ON THE 11TH DAY OF AUGUST 2016.

AND

IN THE MATTER OF: ARTICLE 157 (2), (3) AND 118 (2) (e), (f) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF: SECTION 81, 83, 84, AND 97 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.

AND

IN THE MATTER OF: SECTION 15 OF THE ELECTORAL CODE OF CONDUCT 2016.

AND

IN THE MATTER OF: RULE 11 AND 18 (2) OF THE LOCAL GOVERNMENT ELECTION TRIBUNAL RULES

BETWEEN:

INONGE MUBIKA — APPELLANT

AND

MUKELABAI PELEKELO — RESPONDENT

CORAM: Mulenga, Mulembe, Mulonda, Munalula and Musaluke JJC on 16th February, 2018 and 28th March 2018.

For the Appellant : Ms M. Mushipe of Mesdames Mushipe & Associates
For the Respondent: Mr E. Eyaa of Messrs KBF & Partners

JUDGMENT

Munalula JC, delivered the judgment of the Court.

Cases referred to:

1. Kamanga v Attorney General and Another (2008) 2 Z.R. 7
2. Anderson Mazoka and Others v Levy Mwanawasa and Others (2005) Z.R. 138
3. Michael Mabenga v Sikota Wina and Others (2003) Z.R. 110
4. Mubika Mubika v Poniso Njeulu S.C.Z Appeal No. 114 of 2007 (unreported)
5. Green Nikutisha and Another v The People (1979) Z.R. 261 (S.C.)
6. Josephat Mlewa v Eric Wightman (1995-97) Z.R. 171
7. Subramaniam v Public Prosecutor [1956] 1 W.L.R 965
8. Kufuka Kufuka v Mundia Ndalamei S.C.Z Appeal No. 80 of 2012
9. Simon Malambo Choka v The People (1978) Z.R. 243 (S.C.)
10. Nabukeela Hussein Hanifa v Kibule Ronald and Another HCT-03-CV-EP-00017-2011 (Uganda)
11. Lewanika and Others v Chiluba (1998) Z.R. 79
12. Inonge Mubika v Mukelebai Pelekelo C.C.Z Selected Judgment No. 32 of 2017
13. Saul Zulu v Victoria Kalima S.C.Z. Judgment No. 2 of 2014
14. Wilson Mwenya v The People S.C.Z Judgment No. 5 of 1990
15. Lilly v Virginia 527 U. S. 116 (1999)
16. Access Bank (Zambia) Limited v Zcon (Group Five) Business Park Joint Venture S.C.Z Judgment No. 24 of 2016
17. Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited S.C.Z Judgment No. 20 of 2011
18. Richwell Siamunene v Sialubalo Gift C.C.Z Selected Judgment No. 58 of 2017

19. Henry Kapoko v The People C.C.Z Selected Judgment No. 43 of 2016
    Steven Masumba v Elliot Kamwendo C.C.Z Selected Judgment No. 53 of 2017
20. Samuel Mukwamataba Nayunda v Geoffrey Lungwangwa C.C.Z Appeal No. 56 of 2017

Legislation referred to:

The Constitution of Zambia (Amendment) Act No. 2 of 2016
The Electoral Process Act No. 35 of 2016
The Local Government Election Tribunal Rules S.I No. 60 of 2016

Work referred to:

Halsbury's Laws of England 4th Edition, Vol. 15

This is an appeal by the Appellant against the decision of the Local Government Election Tribunal of the Shang'ombo district delivered on 28th September, 2016. The brief facts are that the Appellant, who was the Respondent before the Tribunal, was a candidate in the Local Government election vying for the position of Ward Councillor in Mulonga Ward of Shang'ombo District, having been adopted as such by the United Party for National Development (UPND). The Respondent, who was the Petitioner before the Tribunal, contested the election under the ticket of the Patriotic Front (PF) and polled a total of 749 votes as against the Appellant's 1212

votes. The Appellant was declared the duly elected Ward Councillor of Mulonga Ward on 13th August 2016.

The Respondent then challenged the election of the Appellant and sought nullification on grounds that her election was invalid for noncompliance with the provisions of the Constitution Amendment Act No. 2 of 2016 (henceforth referred to as the "Constitution as amended") and the Electoral Process Act No. 35 of 2016 (henceforth referred to as the "Act").

The Respondent's petition, filed on 29th August, 2016 raised a number of allegations. Among them that the Appellant during the campaign leading up to the 11th August, 2016 election, brewed and distributed local beer at every polling station. That prior to and on polling day, the Respondent and her agents beat up and threatened violence against PF supporters. That her supporters and agents distributed K50 notes and pens respectively to voters on the queues at the polling station with a promise of a cash payment upon return of the pen after voting. And that UPND supporters ferried voters to the polling stations.

It was alleged that the Appellant and her fellow UPND party members and officials called the Respondent a thief and a drunkard and extended the slurs to other PF party candidates at different levels. That there were two incidents of violence, the first on 29th July, was a threat with a gun perpetrated by the Appellant's elder sibling and the second, on 4th August, was the beating up of a PF cadre with the Appellant's knowledge. That the UPND candidates did not use Party regalia whilst campaigning; instead they used ordinary chitenge cloth. That the Appellant and her agents constantly removed and destroyed PF posters.

The Tribunal found for the Respondent stating the case had been proved beyond a balance of probabilities. Its decision was based on the demeanour of the Respondent and his witnesses who were said to have given their evidence in a forthright way, unperturbed by cross-examination. The Tribunal then nullified the election of the Appellant as Councillor for Mulonga Ward and further held that she was no longer eligible to stand for re-election as a councillor for a duration of five years within Shang'ombo District in accordance with Article 157 (2) and (3) of the Constitution as amended.

The Appellant, dissatisfied with the decision, appealed to this Court and raised the following grounds which we quote verbatim:

1. **The learned members of the Tribunal erred at both law and fact when it nullified the election of the Appellant on grounds of corruption and bribery when it held that the Appellant had paid a sum of five hundred kwacha (ZMW500.00) and gave assorted items to Milimo Simenda when the same was not supported by evidence to the required standard.**

2. **That the learned members of the Tribunal erred in fact and in law when they found that the Appellant didn't comply with the provisions of the Constitution and the Electoral Process Act No. 35 of 2016.**

3. **The learned members of the Tribunal erred in fact and in law when they considered the testimony of the Petitioner in the absence of corroborative evidence when his testimony clearly serves his own interest.**

4. **The learned members of the Tribunal erred in fact and in law when they attached due weight to the testimony of PW1 which was speculative in nature without corroborative evidence.**

5. **The learned members of the Tribunal erred in fact and in law when they attached due weight to the testimony of PW2 who was a witness with an interest to serve in the absence of corroborative evidence.**

6. **The learned members of the Tribunal erred in law and fact when they attached due weight to the testimony of PW3 in the absence of evidence in corroboration in form of a medical report form from the police and/or a supporting testimony from a police officer.**

7. **The learned members of the Tribunal erred in both fact and law when they attached due weight to the testimony of PW4 who was a witness with an interest to serve in the absence of corroborative evidence.**

8. **The learned members of the Tribunal erred in fact and law when they held that the evidence of the Petitioner and his witnesses with an interest to serve was sufficient to nullify the election of the Appellant as Councillor.**

9. **The learned members of the Tribunal erred in law and fact when they did not consider the provisions of section 100 (2) of the Electoral Process Act No. 35 of 2016 when delivering their Judgment.**

10. **The learned members of the Tribunal erred in fact and in law when they did not allow the Respondent to present her case.**

11. **The learned members of the Tribunal erred in fact and in law when they held that the evidence of witnesses with an interest to serve was enough to reach the standard of proof required in election petitions in order to nullify an election in the absence of corroborative evidence.**

The Appellant filed lengthy submissions upon which she relied entirely. It was contended generally in the submissions that the burden of proof is upon the one alleging. That he who alleges has to prove the allegations made in accordance with his pleadings to a standard higher than a balance of probabilities; specifically to a fairly high degree of convincing clarity. **Kamanga v Attorney General and Another,**[1] **Anderson Mazoka and Others v Levy Mwanawasa and Others,**[2] and **Michael Mabenga v Sikota Wina and Others**[3] were cited accordingly. It was further submitted that the petition was premised on section 97 (2) (a) of the Act, under which it must be shown that the majority of the voters were prevented from voting

for the candidate whom they preferred in that ward. The case of **Mubika Mubika v Poniso Njeulu**[4] where the Supreme Court stressed the importance to be attached to the majority clause in election petitions was cited. That a high degree of proof was required despite the exclusion of the Appellant's case by the Tribunal.

Ground one attacked the allegations of bribery and corruption testified to by PW4 on the grounds that PW4 was a receiver of bribery proceeds and a member of the PF. As such there was need for corroboration of his evidence which fell short of the required standard. Counsel cited the case of **Green Nikutisha and Another v The People**[5] to

-argue that the need to call other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt.

The Appellant argued that there needs to be established clear and unequivocal proof and referred to **Halsbury's Laws of England 4th Edition, volume 15** at page 780 where it is stated that clear and unequivocal proof is required before a case of bribery will be held to have been established. That suspicion is not sufficient, and the confession of the

receiver of the bribe is not conclusive. She distinguished the case **of Mabenga v Wina and Others**[3] wherein the court had satisfactory proof of corruption and bribery during an election; which proof was sufficient to nullify an election, from this case in which the evidence was not conclusive as it was based solely on the testimony of the receiver. That in this case the requirements of section 81 (1) (a) (b) (c) and (f) of the Act, relating to bribery and corruption were not met.

The Appellant referred to the **Mubika v Njeulu**[4] case and **Josephat Mlewa v Eric Wightman**[6] to argue that the courts must be satisfied that the scale or type of wrongdoing is widespread so as to influence the majority of voters and that in the present case there was no evidence to show how the said corruption had affected the majority of voters.

Ground two attacked the finding that there had been noncompliance with the Constitution and the Act. Section 81 (1) (a) (b) (c) and (f) of the Act was applied to the testimony of bribery from PW4 in order to challenge its adequacy. The same provision was used to challenge the testimony of the Respondent that the Appellant and her supporters failed to wear party regalia while campaigning, perpetrated vote buying, distributed K50 notes,

Way laid voters to give out pens, and ferried voters to polling stations. The challenge was extended to PW2's testimony alleging beer brewing and distribution by the Appellant which allegedly caused the witness to vote for the Appellant even though he was PF.

Furthermore, it was submitted that there was also no proof that the people that distributed the items causing the corruption and bribery allegations where indeed duly appointed agents of the Appellant nor was there proof that the Appellant brewed the beer or was the one who distributed it. The Appellant also stated that there was no evidence from the recipients of the distributed items to confirm the allegation that PW4 had been given items to distribute to the electorate.

Ground two also responded to the finding on the use of threats and violence by the Appellant. Section 83(1) (a) (b) (c) and (5) of the Act, on undue influence, was cited to demonstrate how the evidence of the Respondent, PW1 and PW3 fell short of the requirement that the evidence produced must show to the satisfaction of the court that a person directly or indirectly or through another person caused the use of or threatened to make use of force or violence or restraint on another person.

The Appellant submitted that the evidence of violence did not prove that it was the Appellant or her agents with her consent, knowledge and approval that had engaged in the said acts and the Respondent's evidence with regard to the violence at Ngandwe and Natukoma was merely hearsay; she relied on the case of **Subramaniam v Public Prosecutor**[7] to argue that such evidence is not admissible. The Appellant also argued that the evidence of PW3 who was said to be *non-compos mentis* lacked substance as there was no one that was called to substantiate the allegation nor was there any medical report to prove the assault.

On the allegations of disparaging remarks against the Respondent, the Appellant cited section 15 (1) (c) of the Electoral Code of Conduct in the Schedule to the Act, in challenging the evidence of the Respondent, PW1 and PW4. It was contended that the Respondent had not adduced evidence that showed that it was the Appellant or her agent that had called him a thief or drunkard. It was indicated that the evidence equally did not show how many people had been affected by these acts of violence or disparaging remarks to show they were widespread or indeed how many of the electorate had been influenced and prevented from electing their

preferred candidate. Counsel cited paragraph 784 from **Halsbury's Laws of England 4th Edition, Volume 15** wherein it was stated that:

> **In order to constitute undue influence, a threat must be serious and intended to influence the voter, but it must appear that the threat should be judged by its effect on the person threatened and not by the intention of the person using the threat.**

Additionally, the Appellant referred this Court to the case of **Kufuka Kufuka v Mundia Ndalamei**[8] where the Supreme Court had opined that it is not enough for the Petitioner to say 'people were saying'; what was required was for the Petitioner to provide the proof of his allegations and the extent of influence that these allegations had on the electorate.

It was submitted that in totality the evidence did not meet the standard of a fairly high degree of convincing clarity and at no time did the burden of proof shift to the Respondent even though an answer had not been filed. The case of **Mazoka and Others v Mwanawasa and Others**[2] was relied upon in aid of this point. The Appellant argued that section 97 (3) of the Act does not shift the burden of proof to the Respondent but merely places a duty on the court to determine from the evidence before it whether the petitioner has proved his case and therefore the reasoning of the Tribunal that subsection 3 had shifted the burden on to the Appellant was a misdirection.

In arguing grounds five, seven, eight and eleven together, the Appellant submitted that the Tribunal should not have nullified the election based on the evidence of the Respondent and PW4 without taking into account the fact that they are witnesses with an interest to serve and as such their evidence especially that pertaining to the allegation of bribery in the sum of K500. 00 and other household essentials such as cooking oil required corroboration. She relied on the case of **Simon Malambo Choka v The People**[9] wherein it was held that:

> **A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration**
>
> **or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of his evidence.**

The Appellant relied on the holding in the case of **Nabukeela Hussein Hanifa v Kibule Ronald and Another**[10] wherein the court in Uganda had indicated inter alia that since each party in an election petition sets out to win, the court should cautiously and carefully evaluate all the evidence especially that of partisan witnesses which is to be viewed with great care, scrutiny, circumspection and caution. It was also opined therein that it is difficult for the court to believe that the supporters of one candidate behaved like saints whilst those of another like the devil. That witnesses

with a desire to win resort to peddling falsehood. Their evidence should in its entirety be regarded as subjective and cannot be relied upon without testing its truthfulness through a neutral or independent source.

The Appellant argued grounds four and six together and stated that in accordance with the provisions of the Act, a candidate will only be held responsible for acts of misconduct or electoral malpractice which are done by the candidate or with their knowledge and consent or approval of their agent. Counsel stated that apart from the lack of corroborative evidence as per the case of **Green Nikutisha**[5] the evidence did not show that the purported *Folosi* who was apprehended by the police was the Appellant's appointed agent. The case of **Lewanika and Others v Chiluba**[11] where it was indicated that not everyone in one's political party is one's election agent since under the relevant regulation an election agent has to be specifically so appointed, was cited. The Appellant maintained the argument that it was also a misdirection for the Tribunal to have found for the Respondent in the absence of a police or medical report to corroborate PW3's testimony.

In ground ten the Appellant averred that she had a right to be heard and the Tribunal misdirected itself when it denied her the opportunity to file her

answer out of time. Counsel relied on Article 118 (2) (e) and (f) of the Constitution as amended and stated that the reason given by the Tribunal, thereby denying the application, on grounds that local government elections are time bound was a misdirection and against the Constitution as amended which does not give any time frame within which disposal of local government election appeals is to be done. Counsel referred to the decision of this Court in **Inonge Mubika v Mukelebai Pelekelo**[12] in aid of this point.

The Respondent and his counsel were not present before the Court and we shall therefore make reference only to the submissions filed. The Respondent countered the Appellant's arguments by first citing the decision in the case of **Michael Mabenga v Sikota Wina and Wallace George Samulela**[3] to argue that an election petition, like any other civil claim depends on the pleadings and the parties are bound by the pleadings, being the petition and answer. The Respondent relied on **Saul Zulu v Victoria Kalima**[13] wherein the court emphasized the function of pleadings and the fact that failing to plead matters in a case can be fatal. That it is the duty of parties and their counsel to plead matters in dispute and they cannot transfer that duty to the court.

The Respondent further argued in response to ground one that the Tribunal was on firm ground to have nullified the election of the Appellant as Ward Councillor on grounds of corruption and bribery, and further relied on **Mabenga v Wina and Others**[3] to contend that satisfactory proof of any one corrupt or illegal act or misconduct in an election petition is sufficient to nullify an election.

It was submitted in answer to ground two that the Appellant's action of brewing and distributing beer to the voters was caught up by section 81 (1) (a) (c) and (f) of the Act as this act which was done during the campaign period resulted in the Respondent not being voted for in Mulonga Ward. It was also contended that the Appellant had contravened section 83(1) (a) (b) (c) and (5) of the Act when the Appellant and her agents caused violence during campaigns in Mulonga Ward, proof of which counsel said, had come out during the testimony of the Respondent who was said to have reported the matter to the police, leading to the arrest of one UPND cadre. It was argued that as a result of the acts of violence perpetrated against the Respondent, people lived in fear during the campaign period and as such they could not vote.

The Respondent further submitted that as a result of the Appellant calling the Respondent a 'thief and drunkard' people lost confidence in the Respondent. That in remote areas people are illiterate and when they hear these negative statements they easily change and so people lost confidence in him as a result of the accusations. That the Appellant's

action is proscribed under section 15 (1) (c) of the Code of Conduct in the Schedule to the Act.

In arguing grounds five, seven, eight and eleven, the Respondent contended that his evidence was sufficiently corroborated by four witnesses that had come to testify in aid of his case. Counsel relied on the definition of corroboration offered in the case of **Wilson Mwenya v The People**[14] and indicated that most of the evidence that corroborated the allegations against the Appellant stood unchallenged by the Appellant despite cross-examination. He referred to the case of **Lilly v Virginia**[15] to point out that cross examination is the greatest legal engine ever invented for the discovery of truth. Additionally it was contended that the Appellant's argument that the evidence of PW3 was speculative is unjustified as the Appellant herself failed to challenge that witness's testimony.

In ground nine, the Respondent analysed the provisions of section 100 (2) of the Act and submitted that there was nothing wrong with the manner in which the Tribunal had proceeded as it did consider the provision.

In relation to the argument in ground ten on non-adherence to the provisions of Article 118 (2) (e) and (f) of the Constitution as amended, it

was argued that this was an attempt by the Appellant to use the provision for circumventing a procedural rule. The Respondent referred us to the case of **Access Bank (Zambia) Limited v Zcon (Group Five) Business Park Joint Venture**[16] wherein the Supreme Court opined in relation to Article 118 (2) (e) of the Constitution as amended, that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts. It was further argued based on the principle propounded in **Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited**[17] that the Appellant cannot hide or seek solace in the Constitution and at no time was she stopped from filing her Answer which as per Rule 11 of the Local Government Election Tribunal Rules S.I No. 60 of 2016 (henceforth referred to as the Election Tribunal Rules), ought to have been filed within seven days of receipt of the election Petition. It was submitted that even

after the issue was raised, the Appellant did not make an application to file the Answer out of time. He prayed that the appeal be dismissed. In her lengthy reply filed into Court on 13th February 2018, the Appellant repeated her earlier submissions.

We have considered the eleven grounds of appeal. We carefully perused the record of proceedings before the Tribunal and the Judgment as well as the written arguments filed into this Court by both sides. The issues that have been raised may be summed up as follows:

1. **Whether the Tribunal was in order to proceed without allowing the Appellant to present her answer given the provisions of Article 118 (2) (e) and (f) of the Constitution as amended.**
2. **Whether the Tribunal was in order to attach due weight to the evidence of the Respondent and his witnesses in the absence of independent corroborative evidence.**
3. **Whether the Tribunal applied the standard of proof required as a matter of law in election petitions.**

We take note from the outset that the eleven grounds of appeal challenge the Tribunal's findings of both fact and law. As an appellate

Court, we reiterate our position in **Richwell Siamunene v Sialubalo Gift**[18] wherein we stated that as an appellate court we will not reverse findings of fact made by a trial Judge, unless we are satisfied that the findings in question were perverse, or made in the absence of any relevant evidence or upon a misapprehension of the facts, or that they were findings which on a proper view of the evidence, no trial court acting correctly can reasonably make.

For convenience, we will address the issues raised by considering the first issue which is the basis of ground ten, on its own. We shall then consider the second and third issue constituting grounds one, two, three, four, five, six, seven, eight, and eleven together as they are closely intertwined. As ground nine was abandoned by the Appellant and omitted from her submissions, we shall say no more about it even though the Respondent addressed it in his submissions.

Ground ten challenges the Tribunal's decision to determine the matter without giving the Appellant a chance to make her case. We see from the record of appeal that, at a scheduling conference held on 20th September, 2016 and attended by counsel for both the Appellant and the Respondent,

the Petition was set down for trial beginning at 08.30 on 22nd September, 2016. That on 22nd September, 2016 only the Respondent and his lawyer were present before the Tribunal at 08.30 hours. The matter was then adjourned to 11.00 hours on the same day at which time the Appellant was present but her lawyer was still absent due to illness. The Tribunal decided not to wait for the Appellant's replacement lawyer and proceeded to hear the Respondent's testimony. He was duly cross-examined by the Appellant. The Tribunal then adjourned the matter to 23rd September for continued hearing but before rising, stated that it had received an application from the Respondent asking whether the Appellant should be heard as she had not filed her Answer in accordance with the Election Tribunal Rules. The Tribunal then ordered the parties to file written submissions on the issue and resolved to hear the application the following day at the close of the Respondent's case.

On 23rd September, 2016, the Respondent called four witnesses all of whom were duly cross-examined by the Appellant's Counsel. The Respondent then closed his case. As neither side had filed written submissions, the Tribunal heard the scheduled application *viva voce* on the basis of the Notice to Raise a Preliminary issue dated 22nd September,

2016 and the Affidavit in Opposition dated 23rd September, 2016. At the end of the oral submissions, the Tribunal adjourned the matter to the following day for ruling. On 24th September, 2016, the Tribunal ruled that the Appellant could not present her case as she had not filed an Answer as required by Rule 11 of the Election Tribunal Rules nor applied for leave to file the Answer out of time. The Tribunal then proceeded to give directions for the filing of submissions by both parties in the main matter and reserved judgment for delivery on 28th September, 2016.

The Appellant argued on appeal that the Tribunal misdirected itself when it unjustly denied the Appellant the right to be heard by declining her application to file an Answer out of time. She cited Article 118 (2) (e) and (f) of the Constitution on the principles of adjudication in support. The Respondent on the other hand submitted that the Appellant had not made any effort even after engaging counsel to seek leave of the Tribunal to file her Answer out of time and that the Tribunal was duty bound to comply with Rule 11 of the Election Tribunal Rules.

We agree with the Respondent. The election Petition was filed on 29th August, 2016 and service (as per page 27 of the record of appeal),

was effected on 1st September, 2016 through secondary service. This means that by 14th September, 2016, the Appellant's Answer should have been filed. The Notice of Appointment of Advocates filed by her lawyers does not have a filing date to guide us as to when they officially took over the case on her behalf. We have however established from the record that the Appellant's counsel appeared for her on 20th September, 2016 at the scheduling conference and did not address the Tribunal on the issue of the Appellant's Answer. No attempt appears to have been made by her lawyers to have the said pleading filed. In fact a further perusal of the record reveals that there was no application made by the Appellant's lawyers to have the Answer filed out of time. The argument by the Appellant's Counsel alleging otherwise is an attempt to mislead this Court and we condemn it.

As for the argument pertaining to non-adherence to Article 118 (2) (e) and (f) of the Constitution as amended, we wish to reaffirm our position in the case of **Henry Kapoko v The People**[19] that:

> **In general, rules are necessary to enable the parties to anticipate their role in legal proceedings and make sense of the litigation process.**

And further that:

Article 118(2) (e) does not direct courts to disregard technicalities, it enjoins courts not to pay undue regard to technicalities that obstruct the course of justice.

It was incumbent upon the Appellant to comply with the Rules and facilitate an orderly and expeditious process. The Appellant's argument is in the circumstances, misplaced. So too is the argument that seeks to draw parallels with our Ruling delivered following a preliminary issue raised in **Inonge Mubika v Mukelebai Pelekelo**[12] and avers that there is no time frame that has been given in the Constitution as amended within which appeals in local government election petitions should be disposed of. To the contrary, the matter that was before the Tribunal was not an appeal but a trial and it was governed by time bound rules subject only to the governing Act and ultimately the Constitution as amended. The Tribunal relied on Rule 11 of the Election Tribunal Rules which provides that '*the Respondent shall file an answer within seven days of receipt of an election petition.*' It is couched in mandatory terms. In view of the foregoing and the important role that the Answer plays in enabling the Petitioner to prepare a Reply, we cannot fault the Tribunal for the position it took. In the premises ground ten has no merit and it is dismissed.

We now turn to the remaining grounds of appeal and begin by agreeing with the Tribunal wherein it stated that:

> **...there is no procedure for a default judgment when it comes to local government election petitions. This means that even in the absence of an Answer by the Respondent, the Petitioner still has to prove their case by calling witnesses and making the necessary submissions.**

The Respondent under the circumstances still had to prove his case by calling witnesses and making relevant submissions to the Tribunal despite its refusal to allow the Appellant to present her case without an Answer filed under Rule 11. In grounds one, two, three, four, five, six, seven, eight and eleven, the Appellant challenges the Tribunal's finding that the Respondent accordingly, did adduce sufficient evidence to nullify her election.

For convenience and as is our usual practice we shall first set out the relevant law on the issues raised. The appeal is premised on a number of provisions under the Act, namely relevant portions of section 97 read in conjunction with sections 81, 83 and 84 of the said Act. They provide:

> **97(2) The election of a candidate as a ... council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the ... tribunal ... 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 ... ward were or may have been prevented from electing the candidate in that .... ward whom they preferred;

The contested offences are under sections 81, 83 and 84 of the Act. Under section 81 (1) (a) the Respondent had to prove that the Appellant directly or indirectly, by herself or through her election or polling agent or another person with her knowledge and consent or that of her agent had corruptly given, lent, procured, offered, promised or agreed to give, lend, procure or offer, any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce someone to vote in a particular way.

Under section 81 (1) (c) the Respondent had to prove that the Appellant directly or indirectly, by herself or through her election or polling agent or with any other person corruptly made gifts, loans, offers, promises, a procurement or agreement, and that the said acts were made to or for the benefit of herself or any other person as inducement for someone to vote in a particular way. As for a corrupt act under section 81 (1) (f) of the Act, the Respondent had to prove that the Appellant directly or indirectly, by herself

or through her election or polling agent or with any other person before or during elections corruptly received or contracted for any money or loan for herself or for any other person as inducement for someone to vote in a particular way.

Under section 83 (1) (b) and (c) (i) (ii) (iii) and (iv) of the Act, the Respondent had to prove that the Appellant either acting in person or through any other person firstly, made use or threatened to make use of any force, violence or restraint upon any other person, and secondly, inflicted or threatened to inflict by herself or any other person, or by supernatural (or pretended supernatural) or non-natural (or pretended non-natural) means to cause psychological, mental or spiritual injury, damage or loss upon or against any person. Alternatively that the Appellant threatened or did something to induce or compel a person to either register or not to register, to vote or not to vote, to vote or not to vote for any registered political party or to support or not to support any registered political party or candidate. Then under section 84 (1) of the Act, the Respondent had to prove that the Appellant or her election or polling agent

or someone acting with her knowledge and consent published falsehoods suggesting the illness, death or withdrawal from an election by a candidate.

Under section 97 (2) (a) (ii) of the Act, once the Tribunal found the alleged offence or offences made out as stated above, it had to establish that as a consequence of such acts, the majority of voters were or may have been prevented from electing the candidate they preferred, before it could nullify the election.

In reviewing the evidence on the record of appeal, we wish to say from the outset, that the duty lay upon the Respondent to adduce credible or cogent evidence to prove all the allegations at the required standard of a fairly high degree of convincing clarity and at no time did that burden shift to the Appellant regardless of how poorly she cross examined the Respondent and his witnesses, or her failure to file an answer, or indeed, the manner in which her submissions were made to the Tribunal.

The standard of proof required is not that of a balance of probability but that of a fairly high degree of convincing clarity. This was settled by the Supreme Court in **Lewanika and Others v Chiluba**[11] wherein it was stated that:

> **...parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity.**

We found this to be good law in **Steven Masumba v Elliot Kamondo**[20] wherein we also observed that in election petitions the required standard is higher than a mere balance of probability applicable in ordinary civil cases albeit less than the standard of proof in criminal cases of beyond all reasonable doubt. And in **Richwell Siamunene v Sialubalo Gift**[18] we reiterated the need for the evidence adduced to establish the issues raised to a fairly high degree of convincing clarity in that the proven defects and electoral flaws must be established and attributable to the person whose election is challenged. In particular, we stated that:

> **...a Petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof. The evidence must be of a kind that is free from contradictions and truthful so as to convince a reasonable tribunal to give Judgment in a party's favour.**

The evidence must also be such that it shows the majority of voters were or might have been prevented from electing the candidate whom they preferred. And we said in **Samuel Mukwamataba Nayunda v Geoffrey Lungwangwa**[21] that where a Petitioner only proves one limb, the allegation cannot be said to have been proved to the required standard of proof.

We have applied the prescribed burden and standard of proof to the evidence on the record of appeal and the reasoning in both the parties' arguments before us as well as the Judgment of the Tribunal. We find the overarching issue to be that of corroboration. The Appellant argued quite vehemently, that the Respondent and his witnesses had an interest to serve as they belonged to the same political party and questioned the decision of the Tribunal to attach due weight to their testimony when it was not corroborated. She argued that on the said factual finding and as a matter of law, the evidence in the case did not meet the required standard of proof in election petitions. The Respondent argued in response, that most of the Respondent's evidence as well as that of his witnesses went

unchallenged during cross examination. That the witnesses corroborated each other.

We note that the evidence on record is confined to the Respondent's testimony and that of his four witnesses. For the sake of clarity we have set out the evidence in brief.

The Respondent testified that during campaigning, he observed the Appellant's beer brewing and distribution at all polling stations; various incidents of threats and violence in all polling areas, including at a place called Nasimbandu, which he reported to the police leading to the arrest of a UPND cadre called *Folosi*; character assassination; non-wearing of party dress; and bribery and ferrying of voters to polling stations on polling day. That he was told of an incident of bribery. All of which led to the voters loss of confidence in him and hence his losing the election. During cross examination he changed his statement about the beer brewing and admitted that he did not directly witness all the alleged violence. And in re-examination he attributed the violence to the Appellant's supporters as opposed to the Appellant herself.

PW1 testified that he was chased from his village by the Appellant and her agents because he was PF; That someone called *Lumunyi* was also attacked by the Appellant and forced to flee with his wife and couldn't vote; that there were various incidents of violence including an attack on PW3; he confirmed the reported violence at Nasimbandu and that the violence which was reported to the police led to *Folosi*, being arrested; that he voted for the PF, but other people did not vote out of fear. In cross-examination he stated that it was the Appellant's agents and not the Appellant herself that beat up people. PW2 testified that all he knows about the case was that the Appellant brewed and distributed beer at her rallies and he drank the beer as a result of which he voted for her even though at the time he was branch chairperson for the PF. That the Appellant called the Respondent a thief and a stranger at her rallies.

PW3 testified that all he knows about the case is what happened to himself. That he was waylaid and assaulted by the Appellant and two of her agents because he was wearing a PF T-shirt and as a result, he was hospitalised for several weeks and continues to suffer mental ill health. He

did not produce his medical records; he had left them at home because he did not know they would be required.

PW4 said that all he knows was that the Appellant held a rally at Mulapo polling station where she called the Respondent a drunkard, a thief and a stranger to the Mulonga Ward. That she distributed unmarked chitenge cloth to persons whose national registration cards were collected and registered. That she bribed him with K500.00, four 50Kg bags of maize, a case of sugar, eight bottles of cooking oil, three packets of salt and sixteen bottles of yeast which he shared with other PF cadres to entice them to vote for her. That he stored the items with one *Bornface Lufunga*. That he nevertheless voted for the PF.

The Tribunal in its judgment found that the Respondent and his witnesses' credibility had not been brought into question during cross examination. The Tribunal at page J25 of the Judgment stated that:

> **We took into account the demeanor of the petitioner and his witnesses and we observed that they gave evidence in a forthright way and they were unperturbed by cross examination. Even the answers they were giving both at the time they were cross examined by the Respondent or indeed after**

her counsel took over cross examination were not shaken in any way. They maintained their original story as given in examination in chief.

The Tribunal further found at pages J26 and J27 of the Judgment that:

It is clear from the evidence adduced by the Petitioner and his witnesses that the Respondent took part in acts of violence when she and her agents assaulted the Petitioner, PW3 as well as chasing her son-in-law (PW1) Sichechani Kambungo from his own house simply because he was a PF sympathizer...

.....

The Respondent has only given general...denials...

We find the Tribunal's acceptance of the Respondent's evidence without considering it further to be a serious misdirection because the Respondent and his witnesses fell in the category of witnesses with a possible interest to serve.

The Tribunal itself acknowledged that the Respondent's witnesses were perceived to be from the PF and having so found it was incumbent upon the Tribunal to look to other independent evidence to corroborate the witness testimony. We reiterate our position in the **Masumba v Kamondo**[19] case where we stated that partisan witnesses are likely to exaggerate their evidence in an effort to tilt the balance of proof in favour of the candidate they support. That in such situations it is necessary to look

for 'other' evidence from an independent source to confirm the truthfulness or falsity of the allegation. So although even one independent witness would be adequate to corroborate and/or establish a fact in contention, there is no such witness in this case. There is no documentary evidence such as police or medical reports either. The Respondent and his witnesses said they made reports to the police and yet no police officer or police report was produced in support.

The evidence of PW3 in particular needed to be corroborated by a medical or police report. None, was presented. The evidence of the Respondent and PW1 corroborating PW3's testimony was itself in need of corroboration. Further, the statement by Respondent's counsel at page 82 of the record of appeal that the witness was *non-compos mentis* was not dealt with by the Tribunal. In the case of PW4 he was the only witness who testified to have been bribed by the Appellant and he was not corroborated by an independent witness

In our considered view, the Respondent took a rather casual attitude toward the need for independent evidence. In cross-examination at page

71 of the record of appeal, his response was *"I cannot order the police to bring the report. The Tribunal can access the documents at the police."* And at page 76 of the record of appeal PW1 testified as follows: "*If this Tribunal is to go and check..."* This is not the way in which corroborating evidence is adduced before a court of law. The Respondent had to bring the evidence to court.

We also do not accept that the evidence given by the witnesses is as sound as the Tribunal found it to be. This is because our perusal of the record of appeal shows firstly, that the testimony of some witnesses was inconsistent. It shows discrepancies between the evidence in chief and cross examination of the Respondent and PW1. The Respondent testified that the Appellant was brewing and distributing beer at all polling stations during campaigning. At page 68 of the record of appeal he stated that: "*I used to see her when she was brewing beer and give it to people*" yet in cross-examination at page 72 of the record of appeal he said: *"you were giving out beer to your agents."* Then in re-examination at page 73, that: *"The Respondent's supporters are the ones who were brewing beer and*

distributed to people, these people voted for the Respondent." Without precise evidence as to the beer recipients and the proper identification of the Appellant's agents to connect them to the Appellant, the testimony is inconsistent and inadequate even in the absence of the corroboration requirement. Then there is the testimony of PW1, who during cross-examination said that the Appellant did not beat anyone but it was her agents who assaulted *Mututwa Mututwa*; in re-examination he said that the Appellant assaulted *Mututwa*. This shows lack of clarity on the part of the witness that leaves us to question his credibility. Again the alleged agents were not sufficiently connected to the Appellant.

Secondly, we note that the Respondent did admit that he was merely told and did not personally perceive some of the events in his allegations. In this regard we refer to his statement at page 70 of the record of appeal where he addresses the allegation of violence and states that '*the person who saw respondent and her agents and the one who was beaten will come to give this evidence.'* In cross examination the Respondent said at page 72 that '*I did not see you giving out money but the person who you*

gave money on polling day will come and testify.' The Tribunal should not have attached due weight to this evidence as it was hearsay.

Thirdly, we find insufficient evidence of the second limb of section 97(2)(a), the majority principle. We find that the witnesses' evidence was speculative when it came to whether the alleged events were widespread and affected or could have affected the majority of the Ward. It was the opinion of the Respondent, PW1, PW2 and PW3 that voting was affected by the Appellant's alleged actions but no independent evidence was led to support their statements. The information that they volunteered about who they voted for was also inconclusive. While PW2 said he voted for the Appellant because he was given beer, PW1 said he voted for PF; this is despite his testimony that people were afraid of the alleged violence. PW4 also said he voted for PF; again, this is despite his testimony that he was bribed and had canvassed people in his area to vote for the Appellant. Further no independent or concrete evidence was led to show the general or widespread effect through the number of polling stations affected or which were likely affected by the alleged misconduct.

Fourthly, there is the issue of the standard of proof applicable in election petitions. It is our considered view that the Tribunal misdirected itself by not requiring the evidence to attain a fairly high degree of convincing clarity. The evidence as it stands on record and as we have demonstrated, does not meet the standard required in order to prove the allegations and connect them to the Appellant or her agents or to prove that they were committed with her knowledge and approval or consent. We cannot rely on the evidence to hold that the allegations were widespread and affected or could have affected a majority of voters in Mulonga Ward because it falls short of a fairly high degree of convincing clarity. It is our finding that there was a misapprehension of the facts on record as well as the law and we are justified as an appellate court to set aside both the findings of fact and of law. Grounds one, two, three, four, five, six, seven, eight and eleven have merit and are allowed.

Since ground ten was dismissed but the substantive grounds were successful, we set aside the decision of the Tribunal and find that the Appellant is the duly elected Councillor for Mulonga Ward. For the

avoidance of doubt, we set aside the decision banning the Appellant from standing for re-election as councillor for a duration of five years within Shang'ombo District. We further set aside the decision of the Tribunal on costs and order that each party shall bear their own costs both in this Court and in the Tribunal below.

Before we leave this matter and for purposes of guidance, we are constrained to comment on two issues of procedural concern. First, we observed in the record of appeal that the Respondent appeared as the "Petitioner" whilst his witnesses appeared as PW1, PW2, PW3 and PW4. Identifying the witnesses in this manner was a misdirection. The Respondent as the first person to give evidence should have been PW1 and his witnesses renumbered accordingly. We also observed that the record reflects the answers given by the Respondent and his witnesses in the examination in chief, cross-examination and re-examination but excludes the questions asked.

This is also a misdirection as everything said on record during trial must appear in the record of proceedings to provide a complete picture of the evidence as required by section 106(5) of the Act.

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M.S. Mulenga

Constitutional Court Judge

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E. Mulembe

Constitutional Court Judge

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P. Mulonda

Constitutional Court Judge

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M.M. Munalula

Constitutional Court Judge

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M. Musaluke

Constitutional Court Judge