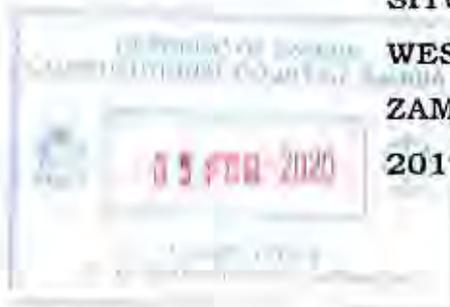


IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(Constitutional jurisdiction)

2019/CC/A002

IN THE MATTER OF:

A PARLIAMENTARY ELECTION PETITION FOR
SESHEKE CONSTITUENCY NUMBER 153
SITUATE IN THE SESHEKE DISTRICT OF THE
WESTERN PROVINCE OF THE REPUBLIC OF
ZAMBIA HELD ON TUESDAY, 12TH FEBRUARY,
2019



AND

IN THE MATTER OF:

ARTICLE 73 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 97 OF THE ELECTORAL PROCESS
ACT NO. 35 OF 2016

AND

IN THE MATTER OF:

SECTION 98 AND 99 OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016



AND

IN THE MATTER OF: SECTION 108(6)(C) OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: THE SCHEDULE TO THE ELECTORAL
PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: THE ELECTORAL (CODE OF CONDUCT)
REGULATIONS 2011 STATUTORY
INSTRUMENT NO. 52 OF 2011

AND

IN THE MATTER OF: THE ELECTORAL COMMISSION OF ZAMBIA
ACT NO. 25 OF 2016

BETWEEN:

DEAN MASULE

APPELLANT

AND

ROMEO KANGOMBE

RESPONDENT

**Coram: Chibomba, PC, Mulenga, Mulembe, Munalula and Musaluke JJC
on 8th October, 2019 and 5th February, 2020**

For the Appellant: Mr. J. Jalasi and Mr. M. Chileshe of Eric
Silwamba, Jalasi and Linyama Legal
Practitioners.

For the Respondent: Mr. M. H. Haimbe and Mr. K. Phiri of Malambo
and Company.

JUDGMENT

Musaluke, JC delivered the Judgment of the Court.

Cases referred to:

1. Khalid Mohammed v The Attorney General (1982) Z.R. 49.
2. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.
3. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79.
4. Sunday Chitungu Maluba v Rodgers Mwewa and Attorney General CCZ Appeal No. 4 of 2017.
5. Josephat Mlewa v Eric Wightman (1995 – 1997) Z.R. 171.
6. Nkandu Luo and Another v Doreen Sefuke Mwamba and Another Selected Judgment No. 51 of 2019.
7. Herbert Shabula v Greyford Monde CCZ Appeal No. 13 of 2016.
8. Sibongile Mwamba v Kelvin M. Sampa and Another CCZ Appeal No. 2 of 2017.
9. Poniso Njeulu v Mubika Mubika CCZ Appeal No. 9 of 2017.

10. Giles Chomba Yamba Yamba v Kapembwa Simbao and Others Selected Judgment No. 6 of 2018.
11. Margaret Mwanakatwe v Charlotte Scott and Attorney General Selected Judgment No. 50 of 2018.
12. Austin C. Milambo v Machila Jamba CCZ Appeal No. 6 of 2016.
13. Webster Chipili v David Nyirenda SCZ Appeal No. 35 of 2003.
14. Raila Odinga and five others v Independent Electoral and Boundaries Commission and 3 others Election Petition No. 5 of 2013 - Supreme Court of Kenya.
15. Match Corporation Limited and Development Bank of Zambia v Attorney General SCZ Judgment No. 3 of 1999.
16. Motor Holdings (Z) Limited v Raj Raman SCZ Judgment No 17 of 2001.
17. Re Thomas Mumba v The People (1984) Z.R. 38.
18. Mwenya Musenge v Mwila Mutale and Another CCZ Appeal No. 41 of 2016.

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016
2. Electoral Commission Act No. 25 of 2016
3. The Electoral Process Act No. 35 of 2016
4. Electoral Act No. 2 of 2006
5. Electoral Act chapter 13 of the Laws of Zambia
6. Electoral Act No. 2 of 1991
7. Electoral Act No. 44 of 1973

1.0 **Introduction**

1.1 This is an appeal against the judgment of Chawatama, J in the High Court, which upheld the election of Mr. Romeo Kangombe as Member of Parliament for Sesheke Constituency, in the Sesheke District of the Western Province of the Republic of Zambia.

2.0 **Background**

2.1 The background to this appeal is that upon the death of the area Member of Parliament for Sesheke Constituency, the Electoral Commission of Zambia conducted a by-election which was contested by: Mr. Dean Masule (the Appellant herein) of the Patriotic Front (PF); Mr. Romeo Kangombe (the Respondent herein) of the United Party for National Development (UPND); Mr. Victor Kalimukwa, of the United Prosperous and Peaceful Zambia (UPPZ) and Ms. Charity L. Muhau of the People's Alliance for Change (PAC).

2.2 The Respondent emerged victorious with 8, 496 votes and was declared duly elected Member of Parliament for the Sesheke Parliamentary Constituency. The Appellant came in second having polled 3,640 votes; the other candidates shared the remaining valid votes as follows: Mr. Victor Kalimukwa, UPPZ – 160 votes and Ms. Charity L. Muhau, PAC – 139 votes.

3.0 Evidence before the trial court

3.1 Aggrieved by the outcome of the by-election, the Appellant on 27th February, 2019 took out a petition before the High Court, seeking among other reliefs; a declaration that the election of the Respondent was null and *void ab initio*.

3.2 In his petition in the court below, the Appellant alleged that the election was marred by undue influence emanating from threats and violence to life and property and rampant physical attack on the members of the PF and members of the general public which culminated in severe injuries to persons and property.

That the said acts of violence were widespread and affected the majority of voters in the nine wards of the constituency.

3.3 The Appellant specifically contended that the acts of violence resulted in several people being occasioned with serious injuries and being treated in hospitals. That most of the perpetrators of the violence were being arrested by the Police. He cited numerous incidents of violence which occurred prior to the nomination, during the period of campaign and on the voting day which incidents have been highlighted in the judgment of the lower court.

3.4 The Appellant had contended that as a consequence of the violence, the majority of voters were prevented from electing their preferred candidate.

3.5 In rebutting the allegations, the Respondent contended that the violence was not widespread and stated that all political parties campaigned freely. In his evidence, the Respondent only recounted two incidents of violence which he witnessed. One

such incident was at Maondo where he alleged that he was at a public rally with party president for the UPND Mr. Hakande Hichilema on 8th February, 2019 when they were attacked by the Police and other people in plain clothes. The other incident he referred to was when his polling agent was allegedly abducted at Tahalima Polling Station and the subsequent beating of PF cadres at Sesheke Guest House.

4.0 Decision of the trial court

4.1 After consideration of the evidence on record and submissions by the parties, the learned trial judge came to the conclusion that the petition before her was predicated on sections 83, 97, 98 and 99 of the Electoral Process Act No. 35 of 2016 as read with the schedule thereto, the Electoral (Code of Conduct) Regulations S.I No. 52 of 2011 and the Electoral Commission Act No. 25 of 2016.

4.2 The learned trial judge reminded herself that the burden of proof in civil matters rests on the Plaintiff as was articulated in

the cases of **Khalid Mohammed v The Attorney General**¹ and **Wilson Masauso Zulu v Avondale Housing Project Limited**². Further, that in election petitions, the standard of proof is not the same as ordinary civil matters as it is higher than on a balance of probability but not to the degree of beyond reasonable doubt as is the case in criminal matters. The trial judge cited the case of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba**³ as authority for this proposition.

- 4.3 Having established the standard of proof required in an election petition, the trial judge proceeded to analyze the case before her. In relation to the provisions of section 97 of the Electoral Process Act, she pointed out that this Court has pronounced itself on section 97 of the Electoral Process Act which is couched in mandatory terms and provides for clear elements which a petitioner must prove in order to successfully have an election nullified.

4.4 The trial judge opined that the threshold contained in the Electoral Process Act for nullification of elections by courts is clear and must be satisfied on the basis of credible and cogent evidence which a petitioner must prove to a fairly high degree of convincing clarity.

4.5 In this regard, the trial judge posed the following questions for determination in relation to the petition before her:

- (i) *Whether or not in connection with the election, misconduct was committed in that the election was marred with violence and undue influence;*
- (ii) *Whether or not the misconduct alleged was committed by the Respondent or his election or polling agent;*
- (iii) *If the misconduct was committed, whether or not the majority of voters in the constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred; and*

(iv) *Whether or not there was non-compliance with the provisions of the Electoral Process Act relating to the conduct of elections.*

4.6 In relation to the first question, the learned trial judge found that based on the evidence before her, the Petitioner had established his allegations regarding the violence and undue influence with the requisite clarity and standard of proof required under the applicable laws.

4.7 On whether or not the violence and undue influence was widespread, the trial judge was guided by the definition of the word '*widespread*' given by this Court in the case of **Sunday Chitungu Maluba v Rodgers Mwewa and Attorney General**⁴ in which we guided that the word "widespread" meant: "*widely distributed and disseminated.*"

4.8 She noted that out of the nine wards in Sesheke constituency, there were acts of violence and undue influence in six wards namely; Lusu, Maondo, Nakatindi, Mulimambango, Katima and

Kalobelelwa. That the number of registered voters in the said six wards was twenty-three thousand, three hundred and ninety -six (23,396). That the two wards that experienced the worst violence were Mulimambango where there was a riot, followed by Maondo where a public rally by the UPND was held and UPND officials were forced to flee and hide in the bush. That the two wards combined had a total number of nine thousand nine hundred and sixty two (9,962) of registered voters. That of the total registered voters in the Constituency of 27,872, only 12,516 cast their votes.

4.9 That given the number of registered voters who cast their votes, an inference was made that most people could have been affected by violence and undue influence, the trial judge therefore came to a conclusion that violence and undue influence was widespread within the contemplation of section 97 (2) (a) of the Electoral Process Act.

4.10 With regards to the second question on whether or not the misconduct alleged was committed by the Respondent or his

election agent, the learned trial judge found that there was no evidence that was proved to the satisfaction of the court that the Respondent or his agent committed corrupt or illegal practices or misconduct in connection with the election.

4.11 As to whether or not the majority of voters in the constituency, district or ward were or may have been prevented from voting for their preferred candidate, the trial judge was satisfied that the voters may have been prevented from electing a candidate of their choice because of the violence which was widespread.

4.12 With regards to the fourth question whether or not there was non-compliance with the provisions of the Electoral Process Act relating to the conduct of elections, the trial judge found that there was a breakdown of the process because the environment in which the election was conducted was not conducive due to the unprecedented acts of violence. It was her finding that violence continued even after the Electoral Commission of Zambia issued a press statement regarding acts of violence during the campaign period. She found that the Electoral Commission of Zambia should have gone further to suspend

campaigns or should have disqualified political parties involved in the violence.

4.13 Addressing the arguments raised on section 97 (2) (b) of the Electoral Process Act, the trial court reiterated the position given by this Court that this provision relates to the conduct of elections and that as per Article 229 of the Constitution as amended, the power to conduct elections vests in the Electoral Commission of Zambia.

4.14 That for an election to be annulled under section 97 (2) (b) of the Electoral Process Act, the conduct complained of must exclusively relate to the Electoral Commission of Zambia and its officers.

4.15 The trial judge summed up her findings by stating that it had not been proven to the satisfaction of the court that the misconduct committed in connection with the Sesheke constituency by-election was: i) *By the Candidate*, ii) *With the Knowledge and consent or approval of the Respondent or of the Respondent's election agent and that 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.

4.16 The trial judge then found that the will of the people of Sesheke Constituency was expressed by the number of votes secured by the winning candidate Mr. Romeo Kangombe and that it was her primary duty to sustain that will by giving full effect to the decision of the people of Sesheke Constituency.

4.17 She thus held that the Respondent was validly elected as Member of Parliament in the election that was held on 12th February, 2019 and therefore dismissed the petition.

4.18 With respect to the argument on the ranking of the Constitutional Court and the Supreme Court, the learned judge found that it is not in dispute that the two courts rank *pari passu* and that it was not the intention of the Constitutional Court to overrule the decision of the Supreme Court in the case of **Josephat Mlewa v Eric Wightman**⁵ as suggested in the

submissions by the Appellant but that the Constitutional Court was giving interpretation to the current electoral law. Further, that in **Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney General**⁶, the Constitutional Court gave a position that the **Josephat Mlewa v Eric Wightman**⁵ case was not tenable under the current electoral law.

5.0 Appeal to this Court

5.1 The decision of the lower court to uphold the election of the Respondent as Member of Parliament for Sesheke Constituency dissatisfied the Appellant and he appealed to this Court against parts of the judgment. He advanced two grounds of appeal as follows:

“Ground One:

That the learned trial Judge erred in law and in fact when she held that the provisions of section 97 (2) (b) of the Electoral Process Act No. 35 of 2016 exclusively governed the activities of the Electoral Commission of Zambia.

Ground Two:

The learned trial Judge erred in law when she held that the case of Josephat Mlewa v Eric Wightman (1995 – 1997) ZR 171 has restrictive application in the current Electoral Law.”

6.0 Arguments on appeal by the Appellant

- 6.1 In support of his appeal, the Appellant filed detailed heads of argument on 9th August, 2019. The two grounds of appeal were argued together on the basis that they were interwoven.
- 6.2 The Appellant argued that the trial judge correctly encapsulated the electoral legal framework at local, regional, continental and international levels in her judgment (at pages J210 to J212) and that she extensively referred to the provisions of the Constitution particularly, Articles 11(b), 21, 45 and 229 of the Constitution of Zambia.
- 6.3 The Appellant submitted that the trial judge erred in law and fact when she held that provisions of section 97 (2) (b) of the

Electoral Process Act No. 35 of 2016 exclusively governed the activities of the Electoral Commission of Zambia. Further, that the learned trial judge fell in grave error when she found as a fact that the electoral system in the Sesheke parliamentary by-election had broken down and that the environment was not conducive for the holding of a free and fair election and yet proceeded to hold that the will of the people of Sesheke Constituency was expressed by the number of votes secured by the Respondent.

6.4 It was the Appellant's further submission that it is not the number of votes secured by a winning candidate that determines that an election was free and fair. That as a matter of fact, the converse is the position as the Appellant in the court below averred that he had lost the election because of the violence and that the majority of voters were prevented from choosing a candidate of their choice. The Appellant submitted that since the trial judge had found as a fact that there was violence and also found that the violence was widespread and that the majority of voters were prevented from casting their

vote, therefore, the learned trial judge's judgment was contradictory.

6.5 In support of the above submission, the Appellant called in aid various decisions of this Court in which we have examined section 97 of the Electoral Process Act. Our attention was particularly drawn to the following cases: **Herbert Shabula v Greyford Monde**⁷, **Sibongile Mwamba v Kelvin M. Sampa and Another**,⁸ **Poniso Njeulu v Mubika Mubika**⁹, **Giles Chomba Yamba Yamba v Kapembwa Simbao, Electoral Commission of Zambia and Attorney General**¹⁰, **Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney General**⁶ and **Margaret Mwanakatwe v Charlotte Scott and Attorney General**¹¹

6.6 In distinguishing the cases cited in paragraph 6.5 above, the Appellant argued that in interpreting section 97 (2) (b) of the Electoral Process Act in those cases, this Court did not find that the offences committed were of a widespread nature. Unlike in

the case at hand where the trial judge correctly found as a fact that acts of violence were widespread.

6.7 It was further submitted by the Appellant that this Court in its previous decisions was not invited to interrogate the application of the ratio in **Josephat Mlewa v Eric Wightman**⁵ to the current electoral legal regime.

6.8 It was the Appellant's submission that a historical look at the wording of section 97 of the Electoral Process Act shows that it has remained the same and that it was never the intention of Parliament to make the provisions of section 97 of the Electoral Process to become porous and ineffective.

6.9 In demonstrating that the provisions of section 97 of the Electoral Process Act are the same in wording as in previous electoral laws, our attention was drawn to the repealed pieces of legislation as follows: section 18 of the Electoral Act Chapter 13 of the Laws of Zambia, section 18 of the Electoral Act No. 2 of 1991 and section 93 of the Electoral Act No. 12 of 2006. It

was the Appellant's position that provisions of section 17 of the Electoral Act No. 44 of 1973, Chapter 19 of the Laws of Zambia, section 18 of the Electoral Act No. 2 of 1991 and the current section 97 of the Electoral Process Act are almost *Ipsissima verba*.

6.10 It was argued that section 18 of the Electoral Act No. 2 of 1991 was pronounced upon by the Supreme Court in the case of **Josephat Mlewa v Eric Wightman**⁵ in which it was held inter alia that proof of any one of the requirements set out in section 18 was enough to nullify an election.

6.11 On the ranking of the Constitutional Court and the Supreme Court as regards the holding of the Supreme Court in the case of **Josephat Mlewa v Eric Wightman**⁵, the Appellant submitted that the Constitutional Court in **Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney General**⁶ did not hold that **Josephat Mlewa v Eric Wightman**⁵ was bad law but stated that it was inapplicable to that case. That in any event, the Constitutional Court cannot overrule a decision of the

Supreme Court as the said courts rank *pari passu* as per Article 121 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

6.12 The Appellant thus submitted that the trial judge erred in law when she held that the facts in the case of **Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney General**⁶ and the petition which was before her were similar. It was submitted that since the trial judge found as a fact that there was violence and that the said violence was widespread and further that the electoral system in Sesheke Parliamentary by-election held on 12th February, 2019 had broken down and that the environment was not conducive for the conduct of an election, she should have nullified the election of the Respondent as Member of Parliament for Sesheke Constituency.

6.13 The Appellant's prayer was that we should allow the appeal based on the submissions made before us.

7.0 Arguments on appeal by the Respondent

- 7.1 The Respondent filed his heads of argument in response to the appeal on 11th September, 2019. Additionally, the Respondent relied on the submissions filed before the court below and appearing at pages 654 to 716 of the record of appeal.
- 7.2 The Respondent submitted that it is not in dispute that there were incidents of violence though these could not be attributed to the Respondent or his appointed election agent, but by third parties, including the Zambia Police who perpetuated violence during the course of the election,
- 7.3 That the lower court having regard to the evidence before it and the unambiguous provisions of section 97 of the Electoral Process Act was on *terra firma* when it dismissed the petition for failure to meet the very stringent threshold for annulment of an election comprised in section 97 of the Electoral Process Act.

7.4 In demonstrating that the trial judge was on *terra firma* when she arrived at her decision, the Respondent examined the grounds of appeal advanced by the Appellant.

7.5 With respect to ground one that: *'the learned trial Judge erred in law and in fact when she held that the provisions of section 97 (2) (b) of the Electoral Process Act No. 35 of 2016 exclusively governed the activities of the Electoral Commission of Zambia'*, it was the Respondent's position that the learned trial judge properly addressed her mind to the import of section 97 (2) (b) and (4) of the Electoral Process Act, hence arriving at the correct decision that the conduct that section 97 (2) (b) of the Electoral Process Act applies to in determining whether or not to annul an election is that of the Electoral Commission of Zambia and its officers.

7.6 The Respondent thus argued that section 97 (2) (b) of the Electoral Process Act relates to the conduct of elections by the Electoral Commission of Zambia. Further that section 97 (2) (b) of the Electoral Process Act does not apply in the circumstances

of this case as per guidance given by this Court in the cases of **Austin C. Milambo v Machila Jamba**¹² and **Sibongile Mwamba v Kelvin M. Sampa and Another**⁸. The Respondent therefore urged us to uphold the decision of the lower court.

7.7 Further, in urging us to dismiss the Appellant's appeal, the Respondent invited us to consider the import and practical effects of the case of **Webster Chipili v David Nyirenda**¹³ in which the Supreme Court laid down an important principle that in order to invoke section 93 (2) (b) of the Electoral Act No. 2 of 2006 (similar to section 97 (2) (b) of the Electoral Process Act), the lower court was required to review the acts or omissions of election officers in the conduct of the election in order to determine whether the election was conducted so as to be substantially in accordance with the provisions of the Act and whether such acts or omissions did affect the result of the election.

7.8 The Respondent submitted that no evidence whatsoever was led to show that the Electoral Commission of Zambia was culpable in the manner in which it conducted the by-election in Sesheke Constituency.

7.9 The Respondent submitted that in terms of section 97 (4) of the Electoral Process Act, the burden lay on the Appellant to not only plead but also to prove to the requisite standard of a fairly high degree of convincing clarity that the Electoral Commission of Zambia's officers charged with conducting the election, as a whole did not do so substantially in accordance with the provisions of the law.

7.10 That the Appellant failed in all material respects to satisfy the mandatory requirements of section 97 (2) (b) as read with subsection 4 by reason of his failure to show that the conduct complained of was that of the Electoral Commission of Zambia and to establish that there was substantial non-compliance with the Electoral Process Act in the conduct of the election on the part of the Electoral Commission of Zambia's officers.

7.11 The Respondent submitted that as such, the Appellant's case in the court below quite correctly failed both in terms of the formal requirements which the Appellant failed to satisfy but also on account of the sheer lack of proof that the Appellant was required to prove by law.

7.12 It was submitted that the Appellant's failures cannot form the basis upon which this Court can strike down section 97 of the Act for being unconstitutional as prayed by the Appellant.

7.13 Further that, to the contrary, in the absence of clear and decisive evidence to demonstrate that the conduct of the election by the Electoral Commission of Zambia was so devoid of merit and so distorted that there were profound irregularities in the management of the election, the lower court was entitled on the authority of **Raila Odinga and five others v Independent Electoral and Boundaries Commission and 3 Others**¹⁴ to presume that the election was conducted rightly and regularly notwithstanding the actions or omissions of other players in the electoral process.

7.14 The Respondent argued that there was no evidence before the lower court to enable it to assume the contrary. That in fact, the evidence on record showed the converse which was that the Electoral Commission of Zambia made an assessment of the situation when it issued the press release and based on its mandate to conduct elections, went ahead with the by-election.

7.15 The Respondent submitted that the only inference that the lower court and this Court could arrive at when faced with the foregoing evidence on record is that the Electoral Commission of Zambia determined that allowing the Election to go ahead would not entail any substantial departure in the conduct of the election to warrant its being called off.

7.16 In concluding on this point, the Respondent argued that this Court has guided parties in a surfeit of appeals that arose after the 2016 set of laws were promulgated to put such parties on guard as to what threshold a petition must attain if it is to be upheld. That the Appellant's failure to heed to such guidance

was done at his own peril and cannot be the basis upon which to strike down section 97 of the Electoral Process Act.

7.17 The Respondent therefore called upon us to uphold our earlier interpretation of section 97 (2) (b) of the Electoral Process Act.

7.18 That given the terms in which Article 229 (2) of the Constitution as amended is cast, section 97 (2) (b) of the Electoral Process Act does not violate Article 45 of the Constitution as it merely gives effect to the requirement under Article 229 (2) of the Constitution that elections should be conducted by the Electoral Commission of Zambia.

7.19 The Respondent, therefore, submitted that ground one of the appeal lacks merit and ought to be dismissed.

7.20 As for the Appellant's second ground of appeal regarding the applicability of the case of **Josephat Mlewa v Eric Wightman**⁵ to cases under the current electoral laws, the Respondent submitted that he need not belabour the point as this Court has clearly pronounced itself on that case and that the lower court

was bound by the guidance of the Court and was thus on firm ground when it abided by this Court's guidance.

7.21 The Respondent particularly called to aid the case of **Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney General**⁶ where we stated as follows:

*"The 1st Respondent had brought to our attention the holding in **Mlewa v Wightman** as reflected at page 424 of the record of appeal, to the effect that it does not matter who the wrongdoer is. Our firm position is that that argument is not tenable under the current electoral law as espoused in section 97(2) of the Act and we accordingly discount it."*

7.22 The Respondent argued that the present case is on all fours with **Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney General**⁶ in so far as the import of section 97 (2) (b) of the Electoral Process Act is concerned. The Respondent urged this Court to equally discount the argument of bringing in the holding in the **Joseph Mlewa v Eric Wightman**⁵ to the current

electoral laws. Further, that the attempt by the Appellant to have the election of the Respondent annulled on account of the actions of third parties is not tenable at law.

7.23 The Respondent submitted that the Appellant ignored equally instructive precedents of the Supreme Court such as the case of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Chiluba**³ which was decided after **Josephat Mlewa v Eric Wightman**⁵ case and established the principle that the malpractice complained of must be attributable to the Respondent and further that where the flaws complained of affect both parties in equal measure as the Appellant sought to suggest in casu, they cannot be the basis for annulment.

7.24 The Respondent submitted that the Appellant's suggestion that Parliament could not have intended section 97 of the Electoral Process Act to operate in the manner that it does flies in the teeth of this Court's interpretation of section 97 of the Electoral Process Act which has been applied consistently in previous

election petitions and appeals since the current legal regime came into place.

7.25 The Respondent's prayer was that the appeal lacks merit and ought to be dismissed.

8.0 **Oral arguments by the parties**

8.1 At the hearing of the appeal, Mr. Jalasi, counsel for the Appellant opted to rely solely on the filed written arguments.

8.2 Mr. Haimbe, counsel for the Respondent, augmented the Respondent's written arguments with oral submissions.

8.3 In his oral arguments, Mr. Haimbe, submitted that the authorities on when a court can depart from its previous decisions are very clear and that can only be done under compelling reasons where it can be clearly shown that the previous decisions were wrong. The Supreme Court case of **Match Corporation Limited and Development Bank of**

Zambia v the Attorney General¹⁵ was cited as authority for this proposition.

8.4 That previous decisions of this Court are clear as regards section 97 (2) (b) of the Electoral Process Act to the effect that the conduct of the election referred to therein is that of the Electoral Commission of Zambia. That the Appellant in this case has not demonstrated in any way that the previous decisions of this Court were wrong to warrant this Court's departure from the set principles that were clearly laid out in those decisions. Further, that there is nothing in the Appellant's arguments before this Court to suggest that there is any compelling reason why this Court should depart from its previous decisions.

8.5 The Respondent submitted further that the Electoral Commission of Zambia was the only party that could have attested to the fact of whether or not the conditions as set in section 97 (2) (b) and (4) of the Electoral Process Act for conduct of an election had been fulfilled. That having failed to join the Electoral Commission of Zambia to the proceedings in the lower

court, the Appellant's case was fatally flawed. That the learned trial judge was therefore on *terra firma* ultimately when she dismissed the petition.

8.6 In response to the argument by the Appellant that section 97 of the Electoral Process Act ought to be struck out as being unconstitutional, it was the Respondent's submission that as could be seen from pages 13 to 33 of the record of appeal (volume 1), which was the petition before the lower court, the Appellant cannot at this stage of the proceedings sneak in this prayer for consideration given that it was not one of the matters which was pleaded in the court below.

8.7 In his brief response to oral arguments by Mr. Haimbe, Mr. Jalasi referred us to the case of **Motor Holdings (Z) Limited v Raj Raman**¹⁶ and argued that this Court follows its own previous decisions and can only depart from that in subsequent cases for a good cause. It was his submission that the arguments before Court justify the reasons why the Appellant seeks to distinguish this appeal from previous decisions and

that this Court should depart from its previous decisions as regards interpretation of section 97 (2) (b) of the Electoral Process Act in light of the Supreme Court decision in **Josephat Mlewa v Eric Whitman**.⁵

8.8 On the issue of striking out Section 97(2) (b) of the Electoral Process Act and the argument that this aspect cannot be entertained by this Court as it was not pleaded in the court below, Mr. Jalasi submitted that the application to have section 97 (2) (b) of the Electoral Process Act struck out for being unconstitutional was a point of law which could be raised by a party at any stage of the proceedings even when it was not pleaded in the court below. He cited the case of **Re Thomas Mumba v The People**¹⁷ to support his argument.

9.0 Analysis of the appeal and decision

9.1 We have given thoughtful consideration to the grounds of appeal, written and oral submissions for and against the

appeal. We have also exhaustively considered the judgment of the lower court and the evidence on record.

9.2 The appeal before us raises two grounds both of which seek to challenge the findings on the point of law and fact of the lower court. These grounds are set out at paragraph 5.1 in this judgment.

9.3 The key questions in this appeal are therefore:

- i) Whether or not the learned trial court correctly held that section 97 (2) (b) of the Electoral Process Act exclusively governed the activities of the Electoral Commission of Zambia; and
- ii) Whether the learned trial judge erred in law when she held that the Supreme Court case of **Josephat Mlewa v Eric Wightman**⁵ has restrictive application in the current electoral legal regime.

9.4 In addressing ground one of the appeal, it is imperative to reproduce the findings of the lower court in respect of the import of section 97 (2) (b) of the Electoral Process Act. The trial judge in her judgment at page J236 to J237 held as follow:

“section 97 (2) (b) addresses acts of non-compliance with the provisions of the act in the conduct of elections which has an effect on the results of the elections.....The provision seems to suggest that it specifically relates to the conduct of elections. Article 229 (2)(b) of the Constitution as amended by Act No. 2 of 2016 vests power to conduct elections in the Electoral Commission of Zambia. If that is accepted it follows that section 97 (2) (b) relates to the discharge of the Electoral Commission of Zambia’s functions during an election. This position is somehow made clear by the fact that section 97 (2) (b) is subject to subsection (4) which provides that an election will not be declared void due to Act or omission of an election officer in breach of his official duties in relation to the conduct of the election.....”

9.5 In arriving at her decision, the learned trial judge took guidance from decisions of this Court in the cases of **Giles Chomba Yamba Yamba v Kapembwa Simbao and Others**¹⁰ and **Sibongile Mwamba v Kelvin M. Sampa and Another**⁸.

9.6 We note that this appeal comes at a time when we have had occasion to pronounce ourselves on key aspects of the current electoral legal regime particularly provisions of section 97 (2) of the Electoral Process Act. In the case of **Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney General**⁶. We guided that Section 97 (2) of the Electoral Process Act is central to the judicial resolution of electoral disputes.

9.7 In the case of **Giles Chomba Yamba Yamba v Kapembwa Simbao and Others**¹⁰ we examined in detail the provisions of section 97 (2) (b) of the Electoral Process Act and pronounced ourselves as follows:

“It is unequivocal that section 97 (2) (b) relates to non-compliance with the provisions of the law in the “conduct of elections”. It calls for the annulment of elections in the event

that there has been non-compliance with the principles laid down in the Electoral Process Act in as far as the conduct of elections is concerned. The question then arises, who has conduct of elections? The answer, in our view, lies in Article 229 (2) (b) of the Constitution of Zambia. It reads:

“(2) The Electoral Commission shall.....(b) conduct elections and referenda” Thus, the Constitution expressly gives the function to conduct elections to the Electoral Commission of Zambia (ECZ).....Section 97 (2) (b), therefore, concerns non-compliance to the provisions of the Act by the ECZ, the body charged with the conduct of elections under Article 229 (2) (b) of the Constitution, and not the candidates to an election or their agents.”

9.8 Further, In the case of **Austin C. Milambo v Machila Jamba**¹²

we stated as follows:

“As we stated in the case of Sibongile Mwamba v Kelvin Sampa, section 97 (2) (b) of the Act relates to the conduct of elections by the Electoral Commission of Zambia who are not Respondents in this matter and as such the provisions

of section 97 (2) (b) do not apply in the circumstances. We do not agree with the Appellant's argument that the commission of corrupt and illegal practices or other misconduct amounts to non-compliance with the Act within the contemplation of section 97 (2) (b). To take such a view would, in effect, amount to establishing two thresholds for the nullification of an election based on the same facts which could not have been the intention of Parliament. Further, to take section 97 (2) (b) as being open ended in terms of applicability would in our view create an absurdity in view of Article 229 of the Constitution as amended when read together with section 97 (2) (b)."

9.9 In our recent decision in the case of **Margaret Mwanakatwe v Charlotte Scott and the Attorney General**¹¹ we equally guided as follows:

"It is clear to us that section 97 (2) (b) which is set out above relates to non-compliance with the provisions of the Act in

the conduct of the election in issue and that the non-compliance has affected the election result.”

9.10 We have addressed our minds to the previous decisions of this Court as regards section 97 (2) (b) of the Electoral Process Act, our view is that the interpretation we have given in our earlier decisions is sound and that is the current position of the law.

9.11 It is therefore, our position that the trial judge was on firm ground when she correctly held that section 97 (2) (b) relates to the discharge of the Electoral Commission of Zambia's functions during an election. Ground one of the appeal lacks merit and fails.

9.12 The second ground of appeal attacks the trial judge's holding that the Supreme Court case of **Josephat Mlewa v Eric Wightman**⁵ has restrictive application. It was the Appellant's submission that the learned trial judge's holding was to the effect that the case was inapplicable to the current electoral laws or that it had been overruled by legislative intervention.

The Appellant's submission was that the provisions of the current section 97 of the Electoral Process Act had substantially remained the same since the provisions of section 18 of the Electoral Act No. 2 of 1991 whose interpretation was given in **Josephat Mlewa v Eric Wightman**.⁵

9.13 We have considered the holding of the lower court on this issue.

The learned trial judge when referred to the case of **Josephat Mlewa v Eric Wightman**⁵ opined as follows:

“With respect to the argument on the ranking of the Constitutional Court with the Supreme Court, it is not in dispute that the two rank pari passu. However, I do not think that it was the intention of the Constitutional Court to overrule the decision of the Supreme Court in the case of Josephat Mlewa vs. Eric Wightman as suggested in the submissions but rather was giving interpretation to the current electoral law.”

9.14 The ground of appeal suggesting that the trial judge had held that the case of **Josephat Mlewa v Eric Wightman**⁵ has restrictive application to the current electoral laws is therefore misplaced. The trial judge did not in any way state that the **Josephat Mlewa v Eric Wightman**⁵ had restrictive application in the current electoral laws. To the contrary, when referred to **Josephat Mlewa v Eric Wightman**⁵, the trial judge correctly found that this Court has given an interpretation to the current electoral laws.

9.15 The Appellant has argued that the **Josephat Mlewa v Eric Wightman**⁵ case is still good law on the premise that section 97 (2) (b) of the Electoral Process Act is substantially similar to section 18 (2) of the repealed Electoral Act No. 2 of 1991 on which the **Josephat Mlewa v Eric Wightman**⁵ case was determined.

9.16 In regard to that argument, it is our position that this Court has already pronounced itself on the issue in various decisions of this Court. In the case of **Nkandu Luo and Another v Doreen**

Sefuke Mwamba and Attorney General⁶ we held inter alia as follows:

*"The 1st Respondent had brought to our attention the holding in **Mlewa v Wightman** as reflected at page 424 of the record of appeal, to the effect that it does not matter who the wrongdoer is. Our firm position is that that argument is not tenable under the current electoral law as espoused in section 97(2) of the Act and we accordingly discount it."*

9.17 In the more recent case of **Mwenya Musenge v Mwila Mutale and Another**,¹⁸ we aptly put it as follows:

"Section 18 (2) (a) of the Electoral Act of 1991 upon which the Mlewa case was decided no longer exists in our statute book and as such does not apply in this case to the extent of the inconsistency with the current Electoral Process Act."

9.18 We emphasize that our decisions in **Nkandu Luo and Another v Doreen Sefuke Mwamba and Attorney General**⁴ and

Mwenya Musenge v Mwila Mutale and Another¹⁸ have elucidated the current electoral legal regime. Simply put, the holding in the **Josephat Mlewa v Eric Wightman**⁵ was based on section 18 (2) of the **repealed** (emphasis added) Electoral Act of 1991 and therefore, cannot be applied in election petitions post 2016 to the extent of the inconsistency with the current Electoral Process Act.

9.19 In view of what we have said, we find that the learned trial judge was bound by the guidance given by this Court on the status of **Josephat Mlewa v Eric Wightman**⁵ and thus correctly followed that guidance. We therefore, find that ground two of the appeal lacks substance and also fails.

9.20 The Appellant rather in passing submitted that we should strike out section 97 (2) of the Electoral Process Act for being unconstitutional. We agree with the Respondent that this issue was not pleaded in the court below and was only introduced at appeal stage. This is not tenable.

10.0 Conclusion

- 10.1 The two grounds of appeal advanced by the Appellant have failed and therefore, the entire appeal fails. Accordingly, we sustain the decision of the lower court and declare that the Respondent, Mr. Romeo Kangombe was duly elected as Member of Parliament for Sesheke Constituency.
- 10.2 As we conclude, we wish to restate that we frown upon and strongly condemn all forms of electoral violence. Elections are a civilized way of participation of citizens in the governance of the country. Electoral violence diminishes the National Values and Principles enshrined in Article 8 of the Constitution. Therefore, free and fair elections are a cornerstone of every democratic State that espouses its values.
- 10.3 We therefore, strongly urge the Electoral Commission of Zambia (ECZ) to take necessary steps to curb the worrying culture of electoral violence in the Country. We take judicial notice that the ECZ has wide powers under the law to punish

perpetrators of electoral violence which include but not limited to disqualification of a political party in breach of the electoral code of conduct from taking part in an election. It's time that such powers are invoked so as to preserve life, property, democratic values and principles. A copy of this Judgment will accordingly be sent to the ECZ.

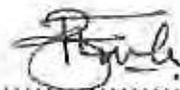
10.4 We order that each party bears own costs of this appeal.



.....
H. Chibomba
PRESIDENT - CONSTITUTIONAL COURT



.....
M.S. Mulenga
CONSTITUTIONAL COURT JUDGE



.....
E. Mulembe
CONSTITUTIONAL COURT JUDGE



.....
Prof. M.M. Munalula
CONSTITUTIONAL COURT JUDGE



.....
M. Musaluke
CONSTITUTIONAL COURT JUDGE