IN THE CONSTITUTIONAL COURT 2021/CCZ/A/0023
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(Appellate Jurisdiction)

IN THE MATTER OF: A PARLIAMENTARY ELECTION FOR LUBANSENSHI CONSTITUENCY IN LUWINGU DISTRICT OF THE NORTHERN PROVINCE OF ZAMBIA HELD ON THE 12TH DAY OF AUGUST 2021

BETWEEN:

KABWE TAULO CHEWE APPELLANT

AND

PATRICK MUCHELEKA 1stRESPONDENT

GEORGE K. MWAMBA 2ndRESPONDENT

Coram: Mulenga, Mulonda, Munalula, Musaluke and Mulongoti JJC on 22nd February, 2022 and 5th May, 2022

For the Petitioner: Mr. L. Lemba of Messrs Mulungushi Chambers
Mr. T.S. Ngulube of Messrs Tutwa Ngulube and Company
Mr. J. Zimba of Messrs Makebi Zulu Advocates

For the 1st Respondent: Mr. K Mwiche of Messrs Jaques & Partners Legal Practitioners

For the 2ndRespondent: Mr. A. Mbambara of Messrs Mbambara Advocates

JUDGMENT

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:

1. Khalid Mohamed v Attorney General (1982) Z.R. 49
2. Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) Z.R. 172 (SC)
3. Galaunia Farms Limited v National Company Limited & Another (2002) Z.R.135
4. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138
5. Akashambatwa Mbikusita Lewanika and 3 Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79
6. Talmadge Heflin v Herbert Vo (1982) U.S. 448
7. Richwell Siamunene v Sialubalo Gift, Selected Judgment No. 58 of 2017
8. Christopher Kalenga v Annie Munshya and 2 Others, 2011/HK/EP/003
9. Levison Mumba v Daka, Appeal No. 31 of 2003
10. Austin Milambo v Jamba Machila CCZ/Appeal No. 6 of 2018
11. Micheal Mabenga v Wina and Others (2003) Z.R. 110
12. Reuben Mtolo Phiri v LameckMangani, SC Judgment No. 2 of 2013
13. Nkandu Luo v Doreen Sefuke Mwamba & Attorney General, Selected Judgment No. 51 of 2018
14. Austin Liato v Sitwala, Selected Judgment No. 23 of 2018
15. Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission, IEBC & 8 Others (2013) eKLR
16. Lazarous Chota v Patrick Mucheleka and Electoral Commission of Zambia Appeal No. 18 of 2015
17. Kanaga v Zambia Revenue Authority SCZ Appeal No. 194 of 2015
18. Subulwa v Mandandi Appeal No. 18 of 2016
19. Amchile Import & Export Limited v Ian Chimanga & Marks Motorways Limited Appeal No. 18 of 2015
20. Nkhata & Others v Attorney General (1966) ZR 124

21. **Abiud Kawangu v Elijah Muchima CCZ Appeal No. 8 of 2017**
22. **Mulenga Chipanta v Rodrick Mulenga and the Electoral Commission 2021/1/LS/LGET/03**
23. **Samuel Nayunda v Geoffrey Lungwangwa Selected Judgement No. 56 of 2017**
24. **Sibongile Mwamba Kelvin N. Sampa and the Electoral Commission of Zambia Selected Judgement No. 57 of 2017**
25. **Steven Masumba v Elliot Kamondo Selected Judgment No. 53 of 2017**
26. **Examination Council of Zambia v Reliance Technology Limited SCZ Judgment No. 46 of 2014**
27. **Herbert Shabula v Monde CCZ Appeal No. 32 of 2016**
28. **Mubika Mubika v Peniso Njeulu SCZ Appeal No. 114 of 2007**
29. **Sunday Chitungu Maluba v Rogers Mwewa and Attorney General CCZ Appeal No. 4 of 2017**

Legislation referred to:

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **The Electoral Process Act, No. 35 of 2016**
3. **The Electoral Process (General) Regulations, 2016 of the Laws of Zambia**

[1] The Appellant Kabwe Taulo Chewe, who was the 1st Respondent in the Court below, appeals against a Judgment of the High Court sitting at Kasama nullifying his election as Member of Parliament for Lubansenshi Constituency in the Parliamentary Elections of 12th August, 2021.

[2] The Appellant, stood on the Patriotic Front (PF) ticket, the 1st

Respondent, Patrick Mucheleka stood on the United Party for National Development (UPND) ticket, and the 2nd Respondent, George K. Mwamba stood as an independent candidate. There were three other candidates, Micheal B. Chiponda of the Socialist Party, Sunday Ng'ambi of the Democratic party and William Mulenga an Independent.

[3] At the close of the poll the Appellant obtained 9,076 votes, 1st Respondent had 8,237 votes, the 2nd Respondent polled 8,851 votes while the three other candidates shared the rest of the votes. The Appellant was duly declared the winner by the Electoral Commission of Zambia (ECZ).

[4] Dissatisfied with the election result, the 1st and 2nd Respondents in the Court below challenged the election of the Appellant in two separate election petitions which the trial Court consolidated.

The 1st petitioner (now the 1st Respondent) sought the following reliefs namely:

1) **A Declaration that the election of the 1st Respondent as a Member of Parliament for Lubansenshi Constituency is null and void;**
2) **A Declaration that the illegal practices committed by the 1st Respondent or their agents affected the election results and that the same should be nullified;**
3) **An order that costs be borne by the Respondent;**
4) **Any other relief that the Court may deem fit.**

[5] The 2nd petitioner (now the 2nd Respondent) sought the following

reliefs namely:

1) **A Declaration that the Election of the 1st Respondent (Appellant) as Member of Parliament for Lubansenshi Constituency is null and void;**
2) **A Declaration that the illegal practices committed by the 1st Respondent and his agents affected the election result and that the same ought to be null and void;**
3) **that the Declaration by the 2nd Respondent that the 1st Respondent was the duly elected Member of Parliament for Lubansenshi Constituency is of no legal effect and consequence whatsoever and the same be nullified;**
4) **A Declaration that the petitioner is the duly elected Member of Parliament for Lubansenshi Constituency.**
5) **An order that the cost occasioned by the petition be borne by the Respondents.**

[6] The 1st and 2nd Respondents sought the nullification of the Appellant's election and made the following allegations against the Appellant and The Electoral Commission of Zambia (ECZ) (the 2nd Respondent in the Court below) as outlined below;

[7] The 1st Respondent alleged that the Appellant had strategically entrusted head teachers of various schools in Lubansenshi Constituency, who were pay point managers of the Social Welfare Cash Transfer Programme (SWCTP), as presiding officers in order to influence voters. The presiding officers manipulated the electoral process to the advantage of the Appellant and that some presiding officers illegally assisted able bodied voters to cast their ballot in collusion with the Appellant agents.

[8] The 1st Respondent further alleged that the Appellant, his agents,

the District Commissioner for Luwingu and a traditional leader chief Chipalo, illegally distributed mealie meal from the Disaster Management and Mitigation Unit (DMMU) to the residents of Lubansenshi constituency despite there being no hunger situation. This allegation against the Appellant was that he flouted the SWCTP rules as he was alleged to have instructed pay point managers to pay beneficiaries under the programme before the bi-monthly interval of September, 2021

[9] It was also alleged by the 1st Respondent that Chief Chipalo, with the knowledge and consent of the Appellant instructed his headmen and subjects to vote for the Appellant. Further, that his agents, the DC for Luwingu, Chief Chipalo, PF party officials and some civil servants engaged in campaigns of defamation, tribal propaganda and hate speech.

[10] The 2nd Respondent alleged that ECZ failed to provide his agents with Gen 20 Forms at some polling stations causing them to fail to verify results; equally failed to enforce the Electoral Code of Conduct against the Appellant after incidents of vote buying at Kandala and Luena polling stations and that the Appellant breached ECZ's Covid 19 guidelines on conducting door to door campaigns but instead held huge rallies.

[11] Both the 1st and 2nd Respondents alleged that the Appellant, his agents and supporters bribed the voters in the constituency during the campaign period up to the day of voting which bribery consisted of dishing out monies to the people in the constituency, slaughtering cattle in various locations and distribution of meat, mealie-meal, cooking oil and other food items to persons who prepared meals for poll day. In addition, it was alleged that the Appellant's agents/supporters lined up on various routes to polling stations offering voters food and urging them to vote for the Appellant and the PF presidential candidate.

[12] The 1st Respondent also alleged that on poll day the Appellant hired motor vehicles to ferry voters in Chifwile ward to various polling stations and distributed, in collusion with his agents/supporters, money to voters at Kandala and Luena polling stations. Further, that on 1st August, 2021, at St Mathews United Church of Zambia (UCZ) congregation in Lubansenshi, the Appellant illegally donated ZMW 2,000 cash and pledged 50 pockets of tile fix.

[13] In answer to the petitions, the Appellant denied the 1st and 2nd Respondents' allegations and maintained that he was validly elected as Member of Parliament for Lubansenshi Constituency. The Appellant denied committing any of the alleged electoral

malpractices or illegalities alongside Chief Chipalo, the DC for Luwingu and others and that they were not his election agents. The Appellant denied the allegation that he alongside his election agents distributed mealie-meal from DMMU to persons in Lubansenshi Constituency. The Appellant refuted the allegations that he dished out money to voters, engaged in defamatory and tribal campaigns and that he scandalized the UPND party or the petitioners and illegally assisted able bodied persons to vote at some polling stations.

[14] The Appellant further denied the allegation that he transported voters to various polling stations and bribed them with money at Kandata and Luena polling stations. And that he did not slaughter cattle to feed the voters on poll day. The Appellant asserted that he made the donation of ZMW 2,000 and pledge of tile fix to St Mathews UCZ congregation as a philanthropic act in his capacity as a member of the UCZ church.

[15] The ECZ in its answer stated that the Lubansenshi parliamentary election was conducted in a free fair and democratic manner and followed all the provisions of the law.

[16] The learned trial Judge upon considering the pleadings, the oral evidence adduced, submissions of learned Counsel and authorities

cited arrived at the conclusion that the issues for her determination were as follows:

i. ***Whether the 2nd Respondent (ECZ) complied with the electoral laws in conducting the Lubansenshi Constituency Parliamentary elections***

ii. ***Whether the 1st Respondent (Appellant) engaged in acts of corruption, bribery, campaigns based on defamation, hate speech, tribal propaganda and failed to comply with the second respondent's Covid 19 campaign guidelines.***

iii. ***Whether the electoral malpractices and illegalities laid against the 1st Respondent (Appellant) are sufficient to vitiate his election result.***

[17] The learned Judge went on to interrogate the allegations in light of the evidence as she saw it and found that:

i. There was no merit in the allegations against ECZ.

ii. With regard to allegations against the Appellant, it was found that it was more probable than not that the Appellant was at Luwingu Boarding School on the date when there was distribution of mealie meal from the DMMU yet there was no declaration of hunger in Lubansenshi Constituency.

iii. The early allocation of the SWCTP was meant to influence the beneficiaries so that they would vote for the PF candidates in the election.

iv. There was undisputed evidence that the Appellant met with civil servants on 29th July, 2021 and that the Appellant inappropriately canvassed for votes from civil servants on government time when they should have been working at that time.

v. The Appellant had knowledge of K5, 100 that was paid to PW4 to distribute to the civil servants and he consented to the payment and that this amounted to voter bribery and contravened section 81(1)(a) of the EPA.

vi. The Appellant paid PW10 to ferry voters on polling day and the affected voters must have felt obliged to the Appellant after they were ferried to their polling stations and given money and food. Thus the allegation of voter bribery had been proved.

vii. The Appellant and his agents/supporters who acted with his full knowledge and consent dished out money to voters near the polling stations in Order to induce them into voting for him and the PF candidates.

viii. The allegation that the Appellant illegally facilitated the feeding of voters on the day of the elections had merit.

ix. The Appellant engaged in further voter bribery by distributing money at Chief Shimumbi's palace and Tungati village.

x. The donation of K2, 000 and pledge of tile fix was not innocent and went beyond a philanthropic activity which is permissible during the campaign period.

xi. The Appellant failed to comply with the Covid 19 guidelines when he addressed a huge rally of more than 2,000 people at Kapisha grounds on 2nd August, 2021.

xii. The Appellant fully endorsed Geoffrey Bwalya Mwamba's utterances against the 1st Respondent which she found to be hateful and had serious tribal undertones. That the utterances against the 2nd Respondent were baseless, malicious and ill-founded aimed at attacking his personal character and integrity.

xiii. Further that this rally was aired live on Lwansanse community radio which has full coverage in the entire Lubansanshi constinuency, Lupososhi, Lunte, Chifunabuli, parts of Chilubi, Samfya, Kawambwa, Mansa and Kasama districts.

[18] The trial Judge proceeded to nullify the Lubansenshi Constituency Parliamentary election and declaring the Appellant, Chewe Taulo Kabwe as not having been validly elected as Member of Parliament.

[19] The Appellant being dissatisfied with the decision of the High Court

appeals to this Court advancing thirteen substantive grounds of appeal which we have reproduced verbatim as follows:

Ground One

The learned trial Judge misdirected herself when she held that the petitioners had proved their case to the required standard in election petitions when the evidence fell below the said standard of proof.

Ground Two

The learned trial Judge erred in law and fact when she held that PW2 and PW3 together with all the Patriotic Front (PF) supporters were agents of the appellant when in fact not.

Ground Three

The Court below erred in law and in fact when she held that the donation of ZMW2, 000 and a pledge of 50 bags of tile fix to St. Matthews United Church of Zambia (UCZ) for the building of the presiding Minister's (or Reverend) house was beyond philanthropic activities and as such amounted to an illegal act.

Ground Four

The learned trial Judge erred in law and in fact by holding that the appellant illegally addressed more than 200 civil servants from the Ministries of Health, Education, Local Government, and police officers on the 29th July, 2021 during working hours at Luwingu boarding school a government facility and thereafter, paid them ZMW5, 100 through Cosmas Chilando for refreshments in order to influence them into voting for all the PF party candidates, when in fact Cosmas Chilando was not the appellant's registered agent.

Ground Five

The learned trial Judge misdirected herself when she held that Chief Chipalo with full knowledge, approval and consent of the appellant, instructed his subjects and headmen in the 96 villages under his control, to vote for all PF candidates in the election when the said Chief Chipalo was not the appellant's registered agent.

Ground Six

The learned trial Judge misdirected herself when she held that the appellant influenced the payment of social cash transfer money by making it conditional to the beneficiaries to vote for the PF without any cogent and tangible evidence. As the appellant was not a government official and social cash transfer was purely government program that started long time ago.

Ground Seven

The learned trial Judge erred in law and in fact when she held that the appellant facilitated the ferrying of voters on poll day in Chifwile ward and feeding those from Saili, Lima, Lukonde, Mwaba and Mulenga Chipalo Villages in Chulungoma ward without any cogent and tangible evidence.

Ground Eight

The learned trial Judge misdirected herself when she held that the appellant, his agents/supporters and other PF party officials defamed the respondents by calling the 1st Respondent a harsh lunatic and the 2nd respondent a thief at their various rallies and meetings in the constituency at Namilandu village and Kapisha grounds without tangible proof.

Ground Nine

The learned trial Judge erred in law and fact when she formed an opinion that the area covered by radio Lwansase Station was a measure of

listenership and as such the alleged defamatory statements issued at Kapisha grounds was widely aired and listened to by all the voters of Lubansenshi Constituency.

Ground Ten

The learned trial Judge erred in law and in fact when she held that the appellant, agents and PF officials engaged in voter bribery at Luena, Njoko and Kandata polling stations in Lwata and Namukolo wards on poll day without any tangible proof.

Ground Eleven

The trial Judge erred in law and fact when she held that the appellant, agents and PF officials paid more than 100 headmen from Chifwile, Mushituwamboo, Lukutu, Lwata and Sangano wards at Chief Shimumbi's palace the sum of K100.00 each for their votes without any tangible proof and convincing evidence.

Ground Twelve

The learned trial Judge erred in law and fact when she held that the appellant, agents and PF officials paid some villagers money so that they could vote for the PF candidate without any tangible proof.

Ground Thirteen

The learned trial Judge erred in law and fact when she held that the allegations made against the appellant had been substantiated and that the appellant engaged in electoral malpractices and illegalities which substantially affected the majority of voters in Lubansenshi Constituency and as a result a great number of voters were prevented from freely choosing their preferred candidate without clear and convincing evidence to hold so.

[20] We note that the appellant included a further ground in his heads of argument which was not part of the memorandum of appeal

which reads as follows:

> **The learned trial Judge erred in law and fact when she held that the appellant, with the help or in collusion with PW3 and PW8 (Patrick Chanda and Chief Chipalo respectively) engaged in the distribution of DMMU mealie meal to the electorates when the said mealie meal distribution was a government program that was initiated by the office of the district commissioner due to the hunger situation in Luwingu District as a result of the Covid-19 pandemic effects and the appellant had no control of the program.**

[21] This ground of appeal was raised outside the memorandum of appeal which is contrary to the provisions of Order 11 Rule 9 (3) of the Constitutional Court Rules which proscribes the inclusion of grounds other than those set out in the memorandum of appeal without leave of court.

[22] We therefore expunge it from the record together with its attendant arguments. We will proceed to consider the arguments relating only to grounds one to thirteen.

APPELLANT'S ARGUMENTS

[23] The Appellant filed heads of arguments in support of the appeal on 27th December, 2021. These were augmented by oral submissions by counsel for the Appellant at the hearing. In submitting on ground one of the appeal, the Appellant argued that the lower court did not apply the correct standard of proof in election matters but

applied a lower standard. It was asserted that he who alleges must prove and in this regard the cases of **Khalid Mohamed v Attorney General**[1], **Wilson Masauso Zulu v Avondale Housing Project Ltd**[2] and **Galaunia Farms Limited v National Milling Company Limited**[3] were cited in support of this position.

[24] It was submitted that the required standard of proof in election petitions is that of a fairly high degree of convincing clarity. The case of **Anderson Mazoka v Levy Mwanawasa**[4] was cited where the Supreme Court held that:

> **The petitioner must adduce evidence establishing the issues raised to a fairly high degree of convincing clarity.**

[25] Further the case of **Akashambatwa Mbikusita Lewanika and Others v Fredrick T. Chiluba and others**[5] was cited wherein the Supreme Court said of the standard of proof that:

> **As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that parliamentary election petitionS have generally 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.**

[26] The Appellant further cited the American case of **Talmadge Heflin v Herbert**[6] where the Master of Discoveries stated that;

But when proof of an allegation must be clear and convincing, even evidence that does more than raise surmise and suspicion will not suffice unless it is capable of producing a firm belief or conviction that the allegation is true. Evidence of a lesser quality is no evidence.

[27] The provisions of section 97 (2) of the EPA, 2016 were reproduced to set out grounds upon which an election of a Member of Parliament may be voided. In this regard it was the Appellant's argument that the allegations of bribery, corrupt activities and other improper conduct against the Appellant were not proved to the requisite standard as the Court below employed a lower standard on almost all the allegations. Concerning the allegations of agency, it was further argued that the Court below deployed the normal private agency standard as opposed to the strict and harsh private law agency set under section 2 of the EPA, 2016.

[28] With regard to the allegations of bribery and corrupt practices, it was the Appellant's argument that these were not proved with tangible evidence in form of pictures or video footage considering that they were alleged to have been openly done in broad day light.

[29] Under grounds two, four and five of the appeal, it was argued that the trial court misdirected herself in law and fact when she held that the District Commissioner, Patrick Chanda, Helen Chabala, Cosmas Chilando, Godfrey Bwalya Mwamba, Innocent Mulenga

Kolala and Chishimba Kambwili were election agents for the Appellant. It was submitted that the trial Court put a blanket that the alleged acts complained of were done by members of the Patriotic Front who campaigned for the Appellant. It was contended that according to the evidence of PW3 (Patrick Chanda) it is clear that he denied campaigning for the Appellant.

[30] It was submitted that the meeting at Luwingu Boarding School was sanctioned by the then Permanent Secretary for Northern Province, Mr. Chakaba and facilitated by the District Commissioner and not the Appellant. It was argued that the money alleged to have been given to government workers did not come from the Appellant but from Mr. Chanda (PW3) and Cosmas Chilando who were not the Appellant's registered agent. It was submitted that although there was evidence from PW4, PW5 and PW6 that the Appellant was at Luwingu Boarding School on 3rd August and addressed civil servants that had gathered there and gave them money, there was no explanation as to why the court preferred the evidence of PW4, PW5 and PW6 and not that of PW3 who disassociated the Appellant from the activities alleged.

[31] It was the Appellant's submission that Chief Chipalo, who was PW8, having stated that he supported the government of the day

did not mean that he campaigned for the Patriotic Front. The Appellant denied that the people mentioned above were his agents and he gave the Court the names of his registered agents which the Respondents did not challenge in the Court below. It was therefore his contention that the Respondent failed to prove that the acts complained of were committed by the Appellant. He submitted that section 97(2) of the EPA is clear that an election can be voided if the corrupt or illegal practices or other misconduct are attributed to the candidate personally or by his election or polling agent with the knowledge or approval of the candidate.

[32] It was submitted that section 2 of the EPA defines an election agent as:

> **a person appointed as an agent of a candidate for the purposes of an election and who is specified in the candidate's nomination paper.**

[33] The Appellant also referred to the definition of polling agent under section 2 of the of the EPA which states that:

> **Polling agent means an agent appointed by a candidate in respect of a polling station.**

[34] It was submitted that the finding of the lower Court that there were acts of bribery, corrupt activities and other improper conduct that were carried out by the Appellant and his agents was without basis

both factually and at law and thus, the holding of the court was flawed. The Appellant cited the case of **Richwell Siamunene v Sialubalo Gift** [7] where this Court held that:

> **Mere proof that UPND supporters were involved in the said act does not warrant the UPND supporters to act as they did. To so hold would amount to speculation and that is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election.**

[35] He further referred to the case of **Nkandu Luo v Doreen Mwamba**[8] where this Court affirmed its view in the **Richwell Siamunene v Sialubalo Gift** [7] that:

> **When section 83 is read with section 97, it is clear that the violence or threat of violence must be perpetuated by the candidate or with the candidate's knowledge and approval or consent or that of his election or polling agent. In order for the candidate to be liable for illegal practice or misconduct, it must be shown to be that of his official agent; there must be proof to the required standard that he had both knowledge of it and approved or consented to or approved of it; or that his election or polling agent had knowledge and consented to or approved of it.**

[36] In submitting on ground three of the appeal, it is argued that the trial Judge misdirected herself in law and fact when she held that the donation of K2,000.00 and a pledge to donate 50 pockets of tile fix to St. Matthews United Church of Zambia (UCZ) Congregation at an event in Luwingu was an act of bribery or vote buying meant to sway congregants who were mostly from the Constituency and went beyond a philanthropic act. The Appellant insisted that as a

member of the UCZ church, there was nothing wrong with him donating to his church especially that he was invited to a fundraising event. It was contended that this position was supported by RW2, the presiding minister at St. Matthews congregation.

[37] It was further submitted that the 1st Respondent as PW1 testified that he was the guest of honour at the fundraising event organized to build the Reverend's Church home. He told the Court below that he gave a donation of K5,000 in cash and promised a further K10,000 which pledge he had since fulfilled. Further that the Appellant was also invited as a guest and that he also gave a gift of K2,000 and promised to give the church 50 bags of tile fix but that he had not yet fulfilled his pledge to give 50 bags of tile fix. It was his contention that there was nothing wrong with him donating to his church especially that he was invited to the fundraising event.

[38] It was the Appellant's submission that the evidence of the 1st Respondent was tainted and his credibility as a witness ought to be scrutinized. He argued that 1st Respondent initially intended to stand as a Member of Parliament for Lubansenshi Constituency under the Patriotic Front but had his adoption certificate revoked.

[39] He argued that philanthropic activities were discussed in the case

of **Akashambatwa Lewanika v Fredrick Chiluba**[5] where it was held that:

> **There was evidence from some of Petitioners who complained that various Ministers and the Respondent donated public funds to public causes, which donations were widely reported in the media. The donations have taken before the elections, during and since. They continue to date. We have anxiously examined the Regulation in which various kinds of conduct or misconduct is prohibited or made an offence. We have tried to see where the allegations in the Petition and in the evidence of various political leaders donating to community projects might have had some influence on the voters yet the Regulations are silent on such matters and on any possibility improper donations when not directed at the individual benefit. As at the present moment, public philanthropic activity is not prohibited by the Regulations and we can do no more than urge the authorities concerned to address this lacuna so that there can be a closed-season at election time for an activity suggestive of vote buying; including any public and official charitable activity involving public funds and related emergencies or any life-saving or life-threatening situations. (emphasis added)**

[40] It was submitted that since the aforementioned case and the Court's observations in that case in relation to philanthropic activities, the view on philanthropic activity has not changed. The Appellant also referred to the case of **Rueben Mtolo Phiri v Lameck Mangani**[9] wherein the Supreme Court stated that:

> **As the electoral law stood in 1998, philanthropic activities even when they had some influence on voters did not constitute corruption or an illegal practice and hence not petitionable.**

[41] The Appellant argued that while the alleged solicitation for votes may have been wrong, the act does not take away the fact that the donation of the K2,000 was a community philanthropic activity

meant for the construction of the Reverend's house which house is for the UCZ. The Appellant referred to the case of **Levison Mumba v Daka**[10] to further support his argument.

[42] In relation to ground six, it was argued that the court below failed to evaluate the evidence provided by both the Appellant and Respondent's witnesses with regard to the allegation on social cash transfer. The Appellant submitted that there was no tangible evidence to show that the early allocation of the social cash transfer was meant to influence the beneficiaries so that they could vote for the PF candidate in the election. He further contended that there was no cogent evidence to show that the Appellant had hijacked and abused the social cash transfer programme to boost his chances of winning the elections. He cited the case of **Webster Chipili v David Nyirenda**[11] and argued that the Appellant did not breach section 81 (1) (a) of the EPA and regulation 15 (1) (k) of the Electoral Code of Conduct. In ground seven, it was argued that the testimony of PW7 on ferrying of voters on polling day raised a lot of doubts in cross-examination and that there are no regulations that prevent a candidate from ferrying voters to polling stations. In any case the Appellant denied these allegations and contended that he was on his way from Kitwe to Luwingu to go and vote on the

material day.

[43] On the allegation of slaughtering cattle to feed the voters, it was argued that the evidence tendered by the 1st and 2nd Respondents' witnesses was confusing and they failed to give an approximate number of people that were alleged to have been fed. According to the Appellant, the only food he provided was for his campaign team, foot soldiers and polling agents. It was argued that the trial Judge failed to evaluate the evidence on record and came to the erroneous conclusion that voters were fed by the Appellant.

[44] With respect to grounds eight and nine of the appeal, it was submitted that the trial Court misdirected itself when it held that the 1st and 2nd Respondents had proved the allegations that the Appellant and his agents used derogatory or offensive language against them to the effect that the 1st Respondent was a mad man who was harsh and that the 2nd Respondent was a thief who had stolen money meant for the roads and other projects. It was submitted that there was no tangible evidence adduced to support the allegations of defaming the 1st and 2nd Respondents and that the video evidence produced from radio Lwansanse contained none of the allegations made by the 1st and 2nd Respondents. He relied on the case of **Austin Milambo v Jamba Machila**[12] where it was

stated that:

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

[45] Grounds ten, eleven and twelve were argued together. With respect to the allegations of bribery, it was argued that the evidence tendered was merely speculative and did not meet the requisite standard of proof stipulated in the **Lewanika case**[4]. The Appellant denied ever bribing anyone either by himself or through his agents. It was submitted that the approach taken by the lower court to evaluate the evidence was casual and liberal. That the trial Court ought to have cautioned herself about the credibility of some of the 1st and 2nd Respondents' witnesses. It was argued that the evidence of the 1st and 2nd Respondents' witnesses was mere hearsay and that the onus to prove the allegations fell on the 1st and 2nd Respondents.

[46] In ground thirteen, it was argued that the court below took a narrow view in determining whether the alleged illegal and corrupt

practices and other malpractices were so widespread as to affect or likely affected the outcome of the elections or whether the majority of people of Lubansenshi Constituency were prevented from voting for a candidate of their choice. He referred the Court to the case of **Nkandu Luo v Doreen Mwamba**[8] where this Court held that:

> **In addition to proving the electoral malpractice or misconduct the Petitioner has a further task of adducing cogent evidence that the electoral malpractice or misconduct was widespread that it swayed or may have swayed the majority of the electorate from electing a candidate of their choice.**

[47] He further referred to the case of **Austin Liato v Sitwala**[13] where this Court held that:

> **It is not sufficient for the petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to an election without proof that the illegal or corrupt practice or misconduct was widespread and prevented or may have presented the majority of voters from the constituency, district or ward from electing a candidate of their choice.**

[48] It was submitted that the 1st and 2nd Respondents failed to adduce cogent evidence that the alleged corrupt or illegal activities were so widespread and that as a result the electorate of Lubansenshi constituency were or may have been prevented from electing a candidate of their choice. It was contended that isolated incidents like the donation of the K2, 000 to the UCZ church fell short of the majority threshold penned in the case of **Nkandu Luo v Doreen Sefuke Mwamba**[8].

[49] It was submitted that the Respondents did not adduce evidence to show that any particular allegation affected all 13 wards or the majority of them to show that there was widespread malpractice in the Constituency.

RESPONDENTS ARGUMENTS

[50] In opposing the appeal, the 1st Respondent filed detailed heads of argument on 3rd February, 2022. In responding to ground one, it was submitted that the court below was on firm ground when it held that the record showed that the evidence adduced by the Respondents established the issues raised to a high degree of convincing clarity. It was argued that the position of the law is clear on the standard of proof in elections as stipulated by section 97(2) of the EPA and the cases of **Nkandu Luo v Doreen Sefuke Mwamba**[8] and **Margaret Mwanakatwe v Charlotte Scott & Attorney General**[14], among others.

[51] It was argued that the authorities referred to espouse the need to satisfy the two elements that would prompt the nullification of an election which are:

> **(i) The requirement that the commission of the illegal practice by the candidate or the candidate's election agent or someone else with their knowledge and consent or approval and the effect of the illegal practice on the electorate.**
> **(ii) That the act alleged in (i) above prevented or may have**

prevented the majority of voters from electing their preferred candidate, be proved.

[52] It was submitted that the assertion that the court below did not apply the required standard of proof was incorrect because Page J100 of the judgment shows that the Court was mindful of the strict interpretation of the meaning of an election agent as provided by the EPA. It was his contention that the evidence of the Court below was so overwhelming therefore the court was on firm ground when it nullified the election. He argued that the position of law is that a petitioner need only prove one of the allegations for the election to be nullified. He cited the case of **Josephat Mlewa v Wightman**[15] to support this argument.

[53] It was submitted that the 1st and 2nd Respondents adduced sufficient evidence on matters of bribery and corrupt practices which the Appellant failed to discredit, and that an election can be nullified on the evidence of one witness. The 1st Respondent referred to the case of **Lazarous Chota v Patrick Mucheleka and ECZ**[16] to support his argument.

[54] In responding to grounds two, four and five, it was argued that the court below did not hold that PW2, PW3 together with all the PF officials were agents for the Appellant. The 1st Respondent

donations and canvassed for votes at the said church service. He submitted that the trial Court relied on the holding in the case of **Rueben Mtolo Phiri v Lameck Mangani.**[9]

[58] It was submitted that the Court below had the opportunity to have sight of the video footage which put the Appellant at the Church making donations and soliciting for votes. It was his contention that the finding of the court was therefore sound and this court cannot overturn or disregard a finding made by the court below which had sight of real evidence in form of video footage. He cited the case of **Kanaga v Zambia Revenue Authority**[17] where the Supreme Court restated its earlier position pronounced in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[2] wherein it said that:

> **The appellate Court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of facts.**

[59] In light of these authorities it was submitted that ground 3 of the appeal should not succeed.

[60] In response to ground six, it was submitted that the trial court Judge found as a fact that the Social Welfare Cash Transfer Program was a government program which reached beneficiaries

through pay point managers in districts. She also found that from the evidence on record, the social cash transfer allocation for September 2021 reached the constituency on 7th August, 2021, a few days before election day. It was argued that there was no misdirection by the court below as there was no finding that that the Appellant was a government official. He added that there was no contradiction in the evidence tendered by PW7 and PW13. It was contended that the trial Court made a finding that the evidence of PW13 was uncontroverted as her evidence was not challenged. Further, that the evidence supported a finding that the allegation was more probable than not and the Appellant was in breach of section 81 (1)(a) of the EPA and Regulation 15 (1)(k) of the Electoral Code of Conduct.

[61] In response to ground seven, it was argued that the action by the Appellant of offering a benefit to the voters by ferrying them to the polling station was a bribe which is prohibited under section 81 (1)(c) of the EPA. On the allegation of feeding the voters, it was argued that sufficient evidence was adduced in the Court below.

[62] In response to grounds eight and nine, it was submitted that the Appellant's argument that there are no regulations that prevent candidates from ferrying voters to polling stations is not consistent

with the provisions of Section 81(1)(c) of the EPA which provides that:

> **(1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly-**
> **(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election.**

[63] It was submitted that the action by the Appellant of offering a benefit to the voters by ferrying them to the polling station was a bribe as the Appellant was not just transporting them for free but wanted them to vote for him. It was also submitted that the evidence on feeding of voters was sufficient and was not challenged as the Appellant did not deny providing food on polling day but that the food was provided for his foot soldiers. He cited the case of **Chota v Mucheleka and the Electoral Commission of Zambia**[16] where the Supreme Court held that:

> **We disagree with the finding by the learned trial judge that the food and drinks provided by the 1st Respondent were mere refreshments incidental to the political meetings he held because this finding was not supported by evidence. In his testimony, the 1st Respondent admitted to providing food only to members of his campaign team and foot soldiers... PW7 gave explicit evidence of how the food was personally delivered by the 1st Respondent and she participated in the cooking of the food for the people who attended the meeting at Masala village. It appears to us that the learned trial judge ignored PW7's evidence which deserved consideration. Bearing this in mind, the finding by the learned trial judge on the allegation of treating was a serious misdirection as it goes against section 81 of the Electoral Act, which forbids the giving of food or drinks to the electorate in exchange for votes. Our considered view is that the evidence of PW7 proved**

the offence of treating to the required standard. Clearly, the 1st Respondent was in breach of section 81 of the Electoral Act and his election was liable to be nullified under section 93(2)(c) of the Electoral Act.

[64] It was submitted that the trial Court evaluated the evidence on record and correctly held that PW22's evidence effectively described the village headmen that were affected who had been consulted by the 1st Respondent as well as the quantity of the food delivered.

[65] With respect to grounds eight and nine it was submitted that an analysis of the evidence revealed that the witnesses and an audio recording all proved that Geoffrey Bwalya Mwamba called the 1st Respondent a lunatic and the 2nd Respondent a thief, which is contrary to section 84 of the EPA.

[66] We note from the record that there are no written submissions from the 1st Respondent in relation to grounds ten, eleven and twelve. The 1st Respondent did however, respond to ground thirteen of the appeal. In opposing ground thirteen, it was submitted that the court below was on firm ground in finding that the illegal acts committed by the Appellant were widespread and that they significantly affected the voters in most wards in Lubansenshi constituency. It was argued that the Court below did not take a narrow view as its finding was within the law and based on the case

of **Subulwa v Mandandi**[18] in which this Court gave guidance on what "widespread" entails in election petitions. It was contended that the evidence on record clearly showed that the electoral malpractices, and violations of electoral laws at the behest of the Appellant and his campaign team took place throughout Lubansenshi constituency. According to him, the evidence such as the distribution of mealie meal to approximately over six hundred (600) people from 6 different wards, namely Katopola ward, Namukolo ward, Chulungoma ward, Mushituwamboo ward, Lukutu ward and Lwata wards qualify as being widespread and satisfy the majority threshold. It was further contended that the disbursement of K5,100 to more than two hundred civil servants from the Ministry of Health, Education, Police officers and Local Government in the whole Luwingu District clearly supports the finding that it was widespread. It was also argued that the donation at St Matthews Congregation where congregants are drawn from the whole constituency also goes to prove the widespread nature of the Appellant's illegal acts. It was further submitted that the rally at Kapisha grounds was a widespread event that was aired on Lwansanse Community Radio which has full coverage in most parts of the Northern Province namely; the entire Lubansenshi

Constituency, Lupososhi, Lunte, Chifunabuli and parts of Chilubi, Samfya, Kawambwa, Mansa and Kasama districts. According to the 1st Respondent, the crowd that attended the rally was approximately over 2000 drawn from all wards of the constituency.

[67] It was finally submitted that the law is clear that where there is an appeal, the appeal must be on a point of law or on a point of law mixed with facts. He relied on the case of **Amchile Import & Export Limited v Ian Chimanaga & Marks Motorways Limited**[19] wherein the Supreme Court held that:

> **The point is undeniable that facts are indeed the fountain head or cradle of the law and that it is often not easy to separate the law from its factual environment. However, the dichotomy between law and fact in a ground of appeal is a significant one for while there can be an appeal against one, there will ordinarily be no appeal against the other. We have time and again explained the position that an appeal to this court will only be entertained if it raises a point of law or if the disputed question is one of mixed law and fact.**

[68] It was contended that the appeal before this court is anchored on findings of fact by the Court below. That it is trite law that the appellate Court will only reverse a finding of fact if one of the conditions is satisfied as set out in the case of **Nkhata and 4 Others v The Attorney General**[20] and **Wilson Masauso Zulu v Avondale Housing Project Limited**[2], among others.

[69] The 2nd Respondent filed in his heads of argument on 10th February, 2022. With respect to ground one of the appeal, it was

argued that the 1st and 2nd Respondents had proved their case to the required standard in election petitions and that the court applied the correct standard of proof required. He also referred to the case of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Chiluba**[5] to support his submission.

[70] He further argued that the 1st and 2nd Respondents had proven their case to a high degree of convincing clarity and the Appellant had failed to show how the court below had used a lower standard. He conceded that in elections the burden of proof rests on the petitioner to not only prove the non-compliance with the law by the other party but also prove that the non-compliance substantially affected the result of the election. He referred us to our decision in **Abiud Kawangu v Elijah Muchima**[21] where in at pages J19 to J20 it was held that:

> **We agree with the Respondent's submission that the burden lay on the Appellant as petitioner in the court below to prove the allegations made in his petition against the Respondent. This is because the one alleging, that is the Appellant in this case, carries the burden of proving all the allegations. He must prove the allegation to the required standard with cogent evidence, otherwise no judgment will be entered in his favour.**

[71] He went on to cite the case of **Anderson Mazoka and others v Levy Patrick Mwanawasa and others**[4] to further support his submission.

[72] With respect to grounds two, four and five, it was submitted that the court below was on firm ground when it held that PW2, PW3 and all the PF supporters were agents of the Appellant. It was his contention that the Appellant had admitted that the PF campaign teams in Luwingu helped him in the campaign. It was argued that section 2 of the EPA if construed strictly and narrowly with regard to the definition of an agent would lead to absurdity in the context of this case. It was submitted that the Appellant had failed to produce before the court below his nomination papers showing his registered agents in line with regulation 55 of the Electoral Process Regulations 2016. According to the 2nd Respondent, the two registered agents were never seen or mentioned anywhere by the Appellant when he went to campaign.

[73] It was submitted that according to paragraph 619 of Volume 15 of the 4th edition of the Halsbury's Laws of England a person who canvasses for votes is defined as follows:

> **A canvasser is a person who solicits and persuades individual voters although not necessarily one by one separately to vote for a candidate. General canvassing is strong evidence of agency and evidence which requires a very strong case to rebut it if it can be rebutted.**

[74] Premised on this definition, he implored us to uphold the holding by the lower court that the Appellant had more people than Mark

Musonda and Joseph Chileshe as his election agents. He also relied on the case of **Nkhata & others v Attorney General**[20] on the requirements for impugning findings of fact by an appellate court. It was contended that there was no evidence on record to show that the court's findings were perverse or made in the absence of any relevant evidence.

[75] It was further submitted that the Appellant participated in the mealie meal distribution exercise at Luwingu Boarding School on 10th August, 2021. The 2nd Respondent argued that the acts of bribery were done with the knowledge and consent or approval of the Appellant and that this falls within this Court's holding in the case of **Austin Milambo v Jamba Machila**[12] where this Court held that:

> **As we stated in the case of Jonathan Kapaipi v Newton Samakai, with regard to the import of section 97(2)(a), an election of a candidate cannot be nullified unless the person challenging the election of the candidate proves to the satisfaction of the court that the candidate personally committed a corrupt practice, an illegal practice or other misconduct in relation to the election or that the corrupt or illegal practice or other misconduct was committed by another person with the candidate's knowledge and consent or approval of the candidate's election agent or polling agent.(emphasis added).**

[76] It was submitted that the 1st and 2nd Respondents satisfied the requirement alluded to by the Court in the cases of **Nkandu Luo v Doreen Sefuke Mwamba and Attorney General**[8] and **Richwell**

Siamunene v Gift Sialubalo[7].

[77] In opposing ground three, it was submitted that the donation of K 2,000 made by the Appellant during the UCZ event and asking for votes fell short of the definition of philanthropic activities. It was contended that the activity was meant to woo votes for the Appellant and the party. The 2nd Respondent cited the case of **Reuben Mtolo Phiri v Lameck Mangani**[9] to also support his argument on this issue.

[78] With respect to ground six it was argued that the Appellant manipulated the Social Cash Transfer Programme to his advantage because the evidence on record was that the Appellant issued a directive that no one of the beneficiaries of the social cash transfer would receive their money until after the elections.

[79] In responding to ground seven it was submitted that it is an offence contrary to section 81(1) of the EPA for a candidate to ferry voters as this makes the voters feel obliged to return the favour by voting for that candidate. On the issue of feeding of the electorate, it was the 2nd Respondent's submission that there was evidence on record that the food was used by the Appellant to induce the people in order to get more votes in the election.

[80] In rebuttal to grounds eight and nine it was submitted that the

Appellant defamed the 2nd Respondent by stating that he was standing as an independent candidate because he is a thief. It was contended that the Appellant breached regulation 15(1)(c) of the Electoral Process Regulations by calling the 2nd Respondent a thief throughout Lubansenshi constituency which negatively affected him. It was further submitted that the derogatory and defamatory statements issued by the Appellants and his party officials were aired on radio Lwansanse which covers all wards in the constituency and this fact is uncontroverted.

[81] With respect to ground ten, it was submitted that there was evidence of PF officials who were dishing out money to voters at Kandata polling station on polling day. Further that the evidence by PW17 that the Appellant was found in the company of PF officials distributing money was unshaken. It was therefore contended that the trial court's finding should not be impugned in that respect.

[82] In responding to ground eleven it was argued that there is sufficient and uncontroverted evidence on record to support the findings that over 100 headmen gathered at Chief Shimumbi's palace and were each given K100 notes in order for them to vote for the Appellant and influence their subjects to vote for him. In arguing ground

twelve, the 2nd Respondent contended that there was cogent evidence that the Appellant and his party officials bribed voters with cash payments to entice them to vote for him. He submitted that the trial court was on firm ground when she believed the 1st and 2nd Respondents' testimony as the Appellant made bare denials in the face of serious allegations and only called one witness who contradicted him over the donation made to the UCZ St. Matthews congregation.

[83] With regard to ground thirteen it was submitted that the trial Court was on firm ground when she held that the allegations against the Appellant were substantiated and that the Appellant did engage in electoral malpractices and illegalities which substantially affected the majority of the voters in Lubansenshi Constituency and as a result a greater number of voters were prevented from freely choosing their preferred candidate. It was argued that the trial court took time to analyse all the evidence before her from witnesses drawn from across the entire Lubansenshi constituency. It was the 2nd Respondent's argument that the 1st and 2nd Respondents proved to the Court below that not only had the Appellant breached the EPA but his malpractices and illegalities were so widespread and affected the result of the elections as most

voters were swayed from voting for a candidate of their choice.

[84] He prayed that the Court dismisses the appeal because it lacks merit.

APPELLANT'S ORAL SUBMISSIONS

[85] In the Appellant's oral submissions, the learned Counsel for the Appellant Mr. Lemba argued that according to the record there were 27,673 valid votes cast. Out of the said votes the Appellant amassed 9,076 votes representing 32.79%. The 2nd Respondent polled 8,851 votes representing 31.98% while the 1st Respondent polled 8,237 votes representing 29.76% of the total votes and 55 votes were rejected. Counsel argued that the statistics show that over 60% of the voters voted against the Appellant who only managed 32%.

[86] It was submitted that given the statistics, the test contained in section 97 with respect to the majority of the voters being prevented from voting for a candidate of their choice is not met. Counsel referred to the definition of majority in the Oxford Dictionary which he submitted means the largest part of a group of things. He argued that in this poll, the largest part did exercise their right to vote for a candidate of their choice. It was submitted that the court below preferring the evidence of PW11, PW12 and PW20 over the

evidence of PW2 and PW3 has no basis. He referred the Court to the decision of the Local Government Elections Tribunal sitting at Luwingu in the case of **Mulenga Chipanta v Rodrick Mulenga and the Electoral Commission**[22]. Counsel submitted that in that case PW12 in *casu* appeared as PW5 before the tribunal where she testified that Rodrick Mulenga gave her the mealie meal while in *casu* she alleges that the Appellant was the one who gave her the mealie meal.

[87] It was Counsel's submission that the findings of the trial court were devoid of statistical information to show that the alleged malpractices were widespread and prevented the majority of the voters from electing their preferred candidate.

[88] The learned Counsel Mr. Ngulube, also on behalf of the Appellant, further submitted that the learned trial judge made several presumptions without evidence as most of her findings were not supported by evidence. He impugned the finding that the rally at Kapisha was aired live when there was no such evidence on record to support such a finding. He also submitted that the hate speech alleged to have been committed by a party official and many other was attributed to the Appellant when section 2 of the EPA clearly defines who an agent is.

[89] It was further submitted that the trial court misdirected itself when the Judge applied the wrong standard applicable in ordinary civil matters and not the one required in election petitions. He referred us to our decision in the case of **Samuel Nayunda v Geoffrey Lungwangwa**[23] wherein we held that it is not enough to simply prove that there was wrongdoing. There must be evidence of how that wrongdoing affected the majority of the voters.

1ST AND 2ND RESPONDENT'S ORAL SUBMISSIONS

[90] In responding to the submissions on behalf of the 1st Respondent, Mr. Mwiche submitted that there is a plethora of authorities which clearly state when an appellate court would interfere with findings of fact. He referred to the case of **Sibongile Mwamba v Kelvin N. Sampa and The Electoral Commission of Zambia**[24] which demonstrated that the **Nkhata case**[20] is still good law wherein it was held that for findings of fact to be overturned the conditions outlined in that case must be met. He asked the Court to find in favour of the1st and 2nd Respondents. When asked what standard of proof is required in election petitions he told the Court that the standard of proof must be to a convincing degree of clarity. He further submitted that where a Judge applies the wrong standard of proof it would be left to the wisdom of the appellate court to decide.

Kombokombo polling station and denied travelling to Chifwile ward. PW10 at page 568 of the Record of Appeal stated that on 11th August, 2021 he was called to go to Luwingu filling station by the Chairman of Chifwile ward. When he got to the filling station he was told that he needed to take people from the village to the polling station the next day. He agreed to work and he was taken to the Appellant where he asked him for K2,000. The Appellant did not have cash and he sent him K4,100 of which K2,100 was for Chifwile ward. When cross examined he stated that he took people to Mubinga and Chifwile polling stations. Based on this evidence PW10 did not state that he met the Appellant at Chifwile but that he was called to meet the Chairman of Chifwile ward on 11th August, 2021 at Luwingu filling station. PW10 did not allege that the Appellant was at Chifwile on polling day as stated by the Appellant. Therefore, while this evidence was uncorroborated we are satisfied that the trial Judge correctly evaluated the evidence before her. This ground of appeal therefore fails.

[117] Under grounds eight and nine it was contended that the trial Judge misdirected herself when she held that the Appellant, his agents/supporters and other PF party officials defamed the Respondents by calling the 1st Respondent a harsh lunatic and the

2nd Respondent a thief at their various rallies and meetings in the constituency at Namilandu village and Kapisha grounds without tangible proof. Further, that she erred in law and fact when she formed an opinion that the area covered by Lwansanse Community Radio Station was a measure of listenership and as such the alleged defamatory statements issued at Kapisha grounds were widely aired and listened to by all the voters of Lubansenshi Constituency.

[118] The Appellant argued that there was no tangible evidence to support the court's findings. The 1st and 2nd Respondents on the other hand argued that there was sufficient evidence from the 2nd Respondent, PW25, PW17, PW18 and PW19 that the appellant uttered defamatory statements. It was submitted that labeling of the 1st Respondent as a lunatic contravenes section 84 of the EPA. It was contended that the utterances were broadcast on radio Lwansanse which covers the entire Lubanseshi constituency and surrounding areas. The trial court found that the rally was aired live on Lwansanse community radio which has full coverage in the entire Lubansenshi constituency, Lupososhi, Lunte, Chifunabuli, parts of Chilubi, Samfya, Kawambwa, Mansa and Kasama. She found that the utterances were communicated to a large audience in the constituency and far beyond. She also found that the defamatory

[91] The learned Counsel Mr. Mbambara on behalf of the 2nd Respondent submitted, with respect to the argument that the court below used the wrong standard of proof that the court below adequately addressed the aspect of the standard required by section 97 of the EPA. He contended that based on the evidence before it, the court firmly arrived at the decision of nullifying the election. He agreed with Mr. Mwiche's submissions that the court's findings could not be impugned unless it can be shown that they are perverse or based on wrong assumptions.

[92] With respect to the rally being aired on radio it was submitted that there were witnesses on record who testified to having been at the rally and another witness from the radio station. It was submitted that based on the evidence before her, the court below could not be faulted. It was further submitted that there has been no reason given as to why the successful party should be deprived of costs which the Court rightly awarded to the successful party below. He however conceded that according to section 109 of the EPA costs will only be awarded where it is shown that a party misconducted itself during the trial which was not the case in the present case.

[93] With respect to the argument on the majority of voters having voted for a candidate of their choice, Mr. Mbambara argued that the

argument by Mr. Lemba that the majority of the voters did not vote for the Appellant was flawed and could lead to a serious absurdity as each candidate must be considered in their own capacity otherwise doing the contrary would lead to serious absurdity. It was contended that the alleged activities happened across Lubansenshi constituency and clearly indicated that the majority of the voters were influenced by the corrupt practices.

ARGUMENTS IN REPLY

[94] In reply to the Respondents' oral submissions Mr. Lemba maintained that there were no statistics given to support the finding of the number of people who were affected and this was a major requirement to satisfy the majoritarian principle.

[95] In addition, Mr. Zimba, on behalf of the Appellant, submitted that the argument that the appeal is about findings of fact is not correct because the question of the majority and widespread stems from section 97 of the EPA. Further, that even if it was argued that the appeal is about facts, the requirements to overturn findings of fact as stated in the **Nkhata case**[20] and **Wilson Masauso Zulu**[2] have been met as the findings of the court are not supported.

[96] Mr. Ngulube added that the court below erred in finding that the radio broadcast was transmitted live because there is no such

evidence from the court below. With respect to the arguments on the standard of proof, counsel referred the Court to the case of **Khalid Mohamed v Attorney General**[1]. He submitted that the quality of evidence received from the 23 witnesses was poor.

ANALYSIS AND DECISION

[97] We have considered the grounds of appeal, the written and oral arguments by the parties and the judgment of the lower Court. In determining the appeal, we have examined the law upon which an election of a candidate can be nullified.

[98] Section 97 (2) (a) of the EPA provides that:

> **97 (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void, if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**
>
> **the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in the constituency, district or ward whom they preferred;**

[99] The import of the above provision is that for the election of a

candidate to be nullified, a petitioner must prove to the satisfaction of the court that the corrupt practice, illegal practice or other misconduct was committed by a candidate personally or with his knowledge and consent or approval or by his election or polling agent. The petitioner must further prove that as a result of the electoral malpractice or misconduct, the majority of voters in the constituency, district or ward were or may have been prevented from voting for their preferred candidate.

[100] In interpreting the provisions of section 97 (2)(a) of the EPA we stated in the case of **Steven Masumba v Elliot Kamondo**[25] that:

> **The requirement in the current law for nullifying an election of a member of parliament is that a petitioner must not only prove that the Respondent has committed a corrupt or illegal act or other misconduct or that the illegal act or misconduct complained of was committed by the Respondent's election agent or polling agent or with the Respondent's knowledge, consent or approval but that he/she must also prove that as a consequence of the corrupt or illegal act or misconduct committed, the majority of the voters in the constituency were or may have been prevented from electing a candidate whom they preferred.**

[101] In light of the above authority we reiterate our position that section 97 (2) of the EPA requires that where it is proved that a corrupt or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or

that of his election agent or polling agent and the petitioner must further demonstrate that as a result of the above proscribed acts, the majority of voters in that constituency, district or ward were or may have been prevented from selecting their preferred candidate. This requires the proscribed act to be widespread so as to prevent or potentially prevent the majority of the voters from electing the candidate they prefer.

[102] In addition to the above requirements under section 97 (2) (a) of the Act, as is the case in any civil matters, it is trite law that the burden to prove any allegation made against a candidate rests on the petitioner. The distinguishing factor in election petitions, however, is that a petitioner ought to prove to a fairly high degree of convincing clarity all the allegations made against the candidate and not on a mere balance of probabilities. To this end, we have cited with approval in numerous cases the holding in the case of **Lewanika v Chiluba**[5] where this settled position was stated as follows:

> **As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long been 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..., 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.**

[103] That said, we will now turn to consider the grounds of appeal. In ground one it was contended that the trial Judge misdirected herself when she held that the 1st and 2nd Respondent had proved their case to the required standard in election petitions when the evidence fell below the said standard of proof. The Appellant argued that the required standard of proof in election petitions in Zambia is higher than on a balance of probabilities in that it should be to a high degree of convincing clarity as stipulated in the **Lewanika v Chiluba case**[5]**.** The 1st and 2nd Respondents on the other hand contended that the trial Court correctly addressed her mind to provisions of section 97(2) and the authorities on the standard of proof in election petitions.

[104] We have carefully perused the judgment of the trial Court. It was alleged by the 1st and 2nd Respondents that the Appellant was involved in the distribution of mealie meal from the DMMU when there was no declaration of hunger in the constituency. The evidence of the 1st and 2nd Respondents in the Court below was that the Appellant was in Luwingu and was part of the distribution of the mealie meal from the DMMU at Luwingu Boarding School a few days before polling day. The Appellant on the other hand told the trial

Court that he was not in Luwingu at the material time as he was making his way to the Lubansenshi Constituency from Kitwe on 11th August, 2021. The trial Judge evaluated this evidence and she stated, at page J78 of the judgment, that it was more probable than not that the Appellant was at Luwingu Boarding School on the material day and not in Kitwe as he alleged when the distribution of the mealie-meal was done.

[105] Further, with respect to the allegation that social cash transfer payments coincided closely with election day, the trial Judge found at page J81 of her judgment that it was more probable than not that the Appellant and his associates addressed the beneficiaries a day before 12th August, 2021 at a government school.

[106] As earlier stated in this Judgment, in election petitions the standard of proof is on a higher degree of convincing clarity which is a standard higher than a mere balance of probabilities but not as high as the standard in criminal matters. This position is established in the **Lewanika v Chiluba**[5] case which we have referred to earlier in our judgment. It therefore follows that for a finding of the trial Court in an election petition to be sustained, an allegation must be proved on a fairly high degree of convincing clarity. It is quite evident from the judgment of the trial Court that in her findings on the issues we

have referred to on pages J78 and J81 of her judgment, she premised her findings on the wrong standard of proof not applicable in election petitions. These findings can therefore not be sustained by this Court as they were not sufficiently proven. This ground of appeal therefore succeeds only to the extent that it relates to the trial Court's findings which were based on a wrong standard of proof of balance of probabilities. The allegation of the Appellant having participated in the distribution of DMMU mealie-meal as well as his participation in the distribution of the social cash transfer payments a few days before polling day should have been proved to a fairly high degree of convincing clarity.

[107] In ground two the Appellant argues that the trial Judge erred in law and fact when she held that PW2 and PW3 together with all the Patriotic Front (PF) supporters were agents of the Appellant when in fact not. The Appellant argued that section 2 of the EPA is clear as to the definition of an election agent and a polling agent and therefore PW2 and PW3 and all the PF supporters were not his agents. It was his argument that the finding was grossly flawed and not supported by evidence. We have carefully considered the evidence on record and judgment of the Court below. At page J115 of the judgment, the trial Court refers to PW2 and PW3 as the

Appellant's agents or supporters. Section 2 of the EPA provides that an election agent is one that is specified in the candidate's nomination paper. In the present case the evidence on record is that PW2 and PW3 and the PF supporters were not the registered agents of the Appellant. We agree with the arguments by the Appellant that only a person named as an election agent within the meaning of agent in the EPA qualifies to be an agent of a candidate. We therefore agree with the Appellant that the finding that PW2 and PW3 and all PF supporters were the Appellant's agents is not supported by any evidence on record. We accordingly find that this ground of appeal has merit and succeeds.

[108] With regard to ground three, the Appellant contended that the Court below erred in law and in fact when she held that the donation of K2, 000 and a pledge of 50 bags of tile fix to St. Matthews United Church of Zambia (UCZ) for the building of the presiding Minister's house went beyond philanthropic activities and as such amounted to an illegal act contrary to section 81(1)(c) and 81(1)(2) of the EPA. The Appellant contended that his donation of K2,000 was merely philanthropic activity which is permissible. On the other hand, the Respondent strongly contends that the donation went beyond a philanthropic act because the Appellant was asking for votes from

the congregants. In evaluating this ground of appeal, we have considered the case of **Rueben Mutolo Phiri v Mangani Phiri**[9] wherein the Supreme Court held that:

> **On the authority of the Mabenga case and on the evidence on record, we hold that the Appellant's conduct in donating the money to the church congregation, when he was introduced as a Parliamentary candidate and expressly asking for votes, went beyond philanthropic activity.(emphasis added)**

[109] It is our considered view that where a donation is followed by a request for votes, it goes beyond philanthropic activities. As such the Appellant's act of donating K2,000 and tile fix to the church whilst asking for votes was beyond philanthropic activity. The evidence on record is clear that the Appellant and his campaign team attended a fundraising event at the UCZ St Matthews Congregation where he donated K2,000 towards the building of the Reverend's residence. There is also undisputed evidence that the Appellant also pledged 50 bags of tile fix. There is further evidence at page 514 of Vol. 2 of the Record of Appeal that votes were solicited in favour of the Appellant after the donation was made. We therefore do not fault the trial Court for finding that the conduct by the Appellant breached the provisions of the EPA. We accordingly find that this ground of appeal fails.

[110] In arguing ground four it was contended that the trial Judge erred

in law and in fact by holding that the Appellant illegally addressed more than 200 civil servants from the Ministries of Health, Education, Local Government, and police officers on the 29th July, 2021 during working hours at Luwingu boarding school a government facility and thereafter, paid them K5,100 through Cosmas Chilando for refreshments in order to influence them into voting for all the PF party candidates, when in fact Cosmas Chilando was not the Appellant's registered agent. It was contended that this is contrary to regulation 15(1)(k) of the Electoral Code of Conduct. The trial Court made a finding of fact that based on the evidence before her, the meeting with the civil servants held on 29th July, 2021 was not disputed. The trial Court further found that the meeting was allegedly convened by PW3 for the Permanent Secretary of Northern Province but was taken over by the Appellant and Cosmas Chilando at short notice. She also found that according to the Respondents' evidence Cosmas Chilando was consistently connected to the Appellant at different campaign meetings.

[111] We have already found that an agent of a candidate is one specified on the candidate's nomination paper. The trial Judge in her judgment at page J82 stated that Cosmas Chilando was the PF District Chairperson for Lubansenshi Constituency. That said, the

relevant portion of section 97(2)(a) provides that the corrupt practice illegal practice or other misconduct committed in connection with the election must be done with the knowledge and consent or approval of a candidate or that candidate's election or polling agent.

[112] The trial Court satisfied herself that the while Cosmas Chilando was not an election agent of the Appellant, the Appellant had knowledge that Cosmas Chilando had given PW4 the K5,100 for refreshments. The evidence on record from PW4 at pages 545 to 550 of Vol. 2 of the Record of Appeal is that he received a message that all civil servants needed to attend a meeting to be addressed by the Permanent Secretary. The Permanent Secretary however did not attend the meeting but the civil servants present at the meeting were addressed by the District Commissioner, PW3. PW3 told them to vote for the PF and the PF candidate. He said that the Appellant, addressed the civil servants and told them that he had come to lobby for votes. PW4 further testified that the Appellant was in the company of Mr. Cosmas Chilando. The duo went outside and told PW4 that they had no cash but would transfer K5,100 to his mobile account. It was PW4's evidence that Mr. Chilando transferred this money to him while the appellant was with him. PW4 further stated that he distributed the money to all the civil servants who were in

the hall. The Appellant denied giving PW4 this money. The trial Court found that the said Cosmas Chilando was with the Appellant at this meeting and that Mr. Chilando was closely connected to the Appellant and was at nearly all the campaign meetings. This finding is evident from the record. It is settled law that an appellate Court will not lightly interfere with the findings of fact by a trial court. We stated this position in our decision in **Sibongile Mwamba v Kelvin M. Sampa and Electoral Commission of Zambia**[24] where we referred to the Supreme Court decision of **Examination Council of Zambia v Reliance Technology Limited**[26] wherein the Supreme Court held that an appellate Court will not lightly interfere with findings of fact of the trial Judge who had the benefit of seeing and evaluating the witnesses unless it is shown that the findings of fact were either perverse or were made in the absence of relevant evidence. We have carefully considered the evidence that was tendered to support this finding and we find that we cannot fault the trial Court for this finding because she evaluated the evidence and also addressed her mind to whether PW4 had any motive to falsely implicate the Appellant and she found none. She went on to find that the Appellant had knowledge of the K5,100 that was paid to PW4 and he consented to the payment. We accordingly find that this

ground of appeal fails.

[113] Under ground five the Appellant contends that the trial Judge misdirected herself when she held that Chief Chipalo with full knowledge, approval and consent of the Appellant, instructed his subjects and headmen in the 96 villages under his control, to vote for all PF candidates in the election when the said Chief Chipalo was not the Appellant's registered agent. Similarly, under this ground it was contended that Chief Chipalo was not the Appellant's registered agent however as we have already stated under ground four, a candidate will be liable for acts done by his agents or others with his knowledge or consent and approval. We have considered the evidence relating to the evidence of Chief Chipalo (PW8) who admitted that he assisted the PF party during campaigns. The trial Court further found that the evidence of PW2 was that the Appellant was introduced to Chief Chipalo during the campaign period and was welcomed by him. We have carefully perused the record and we have not found evidence to show that the Appellant had knowledge of Chief Chipalo's instruction to his headmen to urge their subjects to vote for the Appellant or that the Appellant was present at such a meeting. The trial court also referred to the evidence of Chief Chipalo who said that he had disdain for other candidates because they did

not belong to the ruling party. There is no evidence that the Appellant was aware of this instruction by Chief Chipalo to his headmen. We therefore find that the finding that Chief Chipalo with full knowledge, approval and consent of the Appellant, instructed his subjects and headmen in the 96 villages under his control, to vote for all PF candidates in the election is not supported by evidence. We accordingly find that this ground of appeal has merit and succeeds.

[114] With respect to ground six the Appellant argued that the trial Judge misdirected herself when she held that the Appellant influenced the payment of social cash transfer money by making it conditional to the beneficiaries to vote for the PF without any cogent and tangible evidence. He argued that the trial court failed to evaluate the evidence by the witnesses with regard to this allegation. According to the Appellant the 1st and 2nd Respondent failed to prove that the Appellant had used the social cash transfer programme to prop up his campaigns that ushered him into office.

[115] With respect to this ground of appeal we have found earlier under ground one that this fact was not proved to the required standard of proof. We therefore find that this ground has merit and succeeds.

[116] With respect to ground seven the Appellant contended that the trial Judge erred in law and in fact when she held that the Appellant

facilitated the ferrying of voters on poll day in Chifwile ward and feeding those from Saili, Lima, Lukonde, Mwaba and Mulenga Chipalo Villages in Chulungoma ward without any cogent and tangible evidence. It is argued that the ferrying of the voters was paid for using mobile money transactions. We have considered the evidence on record and the finding of the trial Court. The trial Court stated that she took judicial notice that mobile money transactions will not show the name of the recipient but rather the sender. She relied on the evidence of PW10 who according to her was even willing to show the Court the transactions on his phone under cross examination but did not do so because counsel abandoned the question. Having looked at the evidence on record, PW10 entered into an agreement with Mr. Chewe (the Appellant), who was introduced to him by the Chairman for Chifwile ward, to ferry people to the polling stations and was given money to also buy food for the people. The trial court was also satisfied that PW10 had no motive of his own to serve and therefore was a credible witness and weighing the opposing evidence she found that the allegation was proved. We considered the evidence of PW10 and the opposing evidence by the appellant at page 654 of the Record of Appeal. In his evidence the Appellant testified that he went to cast his vote at Kasonde

statements and the hate speech issued by Geoffrey Bwalya Mwamba were attributed to the Appellant because the same were fully endorsed by the Appellant and the same were hateful and had serious tribal undertones. She further found that there was unchallenged evidence that the Appellant called the 2nd Respondent a thief at a rally at Namilandu Village and that the 1st Respondent was a lunatic.

[119] The undisputed evidence on record is that the Appellant was present at a rally where Geoffrey Bwalya Mwamba made utterances deemed to be defamatory and hate speech. In fact, the Appellant also addressed the people present at that rally and asked for the people of Lubansenshi to vote for him. The Appellant however argues that none of the alleged statements were made by him and there was no evidence to that effect. In our view this argument by the Appellant cannot stand in light of section 97(2)(a)(ii) because he had knowledge of the derogatory statements and did not disassociate himself from them when he spoke at the same rally. In the case of **Herbert Shabula v Monde**[27] we found that:

> **The Appellant therefore should have dissociated himself from what was stated by Mr. Luyako, if the uttered words went against the message agreed upon by the UPND campaign team.**

[120] Similarly, in the case in *casu,* the Appellant should have disassociated himself from the derogatory and defamatory utterances if he did not approve of them. We will now determine whether the words spoken were defamatory or derogatory. The Court found that at the rally, it was stated that the 1st Respondent was a product of a relationship with a Tonga man after his mother was impregnated and that this had tribal under tones. It was because of that that it was said that he ordinarily sided with President Hakainde Hichilema who was also Tonga.

[121] The trial Court found as a fact that the Appellant was complicit in defamatory and hateful utterances that were made by Geoffrey Mwamba at Kapisha grounds rally which according to the Judge represented the pillar of the PF campaign policy. The trial judge on page J112 of the judgment went on to state that:

> **a number of witnesses testified that they personally heard him at various campaign meetings or rallies in the constituency calling the 1st Respondent a harsh lunatic. I have no doubt in my mind whatsoever, that the objective of the well calculated smear campaign by the 1st Respondent and the PF Party official had the purpose of maligning the 1st Respondent in the election race.**

[122] We have carefully perused the record, the evidence of PW1, who is the 1st Respondent in this matter, at page 510 of the record of appeal stated that the Appellant painted him a tribalist and

perpetuated hate speech and tribalism in his campaign. PW14's evidence on page 583 of the Record of Appeal was that he attended the rally at Kapisha grounds and confirmed that Geoffrey Bwalya Mwamba made tribal utterances against Tongas. He also confirmed the evidence that Mr. Mwamba talked about the 1st Respondent's parentage of his mother having been impregnated by a Tonga man. This witness told the Court that he feared being displaced by the 1st Respondent and President Hakainde Hichilema who would turn the place into land for animals. PW15 also confirmed the evidence of PW14.

[123] With respect to the allegation that the 2nd Respondent was called a thief by the Appellant, the evidence at page 628 of the Record of Appeal from PW23 who is the 2nd Respondent in this matter, is that while he was at Namilandu village he heard that there would be a meeting at headman Namilandu's home which was about 300 metres from where he was. At the meeting the Appellant was present in the company of others where he was introduced as the Lubansenshi constituency aspiring candidate. At that meeting, the 2nd Respondent heard the Information and Publicity Secretary, Ms. Helen Chabala, tell the crowd present that the 2nd Respondent was not chosen to stand on the PF ticket because he was a thief and

should not be voted for. She went on to ask the people to vote for the Appellant and the councilors. Under cross examination, the 2nd Respondent conceded that he did not report the issue of defamation to the Conflict Management Committee. PW25 confirmed, at pages 646 and 647 of the record of appeal, that she heard the Appellant say that the 2nd Respondent was not adopted because he was a thief as he stole money that was meant for a shed at Chief Shimumbi's palace. Further, that the money was meant for road construction from Luwingu to Chaba.

[124] It was premised on this evidence that the trial Court was satisfied that the Appellant uttered defamatory remarks against the 1st and 2nd Respondents. We do not fault the finding of the trial Judge.

[125] The term defamation according to Black's Law Dictionary, 8th Edition (2004) Bryan Garner, Ed, USA, Thompson West, is defined as:

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

[126] Having carefully considered the evidence on record we have no doubt that the utterances made relating to the 1st Respondent's parentage were meant to attack the reputation of the 1st Respondent. There was no evidence as to the truth of the said

utterances that was produced in the court below. We further have no doubt that the Appellant was present when tribal remarks were made at the rally by Geoffrey Bwalya Mwamba.

[127] In view of the evidence that was before her, we do not fault the trial Court for finding that the Appellant engaged in defamatory and derogatory utterances which he did not disown when they were said in his presence. We are of the view that we cannot reverse these findings of fact as there was evidence on record to support her findings.

[128] With regard to whether the trial court's finding on the listenership of the radio station was supported by evidence, it was argued in the Appellant's oral submissions that the trial Court's finding that the rally was broadcast live was not supported by evidence on record. We have considered the evidence of PW9, the station manager at Lwansanse Community Radio Station, in the court below at pages 564 to 567. Her evidence was that the recording was made between 1st and 11th August, 2021 and that the same was recorded and transmitted through their radio station. We agree with the Appellant that there is nowhere on record where it was testified that the rally was broadcast live on radio. The trial Court therefore fell in error when she found as such.

[129] That said, it is not disputed that the rally was transmitted through the radio station before the 12th August, 2021 general elections. The coverage of the radio station was also not disputed. The Appellant disputes that this translates into actual listenership from the stipulated coverage and cited the case of **Austin Milambo v Jamba Machila**[12] and argued that to take radio transmission as a measure of the number of listeners in the absence of evidence would be lowering the majority threshold required under section 97(2)(a). We have considered the arguments under this head and we note that in the case of **Herbert Shabula v Monde**[27] we considered whether a radio broadcast of a programme automatically spoke to the widespread nature of the broadcast or the listenership of the programme. In that case we relied on our decision in **Austin Milambo v Machila Jamba**[12] where we stated, *inter alia*, that:

> **With regard to the radio broadcast, apart from the Appellant's testimony, no other witnesses were called to testify that the radio broadcast reached them and affected them in their choice of a candidate. We are of the view that to take the radio station coverage area as a measure of the approximate number of listeners in the absence of other supporting evidence regarding listenership would be, in our view, lowering the majority threshold requirement assuming we were to consider the limb of section 97(2) (a) ..**

[130] It is our view that while there is evidence that Radio Lwansanse

has wide coverage, there was no evidence that was adduced to support the fact that wide coverage had translated to wide listenership. We therefore agree that there is no evidence as to the actual listenership of this broadcast that was presented before the Court below. This ground of appeal therefore has merit and succeeds.

[131] Grounds ten, eleven and twelve were all related to allegations of bribery and vote buying. The Appellant under ground ten contended that the trial Judge erred in law and in fact when she held that the Appellant, agents and PF officials engaged in voter bribery at Luena, Njoko and Kandata polling stations in Lwata and Namukolo wards on poll day without any tangible proof.

[132] In ground eleven he argued that the trial Judge erred in law and fact when she held that the Appellant, his agents and PF officials paid more than 100 headmen from Chifwile, Mushituwamboo, Lukutu, Lwata and Sangano wards at Chief Shimumbi's palace the sum of K100.00 each for their votes without any tangible proof and convincing evidence. In ground twelve it was contended that the learned trial Judge erred in law and fact when she held that the Appellant, agents and PF officials paid some villagers money so that they could vote for the PF candidate without any tangible proof.

[133] According to the Appellant, there was no evidence to support these findings as the allegations were merely speculative. We have considered the judgment of the court below and we note that under ground ten, the court below relied on the evidence of the 2nd Respondent who testified that he had personal experience with vote buying by the Appellant at a rally at Namilandu village. She also relied on the evidence of PW17, PW18, PW19 and PW21 who apart from PW17 and PW19 testified that they were influenced to vote for the Appellant because of the money they were given. She also went on to state that these witnesses gave details as to the denominations of the money they were given in their evidence. She went on to find that while PW17 and PW19 refused to take the money, there was evidence that they were offered that money by the Appellant and this was an illegal act contrary to section 81(1)(a) and section 89(1)(e) of the EPA. The evidence of PW17 at pages 600 to 602 of the Record of Appeal is that on 12th August, 2021 he went to cast his vote at Luena polling station when he found people collecting money from the Appellant near a Catholic Church. He followed the Appellant to JK Chishimba village where the Appellant parked and again started distributing money. PW17 said he rebuked the people who were getting the money before the

Appellant finally proceeded to Kasonde Kombokombo. PW17 further testified that when he returned to the Catholic Church he found the Appellant's accomplices still giving out money. He reported the matter to Officer Doris who attempted to stop them but they refused to heed her orders. He then called the Officer in Charge Mr. Mwanza (PW16) whom he reported the incident to. PW16 confirmed receiving a call of this report and interrogated Officer Doris, who was deployed to Luena, on the situation and she confirmed having received the report and that when she confronted the suspected PF members but they were not cooperating. PW16 at page 598 stated that Officer Doris did not see the money that was being distributed when she approached the suspects. PW18 also confirmed having received money at around 13:00hrs from Cosmas Chilando and the Appellant while he was on his way to Njoko polling station. This evidence of PW17 with respect to the Appellant was not corroborated.

[134] It is our considered view that there was insufficient evidence corroborating the allegation of vote buying on polling day with respect to the Appellant. We therefore find that ground ten has merit and accordingly succeeds.

[135] With respect to grounds eleven and twelve, it was the Court's

finding that there was no dispute that the meetings at Chief Shimumbi's palace where 100 headmen were given money by the Appellant took place. This was confirmed by the evidence of PW24, PW 25, PW2 and PW3. The court believed the evidence of PW2 that the Appellant gave the headmen a sum of K100 each and they complained that it was not enough. She found that there was no reason for PW2 and PW3 to lie against the Appellant.

[136] According to the evidence of PW2 at pages 521 to 531 he helped campaign for the Appellant after his adoption certificate to stand as Member of Parliament under the PF ticket was withdrawn. He campaigned for the Appellant and visited various places including Chief Tungati and Chief Shimumbi's palaces. PW2 encouraged the headmen to tell their subjects to cooperate with the Appellant. The headmen were told that they would be given exercise books to write the names of their subjects with the understanding that party regalia and help would be given to those whose names were written in the exercise book. It was his testimony that some of the headmen who were present at the meeting complained that the Appellant only gave them K100 each. He stated that all the headmen present were from the Chiefdom which constitutes Chifwile, Mushtuwamboo, Lukutu, Lwata and Sangano wards.

[137] PW24, a headman in Chief Shimumbi's Chiefdom, at pages 640 to 643 confirmed the evidence of PW2 that there was a meeting that was held at Chief Shimumbi's palace where more than 100 headmen were in attendance. PW24 stated that they were informed at the meeting that they should inform their subjects to vote for the PF because the 2nd Respondent was a thief and the 1st Respondent was harsh. He also confirmed PW2's evidence that books would be given to all the village headmen to register 25 subjects each. They were further each given K100 and that they voted according to instruction. In light of the evidence on record we find that the finding of the trial Judge under these grounds of appeal was supported by evidence and was corroborated. We therefore do not fault her finding and hold that the grounds of appeal lacks merit and accordingly fails.

[138] Finally, with respect to ground thirteen the Appellant contends that the trial Judge erred in law and fact when she held that the allegations made against him had been substantiated and that the Appellant engaged in electoral malpractices and illegalities which substantially affected the majority of voters in Lubansenshi Constituency and as a result a great number of voters were prevented from freely choosing their preferred candidate.

[139] As we have already stated, section 97(2)(a) is very clear as to when an election can be held to be void. In this regard, the Supreme Court in the case of **Mubika Mubika v Poniso Njeulu**[28] stated as follows:

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

[140] Further, in the case of **Nkandu Luo and The Electoral Commission of Zambia v. Doreen Sefuke Mwamba and The Attorney General**[8] at page J50 we stated that:

> **In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a) there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent...**

[141] We went on to say that:

> **In addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent**

evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

[142] The above authorities aptly demonstrate the import of the majority provision under section 97 (2) (a) of the Act.

[143] In the authorities referred to above we found that in addition to proving the alleged malpractice, the petitioner must prove that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

[144] In our decision in **Sunday Chitungu Maluba v Rogers Mwewa and Attorney General**[29] we gave guidance on the interpretation of the majoritarian principle referred to under section 97(2) as follows:

If the court finds a candidate liable under the said section 97 of the EPA 2016, it must also find that by virtue of the said illegal act, the majority were prevented or were likely to have been prevented from electing a candidate of their choice. To appreciate what is meant by majority we resorted to the natural and ordinary meaning in WH Smith Concise Oxford Dictionary wherein the "majority" is said to be the greater number of a part. It is also pertinent that the word is used only with countable nouns. The numerical sense of the word "majority" has been further elaborated through the use of the term "widespread". In the WH Concise Oxford Dictionary "widespread" means widely distributed or disseminated. In the case of Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa the Supreme Court shed light on what widespread means by stating that:

"since a presidential election involves all 150 constituencies; the petitioner must prove electoral malpractices and violations of electoral laws in at least a majority of the constituencies."

[145] Similarly, in a Parliamentary election, the petitioner must prove electoral malpractices and violations in at least a majority of the wards in the constituency.

[146] In light of the aforementioned authorities we maintain our position on this point of law and state that where there are malpractices proven, the petitioner must go a step further to prove that as a result of the said malpractices and illegal acts, the majority of the voters were or may have been prevented from voting for their preferred candidate. In *casu* the evidence on record is that there were incidences of bribery, vote buying and breach of the Electoral Code of Conduct. However, there is nothing on the record as to show the total number of wards in Lubansenshi Constituency as against how many wards were affected by the malpractices and illegal acts. It is our view that the provisions of section 97(2)(a) are very clear on the need to show how widespread the malpractice and conduct was. We accordingly find that the conditions set out under that provision were not proven to warrant a nullification of the election. We accordingly allow ground thirteen.

[147] In conclusion, we allow grounds one, two, five, six, eight, nine, ten

and thirteen which entails that the appeal has merit. We accordingly set aside the nullification of the election and declare that the Appellant, Kabwe Taulo Chewe, was duly elected as Member of Parliament for Lubansenshi Constituency.

[148] We further set aside the Order for costs based on section 109 of the EPA and order that each party bears its own costs in this Court and in the Court below.

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M.S. Mulenga
CONSTITUTIONAL COURT JUDGE

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P. Mulonda
CONSTITUTIONAL COURT JUDGE

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M.M. Munalula J.S.D
CONSTITUTIONAL COURT JUDGE

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M. Musaluke
CONSTITUTIONAL COURT JUDGE

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J.Z. Mulongoti
CONSTITUTIONAL COURT JUDGE