

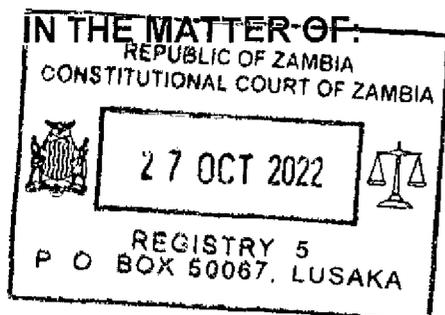
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IN THE CONSTITUTIONAL COURT

2021/CCZ/A0028

HOLDEN AT LUSAKA

(Appellate Jurisdiction)



A PARLIAMENTARY ELECTION PETITION FOR LUMEZI CONSTITUENCY NO. 46 OF DISTRICT NO. 13 LUMEZI SITUATE IN THE LUMEZI DISTRICT OF THE EASTERN PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THURSDAY 12<sup>TH</sup> AUGUST 2021

IN THE MATTER OF:

THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

ARTICLES 1, 2, 5, 8, 9, 45, 46, 47, 48, 49, 50, 54, 70, 71, 72 AND 73 OF THE CONSTITUTION OF ZAMBIA

IN THE MATTER OF:

SECTION 29, 37, 38, 51, 52, 55, 58, 59, 60, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83, 86, 87, 89, 96, 97, 100, 106, 107, 108 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF:

THE SCHEDULE TO THE ELECTORAL PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF:

THE ELECTORAL CODE OF CONDUCT (CODE OF CONDUCT), 2016

IN THE MATTER OF:

THE ELECTORAL (CODE OF CONDUCT) REGULATIONS, STATUTORY INSTRUMENT NO. 52 OF 2011

IN THE MATTER OF:

THE ELECTORAL COMMISSION OF ZAMBIA ACT NO.25 OF 2016

**BETWEEN:**

**MWANZA PILILA GETRUDE JERE** **1<sup>ST</sup> APPELLANT**

**MACDONALD PHIRI** **2<sup>ND</sup> APPELLANT**

**ZELIPA CHITSULO** **3<sup>RD</sup> APPELLANT**

**AND**

**MUNIR ZULU** **1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION OF ZAMBIA** **2<sup>ND</sup> RESPONDENT**

**CORAM: Sitali, Mulonda, Mulenga, Musaluke and Mulongoti,  
JJC. On 20<sup>th</sup> May, 2022 and 27<sup>th</sup> October, 2022.**

**For the 1<sup>st</sup> Appellant: No Appearance**

**For the 2<sup>nd</sup> Appellant: No Appearance**

**For the 3<sup>rd</sup> Appellant: Mr. B. Sitali of Messrs. Butler and  
Company Legal Practitioners**

**For the 1<sup>st</sup> Respondent: Mr. J. Ilunga and Mr. M. Zaza of Messrs.  
Ilunga and Company**

**For the 2<sup>nd</sup> Respondent: Mr. M. Bwalya – In-house Counsel**

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# J U D G M E N T

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**Musaluke, JC, delivered the Judgment of the Court**

**Cases referred to:**

1. **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General CCZ Selected Judgment No. 51 of 2018**
2. **Stephen Masumba v Elliot Kamondo CCZ Selected Judgment No. 53 of 2017**
3. **Austin C. Liato v Sitwala Sitwala CCZ Selected Judgment No. 23 of 2018**
4. **Reuben Mtofo Phiri v Lameck Mangani SCZ Judgment No. 2 of 2013**
5. **Josephat Mlewa v Eric Wightman (1995 – 1997) Z.R. 171**
6. **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela SCZ Judgment No. 15 of 2003**
7. **Belsford James Gondwe Catherine Namugala, SCZ Appeal No.129 of 2012**
8. **Richwell Siamunene v Gift Sialubalo CCZ Selected Judgment No. 58 of 2018**

9. **Margaret Mwanakatwe v Charlotte Scott and Attorney General**CCZ Selected Judgment No. 50 of 2018
10. **Mutotwe Kafwaya v Chasaya Katongo, Justine Chongo and Electoral Commission of Zambia** 2021/CCZ/A0020
11. **Jonathan Kapaipi v Newton Samakayi** CCZ Appeal No. 13 of 2017
12. **Kufuka Kufuka v Mundia Ndalamei** CCZ Appeal No. 15 of 2016
13. **Joseph Malanji v Charles Abel Mulenga and The Electoral Commission of Zambia** 2021/CCZ/A0021

**Legislation referred to:**

1. **The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by 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, Statutory Instrument No. 63 of 2016**

**Introduction and background**

1. When we sat to hear this appeal, our learned sister Lady Justice Sitali sat with us. She is currently on leave and therefore, this judgment is of the majority.

2. This is an appeal by Ms. Mwanza Pilila Getrude Jere, Mr. Macdonald Phiri and Ms. Zelipa Chitsulo (the Appellants) against the High Court Judgment delivered on 22<sup>nd</sup> November, 2021, which dismissed the Appellants' election petition and declared Mr. Munir Zulu (the 1<sup>st</sup> Respondent) as duly elected as Member of Parliament for Lumezi Constituency.
3. The brief background to this appeal is that the Appellants and the 1<sup>st</sup> Respondent were four of the eight candidates in the general elections held on 12<sup>th</sup> August, 2021, as Member of Parliament for Lumezi Constituency.
4. Ms. Mwanza Pilila Getrude Jere (the 1<sup>st</sup> Appellant) was the candidate for the Patriotic Front (PF), Mr. Macdonald Phiri (the 2<sup>nd</sup> Appellant) was the candidate for the United Party for National Development (UPND), Ms. Zelipa Chitsulo (the 3<sup>rd</sup> Appellant) and Mr. Munir Zulu (the 1<sup>st</sup> Respondent) were independent candidates.
5. The 1<sup>st</sup> Appellant received ten thousand four hundred and seventy one (10,471) votes, the 2<sup>nd</sup> Appellant received four thousand three hundred eighty six (4,386) votes, the 3<sup>rd</sup> Appellant received one thousand eighty one (1,081) votes and the 1<sup>st</sup> respondent received eleven thousand nine hundred twenty nine (11,929) votes and was

declared as the duly elected Member of Parliament for Lumezi Constituency.

6. Dissatisfied with the election results, the 1<sup>st</sup> Appellant filed a petition in the High Court against the 1<sup>st</sup> Respondent and the Electoral Commission of Zambia (the 2<sup>nd</sup> Respondent) asserting, amongst other things, that the 1<sup>st</sup> Respondent committed corrupt practices and electoral malpractices.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants also filed a separate petition in the High Court against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents alleging, *inter alia*, that the 1<sup>st</sup> Respondent did not qualify for election as a Member of Parliament on grounds that he did not possess a valid grade twelve certificate or its equivalent. Both petitions asserted that the 1<sup>st</sup> Respondent's election as Member of Parliament for Lumezi Constituency was null and void.
8. In her petition, the 1<sup>st</sup> Appellant alleged that the 1<sup>st</sup> Respondent engaged in numerous corrupt practices and electoral malpractices. She asserted that the elections for Member of Parliament for Lumezi Constituency were characterised by undue influence. In particular, the 1<sup>st</sup> Appellant alleged that:

- 8.1. During the campaign period, the 1<sup>st</sup> Respondent and his campaign team engaged in rampant bribery, distribution of money, purchasing of cement, iron sheets and other building materials for various schools, health facilities and the community at large. Specifically, that the 1<sup>st</sup> Respondent engaged in bribery in the form of donations in the following wards: Kaikumbe Ward, Wachitangachi Ward, Chamtowa Ward, Kachana Ward, Kamimba Ward and Diwa Ward. That the 1<sup>st</sup> Respondent and his campaign team delivered iron sheets, cement and other materials mostly after 18.00 hours in the evening and before dawn.
- 8.2. Three weeks before the elections, the 1<sup>st</sup> Respondent donated a Toyota Dyna motor vehicle registration No. ALM 4371 to Mr. Felix Zulu, an Independent Councilor in Lumimba Ward. That the 1<sup>st</sup> Respondent also gave a sum of K 4,000.00 to Nkanyi School in Diwa Ward and distributed sums of money to health care centers and schools.
- 8.3. The elections were marred by threats of violence and actual violence to life and property of PF members and the public. Further that the 1<sup>st</sup> Respondent and his campaign manager warned the 1<sup>st</sup> Appellant and the electorate that he had a gun

and would "*shoot and kill*" any person that benefitted from his donations but did not vote for him. The 1<sup>st</sup> Respondent also threatened that he would know who did not vote for him because he had the voter register for each ward.

8.4. The 1<sup>st</sup> Respondent and members of his campaign team verbally assaulted and abused the 1<sup>st</sup> Appellant and threatened that they would cause a "*head-on car collision*" if they met on the campaign trail. On 8<sup>th</sup> August, 2021, along the Lundazi - Chipata Road, the 1<sup>st</sup> Respondent and his campaign team nearly caused a road traffic accident by deliberately attempting to drive straight into the 1<sup>st</sup> Appellant's motor vehicle convoy. Following this near-miss, the 1<sup>st</sup> Respondent and his campaign team stopped their vehicles and made unpalatable remarks directed at the 1<sup>st</sup> Appellant before speeding off.

8.5. The 1<sup>st</sup> Respondent and his campaign team defaced the 1<sup>st</sup> Appellant's campaign materials. The 1<sup>st</sup> Appellant and her campaign team received numerous threatening messages and voice call recordings threatening serious harm if they continued to campaign in Lumezi Constituency. The threats and violent acts led to PF members and the public to fear for

their safety and forced some voters not to vote on Election Day.

8.6. Throughout the campaign period, the 1<sup>st</sup> Respondent and his campaign manager namely, Mr. Patson Chipeta used two Mitsubishi Pajero motor vehicles branded with the registration plate "ECL 2021" and distributed PF branded regalia in Lumezi Constituency. Thus, the 1<sup>st</sup> Respondent contravened guidelines issued by the 2<sup>nd</sup> Respondent to the effect that independent candidates were prohibited from campaigning for a presidential candidate of a political party and the use of a political party's campaign materials.

8.7. The 1<sup>st</sup> Respondent contravened the Electoral Process Act No. 35 of 2016 (EPA) and the Electoral Process Code of Conduct during the entire period of campaigns.

9. In their amended petition, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants alleged that he did not comply with the provisions of the Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016, (the Constitution) and the EPA. Particularly, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants alleged that:

- 9.1. The 1<sup>st</sup> Respondent and his agents distributed monetary and non-monetary materials including cement, roofing sheets, blankets, bed sheets, mealie meal, second hand clothes, bicycles, a heavy duty solar battery and a Mitsubishi Canter Registration No. ALM 4371;
  - 9.2. On 10<sup>th</sup> August, 2021, the 1<sup>st</sup> Respondent threatened the 2<sup>nd</sup> Appellant and Baldwin Chitsulo (PW19) with a gun while they were erecting campaign posters. The 1<sup>st</sup> Respondent also removed the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants' campaign posters;
  - 9.3. On 11<sup>th</sup> August, 2021, the 1<sup>st</sup> Respondent made large cash payouts and disbursed social cash transfer funds to voters in Lumezi Constituency; and
  - 9.4. The 1<sup>st</sup> Respondent did not have a grade twelve certificate and therefore, he was not a person that was qualified to be elected as a Member of Parliament for Lumezi Constituency.
10. On the basis of these allegations, the Appellants asserted that the election was not free and fair and that the corrupt practices and electoral malpractices attributed to the 1<sup>st</sup> Respondent were widespread and prevented the majority of voters in Lumezi Constituency from voting for a candidate whom they preferred.

## **The Answer**

11. In response to the consolidated petitions, the 1<sup>st</sup> Respondent filed an answer and affidavit in opposition. The affidavit was sworn by the 1<sup>st</sup> Respondent where he deposed that he conducted his campaigns in a peaceful manner and in accordance with the law governing elections. He averred that he was not aware of any irregularities or malpractices perpetrated by any of his agents before, during or after the elections. The 1<sup>st</sup> Respondent alleged that the 1<sup>st</sup> Appellant and the PF engaged in massive vote buying, corruption, bribery and other electoral malpractices in breach of the Constitution and the EPA.
12. In its combined answer to the consolidated petitions, the 2<sup>nd</sup> Respondent asserted that it had no knowledge of any electoral malpractice and therefore, the election was validly conducted.

## **Consideration of evidence and decision of the trial court**

13. The learned trial Judge, subsequently consolidated the two petitions. In the consolidated petition, the 1<sup>st</sup> Appellant was the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> Appellant was the 2<sup>nd</sup> petitioner and the 3<sup>rd</sup> Appellant was the 3<sup>rd</sup> petitioner. The 1<sup>st</sup> Respondent and the 2<sup>nd</sup>

Respondent were also the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively in the trial court.

14. At the trial of the consolidated petition, the Appellants testified as PW1, PW17 and PW18, respectively. The Appellants also called seventeen (17) other witnesses to the stand. The 1<sup>st</sup> Respondent on the other hand, testified on his own behalf and took to the stand as RW1. The 2<sup>nd</sup> Respondent called one (01) witness.

15. The learned trial Judge identified and summarized the allegations against the 1<sup>st</sup> Respondent as follows:

15.1. Bribery in the form of donations made by the 1<sup>st</sup> Respondent during the campaign period;

15.2. Use of the PF election campaign material and campaigning for the PF Presidential Candidate;

15.3. Alleged threats and acts of violence perpetrated by the 1<sup>st</sup> Respondent and his agents during the campaign period;  
and

15.4. An allegation that the 1<sup>st</sup> Respondent did not possess a full grade twelve certificate or its equivalent.

16. In respect of the allegation that the 1<sup>st</sup> Respondent committed bribery by making donations, the learned trial Judge observed that the evidence pertaining to this allegation was given by PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10, PW11, PW12, PW13 and PW14. She framed the issue to be whether or not the donations were made with the consent and full knowledge of the 1<sup>st</sup> Respondent or his electoral agents, and if so, whether the impact of the donations was so widespread that it influenced the outcome of the election.
17. The learned trial Judge found that the evidence on record showed that the 1<sup>st</sup> Respondent did not personally deliver any of the donated materials. She also found that there was no evidence to the effect that the donations were made with the knowledge and consent or approval of the 1<sup>st</sup> Respondent or his election or polling agents. She further found that the Appellants did not show, with certainty, the connection between the persons delivering the donations and the 1<sup>st</sup> Respondent.
18. The learned trial Judge reasoned that the standard of proof is not met by merely mentioning that some unknown people delivered the items and then told them that they were from the 1<sup>st</sup> Respondent. She opined that she could not be left to speculate the identity of the

people who delivered the donations or the extent of the 1<sup>st</sup> Respondent's alleged knowledge and consent or approval. She further found that the Appellants did not demonstrate that the donations were made by the 1<sup>st</sup> Respondent or his election or polling agents. The learned trial Judge concluded that the allegations that the 1<sup>st</sup> Respondent made donations that influenced the electorate to vote for him had not been proved to the required standard and that it had not been shown that the donations were so widespread that they influenced the voters in Lumezi Constituency. This allegation was therefore, dismissed.

19. Regarding the allegation that the 1<sup>st</sup> Respondent campaigned for the PF presidential candidate and used PF campaign materials, the learned trial Judge found that it was not in dispute that the 1<sup>st</sup> Respondent had two vehicles in his campaign fleet that had the registration plate "ECL 2021". She also found that it was not in dispute that the 2<sup>nd</sup> Respondent guided independent candidates that they must relinquish any political affiliation at least two months before the election. She further found that save for the two vehicles, there was no other evidence presented to show, not only that the 1<sup>st</sup> Respondent campaigned for the PF but also that he used the PF's campaign material. She found that all the witnesses were

unequivocal in their evidence that they knew that the 1<sup>st</sup> Appellant was standing on the PF ticket, therefore, even in the event that the 1<sup>st</sup> Respondent did campaign for the PF presidential candidate, there was no confusion in the minds of the electorate who stood on the PF ticket for the position of Member of Parliament. The learned trial Judge concluded that this allegation was not supported by sufficient evidence to warrant a finding that the electorate were confused as to who was standing on the PF ticket. Thus, this allegation was dismissed.

20. On the 1<sup>st</sup> Appellant's allegation that the 1<sup>st</sup> Respondent attempted to cause a head-on car collision on the Lundazi-Chipata road, causing the 1<sup>st</sup> Appellant's motor vehicle to veer off the road, the learned trial Judge observed that there was no other witness that was called to substantiate the 1<sup>st</sup> Appellant's evidence regarding this allegations of threats and actual violence. The trial Judge reasoned that evidence on record did not show that it was the 1<sup>st</sup> Respondent or his election or polling agent who was in the motor vehicle or that the attempted head-on car collision was sanctioned by the 1<sup>st</sup> Respondent or with his knowledge and consent or approval.

21. In respect of the second allegation of threats and violence, the learned trial Judge observed that the 3<sup>rd</sup> Appellant relied on the

evidence of PW19 and an exhibited photograph of the 1<sup>st</sup> Respondent holding a firearm. She reasoned that the 3<sup>rd</sup> Appellant's own evidence showed that the exhibited photograph was not contemporaneous and was not relevant to the petition. She found that the 1<sup>st</sup> and 3<sup>rd</sup> Appellants did not show the effect of the alleged threats and violence on the electorate and concluded that the conduct of the 1<sup>st</sup> Respondent was not widespread. The allegation was therefore, dismissed.

22. In regard to the allegation that the 1<sup>st</sup> Respondent did not have a grade twelve certificate or its equivalent, the learned trial Judge reasoned that the fact that the 1<sup>st</sup> Respondent was declared and duly nominated and entered on the ballot was *prima facie* evidence that he was qualified to participate in the elections. She observed that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants produced a document that suggested that the 1<sup>st</sup> Respondent acquired a grade twelve certificate one year after his birth and thus argued that he could not have taken a grade twelve exam one year after he was born and therefore his grade twelve certificate was a forgery. She also observed that the 3<sup>rd</sup> Appellant testified that she retrieved the 1<sup>st</sup> Respondent's alleged forged grade twelve certificate from a WhatsApp group. She further observed that the 1<sup>st</sup> Respondent had produced correspondence

from the Examinations Council of Zambia stating that he possessed the equivalent of a grade twelve certificate.

23. The learned trial Judge was not convinced to a fairly high degree of convincing clarity as to the authenticity of the purported grade 12 certificate produced by the 3<sup>rd</sup> Appellants. She found that the 3<sup>rd</sup> Appellant's evidence regarding the 1<sup>st</sup> Respondent's grade twelve certificate to be hearsay evidence as such she could not rely on it. She also reasoned that the 1<sup>st</sup> Respondent produced evidence that demonstrated that the Examinations Council of Zambia assessed his grade twelve certificate and issued correspondence that confirmed that he possessed the equivalent of a grade twelve certificate, which evidence was not rebutted by the Appellants.
24. Ultimately, the learned trial Judge found that the Appellants did not discharge their burden to prove the allegation that the 1<sup>st</sup> Respondent did not have a valid grade twelve certificate or its equivalent and that there were therefore, no grounds upon which the 1<sup>st</sup> Respondent's eligibility could be questioned. Thus, this allegation was dismissed.
25. The learned trial judge dismissed the Appellants' petition and found that the 1<sup>st</sup> Respondent was duly elected Member of Parliament for Lumezi Constituency.

## The Appeal

26. Aggrieved by the decision of the learned trial Judge, the Appellants appealed to this Court. In their Memorandum of Appeal, the Appellants advanced four (04) grounds of appeal as follows:

- 1) The learned trial judge misdirected herself both in law and in fact when she ruled that the allegations that the 1<sup>st</sup> Respondent's activities in the constituency influenced the electorate to vote for her has not been proven to the required standard and that there was no demonstration by the Petitioners that the donations were made by the 1<sup>st</sup> Respondent or his election or polling agents or with their knowledge.
- 2) The learned trial judge erred both in law and in fact when she held that it had not been shown that the conduct of making donations by the 1<sup>st</sup> Respondent was too widespread as to influence the voters in the constituency.
- 3) The learned trial judge misdirected herself both in law and in fact when she ruled that the fact that the 1<sup>st</sup> Respondent was declared duly nominated and was even entered on the ballot is *prima facie* evidence that he was qualified to participate in the elections.
- 4) The learned trial judge erred in law and in fact when she ruled that the 1<sup>st</sup> Respondent possessed a grade twelve certificate or its equivalent to warrant him qualify to participate in the parliamentary

election for the Lumezi Constituency when the 1<sup>st</sup> Respondent failed, refused and or neglected to rebut the Petitioners' evidence that he did not possess a grade 12 certificate.

### The 1<sup>st</sup> and 2<sup>nd</sup> Appellants' arguments

27. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants did not file any written heads of argument.

### The 3<sup>rd</sup> Appellant's arguments

28. In support of the appeal, the 3<sup>rd</sup> Appellant filed heads of argument on 21<sup>st</sup> March, 2022. At the hearing of the appeal, Counsel for the 3<sup>rd</sup> Appellant augmented the heads of argument with oral submissions. Grounds one and two were argued separately while grounds three and four were argued together.

29. In arguing ground one of the appeal, the 3<sup>rd</sup> Appellant relied on the case of **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General**<sup>1</sup> and submitted that the burden to prove the allegations against the 1<sup>st</sup> Respondent lay on the Appellants. It was submitted that there was overwhelming evidence on record of the meetings that the 1<sup>st</sup> Respondent held during the campaign period where he made promises indicating that the electorate should not vote for him if he did not deliver on the promises he made. It was argued that this presented a condition

32. Thus, the 3<sup>rd</sup> Appellant submitted that the 1<sup>st</sup> Respondent possessed the requisite knowledge and consent or approval to the donations being made as stipulated by section 97 (2) (a) (ii) of the EPA and the case of **Stephen Masumba v Elliot Kamondo**<sup>2</sup>. It was further submitted that it could not be said that the conduct of the 1<sup>st</sup> Respondent may not have influenced the outcome of the election.
33. The 3<sup>rd</sup> Appellant submitted that the conduct of the 1<sup>st</sup> Respondent amounted to bribery and as such he contravened section 81(1)(c) of the EPA which reads that:

**81. (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 endeavor to procure the return of any candidate at any election or the vote of any voter at any election;**

34. The 3<sup>rd</sup> Appellant contended that, at page J62 of the judgment, the trial Judge observed that the 1<sup>st</sup> Respondent's motor vehicle was involved in a road traffic accident on 8<sup>th</sup> August, 2021, on the Chikomani-Suzi Road, and that the 1<sup>st</sup> Respondent went to the scene of the accident as part of a rescue team and he confirmed that the motor vehicle in question was part of a fleet of vehicles used

by his campaign team. It was therefore, argued that the 1<sup>st</sup> Respondent was always aware of the acts done by his campaign team and that it was not plausible that his campaign team made donations without his consent or approval. We were urged to uphold this appeal on account that the Appellants had proved that the 1<sup>st</sup> Respondent used donations to win votes across Lumezi Constituency.

35. In arguing ground two of the appeal, the 3<sup>rd</sup> Appellant submitted that the actions of the 1<sup>st</sup> Respondent and his campaign team potentially influenced the outcome of the election. In particular, it was argued that the Appellants' failure to show the exact number of people that attended the meetings held by the 1<sup>st</sup> Respondent did not take away the risk that the 1<sup>st</sup> Respondent's conduct may have had on the electorate because all the witnesses testified that they voted for him based on the donations he made.

36. The 3<sup>rd</sup> Appellant cited the case of **Austin C. Liato v Sitwala Sitwala**<sup>3</sup> where we said that :

**It is not sufficient for a Petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented**

or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice.

37. The 3<sup>rd</sup> Appellant, therefore, argued that it was proved in the trial court that the 1<sup>st</sup> Respondent's misconduct was widespread and it prevented or may have prevented the majority of the voters in Lumezi Constituency to vote for their preferred candidate. Alternatively, the 3<sup>rd</sup> Appellant submitted that the requirement to satisfy that the misconduct was widespread does not arise in cases where bribery or corrupt practices are alleged. The 3<sup>rd</sup> Appellant referred us to the case of **Reuben Mtolo Phiri v Lameck Mangani**<sup>4</sup> where the Supreme Court stated 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. We uphold the holding by the learned trial Judge that the Appellant's conduct amounted to a corrupt or illegal practice, under section 79(1)(c) and 93(2)(c) of the Electoral Act, 2006. It warranted nullification of his election to the National Assembly.

38. The 3<sup>rd</sup> Appellant also referred us to the Supreme Court cases of **Josephat Mlewa v Eric Wightman**<sup>5</sup> and **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela**<sup>6</sup> and submitted that satisfactory proof of any one corrupt or illegal practice or misconduct in an election petition is sufficient to nullify any election. On the basis of the foregoing authorities, the 3<sup>rd</sup> Appellant argued that acts of misconduct attributed to the 1<sup>st</sup> Respondent were widespread and that alternatively, this Court must find that the 1<sup>st</sup> Respondent committed bribery which requires proof of a single act to justify the nullification of the 1<sup>st</sup> Respondent's election as Member of Parliament for Lumezi Constituency.
39. In arguing grounds three and four of the appeal, the 3<sup>rd</sup> Appellant submitted that it was a serious misdirection for the trial Judge to find that the mere successful filing in of the 1<sup>st</sup> Respondent's nomination was *prima facie* evidence of his qualification to contest the election in the absence of any legal backing. It was argued that if that were the position, the law would not provide for avenues to challenge a candidate's qualification post the election. It was argued that section 97 (2) (c) of the EPA allows that a candidate who participated in an election could be subject to challenge on the basis that at the time

of the election that person was not qualified to take part in the election or was a person disqualified for election.

40. The 3<sup>rd</sup> Appellant submitted that Article 70 of the Constitution provides that a person is eligible to be elected as a Member of Parliament if, *inter alia*, that person has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent. It was argued that the 1<sup>st</sup> Respondent failed to give a satisfactory answer as to why he had not presented his grade twelve certificate. That the learned trial Judge solely relied on a letter from the Examinations Council of Zambia as conclusive evidence of the 1<sup>st</sup> Respondent's possessing a grade twelve certificate which was a serious misdirection. It was further argued that the 1<sup>st</sup> Respondent left the trial court in doubt as to whether he has a grade twelve certificate or its equivalent.
41. The 3<sup>rd</sup> Appellant argued that the testimony of RW2 to the effect that the 2<sup>nd</sup> Respondent only received a letter from the Examinations Council of Zambia was highly misleading and a deliberate attempt to mislead the court. It was submitted that the Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016, essentially provides that an actual certified copy of a grade twelve certificate or its equivalent is required by the 2<sup>nd</sup> Respondent for

purposes of filing one's nomination for Member of Parliament. It was argued that the holding by the trial Judge that the role of the 2<sup>nd</sup> Respondent is to merely receive an affidavit without stating the nature and content of the said affidavit was a serious misdirection at law. The 3<sup>rd</sup> Appellant argued that the trial Judge ought to have gone further and considered what the affidavit demanded of the candidates, she would have arrived at a different conclusion and would not have taken the position that a mere verification letter from the Examinations Council of Zambia was *prima facie* evidence of one's eligibility. It was contended that the Appellants' duty to prove the 1<sup>st</sup> Respondent's non-possession of a grade twelve certificate or its equivalent was sufficiently discharged.

42. At the hearing of the appeal, Counsel for the Appellant submitted that the 1<sup>st</sup> Respondent did not have a grade twelve certificate or its equivalent at the time of the election, and therefore, he was not eligible to participate in the said election. Counsel argued that the finding by the trial Judge that the 1<sup>st</sup> Respondent qualified for the election on account that he had successfully filed in his nomination, was a misdirection. It was submitted therefore, that the mere fact that a nomination is successful does not preclude a candidate's election from being challenged as per section 97(2) of the EPA.

Counsel submitted that a candidate for Member of Parliament must submit a grade twelve certificate when filing a nomination, and the allegation that 1<sup>st</sup> Respondent did not do so was not rebutted before the trial Judge. Counsel urged us to uphold this appeal.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents arguments**

43. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not file any heads of argument.

### **Analysis and decision**

44. We have considered the grounds of appeal, the 3<sup>rd</sup> appellant's written and oral arguments, the authorities cited and the judgment of the trial court. It is our considered view that the main issue in this appeal is whether or not the trial Judge was on *terra firma* when she dismissed the Appellants' consolidated election petition and declared that the 1<sup>st</sup> Respondent was duly elected Member of Parliament for Lumezi Constituency.

45. Before we delve into determining this appeal, we consider it imperative that we remain mindful as to the applicable burden and standard of proof in election petitions. The burden of proof in election petitions, as in any other civil matter, lies on the petitioner. It is therefore, incumbent on the petitioner to establish the corrupt or illegal practice, electoral malpractice or misconduct alleged to the

requisite standard of proof. In several of our judgments, we have approved the view pronounced in the case of **Brelsford James Gondwe v Catherine Namugala**<sup>7</sup> where the Supreme Court stated that:

**The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove.**

46. In terms of the standard of proof in election petitions, it is trite that it is higher than the standard required in a civil matter of a mere balance of probabilities. In the case of **Austin C. Liato v Sitwala Sitwala**<sup>3</sup> we stated that:

**In the persuasive authority of *Lewanika and Others v Chiluba* the Supreme Court said this regarding the standard of proof: 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 also that the issues raised are required to be established to a fairly high degree of convincing clarity.**

47. We also consider that it is essential that we outline section 97(2) of the EPA as it provides for the grounds upon which the election of a

candidate as a Member of Parliament may be nullified or voided.

Section 97(2) of the EPA provides that:

**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 that constituency, district or ward whom they preferred;**

**(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of the elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such**

provision and that such non-compliance affected the result of the election; or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.

48. It is apparent from the grounds of appeal, that the consolidated petition before the learned trial Judge and this appeal are anchored on section 97(2) (a) and (c) of the EPA. In essence, section 97(2) (a) of the EPA entails that the election of a candidate as, *inter alia*, Member of Parliament can only be nullified if the person challenging the election proves to the satisfaction of the Court that the candidate in question personally committed a corrupt practice or illegal practice or other misconduct in relation to the election or that the corrupt practice or illegal practice or misconduct was committed by another person with the candidate's knowledge and consent or approval or that of the candidate's election or polling agent. Furthermore, it must also be proved that that the corrupt practice, illegal practice, electoral malpractice or misconduct was so widespread that it prevented or may have prevented the majority of the electorate from electing the candidate of their choice.

49. We have, on numerous occasions interpreted section 97(2) (a) of the EPA. In the case of **Nkandu Luo and Electoral Commission**

**of Zambia v Doreen Sefuke Mwamba and Attorney General<sup>1</sup> 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.**

50. We went on to add 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.**

51. Section 97(2) (c) of the EPA, on the other hand, provides a process for nullifying or voiding an election where it is proved that a candidate was not qualified to be elected or the candidate was disqualified for election as *inter alia*, Member of Parliament at the time of the election.

52. What we discern from the foregoing authorities is that, having alleged a number of electoral malpractices on the part of the 1<sup>st</sup> Respondent, the Appellants must prove to a fairly high degree of convincing clarity that:

52.1. The 1<sup>st</sup> Respondent personally or through his duly appointed election or polling agents committed the electoral malpractices alleged or that such malpractices were committed with the knowledge and consent or approval of the 1<sup>st</sup> Respondent or his appointed election or polling agents; and

52.2. The electoral malpractice was so widespread that it prevented or may have prevented the majority of the electorate in Lumezi Constituency from electing the candidate of their choice; or

52.3. The 1<sup>st</sup> Respondent was at the time of the election a person not qualified to be elected as Member of Parliament or a person disqualified for election as Member of Parliament.

53. In determining this appeal we shall consider the grounds of appeal in the order in which they were argued, that is to say, grounds one and two shall be considered separately whereas grounds three and four shall be considered together.

54. There were four main allegations that were identified and subsequently dismissed by the learned trial Judge namely, bribery in the form of donations, the wrongful use of PF campaign materials, threats and acts of violence and ineligibility to be elected as a Member of Parliament on account of a lack of a valid grade twelve certificate or its equivalent. The grounds of appeal, however, only challenge the allegations pertaining to the making of donations and ineligibility due to lack of a valid grade twelve certificate or its equivalent.
55. In particular, grounds one and two of the appeal challenge the trial Judge's findings regarding bribery in the form of donations and grounds three and four of the appeal challenge the learned trial Judges' findings regarding the alleged lack of a valid grade twelve certificate or its equivalent. The learned trial Judge's findings concerning the allegations of wrongful use of PF campaign materials and the threats and acts of violence were not challenged and therefore, do not form part of this appeal.
56. The issue, therefore for consideration in grounds one and two of the appeal is whether or not the learned trial Judge misdirected herself when she found that the allegation that the 1<sup>st</sup> Respondent committed bribery in the form of donations that influenced the

majority of the electorate in Lumezi Constituency to vote for him had not been proved to the required standard.

57. In ground one of the appeal, the 3<sup>rd</sup> Appellant contends that the 1<sup>st</sup> Respondent was the architect of a scheme under which he made donations to the electorate in return for a vote in his favour. It was argued that it was not a mere coincidence that in all wards where the 1<sup>st</sup> Respondent had previously made promises to distribute assorted materials, donations were subsequently made in line with the said promises. That, therefore, the 1<sup>st</sup> Respondent had knowledge of and consented to the donations being made. It was further argued that the donations amounted to bribery and they influenced the outcome of the election.

58. The evidence concerning the allegation of bribery in the form of donations was adduced by PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10, PW11, PW12, PW13, PW14, PW15 and PW16. The evidence of the aforementioned witnesses was identical in the sense that they all testified that the 1<sup>st</sup> Respondent held meetings in their respective Wards where he promised to donate assorted materials in exchange for their vote. The witnesses testified that other persons on behalf of the 1<sup>st</sup> Respondent delivered the assorted materials, and consequently they voted for the 1<sup>st</sup>

Respondent. It was their testimony that the 1<sup>st</sup> Respondent's donations during the campaign period influenced who they voted for at the election. None of the witnesses, however, testified that the 1<sup>st</sup> Respondent personally made the donations.

59. The learned trial Judge, found that all the witnesses who were called to testify regarding the donations confirmed that the 1<sup>st</sup> Respondent did not personally deliver any of the donated items. Thus, the learned trial Judge identified the issue to be whether the donations were made with the knowledge and consent of the 1<sup>st</sup> Respondent or by his appointed election or polling agents. The trial Judge found that the Appellants' witnesses did not adduce any evidence that identified the persons that delivered the donations. She opined that the identity of such persons was important, as it would at the very least show with certainty the connection between the persons delivering the donations and the 1<sup>st</sup> Respondent. She further opined that she could not be left to speculate the identity of the people who delivered the donations or the extent of the 1<sup>st</sup> Respondent's knowledge and consent in respect of the donations. In view of the foregoing, the learned trial Judge found that the Appellants did not demonstrate that the donations were made by the 1<sup>st</sup> Respondent

or by his appointed election or polling agents or with their knowledge and consent or approval.

60. The learned trial Judge also found that evidence concerning the numbers, precise or estimated, of the people that attended the meetings allegedly held by the 1<sup>st</sup> Respondent was not adduced by the Appellants. She reasoned that without this evidence she would be left to guess the extent of the influence of the donations on the electorate. Thus, that it was necessary for the Appellants to demonstrate, by adducing evidence, the number of people that attended the meetings held by the 1<sup>st</sup> Respondent. She opined that this evidence would allow an inference to be drawn regarding the influence of the donations on the electorate. In view of this, the trial Judge found that the allegation that the 1<sup>st</sup> Respondent's donations influenced the electorate to vote for him had not been proved to the required standard.
61. We have examined the record of appeal, we find that PW1 to PW16 all testified that the 1<sup>st</sup> Respondent held meetings in their respective Wards and he promised to make donations of mostly building materials in exchange for a vote. PW1 to PW16 all testified that shortly after the meetings aforesaid, building materials were delivered to their Wards, and that it is the donations that influenced

them to vote for the 1<sup>st</sup> Respondent. In his evidence, the 1<sup>st</sup> Respondent (RW1) testified that during the campaign period, he held meetings that were attended by about one hundred (100) people in different Wards of Lumezi Constituency. We therefore, find that it is not in dispute that the 1<sup>st</sup> Respondent convened meetings throughout the different Wards in Lumezi Constituency. It is at these meetings, that the Appellants allege that the 1<sup>st</sup> Respondent committed bribery in the form of donations and that the donations influenced the electorate to vote for the 1<sup>st</sup> Respondent.

62. The question therefore, is whether or not the 1<sup>st</sup> Respondent personally made the donations or whether they were made by the 1<sup>st</sup> Respondent's appointed election or polling agents or with his knowledge and consent or approval.

63. The record shows that, under cross examination, as shown on pages 352 and 353 of the record of appeal, PW1 testified that she saw the 1<sup>st</sup> Respondent distribute money but that she had no pictorial or video evidence that showed the 1<sup>st</sup> Respondent distributing money or building materials. On page 379 of the record of appeal, PW2 testified that he did not see the 1<sup>st</sup> Respondent distributing any money or roofing sheets. On page 384 of the record of appeal, PW3 testified that on 2<sup>nd</sup> July,

2021, cement and iron sheets were delivered to Kamusalo School in Lumezi District but he did not know the persons that delivered the cement and iron sheets. On page 384 of the record of appeal, PW4 testified that he did not see the 1<sup>st</sup> Respondent deliver cement but that the cement was delivered by people he did not know but were sent by the 1<sup>st</sup> Respondent. On pages 401 and 407 of the record of appeal, PW5 testified that iron sheets were delivered to Katope School in Lumezi District but that he did not know the people that delivered the iron sheets and he did not confirm if the iron sheets were caused to be delivered by the 1<sup>st</sup> Respondent.

64. At page 413 of the record of appeal, PW6 testified that on 8<sup>th</sup> August, 2021, bed sheets, jik (disinfectant liquid) and a battery were delivered to Wachitangachi Ward by the 1<sup>st</sup> Respondent's agents. On pages 422 and 423 of the record of appeal, PW7 testified that bed sheets, beddings and jik were delivered to Zumwanda clinic by a driver whom he did not know. On page 431 of the record of appeal, PW8 testified that on 9<sup>th</sup> August, 2021, twenty (20) bags of cement were delivered to Luamphamba School in Lumezi District by Mr. Patson Mphunda. On pages 443 and 454 of the record of appeal, PW9 and PW10 also testified that twenty (20) bags of cement were

delivered to Luamphamba School in Lumezi District by persons who they only knew to be agents of the 1<sup>st</sup> Respondent.

65. On pages 467 and 471 of the record of appeal, PW11 testified that thirty five (35) iron sheets were delivered to Chanyalubwe School in Lumezi District. It was PW11's evidence that he did not see the 1<sup>st</sup> Respondent deliver the iron sheets, neither did he know the 1<sup>st</sup> Respondent's campaign agents. On pages 481 and 484 of the record of appeal, PW12 testified that twenty (20) bags of cement were delivered to Morombo village, but he did not see the 1<sup>st</sup> Respondent delivering them and he did not know the 1<sup>st</sup> Respondent's agents. On page 491 of the record of appeal, PW13 testified that cement was delivered to Kalindi School in Lumezi District on 7<sup>th</sup> August, 2021, by people he did not know.
66. On pages 504 and 507 of the record of appeal, PW14 testified that cement was delivered to Chafisi School in Lumezi District on 7<sup>th</sup> August, 2021 by Mr. Mphunda, the 1<sup>st</sup> Respondent's campaign manager. PW14 confirmed that he did not see the 1<sup>st</sup> Respondent delivering the cement. On page 512 of the record of appeal, PW15 testified that thirty (30) iron sheets were delivered to Kasasa Community School in Lumezi District on 7<sup>th</sup> August, 2021, by people the 1<sup>st</sup> Respondent worked with. PW15 confirmed that it was

not the 1<sup>st</sup> Respondent who delivered the iron sheets. On pages 522 and 524 of the record of appeal, PW16 testified that twenty (20) iron sheets and ten (10) bags of cement were delivered to Mr. Sylvester Ngwira, the Parents Teachers Association Chairperson at Chavuma School in Lumezi District, on 11<sup>th</sup> August, 2021. PW16 confirmed that he was not present during the delivery of the iron sheets and cement and so he did not know who delivered them.

67. This evidence clearly shows that none of the witnesses testified to the effect that the 1<sup>st</sup> Respondent personally delivered the donated materials. There being no evidence that the 1<sup>st</sup> Respondent personally delivered the donated materials we find that the learned trial Judge was on firm ground when she found in her judgment at page 98 of the record of appeal that the 1<sup>st</sup> Respondent did not personally deliver any of the donated materials.

68. Under section 97(2)(a) of the EPA, an election may be annulled where it is shown that the alleged corrupt or electoral malpractice or misconduct was committed in connection with the election by a candidate's appointed election or polling agents. In this case, the next question therefore, is whether or not the 1<sup>st</sup> Respondent's appointed election or polling agents donated the materials in the various Wards of Lumezi Constituency. In their testimony, PW1 to

PW16 described the persons who delivered the donated materials as follows:

68.1. Mr. Patson Mphunda, who it was alleged was the 1<sup>st</sup> Respondent's campaign manager;

68.2. Agents and Workers of the 1<sup>st</sup> Respondent; and

68.3. Unknown persons.

69. We remain mindful of our decision in **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General**<sup>1</sup> where we stated that a candidate cannot be held liable for acts of other members of the candidate's political party or other persons who are not the candidate's election or polling agent. The exception to this, is where it is shown that the persons did so with the candidate's knowledge and approval.

70. By virtue of regulation 55 (1) of the Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016, a candidate is mandated to name an election agent in the National Assembly nomination paper (Form GEN7). Form GEN 7 is therefore, the best evidence that would prove the identity of the 1<sup>st</sup> Respondent's appointed election and polling agents.

71. A careful examination of the record of appeal shows that the Appellants did not adduce any evidence to show the identity of the 1<sup>st</sup> Respondent's appointed election agents. There is therefore, no Form GEN 7 on the record of appeal to show the 1<sup>st</sup> Respondent's appointed election or polling agents. Mr. Patson Mphunda was singled out by PW8 and PW14 as being the person who delivered the donations in their respective Wards in Lumezi Constituency. PW8 and PW14 also testified that Mr. Patson Mphunda was the 1<sup>st</sup> Respondent's campaign manager. Section 97(2) (a) (ii) of the EPA, however, restricts culpability of electoral malpractice to a candidate, his appointed election or polling agent or with their knowledge and consent or approval. In view of the foregoing, we find that, there being no proof of knowledge and consent or approval, the 1<sup>st</sup> Respondent cannot be held liable for the donations made by Mr. Patson Mphunda.

72. The other persons that were alleged to have delivered the donations, were described as agents and workers of the 1<sup>st</sup> Respondent and persons unknown to PW1 to PW16. The Appellants' evidence does not even attempt to provide the names of the said agents and workers of the 1<sup>st</sup> Respondent and the unknown persons that made the donations to the various Wards of

Lumezi Constituency. Since there was no evidence to the effect that the said unknown persons, agents and workers of the 1<sup>st</sup> Respondent were the appointed election or polling agents, the 1<sup>st</sup> Respondent cannot be held liable for the donations.

73. The next question is whether the persons that made the donations identified in the Appellants' evidence as Mr. Patson Mphunda, the purported agents and workers of the 1<sup>st</sup> Respondent and the unknown persons, made the donations with the knowledge and consent or approval of the 1<sup>st</sup> Respondent or his appointed election or polling agents.
74. The Appellants argued that the mere fact that the 1<sup>st</sup> Respondent promised to provide the various Wards of Lumezi Constituency, with assorted materials meant that he had knowledge of and consented to or approved of the donations being made.
75. In our considered view, there is a gap in the Appellants' evidence, between the making of the alleged promises by the 1<sup>st</sup> Respondent and the distribution and delivery of the donations by Mr. Patson Mphunda, the purported agents and workers of the 1<sup>st</sup> Respondent and the unknown persons. In other words, the Appellants did not demonstrate, with convincing evidence, what occurred between the time the promises were made and the time the donations were

actually distributed, that would warrant an inference that the 1<sup>st</sup> Respondent had knowledge of and consented to or approved of the donations being made.

76. It is our considered view that making an inference that there was a connection or a link between the 1<sup>st</sup> Respondent's promises and the distribution of donations by persons who were not the 1<sup>st</sup> Respondent nor his election or polling agents, in the absence of cogent evidence clearly establishing that link to a fairly high degree of convincing clarity, amounts to speculation.
77. As per our decisions in **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General**<sup>1</sup> and **Richwell Siamunene v Gift Sialubalo**<sup>8</sup> the Court will not make inferences that are based on speculation. Further, in line with our decisions in the cases of **Margaret Mwanakatwe v Charlotte Scott and Attorney General**<sup>9</sup> and **Mutotwe Kafwaya v Chasaya Katongo, Justine Chongo and Electoral Commission of Zambia**<sup>10</sup> it is not the Court's duty to fill up gaps in the Appellants' evidence.
78. We, therefore, find that the Appellants have not adduced cogent evidence to prove that the 1<sup>st</sup> Respondent had knowledge of and consented to or approved of the donations that were made by Mr.

Patson Mphunda, the purported agents and workers of the 1<sup>st</sup> Respondent and the unknown persons in various Wards of Lumezi Constituency. To this end, we cannot fault the learned trial Judge's finding that the Appellants did not demonstrate that the donations were made by the 1<sup>st</sup> Respondent or his election or polling agents or with their knowledge and consent or approval.

79. We find that the Appellants did not prove the allegation that the 1<sup>st</sup> Respondent committed bribery in the form of donations. Thus, it follows that the donations could not possibly have influenced the electorate to vote for the 1<sup>st</sup> Respondent. We therefore, find that ground one of the appeal has no merit and it is accordingly dismissed.
80. In ground two of the appeal, the 3<sup>rd</sup> Appellant contended that the learned trial Judge erred both in law and fact when she held that it had not been shown that the conduct of making donations by the 1<sup>st</sup> Respondent was so widespread as to influence the voters in the Constituency. The 3<sup>rd</sup> Appellant submitted that in making donations, the conduct of the 1<sup>st</sup> Respondent amounted to bribery and contravened section 81(1) (c) of the EPA. It was submitted that the Appellants proved that the donations were widespread.

81. In her judgment, the learned trial Judge observed that the Appellants did not adduce evidence that showed numbers of the people that attended the meetings held by the 1<sup>st</sup> Respondent. She reasoned that without this evidence the trial Court would be left to guess the extent of the influence on the electorate. She, therefore, found that the Appellants did not show that the donations alleged were so widespread so as to influence the voters in Lumezi Constituency.

82. In the case of **Jonathan Kapaipi v Newton Samakayi**<sup>11</sup> we stated that:

**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 as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a great number of registered voters were prevented or might have been prevented from electing their preferred candidate.**

83. In the present case, we have already found that the allegations of misconduct of bribery, which is a prohibited conduct, had not been proved. We find that ground two has no merit and it is accordingly dismissed.

84. We need however, to comment on the 3<sup>rd</sup> Appellant's arguments in the alternative in ground two of the appeal that proof of one single act of bribery justifies the nullification of the 1<sup>st</sup> Respondent's election as Member of Parliament for Lumezi Constituency. It was further argued that the requirement to satisfy that the misconduct was widespread does not arise in cases alleging bribery. The 3<sup>rd</sup> appellant cited the cases of **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela<sup>6</sup>** and **Josephat Mlewa v Eric Wightman<sup>5</sup>** to support his arguments.

85. In our decision in the case of **Kufuka Kufuka v Mundia Ndalamei<sup>12</sup>** we stated that:

**We wish to state that proof of one corrupt or illegal practice or misconduct by the candidate is generally enough to nullify an election only if that one act is also proved to have been so widespread or that it affected or may have affected the majority of the electorate. It is to this extent only, that the case of Josephat Mlewa v Eric Wightman is distinguishable from the current provisions of section 97(2)(a) of the Act.**

86. In light of the foregoing, we reiterate that since the coming into effect of the EPA, an election can only be nullified by satisfying two requirements under section 97 (2)(a) of the Act. Firstly, it must be proved that corrupt practice or illegal practice or misconduct was

committed by a candidate or his election or polling agents or with their knowledge and consent or approval. Secondly, after proving the first requirement, it must also be proved that the corrupt practice or illegal practice or misconduct was so widespread that it prevented or may have prevented the electorate from choosing a candidate of their choice. It is only when these two requirements are satisfied to a fairly high degree of convincing clarity that an election can be nullified or voided under section 97(2)(a) of the EPA.

87. In view of this, it is imperative for the Appellants to prove that a single act of bribery was committed and that it was so widespread that it affected or may have affected the majority of the electorate. In the absence of convincing evidence that the single act of bribery in the form of donations was widespread, we find that the 3<sup>rd</sup> Appellant's argument based on the cases of **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela<sup>6</sup>** and **Josephat Mlewa v Eric Wightman<sup>5</sup>** has no basis in light of the provisions of section 97(2) (a) of the EPA.

88. In ground three, the 3<sup>rd</sup> Appellant contended that the learned trial Judge misdirected herself when she ruled that the fact that the 1<sup>st</sup> Respondent was declared duly nominated and was even entered on the ballot is *prima facie* evidence that he was qualified to participate

in the elections. In ground four, the 3<sup>rd</sup> Appellant contended that the learned trial Judge erred in law and fact when she ruled that the 1<sup>st</sup> Respondent possessed a grade twelve certificate or its equivalent to warrant him to qualify and participate in the parliamentary election for Lumezi Constituency when the 1<sup>st</sup> Respondent failed, refused and or neglected to rebut the petitioner's evidence that he did not possess a grade twelve certificate or its equivalent.

89. The evidence concerning the 1<sup>st</sup> Respondent's possession of grade twelve certificate or its equivalent or lack thereof, was provided by PW18 (3<sup>rd</sup> Appellant), RW1 (1<sup>st</sup> Respondent) and RW2 (Michael Ngulube, the 2<sup>nd</sup> Respondent's returning officer for Lumezi District). Under cross examination, PW18 testified that the document that the 1<sup>st</sup> Respondent filed together with his nomination was a forgery and not a full grade twelve certificate. PW18 produced two documents shown at pages 219 and 221 of the record of appeal. The first document suggested that the 1<sup>st</sup> Respondent obtained an equivalent of a grade twelve certificate in 1988. The second document suggested that the 1<sup>st</sup> Respondent obtained an equivalent of a grade twelve certificate in 2009. PW18 testified that she retrieved these two documents from the 1<sup>st</sup> Respondent's facebook page and a WhatsApp group. PW18 confirmed that she

did not verify the authenticity of the two documents with the 1<sup>st</sup> Respondent or 2<sup>nd</sup> Respondent nor the Examinations Council of Zambia. PW18 further confirmed that a grade twelve certificate or its equivalent was certified by the Examinations Council of Zambia.

90. Under cross examination, the 1<sup>st</sup> Respondent (RW1) confirmed that he was born in 1987 and he completed his grade twelve in 2008 at LICEF School in Lusaka. He also confirmed that he did not produce his actual grade twelve certificate as part of his evidence. His evidence was that the Examinations Council of Zambia confirmed his grade twelve results and issued him with a letter confirming the said results. RW2 testified that the 2<sup>nd</sup> Respondent does not verify grade twelve results and that it is the Examinations Council of Zambia that verifies a candidates grade twelve results. His evidence was that the 2<sup>nd</sup> Respondent receives a letter from the Examinations Council of Zambia confirming whether or not a candidate possesses a grade twelve certificate or its equivalent for purposes of an election.

91. In her judgment, the learned trial Judge observed that the allegation that the 1<sup>st</sup> Respondent did not possess a grade twelve certificate or its equivalent was supported by documents that were obtained from Facebook and WhatsApp. She found the authenticity of the

documents obtained from Facebook and WhatsApp and produced by the 3<sup>rd</sup> Appellant to support this allegation to be highly questionable. She further found that the Examinations Council of Zambia is the institution that is charged with certification of grade twelve results and that the role of the Electoral Commission of Zambia was to receive an affidavit from a candidate and not to verify the grade twelve results presented by a candidate. The learned trial Judge reasoned that the fact that the 1<sup>st</sup> Respondent was declared duly nominated and was entered on the ballot was *prima facie* evidence that he was qualified to participate in the elections.

92. The learned trial Judge also observed that the 1<sup>st</sup> Respondent exhibited a copy of a certificate that indicated that he had retaken his mathematics exam and he had also exhibited correspondence from the Examinations Council of Zambia stating that he possessed the equivalent of grade twelve certificate and that this evidence had not been rebutted by the Appellants. She found that the evidence in support of the allegation that the 1<sup>st</sup> Respondent did not possess a grade twelve certificate or its equivalent amounted to hearsay evidence. The learned trial Judge therefore, found that the Appellants did not provide sufficient grounds upon which she could question the eligibility of the 1<sup>st</sup> Respondent.

93. We have carefully examined the record of appeal in relation to grounds three and four of the appeal. We are of the considered view that the issue for consideration in grounds three and four of the appeal is whether or not the trial Judge misdirected herself when she found that the allegation that the 1<sup>st</sup> Respondent did not possess a valid grade twelve certificate or its equivalent, was not proved to the required standard by the Appellants.
94. Ground three of the appeal attacks the finding of the learned trial Judge that the fact that the 1<sup>st</sup> Respondent was declared duly nominated and was entered on the ballot was *prima facie* evidence that he was qualified to participate in the elections. We wish to reiterate, that the burden to prove the allegation that the 1<sup>st</sup> Respondent did not possess a valid grade twelve certificate or its equivalent falls squarely on the Appellants. To put it another way, it is the obligation of the Appellants, being the parties that seek to have the allegation to be decided in their favour, to adduce cogent evidence to support their contention that the 1<sup>st</sup> Respondent did not possess a valid grade twelve certificate or its equivalent.
95. We have addressed our minds to the provisions of Article 70 (1) (d) of the Constitution and regulation 12 (2) and Form GEN 8 of the Electoral Process (General) Regulations Statutory Instrument No.

63 of 2016. We are of the considered view that where it is established as a matter of fact that a candidate is successfully nominated for election as Member of Parliament, a reasonable inference can be drawn from those established set of facts that a candidate is, *prima facie*, eligible to be elected as Member of Parliament. This, however, is an inference that is drawn on a *prima facie* basis and it is therefore, subject to challenge and can be displaced by contradictory evidence. It is for this reason that section 97(2)(c) of the EPA provides an avenue under which an election can be nullified or voided if it is proved that the candidate was at the time of the election a person not qualified or a person disqualified for election, despite that candidate having been successfully nominated for election.

96. To say, as the learned trial Judge did in this case, that a candidate who has successfully filed a nomination is *prima facie* qualified for election, simply means that a person challenging that candidate's election must adduce evidence to prove that the candidate was not qualified for election. The duty, therefore, invariably remains on the person alleging that a candidate was not qualified for election, to adduce cogent evidence to prove that allegation. Once the allegation is proved to the required standard, the inference drawn

on a *prima facie* basis disappears and an election can then be nullified or voided.

97. In the case of **Mutotwe Kafwaya v Chasaya Katongo, Justine Chongo and Electoral Commission of Zambia**<sup>10</sup> we stated as follows:

...the nullification of an election is a weighty matter and the decision to do so must be based on clear and cogent evidence to justify the nullification.

98. In the present case, the 3<sup>rd</sup> Appellant's evidence suggested that the 1<sup>st</sup> Respondent completed his grade twelve in 1988 which would have made him one (01) year old at the time of completing his grade twelve. Under cross-examination, the 3<sup>rd</sup> Appellant confirmed that she obtained the information regarding the 1<sup>st</sup> Respondent's grade twelve certificate from Facebook and WhatsApp and that she did not verify the authenticity of this information with neither the 1<sup>st</sup> and 2<sup>nd</sup> Respondents nor the Examinations Council of Zambia.

99. A closer analysis of the documents relied on by the 3<sup>rd</sup> Appellant on pages 219 and 221 of the record of appeal, only shows that the 1<sup>st</sup> Respondent's mathematics results are equivalent to the Zambian School Certificate and General Certificate of Education results. The documents aforesaid do not prove that the 1<sup>st</sup> Respondent does not

possess a valid grade twelve certificate or its equivalent and thus, do not justify the nullification 1<sup>st</sup> Respondent's election.

100. In our view, the 3<sup>rd</sup> Appellant's evidence falls short of the standard required to nullify an election on the basis of section 97 (2) (c) of the EPA. As already stated the standard required to void an election is, to a fairly high degree of convincing clarity. We are therefore, not convinced by the evidence adduced by the 3<sup>rd</sup> Appellant to prove that the 1<sup>st</sup> Respondent did not possess a grade twelve certificate or its equivalent at the time of nomination.

101. Thus, we cannot fault the learned trial Judge for finding that the fact that the 1<sup>st</sup> Respondent was successfully nominated for election was *prima facie* evidence that he was qualified to participate in the elections because the Appellants did not adduce convincing evidence to discharge their burden of proof.

102. As shown on page 228 of the record of appeal, the 1<sup>st</sup> Respondent on the other hand, exhibited a letter from the Examinations Council of Zambia and addressed to the 2<sup>nd</sup> Respondent confirming that he possessed the equivalent of a grade twelve certificate. The 1<sup>st</sup> Respondent also confirmed at page 648 of the record of appeal that he personally collected the said letter from the Examinations Council of Zambia. The letter was not challenged by the Appellants.

In our view, even assuming the evidential burden in this case shifted to the 1<sup>st</sup> Respondent to adduce evidence of the existence of his grade twelve certificate or its equivalent as we held in the case of **Joseph Malanji v Charles Abel Mulenga and The Electoral Commission of Zambia**<sup>13</sup>, he discharged his duty to the required standard in election petitions to a high degree of convincing clarity when he produced a letter from the Examinations Council of Zambia confirming that he was in possession of a qualification equivalent to the grade 12 certificate. To ask him to do more is tantamount to asking him to adduce evidence to a standard of beyond reasonable doubt which is higher than the standard of proof to a fairly high degree of convincing clarity in election petition matters. On a totality of the evidence before us, this piece of evidence is in our considered view, adequate to rebut the 3<sup>rd</sup> Appellant's allegation that the 1<sup>st</sup> Respondent did not possess a grade twelve certificate or its equivalent.

103. In light of this, the 3<sup>rd</sup> Appellant's contention that the 1<sup>st</sup> Respondent failed, refused and/or neglected to rebut the petitioner's evidence that he did not possess a grade twelve certificate is not supported by the evidence on record. This contention is therefore, without merit.

104. In view of the foregoing, we find that the learned trial Judge did not misdirect herself when she found that the allegation that the 1<sup>st</sup> Respondent did not possess a valid grade twelve certificate or its equivalent was not proved to the required standard by the Appellants. Grounds three and four of the appeal have no merit and are dismissed.

105. On the whole, we find that the learned trial Judge was on firm ground when she dismissed the Appellants' consolidated election petition and declared that the 1<sup>st</sup> Respondent was duly elected as Member of Parliament for the Lumezi Constituency.

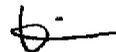
106. We therefore, dismiss the appeal and uphold the decision of the learned trial Judge to declare the 1<sup>st</sup> Respondent, Munir Zulu, as the duly elected Member of Parliament for Lumezi Constituency.

107. We order that each party shall bear their own costs of this appeal.



P. MULONDA

CONSTITUTIONAL COURT JUDGE



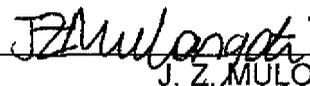
M. S. MULENGA

CONSTITUTIONAL COURT JUDGE



M. MUSALUKE

CONSTITUTIONAL COURT JUDGE



J. Z. MULONGOTI

CONSTITUTIONAL COURT JUDGE