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

**2021/CCZ/A0037**

**IN THE MATTER OF:** THE PARLIAMENTARY ELECTION PETITION  
FOR MILANZI CONSTITUENCY SITUATE IN  
THE KATETE DISTRICT IN THE EASTERN  
PROVINCE OF THE REPUBLIC OF ZAMBIA HELD  
ON 12<sup>TH</sup> AUGUST, 2021

**IN THE MATTER OF:** ARTICLE 73(1) OF THE CONSTITUTION OF  
ZAMBIA AS READ WITH SECTION 98(C) OF THE  
ELECTORAL PROCESS ACT NO.35 OF THE  
LAWS OF ZAMBIA

**IN THE MATTER OF:** SECTION 81 OF THE ELECTORAL PROCESS ACT  
NO. 35 OF 2016

**IN THE MATTER OF:** SECTIONS 83 AND 87 OF THE ELECTORAL  
PROCESS ACT NO. 35 OF 2016

**IN THE MATTER OF:** SECTIONS 97, 98 AND 99 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)  
REGULATIONS STATUTORY INSTRUMENT NO  
52 OF 2011

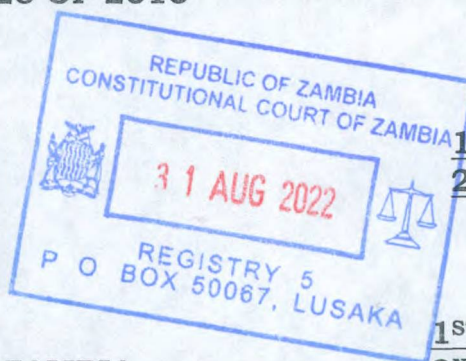
**IN THE MATTER OF:** THE ELECTORAL COMMISSION OF ZAMBIA ACT  
NO. 25 OF 2016

**BETWEEN:**

**CHRISTINE PHIRI**  
**ROSEMARY BANDA**

**AND**

**MELESIANA PHIRI**  
**ELECTORAL COMMISSION OF ZAMBIA**



**1<sup>ST</sup> APPELLANT**  
**2<sup>ND</sup> APPELLANT**

**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**

**CORAM:** Sitali, Mulenga, Mulonda, Musaluke, Chisunka, JJC on 19<sup>th</sup>  
May, 2022 and 31<sup>st</sup> August, 2022

For the Appellants	:	Miss. M. Mwiinga of James and Doris Legal Practitioners and Miss. M. Phiri of PNP Advocates
For the 1 <sup>st</sup> Respondent	:	Mr. J. Tembo and Mr. B. Mwelwa of Linus E. Eyaa and Partners
For the 2 <sup>nd</sup> Respondent	:	Ms. T. M. Phiri and Mr. M. Bwalya In-House Counsel, Electoral Commission of Zambia

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## J U D G M E N T

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Sitali JC, delivered the judgment of the Court.

Cases cited:

1. Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 Others (2013) eKLR
2. Dr Saulos Klaus Chilima, Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika and Three Others Reference No. 1 of 2019
3. Muhali George Imbuwa v Enock Kaywala Mundia Selected Judgment No.12 of 2018
4. Marcus Kapumpa Achiume v Attorney General SCZ Judgment No. 2 of 1983
5. Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and Another Selected Judgment No.51 of 2018
6. Herbert Shabula v Greyford Monde Appeal No.13 of 2016
7. Borniface Chanda Chola, Christopher Nyamonde and Nelson Sricula v The People (1989) SCZ Judgment No. 16 of 1989
8. Effisah v Ansah (2005-2006) SCGLR 943
9. Ndongo v Moses Mulyango and Roostico Banda SCZ Judgment No. 4 of 2011
10. Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014
11. Mubita Mwangala v Inonge Mutukwa Wina SCZ Appeal No.80 of 2007
12. Mazoka and Others v Mwanawasa and Others (2008) ZR 138
13. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba SCZ Judgment No. 14 of 1998
14. Mutotwe Kafwaya v Chisanga Katongo and Two Others 2021/CCZ/A0020

15. **Abuid Kawangu v Elijah Muchima CCZ Appeal No. 8 of 2017**
16. **Zulu v. Avondale Housing Project S.C.Z. Judgment 31 of 1982**

**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, section 97 (2) (a) and (b).**

**Other works cited:**

**Halsbury's Laws of England, Volume 15, 4<sup>th</sup> edition page 376 para. 700**

**[1.0] INTRODUCTION**

[1.1] This is the Appellants' appeal against the judgment of the High Court which dismissed their election petitions against the Respondents and upheld the election of the 1<sup>st</sup> Respondent as duly elected Member of Parliament for Milanzi Constituency.

**[2.0] BACKGROUND**

[2.1] The Appellants and the 1<sup>st</sup> Respondent were among seven candidates who contested for the Milanzi Constituency parliamentary elections on 12<sup>th</sup> August, 2021. The 1<sup>st</sup> Respondent who stood on the Patriotic Front (PF) ticket was declared as duly elected Member of Parliament for Milanzi Constituency having obtained 6,846 votes. The 1<sup>st</sup> Appellant who stood on the United Party for National Development (UPND) ticket was in fourth position having obtained 2,782 votes while the 2<sup>nd</sup> Appellant who stood as

an independent candidate was fifth in line having obtained 2,433 votes.

[2.2] The 1<sup>st</sup> and 2<sup>nd</sup> Appellants separately petitioned the 1<sup>st</sup> Respondent's election before the High Court alleging the commission of several electoral malpractices relating to the election. The common allegations made by the Appellants in their petitions were that Mozambican nationals were issued with Zambian national registration cards (NRCs) and were subsequently issued with voters cards and allowed to vote in the elections by the 2<sup>nd</sup> Respondent thus advantaging the 1<sup>st</sup> Respondent.

[2.3] Further, that the District Commissioner for Katete Mr Makukula (henceforth referred to as the DC) campaigned for the 1<sup>st</sup> Respondent using Government vehicle registration number GRZ 229CM and ferried Mozambican voters to vote on polling day to increase votes for the 1<sup>st</sup> Respondent; that the DC threatened farmers' cooperative officials with exclusion from distribution of fertiliser and social cash transfer if they did not vote for the 1<sup>st</sup> Respondent; and that the 1<sup>st</sup> Respondent through her agents bribed the electorate by distributing money, mealie meal, rice and cooking oil to them on polling day.

[2.4] The 2<sup>nd</sup> Appellant's other allegations against the 1<sup>st</sup> Respondent relevant to this appeal were that the 1<sup>st</sup> Respondent used insulting language against the 2<sup>nd</sup> Appellant; and through her agent, Chieftainess Kawaza, issued threats to potential voters that their land would be taken away from them if they voted for the 2<sup>nd</sup> Appellant.

[2.5] Regarding the 2<sup>nd</sup> Respondent, the Appellants alleged that it did not comply with the provisions of the Constitution and of the Electoral Process Act in the conduct of the election when it registered Mozambican nationals as voters, issued them with voters' cards; allowed them to vote at night and extended voting and counting of ballots to two days; and left ballot boxes unattended to before the verification of the official results.

[2.6] It was alleged that as a result of the illegal practices committed by the 1<sup>st</sup> Respondent and her agents, the majority of the voters in the constituency were prevented from electing their preferred candidate.

[2.7] The 1<sup>st</sup> Respondent filed an answer to the petitions and denied any wrong doing in relation to the election. The 2<sup>nd</sup> Respondent

similarly filed an answer to the petitions and maintained that it complied with the electoral laws in the conduct of the elections.

[2.8] At the trial of the petitions, the 1<sup>st</sup> Appellant testified in support of her petition as PW1 and called nine other witnesses. The 2<sup>nd</sup> Appellant also testified in support of her petition as PW11 and called thirteen other witnesses. In rebuttal, 1<sup>st</sup> Respondent testified as RW1 and called four (4) other witnesses. The 2<sup>nd</sup> Respondent called one witness – RW6.

[2.9] After considering the allegations and assessing the evidence before her, the learned trial Judge found that none of the allegations was proved to the required standard. She therefore dismissed the petitions and upheld the 1<sup>st</sup> Respondent's election as Member of Parliament for Milanzi Constituency.

[2.10] Aggrieved by that decision, the Appellants appealed to this Court advancing 26 grounds of appeal quoted verbatim as follows:

1. **The learned High Court Judge in the court below erred in both law and fact when she discounted the vital testimony of the Appellants' witnesses on all allegations on the basis that they had contradicted themselves and were lying without any proper basis for such findings and in the teeth of overwhelming evidence on the record.**
2. **The lower court erred in both law and fact when she completely disregarded the Appellants' witnesses' evidence who were members of the United Party for National Development (UPND) on the sole basis that they were partisan witnesses.**

3. The learned High Court Judge in the Court below erred both in law and fact when she held that the District Commissioner for Katete, Mr. Joseph Duma Mukukula was not an agent of the 1<sup>st</sup> Respondent contrary to overwhelming evidence on the record.
4. The learned Court below misdirected itself in both law and fact, against evidence on the record, when she held that no evidence was led in support of evidence of the allegation that the District Commissioner for Katete, Mr. Joseph Duma Mukukula was using a government vehicle registration number GRZ 229 CM on multiple occasions in campaigning for the 1<sup>st</sup> Respondent.
5. The learned High Court Judge in the Court below erred both in law and fact when she discounted the evidence of PW3, PW4, PW12 and PW23's evidence that they were Mozambican nationals who together with other Mozambican nationals whose national registration cards and voters' cards were in the voters' register tendered into evidence, obtained Zambian national registration cards and voters cards and voted in the August, 2021 elections.
6. The learned Judge in the Court below erred both in law and fact when she held that there was no link between the actions of the District Commissioner of Katete of facilitating Mozambican nationals to vote in Zambia with the 1<sup>st</sup> Respondent, contrary to evidence adduced on record.
7. The learned Judge in the Court below gravely misdirected herself in both law and fact when she held that it had not been proved that the Mozambican nationals were ferried from their villages to come and participate in the August, 2021 elections in order to inflate a favourable voter turnout for the 1<sup>st</sup> Respondent by the District Commissioner for Katete with the knowledge consent or approval of the 1<sup>st</sup> Respondent and that this affected the 2021 Milanzi election results contrary to overwhelming evidence on the record.
8. The learned Judge in the Court below misapprehended the law and the fact when she held that the 1<sup>st</sup> Appellant needed to show that the participation of alleged Mozambicans in the election affected the voting pattern in favour of the 1<sup>st</sup> Respondent in the Constituency.
9. The learned High Court Judge in the Court below erred in both law and fact when she held that the evidence of PW5 required corroboration from an independent witness to confirm or strengthen his evidence that in fact the 1<sup>st</sup> Respondent threatened at Zakonka Cooperative meeting in Kamphambe ward that those from UPND would not receive fertilizer.
10. The learned High Court Judge erred in both law and fact when she discounted evidence of PW8 regarding threats issued at Chimsitu

village by the 1<sup>st</sup> Respondent that fertilizer will be withheld from UPND members if they did not vote for her on the mere basis that she was a partisan witness whose evidence needed independent validation.

11. The learned High Court Judge in the Court below erred in both law and fact when she held that the 1<sup>st</sup> Appellant had failed to prove to the required standard of fairly high degree of convincing clarity that the 1<sup>st</sup> Respondent or her agents with her knowledge, consent or approval issued threats that social cash transfer and fertilizer would be withdrawn and that the majority of the voters were or may have been prevented to vote for a candidate of their choice, contrary to the evidence on the record.
12. The learned High Court Judge in the Court below erred in both law and fact when she held that the 1<sup>st</sup> Appellant had failed to prove that there was treating of voters after they had voted in Lunga by the 1<sup>st</sup> Respondent or her agent or that it was done with her knowledge, consent or approval contrary to evidence on record.
13. The learned High Court Judge erred both in law and fact when she held that the 1<sup>st</sup> Appellant had failed to prove the allegation that it was the 1<sup>st</sup> Respondent who was responsible for the construction of the Dole-Katawa Road.
14. The lower Court below erred in both law and fact when it held that there was insufficient evidence to prove that PW17, Paul Njovu was assaulted and forcibly caused to wear PF Regalia by individuals in the company of the 1<sup>st</sup> Respondent contrary to the evidence on record.
15. The lower Court erred in both law and fact when it discounted the evidence of PW15 and PW20 concerning their recollection of events at Chieftainess Kawaza's palace on the alleged basis that he was hesitant to answer a question and that he paused for a very long time before he could answer and that the long pause was not indicative of someone who was trying to recall events but someone caught in a web of his lies, without justifiable basis for so finding and contrary to the totality of the witness' testimony.
16. The lower Court erred in both law and fact when it discounted corroborative evidence supporting the evidence that Chieftainess Kawaza issued threats to her subjects through her headmen with the knowledge, consent and approval of the 1<sup>st</sup> Respondent that their fields would be withdrawn or repossessed if they did not vote for the 1<sup>st</sup> Respondent.
17. The learned Court below erred in both law and fact when it held that the threats by Chieftainess Kawaza had on the voters who were her

subjects had not been proven by the 2<sup>nd</sup> Appellant contrary to evidence on the record.

18. The learned Court below erred in both law and fact when she held that the allegation that the 1<sup>st</sup> Respondent acted through Chieftainess Kawaza and issued threats to the electorate had not been proven to a fairly high degree of convincing clarity as required by law contrary to evidence advanced and on the record.
19. The learned Court below erred in both law and fact when she discounted all the evidence on record to the effect that the 1<sup>st</sup> Respondent gave out money and mealie meal to the electorate during the campaign period.
20. The learned Court below erred in both law and fact when she accepted the evidence and explanation by the 1<sup>st</sup> Respondent and found that what was being distributed during the campaign period in the white bags was party regalia and not mealie meal contrary to plain evidence on the record.
21. The learned Court below erred in both law and fact when she held that the allegation that money and mealie meal were distributed on polling day had not been proved through PW20's testimony.
22. The learned Court below erred in both law and fact when she discounted PW19 and PW20's testimony to the effect that they had been given bicycles by the 1<sup>st</sup> Respondent without any justifiable basis.
23. The learned Court below erred in both law and fact when she held that the empty 50kg grain bags were used to pack campaign materials and not to be distributed to the electorate of Milanzi to induce the voters contrary to the evidence on record and the 1<sup>st</sup> Respondent's admission on oath.
24. The learned High Court Judge in the Court below erred in both law and fact when she found that the 2<sup>nd</sup> Appellant had failed to prove the allegation of bribery and corruption to a fairly high degree of convincing clarity that the 1<sup>st</sup> Respondent through her agents distributed money to voting queues and also DMMU mealie meal on voting day and throughout the campaign period, contrary to evidence on the record.
25. The lower Court erred in both law and fact when she held that the 2<sup>nd</sup> Appellant had failed to prove that the disparaging words at campaign meetings by the District Commissioner of Katete to the effect that people should not vote for the 2<sup>nd</sup> Appellant because she was old and could not perform were uttered with the knowledge, consent or approval of the 1<sup>st</sup> Respondent or that he was her agent as by law defined.

26. The learned Court below erred in both law and fact when having found that there was breach of duty by the 2<sup>nd</sup> Respondent's officer as ballot boxes at Kafumbwe Totaling Centre had been tampered with and opened before the official totaling result could be verified still held that the non-compliance with electoral rules by the 2<sup>nd</sup> Respondent affected the election result.

### **[3.0] APPELLANTS' ARGUMENTS**

[3.1] The Appellants relied on their heads of arguments filed on 21<sup>st</sup> January, 2022. Grounds one, five, six, seven and eight were argued together. The Appellants contended that the trial court was wrong when it rejected the Appellants' evidence that Mozambican nationals registered and voted in the 12<sup>th</sup> August, 2021 elections under the facilitation of the DC on account that the evidence was contradictory and contained lies.

[3.2] The Appellants contended that they had proved to the satisfaction of the trial court that persons with Mozambican identity documents registered and voted in the general elections held on 12<sup>th</sup> August, 2021; that their registration and voting was facilitated by the DC whom the 1<sup>st</sup> Respondent attended campaign meetings with where he urged Mozambican nationals to vote for her or lose the services they obtained in Zambia. That RW6 conceded that the

Mozambicans who testified in Court were in the Milanzi voters' register and voted in the elections.

[3.3] They submitted that the 2<sup>nd</sup> Respondent violated Article 46 of the Constitution and section 8(1) of the Electoral Process Act No 35 of 2016 (EPA) when it registered Mozambican nationals as voters and permitted them to vote in the election. That the participation of foreigners in the elections rendered the elections illegitimate and therefore, that they ought to be invalidated. The Appellants further submitted that the 1<sup>st</sup> Respondent benefitted from the malpractice perpetrated by the DC at various campaign meetings, including at Lunga.

[3.4] The Appellants submitted in the alternative that should we not be persuaded that there was a link between the actions of the DC and the 1<sup>st</sup> Respondent, then the participation of Mozambican nationals in the elections shows that there was non-compliance with the law in the conduct of elections. That the non-compliance affected the results of the elections which must therefore be annulled pursuant to section 97 (2) (b) of the EPA.

[3.5] The Appellants submitted that in election petitions, the Petitioner bears the burden to prove alleged irregularities, which

burden is discharged by showing how the irregularities affected the integrity of the elections. To that effect, the Appellants cited the case of **Raila Odinga and Five Others v Independent Electoral and Boundaries Commission and Three Others**<sup>[1]</sup> wherein the Supreme Court of Kenya stated, inter alia, that where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-conformity with the law, but that such non-compliance did affect the validity of the elections. That it is on this basis that the respondent bears the burden of proving the contrary. They further cited the case of **Dr Saulos Klaus Chilima, Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika and Three Others**<sup>[2]</sup> wherein the High Court of Malawi held that the legal burden to prove the allegations in the petition before them lay on the petitioners.

[3.6] The Appellants contended that the 1<sup>st</sup> Respondent did not rebut the allegation that Mozambicans voted but contended that she was not a candidate in the election at the time the Mozambicans were registered as voters and that the DC was not her election agent. That she did not distance herself when the DC told the Mozambicans that if they did not vote for her, the social and

economic services they procured from Zambia would be withdrawn.

[3.7] The Appellants relied on the testimony of PW2 who testified that he was recruited by the DC to help Mozambican nationals to obtain NRCs. They also highlighted the evidence of PW3 and PW4 who testified that they were Mozambican nationals who voted in the elections in Zambia and that they attended campaign meetings addressed by the 1<sup>st</sup> Respondent and the DC at Chimsitu Village in Lunga where Mozambicans were threatened that they would not be allowed to access education and medical services in Zambia if they did not vote for the 1<sup>st</sup> Respondent.

[3.8] The Appellants further argued that PW3 and PW4 gave a plausible explanation of why the names and dates of birth on the Zambian documents they relied on were different from those on the Mozambican identity cards. It was submitted that the voters' register tendered into evidence by RW6 corroborated the evidence of PW2, PW3 and PW4. That since the names of PW3 and PW4 appeared on the voters' register, it was not disputed that they voted.

[3.9] Further, that PW12's evidence corroborated the testimony of PW2, PW3 and PW4 as he testified that he was ferried from

Mozambique, together with other Mozambicans in a vehicle sent to them by the DC and that he voted at Lunga polling station. That similarly PW23, testified that he registered and voted in the August 2021 elections and explained why there was a variance between his names on the Mozambican identity documents he said were his documents and those on the Zambian voter's card.

[3.10] It was submitted that the 2<sup>nd</sup> Respondent's witness RW6 who was the returning officer for Milanzi Constituency testified that the Mozambicans whose identity cards appeared in the bundle of documents before the lower court were also in the voters' register which was admitted in evidence.

[3.11] They submitted that the court below disbelieved PW3 on the basis that he did not bring his NRC to court, and held that PW4 was a Zambian living in Mozambican when there was no such evidence on record. That the lower court neglected to examine the evidence that the details of PW3 and PW4 were on the voter's register which fact was evidence that both witnesses had national registration cards.

[3.12] The Appellants urged us to take a different position from that taken by the trial court regarding the credibility of PW2, PW3

and PW4 and cited the case of **Muhali George Imbuwa v Enock Kaywala Mundia**<sup>[3]</sup> as authority for that proposal. The Appellants cited the case of **Marcus Kampamba Achiume v Attorney General**<sup>[4]</sup> as authority for their submission that we can reverse the trial court's findings of fact. The Appellants urged us to uphold grounds one, five, six, seven and eight of the appeal.

[3.13] In arguing grounds three and four, the Appellant submitted that these grounds address the centrality of the role of the DC in the election of the 1<sup>st</sup> Respondent. They argued that we must construe the DC's activities as being those of an agent because that was what he constructively and apparently was.

[3.14] The Appellants submitted that they were alive to what we said in the case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and Another**<sup>[5]</sup> that not everyone in one's political party is one's election agent since an election agent must be specifically so appointed by a candidate in the candidate's nomination paper for the purpose of that election as stated in section 2 of the EPA and regulation 55(1) of the Electoral Process (General) Regulations Statutory Instrument No. 60 of 2016. They however, argued that the restriction and narrowing of the

scope of who an election agent is does not do justice to this matter. That while they agreed that not everyone in a candidates' political party is a candidate's agent, there are individuals who may not be specifically named in a candidate's nomination paper but who still play a pivotal role in canvassing for votes for a candidate. That the 1<sup>st</sup> Respondent's nomination papers in the record of appeal reveal that she only had one election agent, namely Jackson Banda whom none of the witnesses accused of any wrong doing during the campaign period.

[3.15] The Appellants submitted that the learned authors of **Halsbury's Laws of England**, Volume 15, 4<sup>th</sup> edition, in paragraph 700 at page 376 widen the scope of an agent when they state that:

**"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".**

[3.16] The Appellants submitted that the record is awash with evidence that the DC actively canvassed for votes for the 1<sup>st</sup> Respondent.

[3.17] That the witnesses from Mozambique testified that when the said DC threatened to stop them from accessing services from

Zambia if they did not vote for the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent did not dissociate herself from his utterances.

[3.18] The Appellants argued that this brought the 1<sup>st</sup> Respondent's inaction within the purview of this Court's holding in the case of **Herbert Shabula v Greyford Monde**<sup>(6)</sup>.

[3.19] That the Mozambicans also testified that the said DC facilitated their registration as voters and their coming to Zambia to vote on 12<sup>th</sup> August, 2021. The Appellants therefore, contended that in the circumstances, the court cannot dismiss the said DC's actions on the ground that he was not the 1<sup>st</sup> Respondent's agent.

[3.20] The Appellants contended that the 1<sup>st</sup> Respondent did not rebut the evidence placing her at campaign events with the DC. The Appellants therefore urged us to uphold grounds three and four of the appeal.

[3.21] In arguing grounds two, nine and ten, the Appellants contended that the court below discounted cogent evidence adduced by witnesses on the sole basis that they were members of the UPND.

[3.22] They submitted that although they were alive to jurisprudence that the testimony of members of a political party is

to be accorded little weight because of its partisan nature, in this case, the court did not make a finding of fact that the witnesses who presented themselves as members of the UPND were untruthful in material respects. That since the court below did not find the witnesses to be untruthful, it could not discount the testimony of PW5 that the 1<sup>st</sup> Respondent threatened UPND members that they would not receive fertilizer even though they were members of Zakonka Cooperative.

[3.23] Further, that the testimony of PW8 that the 1<sup>st</sup> Respondent issued threats at Chimsitu Village that UPND members would not receive fertilizer if they did not vote for her was not untruthful and therefore could not be excluded from consideration. In support, the Appellants cited the persuasive case of **Borniface Chanda Chola and Others v The People**<sup>(7)</sup> and urged us to uphold grounds two, nine and ten.

[3.24] Grounds fifteen, sixteen, seventeen and eighteen relate to the Appellants' contention that a traditional authority canvassed for votes for the 1<sup>st</sup> Respondent by issuing threats to headmen and their subjects that she would repossess their land if they did not vote for the 1<sup>st</sup> Respondent.

[3.25] In arguing these grounds, the Appellants referred to the evidence of PW11, PW13, PW15, PW16, PW19, PW20 and PW23 to the effect that Chieftainess Kawaza instructed the headmen under her jurisdiction to inform their subjects in the villages across the constituency that they should vote for the 1<sup>st</sup> Respondent and threatened that if they failed to do so, she would repossess their land and fields.

[3.26] That to demonstrate the widespread nature of the illegality, PW20 (headman Motseni) informed the court that he had about 600 people in his village while PW24 also testified that he was the chairman of Chadaka farms which had a similar number. The Appellants contended that Chieftainess Kawaza by her actions exerted undue influence on the voters contrary to section 83(1) (a), (b) and (c) of the EPA.

[3.27] It was submitted that the headmen were credible independent witnesses with no discernible interest to serve and that their testimony corroborated each other on the aspect of meetings being called by the chieftainess at her palace. That they all testified that she threatened to grab their land; and that she directed that her threats should be communicated to the electorate. That the 1<sup>st</sup>

Respondent was present at some of the meetings at her palace when headmen were threatened.

[3.28] The Appellants contended that the minor discrepancies in the testimony of the witnesses regarding the number of times the meetings were held at the palace and the number of times the 1<sup>st</sup> Respondent was in attendance could be attributed to a genuine failure of memory to recall the exact times and could not invalidate the entire testimony of the witnesses. The Appellants cited the Ghanaian case of **Effisah v Ansah**<sup>(8)</sup> and the case of **Ndongo v Moses Mulyango and Roostico Banda**<sup>(9)</sup> to press the point that inconsistencies cannot be the basis for discarding or disbelieving a witness' evidence when there is other evidence to support the facts in issue.

[3.29] They contended that the 1<sup>st</sup> Respondent and her witnesses RW5 and RW4 failed to successfully rebut the testimony of the headmen and that of PW11 on the meetings convened at the palace and the threats issued.

[3.30] The Appellants contended that they had shown that the illegality perpetrated by Chieftainess Kawaza with the consent of the 1<sup>st</sup> Respondent, who was present at several meetings, was

widespread as the headmen came from all the villages in the chiefdom covering 10 of the 12 wards in the Constituency. They cited the case of **Saul Zulu v Victoria Kalima**<sup>(10)</sup> to support their submission that a petitioner is only expected to show that the corrupt or illegal practice was committed on a large scale so as to affect the majority of voters from voting for their preferred candidate. The Appellants urged us to uphold grounds fifteen, sixteen, seventeen and eighteen.

[3.31] Grounds nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four relate to the allegation that the 1<sup>st</sup> Respondent gave money and distributed mealie meal to the electorate during the campaign period and on polling day. The Appellants submitted that the evidence on record proved that the 1<sup>st</sup> Respondent gave money to the electorate at meetings and to several headmen, such as headman Mtoseni who was given K100 on polling day; that she distributed Disaster Management and Mitigation Unit (DMMU) mealie meal, the remainder of which was tendered in evidence that she distributed empty 50kg grain bags branded "vote for Edgar Chagwa Lungu" to voters and bicycles, mainly to headmen, as well as meat and heads of cabbage.

[3.32] That the DC supplied foodstuff to PW2 and to headmen to cook for voters from Mozambique. That the acts of bribery perpetrated by the 1<sup>st</sup> Respondent were widespread and were sustained throughout the campaign period. The Appellants submitted that the said acts are proscribed by section 81(1) and 2 of the EPA. The case of **Mubita Mwangala v Inonge Mutukwa Wina**<sup>(11)</sup> was cited in support of the submission that an election can be declared void on proof that a corrupt or illegal practice or other misconduct was widespread in the constituency and that the majority of the voters in a constituency were or may have been prevented from electing the candidate they preferred. It was submitted that the 1<sup>st</sup> Respondent failed to rebut the allegations of bribery and only offered bare denials. The Appellants urged us to uphold these six grounds of appeal.

[3.33] In arguing ground twenty five relating to the allegation that disparaging remarks were uttered against the 2<sup>nd</sup> Appellant, the Appellants submitted that the DC and Allan Mvula uttered disparaging remarks and vilified the 2<sup>nd</sup> Appellant. That the 2<sup>nd</sup> Appellant (as PW11) testified that she was referred to as an old woman who could not give birth, and likened to a finished old bone

which was only fit to be thrown away onto a rubbish dump site, and that a song was composed to that effect.

[3.34] That PW12 testified that the character assassination was perpetrated at a meeting at Chimsitu Village where the DC likened the 1<sup>st</sup> Respondent to a beautiful young cow that could give birth unlike older ones. That PW15 corroborated the testimony of PW11 and PW12. It was submitted that the 1<sup>st</sup> Respondent was present at the meetings where the disparaging remarks were uttered but that she did not dissociate herself from them. That she was therefore accountable for the illegal practice as held in the case of **Herbert Shabula v Greyford Monde**<sup>(6)</sup>. They urged us to uphold ground twenty five.

[3.35] The Appellants submitted that the appeal should be upheld and the election of the 1<sup>st</sup> Respondent declared void.

[3.36] At the hearing of the appeal, Counsel for the Appellants essentially repeated the arguments canvassed in the heads of argument. We will, therefore, not restate the oral arguments.

#### **[4.0] 1<sup>ST</sup> RESPONDENT'S ARGUMENTS**

[4.1] In opposing grounds one, five, six, seven and eight of the appeal, the 1<sup>st</sup> Respondent submitted that the court below was right to reject the evidence of PW2, PW3, PW4, PW12 and PW23 as it did not prove that Mozambican nationals registered and voted in the 12<sup>th</sup> August, 2021 elections under facilitation of the DC to a fairly high degree of convincing clarity. She contended that the lower Court cannot be faulted for discounting the Appellants' witnesses' evidence on that allegation as it was contradictory and contained lies.

[4.2] It was contended that even if the Court were to find that Mozambican nationals registered and voted in the general elections facilitated by the DC, the said DC was not the 1<sup>st</sup> Respondent's agent. The 1<sup>st</sup> Respondent argued that PW12 did not produce any document in the lower court to prove that he was a Mozambican national and that he conceded in cross examination that there were twenty Zambian families in Daison Village in Mozambique where he was the headman and that his wife was a Zambian who came to vote in the 12<sup>th</sup> August, 2021 general elections.

[4.3] That PW23 testified that he knew all the Mozambicans appearing on pages 586 to 598 of volume two of the record of appeal as they came from the same village as him and that he obtained NRCs with them from Zambia on the same day in 2020. The 1<sup>st</sup> Respondent observed that most of the NRCs appearing on page 586 to 598 of volume two of the record of appeal were actually obtained in 2001, 2006, 2009 and 2015. That PW23 was therefore found to have lied on oath. It was submitted that the Appellants failed to prove the alleged electoral malpractice to a fairly high degree of convincing clarity as required in an election petition. Counsel cited several cases including **Mazoka and Others v Mwanawasa and Others**<sup>(12)</sup> as authority on the standard of proof required in an election petition.

[4.4] It was submitted that the DC was not the 1<sup>st</sup> Respondent's agent and it is well settled that an election agent of a candidate is the person who has been specified in the candidate's nomination paper in accordance with section 2 of the EPA. That in this case, the 1<sup>st</sup> Respondent's only election agent was Jackson Banda as shown on page 664, volume two of the record of appeal. Further, that she did not consent to the actions or conduct of DC during the

2021 general elections. The cases of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba**<sup>(13)</sup> and **Nkandu Luo (Prof) and ECZ v Doreen Sefuke Mwamba and Attorney General**<sup>(5)</sup> were cited as authority for the submission that a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent, and that not everyone in one's political party is one's election agent.

[4.5] Regarding the credibility of the witnesses, the 1<sup>st</sup> Respondent submitted that the court below was properly entitled to reach the conclusion that she did. She cited the case of **Mutotwe Kafwaya v Chisanga Katongo and Two Others**<sup>(14)</sup> wherein we said that the trial court is entitled to determine a matter based on the credibility of the witnesses and to make findings of facts based on evidence before it. That the judge clearly analysed the evidence of PW3 and PW4 under these grounds of appeal on pages 230 to 237 of volume 1 of the record of appeal and stated why she could not rely on their evidence.

[4.6] It was contended that the 1<sup>st</sup> Appellant and PW2 were partisan witnesses and that their evidence therefore, required corroboration. That PW3 and PW4 were found not to be credible witnesses and

could therefore, not corroborate the evidence of PW1 and PW2 that Mozambicans obtained NRC's in 2020.

[4.7] That more importantly, there was no evidence that the 1<sup>st</sup> Respondent consented to the DC's alleged conduct. We were urged to dismiss grounds one, five, six, seven and eight for lack of merit.

[4.8] In opposing grounds three and four, the 1<sup>st</sup> Respondent urged us not to construe the DC's actions as being those of an agent and argued that to widen the scope of who an election agent is as proposed by the Appellants would amount to this Court enacting the law as opposed to interpreting the law. She reiterated her submissions that the Katete District Commissioner was not the 1<sup>st</sup> Respondent's election agent and Counsel therefore prayed that grounds three and four be dismissed for lack of merit.

[4.9] In opposing grounds two, nine and ten, the 1<sup>st</sup> Respondent submitted that the court below made a finding of fact that PW5 and PW8 were members of the UPND, and therefore, their evidence required corroboration. That PW5 admitted at page 1075 of volume three of the record of appeal that he was a UPND Member while PW8 admitted at page 1111 of the same record of appeal that she was a member of the UPND. It was contended that the lower court

cannot be faulted for requiring corroboration of the two witnesses who could have a motive to lie or exaggerate. That PW18 lied on oath that he was Village headman Changuluka and the truth came out when village headman Changuluka (RW3) came to testify on behalf of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent submitted that the trial court was on firm ground to attach little weight to the evidence of these witnesses. She prayed that grounds two, nine and ten be dismissed for lack of merit.

[4.10] In opposing grounds fifteen, sixteen, seventeen and eighteen, the 1<sup>st</sup> Respondent submitted that the evidence of PW11 and PW13 was hearsay as it was based on what they were told by alleged village headmen.

[4.11] Further, that the evidence of PW15, PW16, PW19, PW20 and PW24 was contradictory and none of them produced a village register before the court to prove that they were indeed village Headmen as per section 3(2) of the Registration and Development of Villages Act, Chapter 289 of the Laws of Zambia.

[4.12] Furthermore, that it is trite that where there are inconsistencies in the evidence of witnesses, the weight to be attached to such evidence is reduced as we held in the case of

**Abuid Kawanga v Elijah Muchima<sup>(15)</sup>**. It was submitted that at pages 309 to 320 of volume one of the record of appeal the trial judge clearly analyzed the evidence of PW15 and PW20 which was full of inconsistencies and gave reasons why she doubted their evidence based on their demeanor. That the learned trial Judge was properly entitled to do so as a trial court. The 1<sup>st</sup> Respondent urged us to dismiss grounds fifteen, sixteen, seventeen and eighteen.

[4.13] In opposing grounds nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four relating to allegations that the 1<sup>st</sup> Respondent gave money and mealie meal to the electorate during the campaign period and on poll day and bicycles to PW19 and PW20 it was submitted that the record reveals that no evidence to support those allegations was adduced by the Appellants at trial. That PW13 told the trial court that no mealie meal was ever distributed by the 1<sup>st</sup> Respondent and that PW20 gave contradictory evidence regarding the date on which he was allegedly given K100 by the 1<sup>st</sup> Respondent.

[4.14] The 1<sup>st</sup> Respondent therefore, prayed that grounds nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four be dismissed for lack of merit.

[4.15] In opposing ground twenty-five the 1<sup>st</sup> Respondent submitted that there was no evidence adduced to connect the 1<sup>st</sup> Respondent or her agent to the utterance of any disparaging words against the 2<sup>nd</sup> Appellant. She therefore prayed that ground twenty-five be dismissed.

[4.16] The 1<sup>st</sup> Respondent submitted that the Appellants did not proffer any arguments in support of grounds eleven, twelve, thirteen and fourteen of the appeal in their heads of arguments. That she would therefore, not offer any arguments in rebuttal. She therefore, prayed that the four grounds be dismissed.

[4.17] In conclusion, the 1<sup>st</sup> Respondent submitted that overall, the evidence adduced by the Appellants in the court below did not prove the allegations to the required standard of proof nor did it prove that the alleged wrong doing was widespread and that it did or may have influenced the majority of the voters not to vote for their preferred candidate. That we should therefore, uphold the

lower court's declaration that the 1<sup>st</sup> Respondent was validly elected and dismiss the appeal.

[4.18] At the hearing of the appeal, Counsel for the 1<sup>st</sup> Respondent also essentially reiterated the arguments in the heads of argument. We will therefore, not set them out here.

#### **[5.0] 2<sup>ND</sup> RESPONDENT'S ARGUMENTS**

[5.1] In its brief heads of argument filed on 4<sup>th</sup> March, 2022, the 2<sup>nd</sup> Respondent begun by submitting that the standard of proof in an election petition, although it is a civil matter, is higher than on a balance of probabilities and that the Supreme Court in the case of **Saul Zulu v Victoria Kalima**<sup>(10)</sup> held that allegations in an election petition are required to be proved to a fairly high degree of convincing clarity.

[5.2] That this court held in the case of **Nkandu Luo and Another v Doreen Sefuke Mwamba and Another**<sup>(5)</sup> that before an election can be nullified, two thresholds must be surmounted. The first being that the malpractice complained of must be proven to have been committed by the candidate or the candidate's election or polling agent or with the knowledge and consent or approval of the candidate and secondly, that the malpractice was so widespread

that it swayed or may have swayed the majority of the electorate from electing their preferred candidate.

[5.3] That regarding the burden of proof, this Court in the case of **Abuid Kawangu v Elijah Muchima**<sup>(15)</sup> held that the person alleging must prove the allegations to the required standard with cogent evidence otherwise judgment will not be entered in his favour.

[5.4] It was submitted that the 2<sup>nd</sup> Respondent duly conducted the elections in substantial conformity with the law and that the appeal should be dismissed and the election upheld.

[5.5] At the hearing of the appeal, Counsel for the 2<sup>nd</sup> Respondent relied entirely on the heads of argument and did not make any oral submissions.

#### **[6.0] EVALUATION AND DECISION**

[6.1] We have considered the grounds of appeal, the heads of argument and the authorities cited therein as well as the judgment of the lower court.

[6.2] Before we consider the appeal, we reiterate that section 97 (2) of the EPA stipulates the grounds on which the election of a candidate may be declared void. In terms of section 97 (2) (a) of the Act, the election of a candidate can only be nullified if the petitioner

proves to the satisfaction of the Court that the candidate personally committed a corrupt or illegal practice or other misconduct in relation to the election or that the corrupt or illegal practice or misconduct was committed by another person with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent. A petitioner must further prove that as a result of the corrupt or illegal practice or misconduct complained of, the majority of the voters were or may have been prevented from electing the candidate whom they preferred.

[6.3] Under section 97 (2) (b) of the EPA, the election of a candidate may be nullified if it is proved to the satisfaction of the Court that the provisions of the Act were not complied with in the conduct of an election and that as a result of the non-compliance, the results of the elections were affected.

[6.4] Further, the petitioner bears the burden to prove the allegations in an election petition to a fairly high degree of convincing clarity, if an election petition is to succeed. Bearing in mind the requirements of the law, we turn to consider the grounds of appeal.

[6.5] In grounds one, five, six, seven and eight the Appellants challenge the lower court's decision to discount the evidence of PW3, PW4, PW12 and PW23 that they were Mozambican nationals who obtained Zambian national registration cards and voters cards and voted in the August, 2021 elections. They further challenged the lower court's finding that there was no evidence that the DC facilitated for Mozambicans to vote in Zambia or that he provided transport for them to come and vote with the knowledge and consent or approval of the 1<sup>st</sup> Respondent. They contended that there was ample evidence on the record that the 1<sup>st</sup> Respondent was aware of the DC's actions and that she did not distance herself from his actions.

[6.6] In the alternative, the Appellants contended that if we are not persuaded that there was a link between the DC's actions and the 1<sup>st</sup> Respondent, then the fact that Mozambican nationals voted in the election demonstrates that there was non-compliance with the law in the conduct of the elections. That the non-compliance affected the results of the elections and warrants the nullification of the election under section 97(2)(b) of the EPA.

[6.7] The 1<sup>st</sup> Respondent on the other hand submitted that the lower court was right to disregard the Appellants' witnesses' evidence as it did not prove to the required standard that Mozambicans were registered as voters and voted in the August, 2021 elections. Further, that the DC was not her agent and that PW12 admitted that Daison village in Mozambique had many Zambian families living there while PW23 was found to have lied on oath as he later admitted that his father was a Zambian.

[6.8] We have considered the parties' submissions on these grounds. We wish to state at the outset that the Appellants in these grounds challenged the lower court's findings of fact and asked us to overturn them. It is settled law that as an appellate Court, we will not easily overturn or interfere with the findings of fact made by a trial court which had the benefit of seeing the demeanor of the witnesses and evaluating their evidence. We can only do so if it is shown that the findings of facts were either perverse or were made in the absence of relevant evidence or were premised on a misapprehension of facts or were findings which could not have been made by a trial court correctly directing itself and on a proper

evaluation of evidence as was held in **Zulu v Avondale Housing Project**<sup>[16]</sup>.

[6.9] With that said, the issue we have to determine under these grounds is whether the evidence adduced by PW2, PW3, PW4, PW12 and PW23 proved the allegation that the 2<sup>nd</sup> Respondent registered Mozambican nationals as voters and issued them with voters' cards thus enabling them to vote in the August 2021 elections.

[6.10] In determining this issue, we have examined the evidence of PW2, PW3, PW4, PW12 and PW23 on the record of appeal. We note that whereas PW2 said he was a PF member who was approached by the DC to assist Mozambican nationals to obtain national registration cards so that they could register to vote in the August 2021 elections, and that he did so, PW2 did not tell the lower court at which place the alleged Mozambican nationals obtained the said national registration cards. He also did not state the dates on which the national registration cards were issued to the Mozambican nationals as he alleged.

[6.11] We further note that although he said he assisted Mozambican nationals to obtain NRCs, he admitted that he was not

present when they allegedly registered as voters and obtained their voters cards. His testimony therefore, did not assist the 1<sup>st</sup> Appellant to prove that Mozambican nationals voted in the August 2021 elections.

[6.12] Regarding PW3 and PW4, who said they were Mozambican nationals who obtained NRCs and voters cards and voted in elections held in Zambia in August, 2021, the two witnesses relied on documents which they said were their Mozambican voters cards and Zambian voters cards. We note that the documents which they *said were* their Mozambican voters' cards were written in a foreign language. PW3 and PW4 did not produce any translated documents to prove to the lower Court that the documents were their Mozambican voters cards as they alleged. More significantly however, we note that the names and dates of birth on the two sets of documents are different. The document on page 554 of volume 2 of the record of appeal which PW3 said was his Mozambican voters card bears the name Lumphani Amerco Lumphani. The date of birth is stated as 22<sup>nd</sup> July, 1983. The document on pages 568 and 569 of the same record which he claims to be his Zambian voters

card bears the name Yohane Phiri with date of birth stated as 14<sup>th</sup> September, 1991.

[6.13] As for PW4, the document which he said was his Mozambican voters card bears the name Liyaya Wilissone Liyaya with date of birth stated as 22<sup>nd</sup> October, 1999. The Zambian voters card on pages 576 and 577 of volume 2 of the record of appeal bears the name Liyaya Phiri and 3<sup>rd</sup> February, 1998 as the date of birth. Neither PW3 nor PW4 produced the NRCs which they said they obtained in 2020.

[6.14] In our view although the names Yohane Phiri and Liyaya Phiri were in the voters register for Milanzi Constituency produced by RW6, that did not prove that Mozambican nationals voted in the elections, as argued by the Appellants, as both names are Zambian names. And as we already stated, PW3 and PW4 did not produce the NRCs which they allegedly obtained in 2020 and which would have been the basis for obtaining Zambian voters' cards.

[6.15] PW12 who said he was the headman of Daison village in Mozambique and that he was a Mozambican national did not produce any document in the lower court to prove that he was a Mozambican national who voted in the August 2021 elections.

Similarly, PW23 alleged that he was a Mozambican national and produced documents which did not assist him to prove his claims because the names on his alleged Mozambican card and the Zambian voters' card were different. Further, his testimony was discredited in cross examination when it was shown that the people whom he said were Mozambican nationals who were issued with NRCs together with him in 2020 actually obtained their NRCs in 2015, 2009, 2006 and 2001, respectively as evidenced by the NRCs set out on pages 588, 591, 594, 595, 596 and 597 of volume two of the record of appeal.

[6.16] Given the disparities in the names and dates of birth stated in the alleged Mozambican voters card and the Zambian voters cards on which PW3, PW4 and PW23 relied, we cannot fault the trial court for rejecting the documents as proof that Mozambican nationals were registered as voters and voted in the elections. It is settled law that a trial court is entitled to make findings of fact based on the evidence before it having seen and heard the witnesses giving evidence. We therefore, cannot fault the trial court for rejecting the evidence of PW2, PW3 PW4, PW12 and PW23

having had the opportunity to observe the witnesses as they testified before her.

[6.17] We find no evidence on record to prove that Mozambican nationals were registered as voters and voted in the 12<sup>th</sup> August, 2021 elections. There is further no evidence that the said Mozambicans voted at night or that the 1<sup>st</sup> Respondent was involved in ferrying Mozambicans to vote on polling date. Grounds one, five, six, seven and eight therefore lack merit and are dismissed.

[6.18] Grounds three and four relate to the 1<sup>st</sup> Appellant's assertion in her petition that the DC campaigned for the 1<sup>st</sup> Respondent using government vehicles throughout the campaign period and that he facilitated the ferrying of Mozambican nationals on trucks to enable them to vote in the 12<sup>th</sup> August, 2021 elections; and the 2<sup>nd</sup> Appellant's allegation that the said DC campaigned for the 1<sup>st</sup> Respondent using vehicle registration number GRZ 229 CM.

[6.19] In support of these grounds, the Appellants conceded that not everyone in one's political party is one's election agent as we held in the **Nkandu Luo**<sup>[5]</sup> case, and that section 2 of the EPA and regulation 55(1) of the Regulations clearly define who an election agent is. The Appellants however, argued that although the DC was

not named as the 1<sup>st</sup> Respondent's election agent in her nomination papers, his actions must nonetheless be taken to be those of an election agent as he actively canvassed for her votes.

[6.20] In rebuttal of the two grounds, the 1<sup>st</sup> Respondent reiterated that the DC was not her election agent; and further that we cannot accept the Appellants' arguments that the DC must be taken to be her election agent despite the definition of an election agent stated in section 2 of the EPA and in regulation 55(1) of the Regulations, as to do so would entail that we would be enacting the law as opposed to interpreting it.

[6.21] Our short response to the Appellants' arguments on grounds three and four is that the provisions of section 2 of the EPA and regulation 55(1) of the Regulations to the effect that an election agent is a person named as such by a candidate in the nomination paper are clear and unambiguous. Thus, the Appellants' reference to the observations of the learned authors of Halsbury's Laws of England on a canvasser is misplaced. Further, their argument that the definition should be extended to the actions of the DC so that he is taken to be the 1<sup>st</sup> Respondent's agent is untenable for two reasons. Firstly, the evidence on record does not reveal that the DC

was the 1<sup>st</sup> Respondent's agent as the lower court found and we agree with her. Secondly, the law is categorical that an election agent must be specifically named as such in a candidate's nomination papers. In this case, the undisputed evidence on record is that the 1<sup>st</sup> Respondent's named election agent was Mr. Jackson Banda.

[6.22] In their submissions, the Appellants conceded that no wrong doing was attributed to Jackson Banda throughout the campaign period. In light of the clear provisions of the EPA and the Regulations on who an election agent is, we refuse to accept the Appellants' invitation for us to extend the definition of an election agent for purposes of this appeal. We agree with Counsel for the 1<sup>st</sup> Respondent that for us to do so would be tantamount to our performing a legislative function and amending an Act of Parliament, which function is not within our mandate. Grounds three and four are entirely devoid of merit and we accordingly dismiss them.

[6.23] Grounds two, nine and ten challenge the trial court's finding that the evidence of PW5 and PW8 needed to be corroborated by an independent witness as they were partisan witnesses. In support of

these grounds the Appellants argued that the trial court disregarded cogent evidence given by PW5 and PW8 merely because they were partisan witnesses when the court did not find the witnesses to have been untruthful in material respects. That the trial court should have believed the testimony of PW5 that the 1<sup>st</sup> Respondent threatened UPND members of Zakonka Co-operative that they would not receive fertilizer if they did not vote for her as well as PW8's testimony that the 1<sup>st</sup> Respondent similarly threatened UPND members that they would not receive fertilizer at Chimusithu village.

[6.24] The 1<sup>st</sup> Respondent on the other hand argued that the trial court found that PW5 and PW8 were members of the UPND whose evidence needed to be corroborated based on their testimony that they were members of the UPND. The 1<sup>st</sup> Respondent contended that the trial court could not be faulted for holding that the evidence of the two witnesses required corroborating evidence as they may have reason to lie or exaggerate.

[6.25] We have examined the evidence on record regarding these grounds. We note that whereas PW5 testified at page 1066 of the record of appeal that the 1<sup>st</sup> Respondent and the PF Constituency

Chairperson at a political rally held at Zakonka Cooperative threatened that anyone following the UPND would not get fertilizer and that the DC was not present at that meeting, the allegation in paragraph 9 of the 1<sup>st</sup> Appellant's petition was that the DC threatened farmers' cooperative officers that they would be excluded from distribution of fertilizer. There was nothing alleged in that petition regarding the 1<sup>st</sup> Respondent issuing threats at Chimusithu village.

[6.26] In her judgment on pages J244 and J245 (set out on pages 252 and 253 of volume one of the record of appeal) the learned trial Judge stated that paragraph 9 of the petition referred to the DC as the person who issued the threats to the farmers' cooperative officials that they would be excluded from the distribution of fertilizer. That PW5 in cross examination admitted that the DC was not present at the meeting where the threats were allegedly issued and attributed the threats to the 1<sup>st</sup> Respondent.

[6.27] We have considered the evidence on record regarding the allegation to which grounds two, nine and ten relate. We note that indeed there was a variance between the contents of paragraph 9 of the 1<sup>st</sup> Appellant's petition which stated that it was the DC who

threatened farmers' cooperative officials that they would be excluded from fertilizer distribution and the evidence of PW5 who alleged that it was the 1<sup>st</sup> Respondent who issued the threats regarding the distribution of fertilizer at a meeting at Zakonka cooperative. Further and more significantly, PW5 said that the DC was not present at the alleged meeting contrary to what was stated in paragraph 9 of the petition. There is no independent evidence on record which corroborated PW5's testimony on this allegation.

[6.28] Regarding PW8's evidence, we agree with the trial Judge that there being undisputed evidence that she was a member of the UPND, her testimony regarding the issuance of threats by the 1<sup>st</sup> Respondent at a meeting at Chimusithu village needed to be corroborated as the inconsistencies in her testimony regarding whether it was the DC or the 1<sup>st</sup> Respondent who uttered threats about the fertilizer to the electorate were glaring.

[6.29] We therefore cannot fault the learned trial Judge for accepting the 1<sup>st</sup> Respondent's evidence that she issued no such threats to the electorate regarding fertilizer as she observed the witnesses and resolved the conflicting evidence adduced by the parties based on the credibility of the witnesses, which opportunity

we did not have. We agree with the learned trial Judge's finding that the 1<sup>st</sup> Appellant's allegation regarding the withholding of social cash transfer and fertilizer from officials of farmers cooperatives was not proved to the required standard. Grounds two, nine, ten and eleven have no merit and are dismissed.

[6.30] The Appellants did not advance any arguments on grounds thirteen and fourteen of the appeal. We take it that the grounds were abandoned and accordingly dismiss them.

[6.31] We shall consider grounds twelve, fifteen, sixteen, seventeen and eighteen together as they are related. In these grounds, the Appellants challenge the trial court's finding that the evidence of PW15 and PW20 that Chieftainess Kawaza with the 1<sup>st</sup> Respondent's knowledge and consent or approval threatened her subjects through her headmen that their fields would be repossessed if they did not vote for the 1<sup>st</sup> Respondent consisted of lies; and that the allegation regarding those threats was not proved to the required standard.

[6.32] In support of these grounds the Appellants relied on the evidence of PW11, PW13, PW15, PW16, PW19, PW20 and PW24. The Appellants contended that PW15, PW16, PW19 and PW20 who

were headmen corroborated each other and that the seeming inconsistencies in their testimony could not justify the court's decision to entirely disbelieve those witnesses' testimonies.

[6.33] The 1<sup>st</sup> Respondent on the other hand argued that PW11 and PW13 based their evidence on what they were told while the evidence of PW15, PW16, PW19, PW20 and PW24 was contradictory and therefore the weight to be attached to it needed to be reduced.

[6.34] We have examined the evidence adduced by the parties on both sides regarding this allegation. We note that the Appellants have taken issue with the learned trial Judge's alleged discounting of the evidence of PW15 and PW20; and also, for her alleged discounting of corroborative evidence supporting the evidence that Chieftainess Kawaza threatened her subjects through their headmen that their fields would be taken away unless they voted for the 1<sup>st</sup> Respondent. However, the real issue we have to determine is whether the 2<sup>nd</sup> Appellant adduced sufficient evidence to prove that Chieftainess Kawaza, as the 1<sup>st</sup> Respondent's agent, issued threats to her subjects who were registered voters that their land would be grabbed from them if they did not vote for the 1<sup>st</sup> Respondent's political party.

[6.35] In determining this issue, we have carefully examined the evidence relating to this allegation in light of the requirements of section 97(2)(a) of the EPA. We note that PW11 and PW13 based their testimony on information allegedly given to them by the headmen and did not witness the issuance of the alleged threats. We therefore, agree with the learned trial Judge when she found that she could not attach much weight to their testimony.

[6.36] PW15 (headman Chisungwi), PW16 (headman Mbeza) PW19 (headman Kapala) and PW20 (headman Muthoseni) on the other hand essentially testified to the effect that Chieftainess Kawaza summoned them to her palace and instructed them to inform their subjects to vote for the 1<sup>st</sup> Respondent and that if they did not vote for her, their land would be taken away from them. They however differed in their testimony regarding how many times the 1<sup>st</sup> Respondent was present at the meetings where the Chieftainess allegedly issued the said threats and regarding the means of transport they used to travel to the palace.

[6.37] While PW15 testified that the 1<sup>st</sup> Respondent attended two meetings, PW16 testified that she was present only at one meeting and PW20 testified that she was present at seven meetings. On the

means of transport used to get to the palace, PW16 testified that they travelled to the palace on the 1<sup>st</sup> Respondent's canter after leaving their bicycles at the 2<sup>nd</sup> Appellant's house while PW19 testified that they rode their bicycles to the palace. These discrepancies in the testimony of the headmen raise questions as to whether they did attend any meetings at which the Chieftainess allegedly issued threats of taking away the land of her subjects if they did not vote for the 1<sup>st</sup> Respondent.

[6.38] We note that no witness was called by the 2<sup>nd</sup> Appellant from among the subjects in the chieftdom to testify that they were informed by any headman that Chieftainess Kawaza had instructed them to vote for the 1<sup>st</sup> Respondent and threatened to take away their fields if they failed to do so. According to the allegation in the petition, the threats were targeted at the villagers who were registered to vote.

[6.39] Considering that the 1<sup>st</sup> Respondent clearly denied in her answer any knowledge of the threats allegedly issued by the Chieftainess to her subjects if they did not vote for her, it was important for the 2<sup>nd</sup> Appellant to have called witnesses from among the villagers to confirm that they were informed by the headmen of

the alleged threat by the Chieftainess. This would have assisted the 2<sup>nd</sup> Appellant to prove, firstly, that the threats were indeed issued by the Chieftainess with the knowledge and consent or approval of the 1<sup>st</sup> Respondent; and secondly, that the threats were widely disseminated among the villagers and therefore that the electorate were or may have been prevented from electing their preferred candidate in line with the requirements of section 97(2)(a) of the EPA.

[6.40] In the absence of this vital evidence, the learned trial Judge resolved the conflicting stories based on the credibility of the witnesses having found PW15, PW19 and PW20 to be untruthful witnesses due to the inconsistencies of their testimony regarding the *number* of times the 1<sup>st</sup> Respondent was present at the meetings where Chieftainess Kawaza allegedly threatened the headmen.

[6.41] Based on the evidence on record, we agree with the learned trial court's finding that neither the commission of the illegal practice relating to threats by the Chieftainess with the knowledge and consent of the 1<sup>st</sup> Respondent nor the widespread effect of the alleged threat was proven to a fairly high degree of convincing

clarity. We further find no evidence on record to support the allegation that Chieftainess Kawaza was the 1<sup>st</sup> Respondent's agent. [6.42] As we stated earlier on in this judgment, the evidence on record is that the 1<sup>st</sup> Respondent's only election agent was Jackson Banda. The 1<sup>st</sup> Respondent testified that the only reason she went to Chieftainess Kawaza's palace was to pay homage to the Chieftainess. That evidence was not discredited in cross examination. Grounds twelve, fifteen, sixteen, seventeen and eighteen therefore have no merit and we accordingly dismiss them.

[6.43] Grounds nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four relate to the allegation that the 1<sup>st</sup> Respondent gave money and mealie meal to the electorate during the campaign period to secure their votes.

[6.44] The 1<sup>st</sup> Appellant alleged in her petition that the 1<sup>st</sup> Respondent, or her agents with her knowledge, distributed mealie meal, rice and cooking oil to voters so that they could vote for her and not the 1<sup>st</sup> Appellant. The evidence in support of this allegation was led by PW11, PW3 and PW4.

[6.45] In her evidence the 1<sup>st</sup> Appellant as PW11, stated that a Mr. Nyoni who was the Constituency Chairman for Milanzi, the Youth

Chairman and the 1<sup>st</sup> Respondent cooked food and gave out money, DMMU mealie meal, rice and cooking oil to the electorate in four of the twelve wards in the constituency. On the other hand, PW3 and PW4 testified that they ate food prepared by the DC after they voted. PW3 added that at a campaign meeting addressed by the DC and the 1<sup>st</sup> Respondent at Lunga, the people present were given clothes after the 1<sup>st</sup> Respondent asked them to vote for her.

[6.46] The 1<sup>st</sup> Respondent denied the allegations that she distributed DMMU mealie meal to the electorate as she did not receive such mealie meal from the Government and was not a government official. She reiterated that her election agent was Jackson Banda (RW5). RW5 also denied the allegation of bribery and testified that they only distributed campaign materials and did not have any rice or cooking oil to distribute to anyone.

[6.47] The learned trial Judge analysed the evidence on this allegation and in her judgment on page J255 set out on page 263 of volume one of the record of appeal, observed that:

**“While the 1<sup>st</sup> Petitioner stated that the 1<sup>st</sup> Respondent, the DC, Misheck Nyoni and Masauso were involved in the distribution of DMMU mealie meal meant for relief, food stuffs and money to the electorate in Kafumbwe, Milanzi and Yowoyani in Chisindiko area, there was no evidence that was adduced from any witness that they**

**received these items from the 1<sup>st</sup> Respondent, DC, Misheck and Masauso or her agents in order to induce them to vote for her."**

[6.48] The trial court added that PW3 and PW4 were the only witnesses who referred to the issue of food and that no evidence was led to show that the food given to them after voting was given in pursuance of a prior agreement that they should vote for the 1<sup>st</sup> Respondent.

[6.49] Further that PW3 said the food was prepared by the DC who the court found was not the 1<sup>st</sup> Respondent's agent nor was there evidence that it was given with the 1<sup>st</sup> Respondent's knowledge, consent or approval, who according to PW3 was not present. The lower court therefore found that the 1<sup>st</sup> Appellant's evidence did not connect the 1<sup>st</sup> Respondent or her agent to the alleged bribery and thus dismissed it.

[6.50] On the other hand, the 2<sup>nd</sup> Appellant alleged in her petition that the 1<sup>st</sup> Respondent through her agents openly distributed money to voters on voting queues on polling day. Further, that DMMU mealie meal was distributed to the electorate throughout the campaign period and on polling day. PW11, PW12, PW13, PW15,

PW16, PW18, PW19, PW20 and PW23 testified in support of the *bribery allegation*.

[6.51] PW11's evidence was that she was only informed by the headmen that the 1<sup>st</sup> Respondent distributed DMMU mealie meal and money to the electorate during her campaign. PW12 testified that he was given K100 by the DC in the presence of the 1<sup>st</sup> Respondent at a meeting in Lunga as he asked the electorate to vote for the 1<sup>st</sup> Respondent. PW13 produced pictures to support his evidence that people in a canter where the 1<sup>st</sup> Respondent stood were distributing mealie meal. He conceded however, that he had no pictures of the electorate receiving mealie meal.

[6.52] The following witnesses testified that they received the following from the 1<sup>st</sup> Respondent as she asked them to vote for her: PW15 - K200 and 25 bags of mealie meal to cook for Mozambicans on polling day; PW16 - K100 and 15 bags of mealie meal to cook for people on polling day; PW18 - K50 and 5 bags of mealie meal to cook for the people so that they could vote for the 1<sup>st</sup> Respondent; PW19 - K50; PW20 - K100 at a meeting and also on polling day; PW23 - K100 from the DC in the presence of the 1<sup>st</sup> Respondent.

All these witnesses testified that they did not see the 1<sup>st</sup> Respondent giving out money and mealie meal on polling day.

[6.53] In rebuttal, the 1<sup>st</sup> Respondent denied giving money and mealie meal to voters on queues. She said the bags in the picture produced by PW13 contained campaign material and not DMMU mealie meal as he alleged. RW3 denied receiving any mealie meal or gift from the 1<sup>st</sup> Respondent while RW5 testified that the 1<sup>st</sup> Respondent did not give out any money or mealie meal on polling day.

[6.54] Faced with conflicting evidence given by the Appellants on one hand and the 1<sup>st</sup> Respondent on the other, the learned trial Judge resolved the matter based on the credibility of the witnesses. She found that PW12 was an untruthful witness when he testified that he was a headman from Mozambique who voted in Zambia in the last elections. The trial Judge observed that having found PWs15, 19 and 20 to be untruthful witnesses due to inconsistencies in their testimony relating to the allegation that Chieftainess Kawaza threatened her subjects that she would take away their land if they did not vote for the 1<sup>st</sup> Respondent, the mere confession that they were given money by the 1<sup>st</sup> Respondent was not

conclusive but needed to be supported by other evidence to prove that they received money from the DC or the 1<sup>st</sup> Respondent during the campaign period.

[6.55] After carefully examining the evidence on record regarding the bribery allegation, we agree with the learned trial Judge's finding that the evidence on the allegation of bribery did not prove that the 1<sup>st</sup> Respondent committed the corrupt act nor was there any evidence that the alleged bribery was widespread. We accordingly dismiss grounds nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four for lack of merit.

[6.56] Ground twenty-five relates to the allegation that the DC and Allen Mvula uttered disparaging remarks against the 2<sup>nd</sup> Appellant at campaign meetings with the knowledge, consent and approval of the 1<sup>st</sup> Respondent. PWs 7, 11, 12, 15 and 18 testified regarding this allegation. PW11 stated that she was informed that the 1<sup>st</sup> Respondent, the DC, Allan Mvula and Daniel Lungu during their campaign used insulting language and character attacks against her prompting her to complain to the 2<sup>nd</sup> Respondent's District Conflict Management Committee (DCMC). That the DC referred to

her as an old bone who could not perform and hence his introducing the 1<sup>st</sup> Respondent who was a young person.

[6.57] PW7, PW12 and PW15 testified that during campaign meetings the DC told them to vote for the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Appellant who was old. That Allan Mvula sang a song whose meaning was that they should throw away old bones. PW7 added that at another meeting, the 1<sup>st</sup> Respondent urged the people to vote for her as she was new and not vote for any old person but did not mention any name. PW18 said the 1<sup>st</sup> Respondent sang a song at a meeting that the 2<sup>nd</sup> Appellant had aged and should go back to the fields but did not insult anyone.

[6.58] In rebuttal, the 1<sup>st</sup> Respondent denied insulting the 2<sup>nd</sup> Appellant during her campaign and said she treated every candidate with respect, especially the 2<sup>nd</sup> Appellant who was much older than her. She stated that the complaint was made against the DC and that she only attended the DCMC meeting as a spectator. That the matter was resolved when the DC apologised to the 2<sup>nd</sup> Appellant and she accepted his apology. RW2 and RW5 denied that the 1<sup>st</sup> Respondent insulted the 2<sup>nd</sup> Appellant during her campaign.

[6.59] The lower court analysed the evidence on this allegation and observed that according to the evidence of PW11, in settling the 2<sup>nd</sup> Appellant's complaint to the DCMC, the DC apologised for his utterances and was directed to stop name calling. The lower court therefore found that the DC admitted to having uttered the words complained of.

[6.60] The trial court however, found that there was no evidence that the 1<sup>st</sup> Respondent admitted that she uttered the words complained of. That the only witness who testified that the 1<sup>st</sup> Respondent sang a song at a meeting and called the 2<sup>nd</sup> Appellant an old bone was PW18. That since it had found PW18 to be an untruthful witness when he lied to the court that he was headman Changuluka, his evidence needed to be corroborated. The lower court found that there was no independent evidence from the people who attended the meeting to corroborate PW18's evidence that the 1<sup>st</sup> Respondent sang the song at the meeting.

[6.61] The lower court found that PW7 was a partisan witness whose testimony needed corroboration that the 1<sup>st</sup> Respondent uttered the words complained of. The learned trial Judge found no such evidence on record and therefore found that it had not been

proved that the 1<sup>st</sup> Respondent uttered the words against the 2<sup>nd</sup> Appellant as alleged.

[6.62] The lower court further found that the DC who apologized for his utterances against the 2<sup>nd</sup> Appellant was not the 1<sup>st</sup> Respondent's election agent in terms of the law and that there was no evidence that he uttered the offensive words against the 2<sup>nd</sup> Appellant with the knowledge and consent or approval of the 1<sup>st</sup> Respondent as alleged by PW12 and PW15 who were discredited witnesses. That PW12 lied to the court that he was a Mozambican national who came and obtained an NRC and voter's card and voted in the last elections. That PW15 lied to the court on the number of times the 1<sup>st</sup> Respondent attended meetings at Chieftainess Kawaza's palace. The trial court found no independent evidence from any witness who attended the meetings at which PW12 and PW15 said the 1<sup>st</sup> Respondent was present when the DC uttered the words complained of.

[6.63] The learned trial Judge thus accepted the 1<sup>st</sup> Respondent's evidence that the DC was not in her campaign team and found that the mediation form revealed that she did not offer an apology at the DCMC meeting meaning that she did not admit to any wrong doing.

The trial court thus found that the 2<sup>nd</sup> Appellant had not proved with cogent evidence that the words uttered by the DC were uttered with the 1<sup>st</sup> Respondent's knowledge and consent or approval. The court consequently dismissed the allegation of character assassination against the 1<sup>st</sup> Respondent.

[6.64] We have thoroughly examined the evidence on record regarding the allegation of character assassination made against the 1<sup>st</sup> Respondent and find that there was no cogent evidence that the 1<sup>st</sup> Respondent uttered the offensive words against the 2<sup>nd</sup> Appellant or that the DC disparagingly referred to the 2<sup>nd</sup> Appellant as an old woman who could not perform or that Allan Mvula sang the song calling the 2<sup>nd</sup> Appellant an old bone to be discarded with the knowledge and consent or approval of the 1<sup>st</sup> Respondent. Ground twenty-five therefore has no merit and is dismissed.

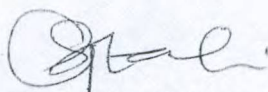
[6.65] The Appellants abandoned ground twenty-six of the appeal as they did not advance any arguments on it. We accordingly dismiss it.

[6.66] As we conclude this judgment, we observe that the Appellants in arguing their grounds of appeal generally did not address the requirements of the law set out in section 97(2)(a) of the EPA that

both the commission of the electoral malpractice and its widespread nature must be proven before an election can be nullified. We say so because in all the arguments they made before us in support of the grounds of appeal, they concentrated on highlighting the evidence which they said proved that the electoral malpractices were committed by the 1<sup>st</sup> Respondent or with her knowledge and consent or approval and made little effort to demonstrate that the alleged malpractices were widespread thereby preventing the electorate from electing their preferred candidate. The Appellants therefore, did not demonstrate in this appeal that as petitioners in the lower court they had adduced cogent evidence which proved with convincing clarity the allegations which they made against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their petitions.

[6.67] As the Appellants did not prove any of the allegations in their petitions in terms of section 97(2)(a) and (b) of the EPA, all the grounds of appeal have failed. The appeal therefore entirely fails and we dismiss it. We uphold the lower court's declaration that the 1<sup>st</sup> Respondent, Melesiana Phiri, was duly elected as Member of Parliament for Milanzi Constituency.

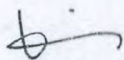
[6.68] We order each party to bear their own costs.



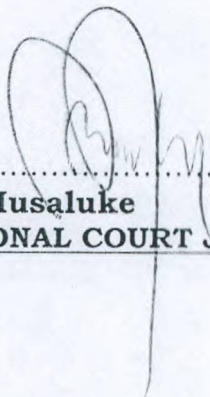
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**A. M. Sitali**  
**CONSTITUTIONAL COURT JUDGE**



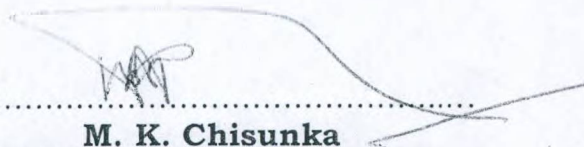
.....  
**P. Mulonda**  
**CONSTITUTIONAL COURT JUDGE**



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



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**M. Musaluke**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**M. K. Chisunka**  
**CONSTITUTIONAL COURT JUDGE**