IN THE CONSTITUTIONAL COURT OF ZAMBIA **2021/CCZ/A0026**
HOLDEN AT LUSAKA
(Appellate Jurisdiction)

IN THE MATTER OF: THE PARLIAMENTARY PETITION RELATING TO THE PARLIAMENTARY ELECTION FOR THE CHINSALI CONSTITUENCY IN MUCHINGA PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON 12TH AUGUST, 2021

AND

IN THE MATTER OF: ARTICLE 73(1) THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 AS READ TOGETHER WITH SECTION 98(C) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: SECTION 97, 98 AND 99 THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

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

AND

IN THE MATTER OF: THE SCHEDULE (CODE OF CONDUCT) TO THE ELECTORAL PROCESS NO. 35 OF 2016

AND

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

BETWEEN:

KALALWE MUKOSA **APPELLANT**

AND

CHRISTOPHER CHIPONDE MULENGA **1ST RESPONDENT**
CHARLES MULENGA MUSANYA **2ND RESPONDENT**
THE ELECTORAL COMMISSION OF ZAMBIA **3RD RESPONDENT**

CORAM: Sitali, Mulonda, Mulenga, Musaluke and Chisunka, JJC on 23rd May, 2022 and 8th December, 2022

For the Appellant:	**Mr. B. C. Mutale S.C of Ellis and Company** **Mr. L. Lemba, Mulungushi Chambers** **Mr. T. S. Ngulube of T. S. Ngulube Advocates** **Mr. J. Kayula, Ms. G. Kapito, and** **Mr. P. Chola of Lewis Nathan and Company**
For the 1st and 2nd Respondent:	**Mr. L. M. Chikuta of** **L. M. Legal Practitioners**
For the 3rd Respondent:	**Mr. B. Bwalya** **In House Counsel** **Electoral Commission of Zambia**

J U D G M E N T

Cases referred to:

1. Margaret Mwanakatwe v Charlotte Scott Selected Judgment No.50 of 2018
2. Richwell Siamunene v Silubalo Gift Selected Judgment No.58 of 2017
3. Sunday Chitungu Maluba v Rodgers Mwewa and The Attorney General Appeal No.4 of 2017
4. George Musupi v The People (1978) ZR 271 (SC)
5. Choka v The People (1978) Z.R 243
6. Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014
7. Nkandu Luo v Doreen Sefuka Mwamba and Attorney General Selected Judgment No. 51 of 2018
8. Abuid Kawangu v Elijah Muchima Appeal No.8 of 2017
9. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79
10. Chief Chanje v Paul Zulu SCZ Appeal No. 73 of 2008
11. Examinations Council of Zambia v Reliance Technology Limited SCZ Judgment No.46 of 2014
12. Steven Masumba v Elliot Kamondo Selected Judgment No.53 of 2017
13. Brelsford James Gondwe v Catherine Namugala SCZ Appeal No.35 of 2012
14. Jonathan Kapaipi v Newton Samakai CCZ Appeal No. 13 of 2017

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

[1.0] INTRODUCTION

[1.1] The Appellant appeals against the Judgment of the High Court which upheld the 1st and 2nd Respondents' election petition and nullified his election as Member of Parliament for the Chinsali Constituency.

[2.0] BACKGROUND

[2.1] The Appellant and the 1st and 2nd Respondents were among six candidates who contested for election in the Chinsali Constituency parliamentary election held on 12th August, 2021.

[2.2] The Appellant who stood on the Patriotic Front (PF) ticket was declared as duly elected Member of Parliament for Chinsali Constituency having received 13,625 votes. The 1st Respondent, an independent candidate, was second and received 12,563 votes, while the 2nd Respondent who stood on the United Party for National Development (UPND) ticket was in fourth position having obtained 3,073 votes.

[2.3] The 1st and 2nd Respondents jointly petitioned the Appellant and the 3rd Respondent alleging that the Appellant committed several electoral malpractices during the campaign period and on

the election day namely, violence against the 2nd Respondent and Lewis Bwalya the UPND mayoral candidate; that the PF party ferried voters to polling stations, using amongst others, the Appellant's truck, that the PF party slaughtered cattle and chickens and cooked nshima at various points of the entire Constituency and fed voters while they waited to vote in queues, and after voting; and that on or before election day, social cash transfer money was given to voters in some areas by the PF through Government workers amid threats that they would be removed from the social cash transfer register if they did not vote for the Appellant and other PF candidates; and lastly that the Appellant donated roofing sheets to Kakombe Community School and asked the community to vote for him.

[2.4] Regarding the 3rd Respondent, the Petitioners essentially alleged that it failed to conduct free and fair elections in the Constituency to the detriment of the Petitioners. That in the premise the Appellant was not duly elected as Member of Parliament for Chinsali Constituency.

[2.5] The Appellant filed an answer to the petition in which he denied any wrong doing in relation to the election. He averred that

the campaigns in Chinsali Constituency were conducted in a free and fair atmosphere and that all the participants, including the 1st and 2nd Respondents, actively participated in and campaigned freely. He asserted that he was duly elected as Member of Parliament for Chinsali Constituency.

[2.6] The 3rd Respondent filed a notice of intention to defend in which it denied all the allegations made against it in the petition.

[2.7] In their reply, the 1st and 2nd Respondents reiterated their allegations in the petition and added that the Appellant defamed the 1st Respondent by alleging that he was a satanist who used his grandson to make money and that the Appellant donated building materials to three other schools not mentioned in the petition.

[2.8] At the trial of the petition, the 1st and 2nd Respondents called 12 witnesses. The 1st Respondent was PW1, while the 2nd Respondent did not testify. In rebuttal, the Appellant subpoenaed one witness who was RW1 and testified as RW2. The 3rd Respondent did not call any witnesses.

[2.9] The learned trial Judge found that the violent assault on PW2 was committed with the knowledge and approval of the 1st Respondent as he was present when the incident occurred at

Chinsali Central police station but held that there was no evidence that the violence was widespread and could have prevented the majority of voters in Chinsali Constituency from electing their preferred candidate.

[2.10] The trial Court further found that the Petitioners had proved that the wrong doing involving the distribution of ordinary and DMMU mealie meal, cooking oil, salt, sugar and money to the public by GGOZA, undue influence on the electorate using the distribution of social cash transfer, the ferrying of voters to polling stations, the donation of roofing sheets and other building materials and money to schools and feeding of voters were carried out by the Appellant personally or with his knowledge and consent or approval. Further, that the wrong doing was widespread and prevented or may have prevented the voters from electing a candidate of their choice. He therefore upheld the petition and accordingly nullified the election of the Appellant as Member of Parliament for Chinsali Constituency.

[2.11] Aggrieved by that decision, the Appellant appealed to this Court advancing six grounds of appeal set out verbatim as follows:

(1) **The Court erred both in law and in fact by finding that the allegations of electoral malpractice, vote buying, intimidation and violence had been proven beyond a reasonable doubt in the absence of evidence supporting the said allegations.**

(2) **The Court erred both in law and in fact by finding that the allegations of electoral malpractice, vote buying, intimidation and violence had been proven beyond a reasonable doubt in the absence of evidence that the Appellant or his election agents committed the said acts of electoral malpractices.**

(3) **The Court erred both in law and in fact by finding that the allegations of electoral malpractice, vote buying, intimidation and violence had been proven beyond a reasonable doubt in the absence of evidence that the Appellant or his election agents had knowledge and had consented to the commission of the said allegations.**

(4) **The Court erred both in law and in fact when it nullified the election of the appellant in the absence of evidence that the allegations of electoral malpractice, vote buying, intimidation and violence were widespread.**

(5) **The Court erred both in law and in fact when it nullified the election of the Appellant in the absence of evidence that as a result of the alleged electoral malpractice, vote buying, intimidation and violence, the majority of the people in Chinsali Constituency were prevented from voting for a candidate of their choice.**

(6) **The Court erred when it relied on evidence of witnesses with an interest to serve to conclude that the Appellant was involved in alleged acts of electoral malpractice, vote buying, intimidation and violence.**

[3.0] APPELLANT'S ARGUMENTS

[3.1] The Appellant relied on his heads of argument filed on 3rd January, 2022. Grounds one, two, three and six were argued together while grounds four and five were also argued together. The Appellant submitted that the contentions under grounds one, two three and six were against the lower Court's finding that various

electoral malpractices and irregularities had been committed by the Appellant or with his knowledge and consent or approval.

[3.2] Regarding the allegation of violence, the Appellant challenged the trial Court's finding that the Appellant consented to or approved of the violence committed against PW2 at Chinsali Central police station on the ground that it was not supported by the evidence on record. That the evidence adduced by PW2 during cross examination was inconsistent with the contents of the occurrence book entry no. 81/37 at page 1481 of the record of appeal, which occurrence book was produced by RW1. That whereas PW2's testimony was that the Appellant was among the people who assaulted him, the occurrence book did not state that the Appellant was involved in the assault. That this disparity in evidence ought to have put the trial Court on guard regarding PW2's credibility regarding the assault at the police station.

[3.3] The Appellant submitted that the evidence of PW2 and PW3 should have been treated with caution due to its inconsistencies because while PW2 testified that he was punched on the face by

someone outside the police station as he got out of the car, PW3 said PW2 was slapped at the inquires desk of the police station.

[3.4] The Appellant further submitted that he was present at the police station to attend a meeting called by the police to advise political leaders in Chinsali to conduct peaceful campaigns as PW2 and PW3 testified. He contended that his presence at the police station could not therefore be construed to mean that he had knowledge of and consented to or approved of the assault on PW2.

[3.5] He further submitted that the lower Court relied heavily on the uncorroborated evidence of PW2 and PW3 who, being UPND members, were partisan witnesses whose evidence required corroboration. The case of **Margaret Mwanakatwe v Charlotte Scott**[1] was cited in support.

[3.6] The Appellant argued that the trial Court's finding that he had knowledge of and consented to or approved of the violence against PW2 was not supported by the evidence on record and urged us to reverse it.

[3.7] The Appellant contended that the allegation of ferrying voters was made against his sponsoring party the PF and not him. That

although PW6, the only witness on this allegation, stated that he held a meeting at her home and promised the people present that he would send them transport on polling day which the ward chairperson for Mikunku ward would be in charge of, PW6 conceded in cross-examination that the said ward chairperson had a son who stood as the PF candidate for councillor in Chinsali Constituency, and could have engaged in the alleged activities to benefit his son. That the trial Court did not exclude that possibility. That PW6 failed to produce the minutes of the meeting and conceded that the ward chairperson did not tell her who provided the alleged transport and therefore merely speculated that the transport was provided by the Appellant, which allegation the Appellant denied.

[3.8] It was submitted that the 1st and 2nd Respondents failed to prove that the Appellant was involved in the ferrying of voters, or that voters were ferried with his knowledge and consent or approval. Further, that the evidence did not prove that the ferrying of voters was widespread as the alleged ferrying of voters was done in two (2) out of the one hundred (100) polling stations in Chinsali

Constituency. That the trial Court therefore could not nullify the Appellant's election based on that allegation.

[3.9] Regarding the GGOZA activities allegation, the Appellant submitted that the lower Court was wrong when it held that the 1st and 2nd Respondents (as petitioners) had proved with sufficient clarity that the Appellant (as 1st Respondent) was involved in GGOZA activities which included the distribution of mealie meal and money to members of the public. He contended that PW1, PW4, PW5, PW6 and PW10 who testified that GGOZA distributed various items including PF campaign regalia and cooked for voters confirmed that GGOZ was a non-governmental organisation (NGO) while the PF was a political party.

[3.10] That to prove the connection between GGOZA and the PF, the 1st and 2nd Respondents produced a GGOZA booklet appearing at pages 221 to 228 of the record of appeal but did not produce the registration documents to support that allegation. That PW1 and PW5 testified that GGOZA was a surrogate of the PF because of the former President's portrait in the booklet.

[3.11] The Appellant argued that although the Court held that GGOZA was a surrogate of the PF and only served the interest of the PF on account of the PF president's portrait in the booklet, that did not warrant an inference being drawn that the Appellant was directly or indirectly involved in the activities of GGOZA, and that doing so would amount to speculation as held in the case of **Richwell Siamunene v Gift Silubalo**[2].

[3.12] It was submitted that the Appellant denied being involved in identifying and recruiting GGOZA coordinators as alleged by PW1. That PW4 testified that she was approached by Felix Chimfwembe; while PW5 and PW10 testified that they were approached by Chipasha and Martin Mumbi, respectively.

[3.13] The Appellant submitted that the documents, videos and foodstuff produced before the lower Court were insufficient to prove that the Appellant had knowledge of and consented to the GGOZA activities in Chinsali.

[3.14] The Appellant submitted that PW4 testified to the video labelled Shimwalule video at page 213 and the GGOZA material distribution acquittal form at pages 229 and 230 of the record of

appeal and produced two bags of GGOZA mealie meal alleged to be left-overs; that in that video, PW4 said that the mealie meal was being distributed by GGOZA and not the PF; and that Danny sent her to distribute the mealie meal. That however, in her oral testimony, PW4 alleged that Danny was authorised by the Appellant and Chipasha to distribute the items but did not produce any evidence to prove that allegation.

[3.15] The Appellant argued that had he worked with PW4 as she alleged, she would have mentioned his name in the video when she was found distributing the mealie meal. The Appellant submitted that by saying in its judgment at page 126 of the record of appeal that the Appellant should have called Danny to testify and distance him from the allegations, the lower Court shifted the burden of proof from the 1st and 2nd Respondents as petitioners to the Appellant. The Appellant argued that it was incumbent upon the 1st and 2nd Respondents as Petitioners to prove their allegations against the Appellant with cogent evidence to a fairly high degree of convincing clarity as held in the **Margaret Mwanakatwe**[1] case.

[3.16] The Appellant submitted that PW4 was not a credible witness because she testified that she knew that what she was doing was wrong but yet did not report the wrong doing to the police or any other authority. That despite these red flags, the lower Court did not state why it relied on her testimony. He further submitted that PW4 admitted that no food was cooked in Milemba ward on polling day because the GGOZA monitors agreed not to cook and instead decided to share the money which was allegedly given to them.

[3.17] The Appellant submitted that the GGOZA material distribution acquittal form on pages 229 and 230 of the record of appeal did not contain any information to prove that he was involved in the operations of GGOZA. That whereas PW4 testified that she filled in more than twenty of those forms for Milemba ward, she only produced one form in the lower Court, and therefore failed to prove that the activities by GGOZA were widespread in Chinsali Constituency.

[3.18] The Appellant submitted that PW5 testified on the GGOZA activities in Kapululu village and on the videos and audio recording relating to Kapululu village and also produced various GGOZA left-

over items which he was found with and which he said were delivered to him by the Appellant in his blackish Ford Ranger. That however, his Ford Ranger was branded green during the campaign period as shown on pages 305 to 306 of the record of appeal and was not blackish as alleged by PW5 which fact proved that he did not deliver the GGOZA items to PW5's residence as he alleged. That PW5's inclusion of the Appellant in this matter was a mere fabrication.

[3.19] The Appellant contended that the audio recording labelled Kapululu audio on page 213 of the record of appeal revealed that PW5 was not present when Mr Chipasha allegedly delivered the GGOZA items to PW5's home because, in the audio recording, PW5 asked Mr Chipasha about the person with whom he left the GGOZA items. That he, therefore, could not testify to who delivered the items to his home.

[3.20] That PW6 who also testified on the GGOZA activities and alleged that the Appellant held a meeting at her home and promised to send them transport on polling day and to feed them after they voted, failed to produce the minutes which she said were taken by Landu Kateba also known as Jimmy Mwansa to prove that such a

meeting took place. The Appellant contended that Hellen Bwalya who allegedly cooked the nshima for GGOZA which PW6 said she ate was not his election agent and that he therefore was not answerable for her actions.

[3.21] The Appellant contended that the assertion that PF ward officials took PW6 to the place where she ate nshima did not mean that he directly or indirectly instructed those ward officials to take voters to the alleged feeding point. That to hold so would amount to speculation as was held in **Richwell Siamunene v Gift Sialubalo**[2]. That the 1st and 2nd Respondents failed to prove with cogent evidence that the Appellant was involved in feeding the electorate.

[3.22] That PW10 testified that he was approached by Martin Mumbi who appointed him to be a GGOZA monitor. That on 15th July, 2021, a meeting was held at Martin Mumbi's house where the Appellant said he was busy and he would leave everything in the hands of Martin Mumbi and Laulent Mpundu who was the PF candidate in Chilinda ward. That therefore cogent evidence should have been adduced to prove that his actions were approved by the Appellant.

[3.23] That PW10 further testified that on another day, Martin Mumbi called him to collect a 20-litre container of cooking oil, 15 bags of mealie meal and 5 packets of 1kg salt and that on 12th August, 2021, Martin Mumbi sent him K1,000 which he alleged was given to him by the Appellant. That PW10 did not produce sufficient evidence to prove that the Appellant was involved in the GGOZA activities in Itapa ward of Chinsali District or that the Appellant had knowledge of and approved of or consented to Martin Mumbi and Laulent Mpundu's activities in that ward. That Martin Mumbi was not the Appellant's duly appointed agent and therefore that the Appellant was not answerable for his actions. That in any case, the Appellant denied any involvement with the GGOZA activities in Itapa ward. That the allegation that the K1,000 which PW10 said he received from Martin Mumbi was given to him by the Appellant was inadmissible hearsay evidence as PW10 was not present when the money was allegedly given to Martin Mumbi by the Appellant.

[3.24] The Appellant contended that PW10's testimony should be treated with caution as it was inconsistent because he testified that he was monitoring elections at a polling station on 12th August,

2021; that he was engaged in distributing various food items which he received from Martin Mumbi and further that he also ferried voters from their homes to polling stations and gave them money after they voted but also said that after giving them money they would ask them to vote for PF.

[3.25] The Appellant contended that the evidence of PW4, PW5 and PW6 established a possible relationship between GGOZA and the PF but failed to establish with cogent evidence that the Appellant associated himself with GGOZA in a manner that advanced his election victory or that the GGOZA activities were done with his knowledge and consent or approval. The Appellant urged us to set aside the lower Court's finding that he was involved in the activities of GGOZA in the Constituency as it was not supported by the evidence on record.

[3.26] Regarding the allegation relating to social cash transfer, the Appellant submitted that this allegation was also made against the PF and not against him personally. He denied addressing the social cash transfer beneficiaries at Mwaba School and submitted that he was not at that school on 11th August, 2021 as alleged by PW8 and

PW9. That he only addressed a meeting at Mwaba School on 9th August, 2021, in the company of Mr. Joe Malanji and Mr. Stephen Kampyongo. The Appellant contended that PW8 was a UPND member as shown by his Facebook campaign poster exhibited at page 307 of the record of appeal, while PW9 testified in cross examination that she was a treasurer in the Socialist Party which participated in and lost the Chinsali parliamentary elections and was working with the UPND in that election. That PW8 and PW9 were partisan witnesses whose evidence required corroboration as was held in the **Margaret Mwanakatwe**[1] case. That no such corroborative evidence was adduced before the lower Court.

[3.27] The Appellant further submitted that the District Commissioner whom PW8 and PW9 said asked the social cash transfer beneficiaries to vote for the PF was not his election agent and that therefore he was not answerable for her actions. Further, that there was no evidence on record to prove that the alleged District Commissioner's action was with his knowledge and consent or approval; or that the alleged malpractice involving social cash transfer beneficiaries was widespread in the Constituency so that

the voters were or could have been prevented from voting for a candidate of their choice as it allegedly only happened at Mwaba School which is in only one (1) ward out of the seventeen (17) wards in Chinsali. The Appellant therefore urged us to set aside the trial Court's finding that he addressed the beneficiaries at Mwaba School and claimed that the social cash transfer was being paid on that day because of him and thereby influenced the people on how they should vote. That no witness testified that they were influenced to vote for the Appellant by his utterances on social cash transfer.

[3.28] Regarding the allegation on donations of building materials and money to schools, the Appellant submitted that PW11 testified that the Appellant donated 50 iron sheets to Kaluka Community School and gave the community K1,000 to be used to buy timber for roofing but did not produce any document to prove what items were donated. Further, that PW11 testified that he stood as a candidate for Councillor in the Chunga ward of Chinsali Constituency on the Socialist Party ticket and was a partisan witness whose evidence required to be corroborated in line with the holding in the **Margaret Mwanakatwe**[1] case. That his testimony

should therefore be treated with caution as no corroborative evidence was produced before the lower Court.

[3.29] The Appellant submitted that PW12 who testified that the Appellant addressed a meeting at Kalela School and gave money to the people present, and that the Appellant's driver delivered iron bars and cement to the school, also testified that he was the 1st Respondent's agent. That he was therefore a partisan witness whose testimony required corroborative evidence which corroborative evidence was not brought before Court.

[3.30] The Appellant submitted that contrary to PW12's assertion that the Appellant used his black Ford Ranger when he went to Kalela School, his vehicle was branded green in colour with PF stickers during the campaign period as shown at pages 305 and 306 of the record of appeal. Furthermore, that PW12 clearly testified that the Appellant was not present when the donated items were delivered. That PW12 did not adduce cogent evidence to prove that the donations made at Kalela School were made with the knowledge and consent or approval of the Appellant.

[3.31] The Appellant submitted that whereas the lower Court held that it found no reason for PW12 to maliciously accuse the Appellant, it did not disclose any reason for its finding. That PW12 testified that he was the 1st Respondent's agent and was therefore a partisan witness. In sum, the Appellant submitted that the 1st and 2nd Respondents failed to prove that the donation of building materials was widespread in the Constituency.

[3.32] Regarding the allegation relating to DMMU mealie meal, the Appellant submitted that although PW1 testified that the Appellant was involved in the distribution of DMMU mealie meal in the campaign period and referred to the videos labelled as Kasomo 2, Kasomo 3, Kasomo 4 and Kasomo 5 and Chandamali compound videos on page 213 of the record of appeal in the file folder marked 'inducements', he conceded that he did not take the videos. That his evidence on the contents of the videos was hearsay evidence. That the woman in the Chandamali compound video was not called to testify and did not say that she got the mealie from the Appellant, which was a clear indication that the Appellant was not involved in the distribution of DMMU mealie meal. The Appellant submitted

that PW7 testified that the Appellant, in the company of Lucy Mulenga, the PF mayoral candidate, and William Chafwila the PF councillor candidate for Ichanga ward, held a meeting at Mukulo Primary School where they distributed DMMU mealie meal. That to support his testimony, PW7 referred to the Kasomo 2, Kasomo 3, Kasomo 4 and Kasomo 5 videos at page 213 of the record of appeal which he said he took except for the Kasomo 4 video, which was taken by his friend on his phone, and identified the persons he named as Lucy Mulenga and Mr. Chafwile, PW7 conceded in cross-examination that the Appellant did not appear in any of the videos.

[3.33] The Appellant submitted that in the absence of cogent evidence, it was not proved that the Appellant, who was not a government employee, was involved in the distribution of DMMU mealie meal to his advantage.

[3.34] The Appellant further submitted that although PW7 testified that the Appellant left money with Lucy Mulenga to distribute to the recipients of the DMMU mealie meal, the Kasomo 4 video did not show any distribution of money.

[3.35] The Appellant contended that the lower Court's finding that based on the evidence of PW6 and PW7, the Appellant actively participated in the distribution of DMMU mealie meal, was highly perverse as none of the videos produced before the lower Court showed that he was present or involved in the distribution of that mealie meal.

[3.36] The Appellant submitted that since the evidence on record showed videos allegedly taken at Mukulo Primary School and Chandamali, it could not be generalised from those two places that the alleged distribution of mealie meal was so widespread as to have prevented voters in the Constituency from voting for a candidate of their choice. The Appellant thus implored us to reverse the lower Court's finding that the Appellant personally participated in the distribution of DMMU mealie meal as the finding was not supported by evidence.

[3.37] In arguing grounds four and five, the Appellant challenged the lower Court's finding that the wrongdoings which it found to have been proven were widespread and prevented or may have prevented voters from voting for a candidate of their choice. He cited

the case of **Sunday Chitungu Maluba v Rodgers Mwewa and Attorney General**[3] to the effect that the term "widespread" meant widely distributed or disseminated and urged us to examine whether any of the alleged malpractices were widespread within Chinsali Constituency.

[3.38] The Appellant submitted that PW4, PW5, PW6 and PW10 who testified to the GGOZA activities were from Mikunku ward, Nkakula ward and Itapa ward. That in line with the **Sunday Chitungu**[3] case, the 1st and 2nd Respondents should have adduced evidence of GGOZA activities in the majority of the 17 wards to prove that the GGOZA activities were widespread within Chinsali Constituency. That in the absence of such evidence, the 1st and 2nd Respondents failed to prove the allegation to the requisite standard of proof.

[3.39] That regarding the allegation on the distribution of DMMU mealie meal, PW1's evidence was mainly inadmissible evidence while PW7 testified that the said mealie meal was distributed at only one place, namely Mukulo Primary School. That its distribution therefore could not be said to have been widespread within the Constituency. That the lower Court therefore ought not

to have held that this activity was widespread within Chinsali Constituency.

[3.40] The Appellant further argued that according to the evidence of PW8 and PW9, social cash transfer was only paid to the beneficiaries at Mwaba School in Nkakula ward. That there was no evidence that it was distributed in all the wards in Chinsali Constituency.

[3.41] As regards the donation of roofing sheets and other building materials, the Appellant submitted that according to PW1 and PW12 the materials were donated at Kaluka School and Kalela School. The Appellant contended that even assuming it had been proved that he had donated the materials as the lower Court erroneously found, that would not warrant the nullification of the election as the alleged infractions were not widespread as the majority of the wards were not affected. The Appellant therefore urged us to reverse the lower Court's finding that the proven allegations were widespread as the finding was not supported by the evidence on record. He further implored us to set aside the nullification of his election and declare him as the duly elected

Member of Parliament for Chinsali Constituency as the 1st and 2nd Respondents did not prove their allegations against him to the required standard.

[3.42] At the hearing of the appeal, learned State Counsel Mr. Mutale and co-counsel for the Appellant reiterated the arguments canvassed in the heads of argument. We will therefore not restate the oral arguments.

[4.0] 1ST AND 2ND RESPONDENTS' ARGUMENTS

[4.1] In opposing the appeal, the 1st and 2nd Respondents also argued grounds one, two, three and six together and grounds four and five together. In response to grounds one, two, three and six, the 1st and 2nd Respondents (henceforth referred to as the Respondents) in relation to the allegation on violence submitted that contrary to the Appellant's assertion that due to lack of corroborative evidence, PW2's evidence could not be relied upon to prove that he (the Appellant) participated in assaulting PW2 at Chinsali Central police station, as the occurrence book did not implicate him in the assault, PW2's medical report at page 187 and his police statement at pages 188 to 190 of the record of appeal

which were produced before the lower Court corroborated his testimony. They submitted that the requirement for corroboration is meant to guard against possible false implication of a person against whom such evidence is led as was held in the case of **George Musupi v The People**[4] and **Chooka v The People**[5]. They contended that the evidence on record was that the Appellant joined in the attack of PW2 by PF members and consented to it.

[4.2] The Respondents further submitted that the effect of the assault of PW2 by PF cadres and the Appellant at the police station was meant to induce fear in PW2 and the 2nd Respondent's UPND team, which fear prevented them from campaigning freely in the Constituency so that they only campaigned in nearby areas as PW2 testified. They contended that the assault of PW2 at the police station by the Appellant personally or with his knowledge and consent or approval was an illegal act or misconduct by PF cadres and the Appellant, which act is proscribed by section 97(2)(a) of the Electoral Process Act No. 35 of 2016.

[4.3] On the requirement to prove both the illegal conduct and its widespread effect, the Respondents submitted that a petitioner need

only prove that the majority of voters in a constituency may have been prevented from electing their preferred candidate and not that the majority of voters were in fact prevented from voting for a candidate of their choice. They contended that this gives a trial Court discretion to determine whether or not, based on the totality of evidence presented by a petitioner, it was possible that the majority of voters may have been prevented from voting for a candidate of their choice.

[4.4] The Respondents submitted that in this case, the effect of the fear was not localised to Chinsali Central police station but was widespread in the Constituency; and that the 2nd Respondent's failure to campaign freely in the entire Constituency may have deprived the majority of the voters from choosing a candidate of their choice.

[4.5] The Respondents further submitted that it was not disputed that there was ferrying of voters to polling stations which PW6 witnessed. That what was disputed was whether the ferrying of voters to the polling station was perpetrated by the Appellant. They contended that the odd coincidence that the Appellant informed the

electorate at a meeting attended by PW6 and others that there would be ferrying of voters and to find transport which was said to come from the Appellant, which PW6 and others boarded to the polling station, offered something more to show that it was provided by the Appellant. That this added up to the other malpractices and cannot be ignored.

[4.6] Turning to the allegation on GGOZA activities, the Respondents submitted that the Appellant's argument that the mere allegation that GGOZA was a surrogate of the PF did not warrant an inference being drawn that he was directly or indirectly involved in the activities of GGOZA in Chinsali Constituency and that the GGOZA incorporation documents should have been adduced in evidence to prove the allegation, was a strange argument because PW1, PW4, PW5, PW6 and PW10 testified that GGOZA participated in the 2021 general election campaigns and in the monitoring of elections in Chinsali Constituency.

[4.7] That PW4 stated that the Appellant helped to set up a team of 10 registered voters per polling station through agents drawn from the 100 polling stations to work as GGOZA agents. Further, that he

gave her his cell phone number so that she could contact him and that he called her on it on election day and complained about her failure to cook meals for voters on that day. The Respondents argued that the Appellant did not challenge that evidence. That according to PW4, GGOZA was in all the 17 wards of Chinsali Constituency and mobilised votes for the PF and the Appellant at his instance, which evidence was unchallenged. That it was not disputed that GGOZA had monitors in all the polling stations in the Constituency who were involved, through the Appellant in contravention of the Electoral Code of Conduct.

[4.8] The Respondents submitted that it was illegal for the Appellant to gain mileage in the elections through GGOZA in the manner demonstrated by PW1, PW4 and PW5. That although GGOZA was politically inclined towards the PF and its candidates, it was allowed to monitor elections as evidenced by the document on page 199 of the record of appeal which shows Sunday Lukonde and Mutale Lukonde as its agents at Chinsali Secondary 03 polling station which was one of the 100 polling stations covered by GGOZA in the Constituency. The Respondents submitted that they had proved to the trial Court that the Appellant was responsible for the affairs of

GGOZA for his own benefit and to the detriment of all other contenders. The Respondents contended that the GGOZA activities were widespread as the record shows that it was present in all the 17 wards and the 100 polling stations, as corroborated by the documents referred to and the evidence of PW4, PW5 and PW6.

[4.9] On the allegation relating to social cash transfer, the Respondents submitted that while it conceded that the Government could carry out its mandate during election time, the law proscribes a candidate seeking political mileage through a government program as the Appellant did. They submitted that PW8 and PW9 were not partisan witnesses as the Appellant alleged and that PW8 denied in cross-examination that he was a member of the UPND. Further, that it was not proved in cross-examination that the Facebook account which the Appellant referred to in his submissions belonged to PW8. That therefore there was no evidence on record that PW8 was a partisan witness.

[4.10] The Respondents submitted that it was not disputed that social cash transfer was paid on 11th August, 2021 at Mwaba School where PW9 was paid, but rather that what was disputed was

whether the Appellant addressed the beneficiaries and informed them that he had ensured that they were paid on that day as PW9 testified. That the documents produced before the lower Court corroborated the evidence of PW9 that social cash transfer was paid on 11th August, 2021.

[4.11] Further, that the evidence of PW8 who was non-partisan confirmed that the Appellant attended a meeting at the Mwaba School grounds, which evidence also corroborated the evidence of PW9 that the Appellant was present at Mwaba School on 11th August, 2021 contrary to his assertion that he was not there. That the evidence of PW8 and PW9 was unshaken and that the Appellant's only challenge to PW8's evidence was an allegation put to the witness that the meeting at Mwaba School took place on 9th August, 2021 and not 11th August, 2021 without any evidence to prove the allegation.

[4.12] Turning to the allegation on donations of building materials and money to schools, the Respondents cited the evidence of PW1, PW11 and PW12 and submitted that the Appellant further argued that because PW11 belonged to the Socialist Party on whose ticket

he stood as councillor, his evidence could not be relied upon by this Court based on the principles which the Appellant alleged are espoused in the **Margaret Mwanakatwe**[1] case.

[4.13] They contended that to accept that proposition regarding a witness with an interest of their own to serve would be to allow for speculation on matters not proved by evidence or by presumption of law. The Respondents submitted that there is no presumption of law that sets up a witness to have a possible interest of his own to serve only because he belongs to a party other than that to which a litigant against whom such evidence is given belongs. They further submitted that there was no relationship which was shown to exist between the 1st Respondent and PW11 which relationship in the Respondents' view ought to be established for the presumption of law in the **Mwanakatwe**[1] case to apply.

[4.14] That in the present case, the evidence was that PW11 and the Respondents belonged to different political parties which made their interests distinguishable from those in the **Mwanakatwe**[1] case. That even assuming that PW11 had a possible interest of his own to serve, he gave evidence of the phone number on which the

Appellant called him during the material time, which number the Appellant did not dispute. In the Respondents' view, the evidence of the Appellant's number corroborated the witness' evidence and excluded the possibility of false implication. That the evidence of PW11 was cogently placed on record and therefore the trial Court was right to accept it as such.

[4.15] The Respondents submitted that PW11's evidence that after delivering the materials at Kaluka School, the Appellant said that the other materials would be donated to Bwinambo and Kalela schools was not challenged at trial. The Respondents contended that although the trial Court did not disclose its reasons for finding that PW12 had no reason to maliciously accuse the Appellant, there was evidence from other witnesses that the Appellant used Lucy Mukuka's Fuso truck to coordinate the malpractices in the Constituency.

[4.16] That the odd coincidence that Lucy Mukuka's Fuso truck delivered in accordance with what the Appellant said at a political meeting which was held earlier provided something more as required by law. They contended that the Fuso truck was the same

truck which was used by the Appellant and Lucy Mukuka in the delivery of DMMU mealie meal donations in another area of the Constituency as PW7 who was an independent witness testified, and corroborated the fact that such donations were made by the Appellant.

[4.17] The Respondents further submitted that although the Appellant attempted to state that the Petitioners in the lower Court needed to prove with cogent evidence that the majority of voters were prevented from voting for a candidate of their choice, the law which proscribes such conduct only requires the petitioner to demonstrate through the evidence led that the voters may have been prevented from electing a candidate of their choice. They submitted that in this case, the Respondents' evidence proved that the majority of voters may have been prevented from voting for a candidate of their choice.

[4.18] On the allegation of defamation of the 1st Respondent, the Respondents submitted that the Appellant did defame the 1st Respondent as PW11 and PW12 testified that the Appellant made defamatory statements against the 1st Respondent at public

campaign meetings and that the audio evidence corroborated the evidence that the Appellant participated in that malpractice. That due to that malpractice the majority of voters were prevented from voting for their preferred candidate.

[4.19] Regarding the allegation on the distribution of DMMU mealie meal, the Respondents submitted that PW1 and PW7 testified that the Appellant was involved in the distribution of DMMU mealie meal in Chinsali Constituency during the campaign period and after the close of the campaign period at 18:00 hours on 11th August, 2021. That PW1 testified that he found that the distribution of mealie meal was rampant throughout the Constituency and relied on the Chandamali video to that effect.

[4.20] That PW7 testified that the Appellant's advance team went around in a canter light truck which was used by the Appellant in his campaign inviting people to a meeting at a named school so that the Appellant could give them what he had promised at an earlier meeting. That PW7 stated that before the Appellant left the meeting held at Mwaba School on 11th August, 2021, he issued instructions on how Lucy Mukuka, the PF mayoral candidate would distribute

mealie meal and money to the people in attendance. That this evidence was supported by video evidence taken by PW7 on his phone and was unchallenged.

[4.21] The Respondents submitted that the lower Court was right to accept the evidence of PW7 as a true account of what happened and that his evidence corroborated the evidence of PW1 and the evidence in the Chandamali video. That the lower Court's finding that there was wrong doing by the Appellant in this regard was backed by evidence and added to the other wrongdoings found to have been done by the Appellant in other locations in the Constituency.

[4.22] The Respondents submitted that contrary to the Appellant and the 3rd Respondent's arguments that the illegal acts or malpractices even when proved were not widespread, the malpractices relating to GGOZA activities, violence, and the distribution of social cash transfer and DMMU mealie meal were proved to have been widespread in the Constituency and may have swayed the majority of voters from voting for their preferred candidate and justified the nullification of the Appellant's election.

[4.23] In conclusion, the Respondents submitted that at the trial of the petition, the trial Judge took his own notes in long hand, on the basis of which he rendered his judgment and yet those notes did not form part of the record of appeal. They contended that it would be a travesty of justice for this Court to reverse the findings of fact made by the lower Court in the absence of the evidence as captured by the lower Court, which is an important part of the record. They further contended that they did not have the video and audio recordings which were part of the evidence of the trial Court. They contended that the absence of the lower Court's notes would lead to unfairness in the determination of the appeal.

[4.24] The Respondents submitted that the burden of proving that the trial Court did not attend well to matters before it to entitle him to a reversal of the lower Court's decision lay with the Appellant who bore the procedural legal burden to present all the relevant materials that the trial Court worked with in coming up with its decision. They submitted that having attempted to show that the Appellant had failed to satisfy this Court that it would be in the

interest of justice to reverse the findings of the trial Court, all the grounds of appeal must fail and the appeal be dismissed with costs.

[4.25] At the hearing of the appeal, Mr Chikuta, learned Counsel for the 1st and 2nd Respondents also essentially reiterated the arguments in the Respondent's heads of argument. We will therefore not set out those oral arguments here.

[5.0] 3RD RESPONDENT'S ARGUMENTS

[5.1] In its heads of argument filed on 29th March, 2022, the 3rd 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**[6] 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**[7] 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**[8] 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 in this case, the Respondents had lamentably failed to prove any electoral malpractice or misconduct to the required standard. Further, that they had not adduced any cogent evidence that the malpractices or misconduct if any, was so widespread that it swayed or may have swayed the majority of the electorate from electing a candidate of their choice.

[5.5] The 3rd Respondent contended that there was no evidence on record that the electorate were prevented from participating in the election and that none of the witnesses specified any provision of the law which the 3rd Respondent breached. In conclusion, the 3rd Respondent submitted that it duly conducted the elections in

substantial conformity with the law and therefore that the appeal should be allowed and the election upheld.

[5.6] At the hearing of the appeal, Counsel for the 3rd 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] The law regarding when the election of a candidate may be nullified is stipulated by section 97 (2) of the Electoral Process Act No. 35 of 2016 (the Act). Section 97(2)(a) of the Act which is relevant to this appeal provides as follows:

> **"(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

[6.3] The import of section 97 (2) (a) of the Act is that both the commission of the corrupt or illegal practice or other misconduct by the candidate personally or by someone else with the candidate's knowledge and consent or approval or that of his or her election or polling agent and the widespread nature of the corrupt or illegal practice or misconduct in the constituency, district or ward, to the extent that the majority of the voters were or may have been prevented from electing their preferred candidate, must be proved to the required standard.

[6.4] The burden of proof in an election petition, as in any other civil matter lies on the petitioner. However, it is settled law that the standard of proof applicable in an election petition is higher than that in an ordinary civil action where allegations must be proved on a balance of probabilities. Allegations in an election petition must be proved to a fairly high degree of convincing clarity as aptly explained by the Supreme Court in the celebrated case of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba**[9].

[6.5] In determining the appeal before us, we are guided by the law and legal principles which we have set out above.

[6.6] Before we consider the grounds of appeal raised, we wish to address the procedural issue raised by the 1st and 2nd Respondents who contended that in the absence of the lower Court's hand written notes from the record of appeal, we cannot fairly determine this appeal as there would be no basis for us to reverse the findings of fact made by the lower Court. In essence, the Respondents argued that the record of appeal is incomplete in the absence of the lower Court's hand written notes.

[6.7] In addressing this issue, we have examined the provisions of section 106 (5) of the Act and Order XI rule 9 of the Constitutional Court Rules, S.I No.37 of 2016 (the Rules) which Order provides for appeals and cross appeals. Section 106(5) of the Act provides as follows:

> **On the trial of an election petition, a verbatim record of all evidence given orally in the trial shall be taken and transcripts of the record shall, at the conclusion of the proceedings, be delivered to the Commission by the Registrar or designated person, as the case may be.**

[6.8] Order XI Rule 9(1) provides with regard to the record of appeal as follows:

The record of appeal shall include copies of the proceedings in the High Court, the tribunal or any lower Court or tribunal as the case may be.

Order XI Rule 9 (4)(j) reads as follows:

(4) The record shall contain the following documents in the order in which they are set out:

(j) a copy of the notes of the hearing at first instance in the Court below or, if the hearing was recorded by shorthand or by means of a recording apparatus, a copy of the transcript thereof. (Emphasis added)

[6.9] The provisions of section 106(5) of the Act and of Order XI rule 9(1) and rule 9(4)(j) of the Rules are instructive on the issue of the inclusion of the proceedings of the lower Court in the record of appeal. While section 106(5) of the Act requires that a verbatim record of all evidence given orally in the trial must be taken and transcripts of the record be delivered to the Commission by the Registrar or designated person, as the case may be, Order XI rule 9(1) further requires that a copy of those proceedings should be included in the record of appeal. According to Order XI rule 9(4)(j) of the Rules, if the recording is by way of shorthand or by means of recording apparatus, a copy of the transcript must be included in the record of appeal.

[6.10] In the present case, the record of appeal contains a verbatim transcript of the evidence which was taken of the election petition proceedings in the lower Court at pages 394 to 892 of volume two of the record of appeal; at pages 803 to 1233 of volume three of the record of appeal and at pages 1234 to 1587 of volume four of the record of appeal. The inclusion of the evidence taken at the trial of the election petition hearing in volumes two to four of the record of appeal satisfies the requirements of section 106(5) of the Act and of Order XI rule 9(1) and (4)(j) of the Rules of this Court.

[6.11] While Mr. Chikuta argued that the record of appeal should contain the trial Judge's hand-written notes, he did not cite any provision of the Act or the Rules which support that contention. We are satisfied that the record of appeal in this case was prepared in accordance with the requirements of Order XI rules 9 (1) and (4) of the Rules, and that based on the record of appeal, which contains the oral and documentary evidence and exhibits which were produced in the lower Court, we are able to fairly and justly determine all matters in controversy in this appeal.

[6.12] Having said that, we turn to consider the grounds of appeal in the order in which they were argued by the parties on both sides. In grounds one, two, three and six, the Appellant challenges the lower Court's finding that the allegations of electoral malpractice, vote buying, intimidation and violence had been proved beyond a reasonable doubt in the absence of evidence that the Appellant or his election agents committed the acts of electoral malpractice or that the acts were committed with their knowledge and consent; and the Court's reliance on witnesses with an interest to serve to conclude that the Appellant engaged in the acts complained of.

[6.13] In determining these grounds, we begin by observing that in its judgment on pages 144 to 145 of volume one of the record of appeal, the lower Court stated thus:

> **I am satisfied that the Petitioners have clearly demonstrated to a standard beyond the preponderance of doubt that the allegations the court has found proved were carried out by the 1st Respondent and further I am satisfied that the Petitioners before me have clearly demonstrated to a standard well beyond the preponderance of doubt that the wrong doings the Court has found were proved were carried out by or with the knowledge and approval of the 1st Respondent.** (Emphasis added)

[6.14] By stating that the allegations by the petitioners were proven to a standard beyond a preponderance of doubt, the lower Court

applied a wrong standard of proof in an election petition. As we already stated earlier in this judgment, Zambian jurisprudence comprises a plethora of Supreme Court and Constitutional Court decisions which state that the standard of proof in election petitions is to a fairly high degree of convincing clarity. This is a standard in between the standard of proof required in criminal cases which is proof beyond reasonable doubt and on a balance of probabilities required in ordinary civil matters.

[6.15] To press the point, even prior to the 2016 electoral regime, the Supreme Court in the case of **Lewanika and Others v Chiluba**[9] stressed that there can be no serious argument that the standard of proof required in parliamentary election petitions is higher than a balance of probabilities; and that parliamentary election petitions must be proven to a fairly high degree of convincing clarity. The Supreme Court added that that standard of proof was to be applied even more stringently in a presidential election petition which is premised on constitutional provisions. It is, therefore, clear that the same standard of proof applies in all election petitions.

[6.16] As the standard of proof in election petitions has been settled by the two apex courts, lower courts, that is, the High Court and local government elections tribunals are bound to strictly follow the decisions on the standard of proof in election petitions handed down by the two apex courts in line with the doctrine of *stare decisis*. That being the case, the learned trial Judge in this case, therefore, misdirected himself when he applied a standard of proof which is not applicable in an election petition.

[6.17] With that said, we shall proceed to consider grounds one, two, three and six. The issue we have to determine in relation to these grounds is whether the 1st and 2nd Respondents adduced cogent evidence which proved that the Appellant personally or with his knowledge and consent or approval or that of his election agent committed the alleged malpractices to the required standard. In so doing, we shall examine the evidence adduced on each allegation in light of the provisions of section 97(2)(a) of the Act.

[6.18] The first allegation related to violence. The evidence on violence was given by PW1, PW2 and PW3. PW1 testified that his wife and siblings were insulted and threatened by the Appellant and his agents. That Lewis Bwalya (PW2) the UPND mayoral candidate

was beaten by PF cadres and the Appellant at Chinsali Central Police Station and sustained a swollen eye and bleeding nose.

[6.19] PW2 testified that on 9th June, 2021, he was punched on the face by a PF cadre known as bashi Kel as he got out of the car on arrival at Chinsali Central Police Station where he was called to attend a meeting in the company of PW3 and David Chibeka Seta. As they were ushered into the office of the officer-in-charge where the meeting was to be held, they found the Appellant, Lucy Mulenga and Laurent Mpundu. The Appellant stood up while Lucy Mulenga and Laurent Mpundu began to beat him until the officer commanding separated them. He sustained a swollen left eye and nose and was issued with a medical report. He was treated at Chinsali District Hospital.

[6.20] PW3 gave similar evidence regarding the assault but stated that PW2 was slapped by a PF cadre called shi Kel and that he too was roughed up by the PF cadres on that day at the police station.

[6.21] In rebuttal, the Appellant called RW1, the officer in charge of Chinsali Central Police Station, who produced the occurrence book (OB) ZP form 89 containing entry number 81/37 relating to the assault reported by PW2. RW1 stated that according to the entry in

the OB, PW2 reported that he was assaulted by male bashi Kelvin, other names not known, a PF member and Lameck Bwalya on 10th June, 2021 around 18:00 hours at Chinsali Central Police Station and ZP form 32 was issued. That he sustained a swollen left cheek and headache as fists were alleged to have been used in the act.

[6.22] In cross examination, RW1 confirmed that PW2 gave a statement to the police in which he stated that shi Kelvin punched him on his left eye. As he was ushered into the office of the officer-in-charge, the PF members rose against him and Mr. Mpundu Laurent punched him on the face while the Appellant and Lucy Mukuka slapped him on the face.

[6.23] On his part, the Appellant as RW2 denied assaulting the 2nd Respondent and PW2 as confirmed by the OB for Chinsali Central Police Station produced by RW1. He said he got along very well with the 1st and 2nd Respondents and had no confrontation with them throughout the campaign period.

[6.24] In his judgment on page 120 of volume one of the record of appeal, the learned trial Judge found that there was no evidence that the Appellant or his agents attacked or intimidated PW1 and his wife as he alleged or that he knew about it. The lower Court

further found that the evidence before it proved that PW2 was assaulted in the presence of the Appellant at Chinsali Central Police Station and sustained a swollen face and an eye injury.

[6.25] However, the trial Judge observed that entry number 81/37 of the occurrence book produced by RW1, the officer in charge of Chinsali Central Police Station showed that PW2 was assaulted by male bashi Kelvin, other names not known and PF member Lameck Bwalya. That the OB did not reflect that the Appellant took part in beating PW2. The lower Court then considered the question whether PW2 was beaten with the Appellant's knowledge and approval. In his judgment at page 121 of volume one of the record of appeal the trial Judge stated as follows:

> **The evidence of the Petitioner's 2nd and 3rd witnesses clearly showed that the 2nd Petitioner's witness was assaulted in the office of the officer in charge and as at that time, the 1st Respondent, madam Lucy Mukuka the Mayoral candidate, Mr. Laurent Mpundu and Shi Kelvin were present in that office and that before the Petitioner's 2nd witness was attacked, he was told by that group that they had been looking for him. The issue of knowledge by the 1st Respondent therefore is very clear in that he was present and saw what was happening.**

[6.26] The lower Court thus concluded at page 122 of the record of appeal that based on the evidence before it, the violence against PW2 was committed with the knowledge and approval of the

Appellant. With regard to whether the assault on PW2 and PW3 at Chinsali Central Police Station had a widespread effect, the lower Court held at page 123 of the record of appeal that the evidence before it did not suggest that apart from the violent attack on PW2 and PW3 on 9th June, 2021 at Chinsali Central Police Station, there were other such attacks on other dates and in different places. That the one incident could not on its own be taken to show that there was widespread violence in the absence of evidence to that effect. The trial Court therefore held that although it accepted that PW2 and PW3 were attacked by PF members with the knowledge and approval of the Appellant, it did not find that the incidences of violence were widespread to lead a reasonable man to conclude that such incidences of violence could have prevented the majority of the voters in Chinsali Constituency from voting for their preferred candidate.

[6.27] We have considered the evidence on record on the allegation of violence given by PW2 and PW3 as well as the documentary evidence contained in the OB produced by RW1. We agree with the learned trial Judge that the evidence proved that PW2 was indeed assaulted at Chinsali Central Police station by a man named as Shi

Kelvin and other PF members and that the assault was committed in the presence of the Appellant who therefore had knowledge of it.

[6.28] We further agree with the lower Court's finding that the evidence on record did not prove that the proven violence on PW2 had a widespread effect so that it prevented or may have prevented voters from electing their preferred candidate. As a Court, we reiterate our strong disapproval of violence related to elections, regardless of who the perpetrator is. We uphold the trial Court's findings related to the allegation of violence.

[6.29] The next allegation relates to the distribution of social cash transfer. In paragraph 16 of the petition set out on page 149 of the record of appeal, the Petitioners alleged that a day or so before the election day, social cash transfer was paid to the electorate by the PF party in some areas through government workers while issuing threats to the electorate that there would be cameras placed in the voting booths which would detect those who voted against PF candidates, including the Appellant as parliamentary candidate, and would consequently be removed from the social cash transfer register.

[6.30] In line with that allegation, PW8 testified that on 11th August, 2021, the Appellant addressed beneficiaries of social cash transfer at Mwaba School and informed them that he had caused them to be paid on that day and asked for their vote. That he threatened that he would know if they did not vote for him. That thereafter, he attended a meeting held in the Mwaba School grounds addressed by Mr Stephen Kampyongo and Mr Joe Malanji. PW9 testified to similar effect.

[6.31] On the other hand, the Appellant denied addressing the social cash transfer beneficiaries at Mwaba School on 11th August, 2021 and said he only attended a campaign meeting held at Mwaba School addressed by the two named PF men on 9th August, 2021 as evidenced by the Smart Eagles write up on Facebook dated 10th August, 2021 exhibited at page 292 of volume one of the record of appeal which showed Mr. Kampyongo holding a microphone.

[6.32] In his judgment at page 141 of volume one of the record of appeal, the trial Judge stated that although social cash transfer was a government programme, the Appellant by his statements tried to show that he had positively influenced its payment as a candidate in the election. He therefore found that although the Appellant did

not personally distribute the social cash transfer, he did claim that it was being distributed because of him; and that the statement was corroborated by the District Commissioner for Chinsali, a government functionary. The trial Judge in conclusion made a sweeping statement that in his view, this had a tendency to influence the people on how they would vote. The learned trial Judge made no reference to the Appellant's evidence in rebuttal.

[6.33] We have examined the evidence on record given by PW8 and PW9 relating to the allegation on the distribution of social cash transfer and have equally examined the Appellant's evidence in rebuttal to that allegation. It is evident from the evidence on record on the social cash transfer allegation, that faced with directly conflicting evidence adduced by the 1st and 2nd Respondents' witnesses, on one hand, and by the Appellant, on the other hand, the trial Court accepted the evidence of PW8 and PW9 and rejected the Appellant's evidence.

[6.34] The law is settled that a trial court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings based on the evidence before it having seen and heard the witnesses giving the evidence.

In the case of **Chief Chanje v Paul Zulu**[10], the Supreme Court stated that:

> **We cannot fault the learned Judge for so finding as he was perfectly entitled to decide whom to believe as he had the opportunity to observe the witnesses and to form the impression he did.**

[6.35] In other words, a trial court is entitled to determine a matter based on the credibility of the witnesses and to make findings of fact based on the evidence before it. In the present case, however, the finding made by the learned trial Judge that the Appellant's claim that he had influenced the payment of the social cash transfer to the beneficiaries on 11th August, 2021 had a tendency to influence the people on how they would vote was not supported by any cogent evidence to that effect.

[6.36] The issue of whether or not the beneficiaries of social cash transfer were or may have been influenced on how to vote by the Appellant's alleged assertion needed to be proved with cogent evidence. It could not be presumed in the manner the learned trial Judge did in the absence of evidence to that effect.

[6.37] In the absence of evidence that the Appellant's remarks swayed or may have swayed the majority of the voters from voting for their preferred candidate, the 1st and 2nd Respondents did not

prove that the alleged illegal practice, relating to the distribution of social cash transfer attributed to the Appellant, had a widespread effect so as to have prevented the majority of voters from electing their preferred candidate.

[6.38] As an appellate Court, we are aware that we ought not to interfere with the findings of fact made by a trial Court except on very clear grounds as was held in the case of **Examinations Council of Zambia v Reliance Technology**[11]. In the present case, the trial Court's finding that the Appellant's claim that he caused the payment of social cash transfer to the beneficiaries, on 11th August, 2021, had a tendency to influence the people on how they should vote was not supported by any evidence to that effect. We accordingly reverse it.

[6.39] The next allegations made against the Appellant were that during the campaign period he donated building materials and money to schools in Chinsali Constituency; and further that he defamed the 1st Respondent by alleging that he was a satanist. The evidence on the two allegations was led by PW1, PW11 and PW12. For convenience and in order to avoid repetition, we shall consider the two allegations simultaneously.

[6.40] PW1 testified that the Appellant donated 50 pockets of cement and iron bars for roofing at Bwinambo Primary School, 50 roofing sheets and K1,000 at Kaluka Community School and 50 roofing sheets at Kakombe Primary School. He further testified that the Appellant defamed him by alleging that he was a satanist who used his grandchild to produce money by defecation. That the Appellant also told the women who had received campaign chitenge material from him (1st Respondent) to urinate on them and cast out demons before using them. PW1 produced an audio recording of his interview at Delight Radio Station where he was asked about the rumours circulating over the defamatory allegations. He, however, conceded that there was no mention of the Appellant's name in the audio recording.

[6.41] PW11 testified that on 9th August, 2021, the Appellant donated 50 iron sheets and K1,000 to Kaluka Community School in Chunga ward of Chinsali Constituency and asked the people to vote for him. He added that the Appellant informed the people in attendance that the 1st Respondent used to make money through a grandchild who defecated money and that the women who had

received chitenges from him must urinate on them before wearing them to remove the demons because he was a satanist.

[6.42] PW12 similarly testified that on 9th August, 2021, the Appellant held a campaign meeting at Kalela School and informed the people in attendance that he would donate cement and iron bars for roofing of the school. That he further told the people that the 1st Respondent had a child who defecated money and that the women should urinate on the campaign chitenge material he had given them before wearing them. Thereafter, he had the men and women queue up and gave them K5.00 each. On 10th August, 2021, a Fuso truck owned by Lucy Mulenga the PF mayoral candidate for Chinsali District delivered 10 iron bars and 50 bags of cement. The Appellant was not present.

[6.43] Both PW11 and PW12 conceded in cross examination that they did not have any documentary evidence to support their allegations against the Appellant. PW11 also confirmed that he participated in the 12th August, 2021 elections as the Socialist party candidate in the local government elections for Chunga ward while PW12 told the lower Court that he was the 1st Respondent's agent.

[6.44] In rebuttal, the Appellant denied that he donated roofing or other building materials and money to Bwinambo, Kalela, Kaluka and Kakombe schools during the campaign period as alleged by PW1, PW11 and PW12. He further denied that he issued defamatory remarks against PW1 in his campaign. He pointed out that even in the audio recording of his interview at Delight Radio Station, produced by PW1 in the lower Court, the interviewer and PW1 did not name the Appellant as the person who had defamed the 1st Respondent.

[6.45] In his judgment on page 143 of volume one of the record of appeal, the trial Judge did not address the evidence of PW1 and PW11 on the allegations of donations of building materials and money to the named schools or to the alleged defamation of the 1st Respondent. The lower Court only referred to the evidence of PW12 that on 10th August, 2021, a Fuso truck delivered the cement, iron sheets and iron bars for roofing as promised by the Appellant. The learned trial Judge then remarked as follows:

> **This evidence taken together with the other evidence on record, leaves me with the impression that the 1st Respondent did actually donate the materials as alleged. In commenting on this evidence, in his evidence the 1st Respondent refused ever having taken building materials. However, having considered that they could have been**

no reason for the 12th Prosecution witness to maliciously accuse the 1st Respondent, I find that his bare denial is not to be relied upon and I accept the evidence that he took building materials as anticipated. (sic)

[6.46] We have examined the evidence given by PW1, PW11 and PW12 on the allegations relating to the donation of building materials and money to schools in light of the provisions of section 97(2)(a) of the Act. We note that PW1 stated that he did not personally witness the donation of the cement, iron sheets and iron bars for roofing of Kakombe Community School, Bwinambo Primary School or Kaluka Community School nor did he hear the Appellant say that he was a satanist. His evidence therefore did not help the Petitioners to prove the two allegations. PW11 and PW12 on their part did not support their allegation against the Appellant with any independent evidence.

[6.47] The learned trial Judge in his judgment did not analyse the evidence of PW11 and PW12 in light of the provisions of section 97(2)(a) of the Act. The reason he gave for accepting PW12's evidence as opposed to accepting the Appellant's version of the evidence was that PW12 had no reason to maliciously accuse the Appellant of donating building materials to the named schools.

[6.48] By holding that PW12 had no reason to maliciously accuse the Appellant, the lower Court overlooked the critical evidence given by PW12 at page 1466 of volume four of the record of appeal that he was the 1st Respondent's agent. As such, PW12 could be categorised as a partisan witness whose evidence needed to be corroborated before it could be accepted. In saying so, we are mindful that the 1st Respondent stood as an independent candidate in the Chinsali Constituency parliamentary elections and not on a party ticket. Nonetheless, his relationship with PW12 who was his agent demanded that independent evidence be adduced to support his allegations against the Appellant. We find no independent evidence to support his claim that the Appellant held a meeting at Kalela school where he promised to donate building materials, gave money to the electorate and uttered defamatory statements against PW1.

[6.49] Similarly, PW11 testified that he stood for the local government elections as councillor for Chunga ward. He therefore was a partisan witness as it is on record that the Socialist Party had a candidate who contested the Chinsali parliamentary seat, namely Juliet Mwape, as the 1st and 2nd Respondents stated in paragraphs 5 and 7 of their petition on page 147 of volume one of the record of

appeal. His evidence against the Appellant therefore needed corroboration. In the case of **Steven Masumba v Elliot Kamondo**[12], we stated that witnesses from a litigant's own political party are partisan witnesses who should be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood. There is no independent evidence on record to support PW11 and PW12's evidence. As the trial Judge did not address his mind to the need for PW11 and PW12's evidence to be corroborated, he fell into error when he held that there was no reason for PW12 to maliciously accuse the Appellant. He further misdirected himself when he held that PW12's evidence taken together with the other evidence on record, without specifying the evidence he was referring to, left him with the impression that the Appellant did actually donate the materials as alleged.

[6.50] In the circumstances, we are left with no choice but to reverse the lower Court's finding that the Appellant donated building materials and money to the schools as it is not supported by the evidence on record.

[6.51] We observe from the record that the trial Court did not address the allegation relating to the defamatory remarks allegedly

made by the Appellant against the 1st Respondent during the campaign period. He therefore did not make a finding on whether or not the allegation had been proven to the required standard.

[6.52] That notwithstanding, we have examined the evidence on record as adduced by PW1, PW11 and PW12. We note that in support of this allegation, PW1 produced an audio recording of his interview at Delight Radio Station. In that interview, which we have listened to as it was availed to us as part of the record of proceedings at page 213 of volume one of the record of appeal, we note that when the interviewer asked him about the alleged defamatory remarks, PW1 did not attribute the alleged defamatory remarks to the Appellant or to his election agent George Mukosa nor did he state that the remarks were made by someone else with the Appellant's knowledge and approval or consent or that of his election agent. Instead, PW1 spoke in general terms saying the people involved in defaming him were letting down the PF presidential candidate Mr. Edgar Chagwa Lungu by not speaking to the policies of the PF to persuade the electorate to vote for him.

[6.53] On the other hand, PW11 and PW12, who spoke to the allegation of defamation, contended that the Appellant defamed the

1st Respondent at Kaluka School and Kalela School, respectively. As we observed earlier on when we addressed the allegation on donations, PW11 and PW12 fell into the category of witnesses whose testimony needed to be corroborated. We have seen no independent evidence on record to support their evidence on the defamation allegation.

[6.54] We further observe from the evidence on record that the allegation that the Appellant defamed the 1st Respondent by calling him a satanist who used his grandchild to make money by defecation was not proven to the standard required by section 97(2)(a) of the Act. We say so because there was no cogent evidence which proved the commission of the illegal practice by the Appellant or with his knowledge and approval or consent. Further, there was no evidence adduced by the 1st and 2nd Respondents that the alleged illegal practice was widespread and did or may have influenced the voters from electing a candidate of their choice.

[6.55] In the circumstances, the 1st and 2nd Respondents did not prove this allegation against the Appellant to the required standard in accordance with the requirements of section 97(2)(a) of the Act.

That being the case, the lower Court could not nullify the Appellant's election based on the allegation of defamation of PW1.

[6.56] The next allegation related to GGOZA and the distribution of mealie meal and other food stuff. PW4, PW5, PW6, PW7 and PW10 testified on this issue. PW4 testified that she was recruited by Felix Chimfwembe as a GGOZA coordinator for Milemba ward and attended a meeting where Chipasha and the Appellant told the 17 GGOZA coordinators to campaign for the PF. They also instructed them to appoint two monitors for each polling station in their respective wards. In July, 2021, Chipasha gave her chitenge materials, t-shirts and caps, cooking oil, salt and sugar which were collected by the 10 monitors. He also gave her mealie meal to cook nshima for voters on polling day. On 10th August, 2021, Chipasha gave her K5000 for relish but she and the monitors agreed not to cook nshima as instructed but instead shared the money leaving the sum of K2,000 which she gave to Danny who was a PF councillor candidate when he demanded for it on polling day. He also compelled her to give the mealie meal to voters for whom she should have cooked nshima.

[6.57] As she was giving out the mealie meal, some people came and took videos of people collecting mealie meal. PW4 referred to a video entitled Shimwalule village as proof of mealie meal being given to people on polling day. She conceded, in cross examination, that she stated in the video that it was Danny who was responsible for the distribution of the mealie meal and did not attribute the distribution to the Appellant or Chipasha. She further conceded that the GGOZA booklet did not link the Appellant to GGOZA and that the material distribution acquittal form on pages 229 to 230 of volume one of the record of appeal showed that only chitenges, t-shirts and caps were distributed and not mealie meal, cooking oil, sugar or salt.

[6.58] PW5 testified that he was recruited as a GGOZA monitor for Kapululu polling station by Laurent Mumbi and that he attended a meeting called by Chipasha at Lameck School with other people from Nkakula ward. Chipasha informed them that they had formed an organisation called GGOZA which was part of the PF and was supported by President Lungu. The Appellant produced a booklet bearing President Lungu's portrait and the PF name and symbol and an x, which Chipasha gave out.

[6.58] On 8th August, 2021, Chipasha and the Appellant in the company of Lucy Mukuka and the Appellant's driver delivered ten bags of mealie meal, 20 litres of cooking oil, eight packets of salt and fifty PF chitenge materials, 50 t-shirts and 50 caps to his home. He was instructed to give the campaign regalia to the people and record their names, national registration card and voter's card numbers on a GGOZA form which had provision for 50 names. The Appellant's driver was driving a blackish Ford Ranger. In the night of 11th August, 2021, the Appellant delivered beef sausage and five bags of mealie meal to him. He produced an audio of a discussion he allegedly had with Chipasha who said he should deny that the Appellant had taken the mealie meal and PF t-shirts to him. That as results were being announced, the village headman for Kapululu village went to his home with some people and demanded to be shown the mealie meal, salt and cooking oil; they took videos of the mealie meal, bucket of cooking oil and salt from his house. He conceded in cross-examination that the form allegedly relating to the Kapululu feeding point was not written on 12th August, 2021.

[6.59] PW6 stated that the Appellant held a meeting at her house where he promised to provide transport to voters and to feed them

on polling day. On 12th August, 2021, they were picked by the PF ward chairman and taken to Mulilansolo polling station. After voting, PF ward officials took her to a house where she ate nshima prepared by Helen Bwalya for GGOZA. PW6 said she believed the transport was provided by the Appellant although the PF ward chairman did not say so, and had a son who stood for election as a PF councillor.

[6.60] PW7 of Kasomo village in Muchinga ward said the Appellant addressed a meeting at Mukulo School where he informed the people that he had come unprepared and would return to them when he was well prepared. On 11th August, 2021, the Appellant returned in the company of Lucy Mukuka and delivered DMMU mealie meal to them so that they could prepare nshima and asked them to vote for him. That the Appellant asked the people to form groups of twenty-five and he gave them K100 per group and campaign regalia. PW7 said he took three videos of the mealie meal being distributed by Lucy Mukuka, which videos were entitled Kasomo 2, Kasomo 3, Kasomo 4 and Kasomo 5 and showed them to the trial Court. Kasomo 2 and Kasomo 5 videos were exactly the same.

[6.61] PW10 testified that Martin Mumbi who was a GGOZA coordinator for Itapa ward, went to his home and told him that he had been appointed as a monitor for GGOZA. He later attended a meeting at Martin Mumbi's home which was addressed by the Appellant and Lawrent Mpundu, who was a PF Councillor for Chilinda ward. Later, he was given PF campaign regalia comprising 50 pieces of chitenge material, t-shirts and caps as well as salt and cooking oil to distribute to the people. He was also given mealie meal and relish to cook for the people.

[6.62] In rebuttal, the Appellant stated that he did not know the leadership of GGOZA and had no knowledge of its activities. He denied being in any meeting with PW4 and PW5 as they alleged. The trial Court in its judgment on page 126 of the record of appeal held that PW4's evidence that she was given money by the Appellant was corroborated by PW5's evidence that the Appellant had given him money and relish to cook for the electorate on polling day. Further, that it found the Appellant's bare denial that he was unaware of the GGOZA activities unconvincing as there was a PF councillor, Danny, who was said to have been demanding money on his behalf after PW4 had not cooked. That the Appellant should have called

Danny to distance him from the allegation. That the Appellant, though not mentioned in the GGOZA booklet knew about GGOZA and did address meetings and talk on behalf of GGOZA. The trial Court found that the Appellant was involved in GGOZA activities which included the distribution of mealie meal and money to the public. Further, that the evidence showed that GGOZA was operating in all the wards in Chinsali Constituency where it had coordinators and monitors. That its activities were therefore widespread and compromised the election in the Constituency.

[6.63] We have carefully examined the evidence on this allegation. We note that the lower Court relied heavily on the evidence of PW4 and PW5 to conclude that the Appellant was involved in the GGOZA activities and that the activities were widespread. This is because the two witnesses alleged that GGOZA had coordinators and monitors in all the 17 wards and 100 polling stations. They also stated that they were given mealie meal, cooking oil, salt and sugar so that they could cook for the electorate on polling day. However, there is no evidence whatsoever on record that GGOZA coordinators distributed salt, cooking oil or sugar to the electorate in the 17 wards. PW4 who stated that she kept a record of the distribution of

those items failed to show to the lower Court where she recorded any such distribution. The only GGOZA material distribution acquittal form which she produced before the lower Court which is on pages 229 to 230 of volume one of the record of appeal revealed that only campaign regalia, namely chitenge material, t-shirts and caps were distributed. Further, not a single witness testified that he or she received salt, cooking oil or sugar from any GGOZA coordinator on behalf of the PF. Further, the Shimwalule video which PW4 referred to showed that she stated that the mealie meal was being distributed by GGOZA and also that Danny was responsible for its distribution. She did not mention in that video that the Appellant or Chipasha had authorised her to distribute the mealie meal as she alleged. PW4 also conceded in cross examination that the GGOZA booklet which the lower Court said linked GGOZA to the PF did not link the Appellant to GGOZA.

[6.64] In short, PW4 did not adduce proof that the Appellant was involved in the distribution of mealie meal on polling day or any other day before that day. The trial Court's finding that the Petitioners had proved to the required standard that mealie meal, salt, cooking oil or sugar were distributed by GGOZA on behalf of

the PF throughout the Constituency during the campaign period and that the Appellant was involved in the distribution was not supported by the evidence on record.

[6.65] We further observe that the lower Court did not properly analyse the evidence adduced by PW4, PW5, PW6, PW7 and PW10 on this allegation in relation to the evidence of the Appellant.

[6.66] With regard to the learned trial Judge's statement that the Appellant's bare denial was unconvincing and that the Appellant should have called Danny to distance him from PW4's allegation that he sent Danny to get the money intended for relish from her and to distribute mealie meal to the electorate in Milemba ward, it is our view that the trial Judge shifted the burden of proof from the petitioners to the 1st Respondent (Appellant), which the trial Court could not legitimately do. As was held in the case of **Brelsford James Gondwe v Catherine Namugala**[13], the burden of proving an allegation made against a respondent in an election petition lies on the petitioner who must do so to the required standard. The lower Court therefore erred in shifting the burden of proof in respect of the allegation that the Appellant was involved in GGOZA activities from the 1st and 2nd Respondents to the Appellant.

[6.67] PW6 who testified that she ate nshima cooked by Hellen Bwalya on behalf of GGOZA conceded that she was taken to the house where she ate by PF officials. Her evidence did not link the PF officials to the Appellant as they were not proved to be his election agents and they were not named. PW6 also did not substantiate her claim that the Appellant was responsible for the transport that took her and other voters to and from Mulilansolo polling station in Mikunku ward as she admitted that the PF ward chairman who drove them to the polling station did not say so. Furthermore, PW7 also did not adduce independent evidence that the Appellant addressed a meeting at Mukulo School. The Kasomo videos which he produced allegedly showed Lucy Mukuka distributing mealie meal and did not show the Appellant or his election agent George Mukosa in there. PW10 also did not adduce independent evidence to prove that the Appellant attended a meeting at Martin Mumbi's house or that he was involved in GGOZA activities.

[6.68] On the totality of the evidence adduced by the 1st and 2nd Respondents on the GGOZA activities, we find that there was no cogent evidence to prove the allegations that the Appellant was

connected to GGOZA or that he was involved in GGOZA activities. Further, there was no evidence adduced by the 1st and 2nd Respondents that the GGOZA activities were widespread in the Constituency and that they did or may have influenced the voters from electing a candidate of their choice. In the circumstances, the 1st and 2nd Respondents did not prove this allegation against the Appellant to the required standard in accordance with section 97(2)(a) of the Act.

[6.69] Even the evidence of PW7 that the Appellant was involved in the distribution of DMMU mealie meal was not supported by the four Kasomo videos as they did not link the Appellant or his election agent George Mukosa to the distribution of that mealie meal by GGOZA. For that reason, we reverse the lower Court's finding that the Appellant was involved in the GGOZA activities as the evidence on record does not support that finding.

[6.70] In sum grounds one, two, three and six succeed and are upheld.

[6.71] In grounds four and five, the Appellant contended that the lower Court was wrong when it nullified his election in the absence of evidence that the alleged electoral malpractice, vote buying,

intimidation and violence were widespread and that as a result of the alleged malpractices, the majority of people in Chinsali Constituency were prevented from voting for a candidate of their choice. The question we have to determine in relation to these two grounds is: was the learned trial Judge on firm ground when he held that the alleged corrupt or illegal practices or misconduct complained of were widespread in the Constituency and that they prevented the majority of voters from voting for their preferred candidate?

[6.72] The gist of the Appellant's arguments under these two grounds was that the evidence led by the 1st and 2nd Respondents on the various allegations against the Appellant did not prove to the required standard that the wrong doings complained of were widespread in the Constituency and prevented the voters from electing their preferred candidate. The Appellant contended that regarding the GGOZA activities, the evidence of PW4, PW5, PW6, PW7 and PW10 revealed that the activities were carried out in Mikunku ward, Nkakula ward, Milemba ward and Itapa ward which were four out of the 17 wards in the Constituency. He submitted that the distribution of DMMU mealie meal was allegedly

done only at Mukulo Primary School as PW7 testified. Further, that social cash transfer was distributed only at Mwaba School and not anywhere else in the Constituency; and that the donation of building materials according to PW11 and PW12 was only done at Kaluka Community School and Kalela School, respectively.

[6.73] The crux of the 1st and 2nd Respondents' argument in response under these grounds was that the learned trial Judge rightly found that the evidence adduced by the 1st and 2nd Respondents proved the allegations to the required standard. That on GGOZA activities, PW4 and PW5 stated that all the 17 wards and 100 polling stations had GGOZA monitors and that this evidence was not challenged by the Appellant and the 3rd Respondent. They further argued that the effect of the violent attack against PW2 and PW3 had a widespread effect and was not localised because it took place at Chinsali Central Police Station. That the distribution of DMMU mealie meal and social cash transfer when taken with the above incidences together added up to the widespread nature of the malpractices adduced in evidence.

[6.74] The 3rd Respondent on its part argued that the 1st and 2nd Respondents did not adduce sufficient evidence to prove that the

wrong doings complained of and ascribed to the Appellant were widespread in the Constituency and therefore did or may have prevented the majority of voters from voting for their preferred candidate. That their allegations against the Appellant and the Electoral Commission of Zambia were not proven in terms of section 97 (2) (a) and (b) of the Act.

[6.75] We have considered the arguments on both sides. We have also thoroughly examined the evidence on record regarding the GGOZA activities on the distribution of mealie meal and other food items; the distribution of DMMU mealie meal; the ferrying of voters; the distribution of social cash transfer; violence; donation of building materials and money to schools and defamation of the 1st Respondent.

[6.76] As we already stated earlier in this judgment, section 97(2)(a) of the Act clearly stipulates a twofold threshold to be satisfied by the petitioner before the election of a candidate can be nullified as was aptly explained in the case of **Nkandu Luo and Another v Doreen Sefuke Mwamba and Another**[7]. This entails that both the commission of the corrupt or illegal practice or other misconduct by the candidate or with the candidate's knowledge and approval or

consent or that of the candidate's election agent or polling agent and the widespread nature of the corrupt or illegal practice or misconduct must be proved. As we held in the case of **Jonathan Kapaipi v Newton Samakai**[14], it is not sufficient for a petitioner to only prove 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 therefore prevented or may have prevented the majority of the voters from electing a candidate of their choice.

[6.77] In the present case, the evidence on violence adduced by PW2 and PW3 shows that PW2 was assaulted at Chinsali Central Police Station. There is no evidence on record that this incident had a widespread effect so as to have prevented the majority of voters from electing their preferred candidate as the learned trial Judge rightly found. The ferrying of voters which PW6 testified to was said to have taken place at only one polling station in Mikunku ward out of 100 polling stations in the Constituency. It therefore cannot be said that the alleged ferrying of voters was widespread.

[6.78] Regarding the GGOZA activities, PW4, PW5, PW6 and PW10 testified of GGOZA activities in only four wards namely Milemba

ward, Mikunku ward, Nkakula ward and Itapa ward. There was no evidence of GGOZA activities in the remaining 13 wards. These activities related to the alleged distribution of mealie meal and other food stuff in the Constituency. Regarding the distribution of DMMU mealie meal, PW7 said this happened at Mukulo Primary School. There was no evidence of this mealie meal being distributed anywhere else. The donation of roofing sheets, cement and money was allegedly done at Kaluka Community School in Chunga ward according to PW11 while PW12 said this was allegedly done at Kalela School.

[6.79] Regarding the distribution of social cash transfer, PW8 and PW9 testified that this was done at Mwaba School on 11th August, 2021 where the Appellant allegedly lobbied for votes. No witness testified that social cash transfer was paid to beneficiaries, in the Constituency, at any other place and on any other day and where the Appellant addressed the beneficiaries and took credit for the payment whilst asking for their votes.

[6.80] It will be observed from the above that no evidence was adduced by the 1st and 2nd Respondents in the lower Court to prove that any of the impugned electoral malpractices attributed to the

Appellant was widespread in the Constituency. The lower Court's finding in his judgment at page 145 of volume one of the record of appeal that the wrong doings which the Court found were proved to have been carried out by the Appellant or with his knowledge and approval or consent were so widespread and clearly affected the electorate and that they did or may have prevented them from voting for a candidate of their choice, was not supported by the evidence on record.

[6.81] It is settled law that the issue of whether a corrupt or illegal practice or misconduct by a candidate or with their knowledge and approval or consent, and whether the corrupt or illegal practice or misconduct was widespread must be proved with cogent evidence before the election of a candidate can be nullified. The threshold set by section 97(2)(a) of the Act is high and it cannot be circumvented by a trial Court's assumption that the impugned electoral malpractice was widespread in the absence of cogent evidence adduced by the petitioner to that effect.

[6.82] In the absence of such evidence, in this case, we reverse the trial Court's finding that the wrong doings attributed to the Appellant were widespread in Chinsali Constituency.

[6.83] In the circumstances, the 1st and 2nd Respondents did not prove their allegations against the Appellant to the required standard in line with section 97(2)(a) of the Act. The trial Court therefore was not on firm ground when it nullified the election of the Appellant. Grounds four and five therefore succeed and are upheld.

[6.84] As all the grounds of appeal have succeeded, the appeal succeeds. We set aside the lower Court's decision to nullify the Appellant's election and declare that the Appellant, Kalalwe Mukosa, was duly elected as Member of Parliament for Chinsali Constituency.

[6.85] Each party will bear their own costs.

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A. M. SITALI
CONSTITUTIONAL COURT JUDGE

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P. MULONDA
CONSTITUTIONAL COURT JUDGE

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M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

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M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE