

**IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Constitutional Jurisdiction)**

2011/HK/EP/03

**IN THE MATTER OF : Article 72(1)(9) of the Constitution of the Republic
of Zambia**

AND

**IN THE MATTER OF : Article 93(1) of the Electoral Act No. 12 of 2006
AND**

**IN THE MATTER OF : Lufwanyama Parliamentary Constituency Election
held in Zambia on the 20th September, 2011**

BETWEEN:

CHRISTOPHER KALENGE

PETITIONER

AND

**ANNIE MUNSHYA
ELECTORAL COMMISSION OF ZAMBIA
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court on this 26th of March, 2012

For the Petitioner: Mr. J. Mukolwe - Mukolwe & Associates and Mr. T.M. Chabu - Ellis & Co

For the 1st Respondent: Mr. C.T. Sinkala – Central Chambers

For the 2nd & 3rd Respondents: Mrs. T. Lungu – Legal Officer – ECZ

J U D G M E N T

Cases referred to:

1. *Mabenga v Wina and others* (2003) ZR 110
2. *Mlewa v Wightman* (1995/97) ZR. 171
3. *Lewanika and others v Chiluba* (1998) Z.R. 49,
4. *Mazoka and others Mwanawasa and others* (2005) Z.R. 138
5. *Mumba v Daka – Appeal No. 38 of 2003*
6. *Kaira v Namugala and others – SCZ judgment No. 131/2002*
7. *Brigadier General Kenneth Kankinza and others v Sara Sayifwanda and another-2011/HP/EP/54*
8. *Col (Rtd) Dr. Besigye v EC & Museveni Yoweri Kaguta-Election Petition No.1 of 2006*
9. *Nabukeera Hussein Hanifa v Kibule Ronald and another* (2011) UGHC 72
10. *Webster Chipili v David Nyirenda – Appeal No. 35 of 2003*
11. *Simasiku Kalaluka v Geoffrey Lungwangwa and others – 2006/HP/EP0017*

Legislation and other works referred to:

1. *Article 72(1)(9) of the Constitution of Zambia*
2. *Electoral Act, No. 12 of 2006, sections 79-86 and 93*
3. *Electoral (Code of Conduct) Regulations, 2011, regulations 10(i)(a), 11(i)(a) and 21 (i)*
4. *Electoral (General) Regulations, 2006, regulations 30(3), 31(b)(iii), 42(4) and 46*
5. *Halsbury's Laws of England, 4th Edition, Volume 15, paras 697, 698 and 780*

FACTS

The undisputed facts may be shortly stated. The petitioner Christopher Kalenge and the 1st respondent Annie Munshya were candidates during the tripartite elections held throughout Zambia on 20th September, 2011. They competed for election as Member of Parliament for Lufwanyama constituency on the Copperbelt Province. The petitioner was sponsored by his party the Patriotic Front (PF) and the 1st respondent was sponsored by her party the Movement for Multiparty Democracy (MMD). The 2nd respondent, Electoral Commission of Zambia organised and conducted the elections pursuant to its constitutional mandate under Article 76(1) of the Constitution. The 3rd respondent is joined as chief legal advisor to the Government by virtue of the State Proceedings Act.

Following the elections the 1st respondent was declared as the winner of the seat and the duly elected Member of Parliament for Lufwanyama constituency. The petitioner polled 2,336 votes while the 1st respondent polled 5,716 votes. There were two other contestants in the race who have not petitioned. The difference in the votes between the petitioner and the 1st respondent was 2,380 votes.

PLEADINGS

The petitioner issued his petition on 11th October, 2011 through Messrs Mukolwe and Associates of Kitwe. That was supported by an affidavit of verification. The petition is brought under Article 72(1) of the Constitution and Regulation 15 of the Electoral Act. Later on 1st December, 2011 the petitioner amended the petition without leave of court prompting counsel for the 1st respondent of Messrs Central Chambers to apply to strike out and dismiss the amended petition for irregularity. I heard the application on 5th January, 2012 and on the same date dismissed it for reasons that appear on the record.

The petitioner has made a number of allegations in the amended petition numbered from 9 to 17. It is alleged in para 9 that the respondents did not comply with electoral rules relating to the election of a member of parliament and that the 1st respondent has not been validly elected. In para 11 it is alleged that contrary to Statutory Instrument No. 179 of 1996, the electoral code of conduct, the 1st respondent and her agents were engaged in acts of intimidation, violence, voter buying and corruption. The petitioner has particularised his grounds in paras 12 to 16.

He prays that it should be declared (1) that the Electoral Commission of Zambia failed to comply with its statutory duty to superintend the election process thereby legitimising the use of bribery, gifts, threats, intimidation, voter buying and actual violence in favour of the 1st respondent; (2) that the electoral process was not free and fair and that the election of the 1st respondent as Member of Parliament of Lufwanyama constituency is null and void; (3) that the court orders fresh parliamentary elections; (4) any other equitable relief; and (5) costs.

The 1st respondent filed her answer on 23rd December, 2011. In brief she states that the election was free and fair and she was validly and duly elected. She denies every allegation in the petition and she has given her reasons in paras 4 to 10 of her answer. She too prays for (a) a declaration that the election was neither void nor a nullity and the election results be upheld as true and accurate; (b) a declaration that she was duly elected as Member of Parliament for Lufwanyama constituency; (c) that the petitioner is not entitled to any further or other relief and that the petition be dismissed with costs.

The 2nd and 3rd respondents were first to file the answer on 15th December, 2011. They admit the contents of para 2 and 8 of the petition and aver that the allegations in paras 1, 3, 4 and 7 are within the petitioner's exclusive knowledge and do not relate to them. Their response to the rest of the allegations in the petition are contained in paras 3 to 9 of their answer. They state that the petitioner is not entitled to any of the reliefs claimed. They were not served with the amended petition at the time they filed their answer.

PETITIONER'S EVIDENCE

The petitioner has testified and called fifteen other witnesses. I shall briefly review the evidence. The petitioner (PW1) testified that he was the aspiring candidate for Lufwanyama under Patriotic Front (PF) in the September, 2011 elections. He said the election was not free and fair as on elections day there was a lot of malpractice by the 1st respondent through the agents of MMD. He said there were a lot of trucks ferrying people from different locations. He established that the Ford trucks, registration numbers ALC 6665 and ALC 6667 belonged to a company in Lusaka called African Strategic Transportation Limited. He personally saw some people in the trucks when coming from Fumbwe polling station. He met the truck at St. Mary's offloading people that were going to vote. He said the 1st respondent should be able to tell the court the relationship between the trucks and the respondents.

He testified further that he received a call from a PF member that their agents at Shibuchinga polling station were denied entry because they had no affidavits from the 2nd respondent. The agents had affirmation letters signed by a commissioner of oaths in Kitwe, but the presiding officer wanted documents signed in Lufwanyama. He said the presiding officer at Fumbwe polling station also denied their agents entry until about 10.00 hours when he rushed there and complained to a representative of Caritas International and to the council secretary who sent the officer-in-charge, Mr. Banda to confirm what was happening over the trucks and polling agents. He said the officer rushed to the scene and found some trucks; and that he asked him to detain the trucks and the driver, but he said it was difficult as MMD was in power and there was no proof.

He said the truck went round from Mafuta to Funda Basic School. He also rushed there and met the truck. He complained to the presiding officer and the police officer on duty. The latter wrote a report which was given to the returning officer later. He said from the Electoral Code of Conduct the campaign should not continue on voting day, but MMD and its agents did so and the agents continued to dish out food and one person was given K20,000.00 by Mr. Daka the current MMD councillor for Lufwanyama. He said the 1st respondent's agents also ferried people from Mafuta and Kabanga to polling stations. They reported the issue to Radio Ichengelo and it was aired.

He testified further that during the verification exercise from 27th to 30th September, 2011, they found a lot of anomalies in that both used and unused ballot papers from various polling stations were not accounted for and that it was very difficult for them to do the exercise and they left it to the 2nd respondent. He said the counting was fair, but for the anomalies and that they required a report from the returning officer after they left the civic centre. He said for St. Josephs and Kapimbe, they found that 600 ballot papers were not accounted for by the returning officer who acknowledged the anomalies and that they took pictures of the anomalies found on that day.

In cross-examination by Mr. Sinkala, counsel for the 1st respondent on the issue of the trucks, he insisted that he met the truck first as he was coming from Kapilamikwa at St. Marys in Shibuchinga and, second when he was coming from Fumbwe and that he parked in front of the truck and that the trucks were going round. He said Mafuta is about 19 to 20 kilometers from Shibuchinga polling station; that there were MMD cadres in the truck from Mafuta and Kabangwe and that there were two trucks, although he does not know the drivers. He said he inquired from RTSA over the trucks, but the document cannot be given to him without a court order. He agreed that the trucks do not belong to MMD, but said he would not know if they belong to the 1st respondent. He said he saw Mr. Gilliard Ngwenya an MMD official in the truck at Shibuchinga and a lot of people disembarking when he was with Dube Sebente and Emily. He said he reported to Mr. Banda on the same date and that some reports were done on phone.

On the distribution of food and materials he said he was not there and does not know who was distributing; and that he had forgotten the name of the witness who received K20,000.00 from Mr. Daka. On the campaigns, he said Mr. Chileshe, the councillor for Luswishi, Mr. Kalenga and a lady called bana car, all MMD officials were assigned from Luswishi to Mashinka and that the ferrying of people was campaigning. On polling agents, he said Beatrice Kalilwa and Mundawalala were the PF agents denied entry; and that the 2nd respondent would be able to show the report because the people involved were their officers. He acknowledged that there was a Conflict Management Committee and said he reported to the CIO, Mr. Dan at Lupopo polling station.

He admitted when asked by Mrs. Lungu that the affidavits given by PF at Kalulushi were supposed to be signed at Lufwanyama; and that the papers did not comply with the rules. On the unaccounted for ballot papers, he said during the counting the presiding officer at St. Josephs failed to produce all the papers, that is, forms where they were writing results; and that they did not resolve anything because of the anomalies. He said the number of accounted for ballot papers on the Ballot Paper Account for Kapimbe polling station at page 5 of the 2nd and 3rd respondents' Bundle of Documents, in the last column was 350 and used ballots in the second column was 110. He refused having agreed that there was no missing ballot paper although their polling agents signed on the results declared, showing that there was no dispute. He said at verification they found that some papers were not signed according to the Electoral Code of Conduct. He acknowledged the results for the candidates on the Record of Proceedings at page 6 of the same Bundle. He admitted that they had agents at St. Josephs polling station who signed on the results; and that there was no anomaly at the polling station.

Charles Mwamba, aged 58 years, a politician and resident of Fumbwe is PW2. He was a field monitoring agent for PF in the September, 2011 elections. He testified that according to reports from people on the ground, their colleagues in the MMD used underhand methods in their campaigns. He said he became actively involved at the counting centre at the council; that the counting went on well, but there was a dispute at St. Josephs. He said Mr. Chisopa, the polling agent disputed the figures on the tallying sheet as they were different from the count at the polling station. The figure was corrected, but not to their satisfaction. He said other issues were raised, but the answers by the person supervising the elections were not convincing. He said it was unfortunate that he did not have the notes he took as he had just come from Kasama.

He said two days later he attended the verification exercise where they questioned the validity of the figures as the used and unused ballot papers for most polling stations did not balance. He said they spent three days on an exercise which should have taken a day; that they did not finish because the first people to walk out were those assisting the presiding officer; and that on the third day they all walked out.

He said he does not know how the report was made. He concluded that the election was not free and fair although the atmosphere was peaceful and that if it was the figures could have tallied.

When asked by Mrs. Lungu he said they were supposed to count the used, unused and spoilt ballot papers; and that they used the actual ballot papers and papers on which the ballot papers were issued. He insisted that the figures for St. Josephs at the polling station were different from those at the verification centre. He said the returning officer wanted the figures to remain the same. He agreed that the results on the Announcement of the Result of the Poll for St. Josephs at page 9 and the Record of Proceedings and the rejected ballot papers of 31 at page 15 of the Bundle of Documents were the same and the ones declared and signed by their agent S. Kazembe. When shown the Declaration of the Result of the Poll at page 1 of the Bundle he agreed that their agents Felix Mutabi, Bowas and Dorothy Chipimpi and the petitioner signed that the results were correct.

PW3 is Graham Samalonga aged 26 years; a resident of Benuma Village in Luswishi. His evidence is that he stood as a councillor on the PF ticket in Luswishi ward. On 20th September, 2011 on the way from Lumwana polling station where he had voted, he met a woman called Rose. She asked for a ride on his bicycle, but he refused as the law did not allow carrying anyone. He said shortly after he saw a Bedford truck registration No. ALC 6652, Fleet 42, crème white in colour, with an MMD councillor, an unknown woman and, a CCP man who was a driver. He said the councillor asked where they were headed. They said they were going to Mashinka. They got on the vehicle. As they were about to cross Lumwana stream the woman stopped the vehicle and asked him to disembark as they did not get along with PF. He tried to resist but CCP Kalenga threw out his bicycle. He disembarked and proceeded to the market where the truck also went and parked on the other side of the road. He said Kalenga opened the tail door and announced that the vehicle was for people going to vote. He said the woman went to the market and people started following her. She told the people to vote for President Rupiah Banda because the money for all the maize sold to FRA had been released.

He told her that she was campaigning when campaigns had ended. She answered that they could not vote for a president who said he would take lights so that they start picking lice. He warned that he would report to the police and PF campaign team so that they could detain the vehicle. He said he asked the polling agent for the independent candidate to call the police because as PF they were not allowed to enter. The polling agent and police officer went to the truck but the latter failed to detain the vehicle which went on and took more people to the polling station. He said when Mr. Chileshe disembarked he took some food into the polling room where they were not allowed to enter. He said the campaign team asked him to write down the registration and fleet numbers of the vehicle and that Mr. Chileshe told him three times to mention that it was him. He said the woman threatened him and that he was afraid to go back until 17.00 hours when a cadre from Radio Ichengelo and Father Kapembwa gave him a lift.

When asked by Mr. Sinkala he said he does not know the name of the woman in the vehicle and he has not seen her again or the name of the police officer he reported to. He said he was at Mashinka polling station when the truck dropped people and went to collect others and that Lumwana is about one hour's walk from Mashinka polling station. When asked by Mrs. Lungu, he said he was not allowed to enter at Mashinka polling station as a candidate and that Chileshe took food in a plastic bag in the polling room.

Gibby Chitefu, aged 40 years, a peasant farmer of Luswishi is PW4. He was a polling agent for Miniver Mutesa at Machinka polling station. He testified that on 20th September, 2011 a PF candidate told him about a white vehicle he had left behind. When he went to the road to go to Luswishi to vote, he saw the vehicle by the road. He confirmed the registration number ALC 6652 and Fleet 42. He saw councillor Chileshe and Naomi Kashiwa the chairlady for MMD Lufwanyama District on the vehicle. He spoke to them. They told him to go and asked if he was mad. He told them that they were campaigning and picking people on voting day. He called the policeman who told them that they were committing an offence and also wrote the numbers of the vehicle. He said he identified Rosemary Chibwana and CPU Kalenga, a Congolese. He said on the way back he met the truck loading more people and he saw another blue vehicle.

In cross-examination by Mr. Sinkala he admitted that he had no first hand information apart from what PW3 told him. He said the blue vehicle was for Miniver Mutesa and was going round during the campaigns.

Marriam Lung'anda aged 44 years a peasant farmer of Luswishi is PW5. She was a PF polling agent at Lumwana polling station. She testified that she was on duty by 06.00 hours, but the MMD polling agent Chinyemba reported at 08.00 hours. When she asked him, he reason said he went to organise food for everyone who would vote for MMD. She asked how he would identify them. He said he would know as they went to vote and would tell them to go and eat; that they had told their people to vote for Rupiah Banda because Sata was mad; that those who would vote for Sata would leave their children and pick dogs because of the war that would erupt; and that they had prepared goats, pigs, Munkoyo and beans. She said around 12.00 hours many people went to the polling station, mostly PF, but after voting they went to Chileshe to eat; and that in the evening she thought many people voted for MMD because they were all going to eat.

She said she asked Chinyemba to give them some food too and he took nshima and munkoyo. Munkoyo was put in the polling room and nshima in a classroom 1. She said every one apart from one person drunk munkoyo. She said she did not eat herself because she does not eat goat or pork. She said they were in the polling room in classroom 2 with an office between the two classrooms. She said they finished voting around 18.00 hours and after counting she believed that all the people voted for MMD. She said Chinyemba also told her that James Chileshe a councillor for Luswishi ward prepared food for voters, but she did not go to his house or see the voters eat the food after voting. She said she only saw them going in that direction. She said Chinyemba told her about the food because they were on good terms.

When asked by Mr. Sinkala she said they also had food which she ate by an anthill; that only a five people eat with Chinyemba while the rest went to eat with Chileshe. She said Chinyemba only told her not to vote for Sata because he was mad. When asked by Mrs. Lungu she agreed that the voting was conducted well at Lumwana polling station.

PW6 is Moses Kopeka aged 33 years, a peasant farmer of Funda. He also stood as councillor on the PF ticket. He testified that on 20th September, 2011 a young man went to his house and informed him that he had travelled with Gilliard Ngwenya, MMD Lufwanyama West chairperson and a teacher at St. Marys. He realised that things were not okey. He followed and found a Bedford truck at a corner driving off. He did not see the driver. He the people he found who confirmed that they had come in the vehicle. He followed the group of over thirty people that was going to vote. He recognised Chanda Chipande, a neighbourhood officer and Musonda Mutete. He went to Funda polling station and complained to the police officer. He promised that they would kill each other where he would meet Gilliard. He was annoyed and followed to Mafuta, but did find him or see him anywhere. He said he did not know the owner of the truck, but he spoke to Kasongo Sandasanda who was picked on the way with his bicycle and Chanda Chipande who was picked from Mafuta. In cross-examination by Mr. Sinkala, he said he knew only three people from the truck and that there were people going elsewhere.

Chanda Chipande aged 35 years, a farmer is PW7. His evidence is that on 20th September, 2011 he was at Chitete Community School to work at the hammer mill between 08.00 and 10.00 hours when a Bedford truck registration No. ALC 6667 arrived with two people, the driver and Gilliard Ngwenya. He said about twenty people were present because the place is like a market; some people were drinking beer while others had gone to the hammer mill. He said Gilliard told them that the truck had been sent by the President Rupiah Banda because in the past people did not turn out to vote due to distances to polling stations.

He said they were picked by the truck and when they reached the polling station at Funda Gilliard told them that they should know how to vote; that if they voted anyhow they would vote for a president that would bring war in the country; and that they should vote for President Rupiah Banda and that the truck would return to pick them. They agreed to be picked from councillor Daka's house where they were told to take some refreshments because they were coming from afar. He refused that Gilliard has a farm at Funda.

He testified that he went to vote and passed by Mr. Daka's house to see if the food was prepared. He did not find munkoyo, but was assured by Daka that nshima would be prepared. He was told to vote on the clock. He said after voting he returned to Mr. Daka's house and was directed to Edwina Sandasanda's house, the chairlady. He said he found nshima which they ate with vegetables and they drunk munkoyo. He said after eating he went back to Mr. Daka who gave him K20,000.00. He used K10,000.00 to buy beer. He said people followed him for a share and they bought 20 sachets of tujilijili which they drunk. He said later when they phoned Gilliard for transport they did not go through. The following day he heard that the truck had gone back.

When asked by Mr. Sinkala he reiterated that Gilliard said the truck had been sent by Rupiah Banda. He said the truck dropped them at a distance from the polling station; that he was with Joseph Mtonga, Mathews Chipanda, Brian Kunda and Amos Mutambo; and that when they disembarked they met Gregory Mwinga, but anyone they spoke with. He said the vehicle also took people to Kabunda ward. He said when he went to Mr. Daka's house the people he was with proceeded to the polling station and that later Mr. Daka gave him money to buy Munkoyo and K20,000.00 and that he was with Amos.

Musonda Mukete aged 25 years a farmer of Mwilaisha village is PW8. He confirmed that on 20th September, 2011 Gilliard went to Chatete School with a vehicle and that he was with PW7. He said Gilliard told them that the vehicle was for voters from Government because many people did not turn up for voting and they should tell people to gather at the school while he went to pick his mother. He said the vehicle returned shortly and picked them and took them to Funda polling station. He said half way through their journey Gilliard told them that they should not vote for PF but for RB and that the young men and women in the truck said they could not read, so he told them to vote on the clock. He said the truck turned back half way and Gilliard got their phone numbers, so that he could pick them after voting and told them that if asked about the truck they should say that it was ferrying maize. He said after he voted he went to visit a patient, but others waited for the truck.

In cross-examination by Mr. Sinkala he said he did not know the driver or the owner of the truck and that it was his first time to see it in Mafuta. He insisted that Gilliard told them to vote for MMD. He said he was together with PW7 until they reached the polling station and that the latter did not divert anywhere. He too said they did not meet anyone they spoke to. He confirmed that Gilliard told them to say that the truck was ferrying maize and that there was no maize in the truck. In re-examination he said he left PW7 around 11.00 hours and PW7 had disembarked from behind the truck while he did so from the left. He stated that Gilliard spoke publicly about voting for RB on the clock and about the vehicle being for transportation.

Claudias Sebente Dube aged 30 years is PW9. He was the PF candidate for Kabunde ward. He testified that on 18th September, 2011 he went to Shibuchinga polling station with polling agents to have forms signed by the Head teacher. They found the deputy head who said he was not entitled to sign the papers. They went back on 19th, but the Head teacher said she was the presiding officer and referred them to Mafuta Basic School. He said they separated and he went to Funda polling station with two agents. They found the Head teacher, but he refused to sign. He wanted a letter of adoption signed by Mr. Wynter Kabimba which was produced but was rejected. He informed the petitioner before he went home. He said on 20th September the petitioner went to Funda polling station to resolve the matter, he but failed until Father Kapembwa signed the papers between 10.00 hours and 11.00 hours meaning that their polling agents at Funda and Shibuchinga polling stations were not there from 06.00 hours to 10.00 hours.

His evidence is further that five PF cadres were not allowed to vote because they had 2005 voter's cards. He said only one person Frank Matandiko was allowed to vote after he wrote a letter. He also confirmed that he was monitoring polling stations with the petitioner when they met a big truck registration No. ALC 6667 a short distance from Shibuchinga polling station carrying MMD members who were going to vote. He named Gilliard Ngwenya and the chairlady for Kabunda ward Nabasilio Nkausu. He said they informed his campaign manager, Jack Kalala, Wynter Kabimba and the officer-in-charge of Lufwanyama police and the policeman at Lupopo polling station.

He said while they were at Katembula explaining the matter to their constituency secretary the truck came from St. Marys with only the driver who booked a room at Salamu. He said they went to Lufwanyama ward and found that the same truck had picked people from Mafuta and taken them to vote. He said from his recollection the truck went only to his polling station Shibuchinga. He said the people went to vote because Gilliard went with people from Mafuta with Mrs. Nkausu the MMD chairperson.

When asked by Mr. Sinkala he said he would not know the owner of the truck as it was his first time to see it. He said he saw it twice at Shibuchinga and Katembula and identified Gilliard and Mrs. Nkausu, although at Katembula there was only the driver. He said he knew well the people he saw in the truck although he could not name them. He said he did not know the name of the police officer at Lufwanyama and that at Lupopo they reported to Dan the CIO, but he refused to do anything as he was manning the polling station. He said according to the electoral code of conduct it was not allowed to use vehicles, but he saw MMD leaders carrying their members to go and vote.

When asked by Mrs. Lungu he said the problem with the affirmation forms at St Marys was administrative; the names of the people who were refused to vote with 2005 voter's cards were in the register; and that according to the announcement by the 2nd respondent people could use the 2005 voters cards. In re-examination he said it was not his fault that the forms were not signed as he went on good time on 18th September.

Emily Nyishimbika aged 32 years a farmer is PW10. She testified that on 20th September, 2011 they were going to the mission to vote when near Kapopo village they saw a white Bedford truck which by-passed them and stopped at Wafwawafwa and people disembarked and started going to the mission and only Gilliard Ngwenya remained. She said they met the petitioner and PW9 who asked where Gilliard got the people from. She said from the faces the people were from Mafuta and that they caught up with the people and asked Sabina Malombola, Charity Mukobola and others who said they were picked by Gilliard and told to vote well and go to his house to eat and wait for the truck.

When asked by Mr. Sinkala she said from where she saw the truck to Mafuta it is very far. She admitted that Gilliard advised people to vote wisely and that there was nothing wrong in that or in offering people food that came from afar. When asked by Mrs. Lungu she said she voted at St. Marys; that the presidential ballot was not stamped before she voted; and that people would not know who she voted for.

PW11 is Beaterias Kalilwa aged 27 years of St. Marys was a PF polling agent at Shibuchinga polling station. Her testimony is that on 7th September they were given papers to be signed by the Head teacher at the nearest school. On 18th they went to the school with their councillor PW9 and another polling agent Trace Mundawalala. She confirmed that they did not find the Head teacher and that the Deputy said he had no power to sign the forms and advised them to go back the next day which they did. She confirmed that they found the Head teacher Catherine Gondwe (RW11), but she refused to sign as she was the presiding officer. She referred them to Mafuta where the Head teacher said he had no power to sign the forms. On 20th September, they informed the petitioner and met him around 09.00 hours. They went to Father Kapembwa who signed their forms and they entered the polling station at 10.00 hours.

She testified that when people were given ballot papers, Mr. Lungu who was in charge forgot to stamp some. She observed that 36 ballot papers were not stamped. She said they advised them to pay attention when stamping the ballot papers, but the presiding officer said they had no right to correct them, but to sit and observe and threatened to throw them out. She said they started counting at 20.00 hours; that unstamped rejected ballot papers for PF were 36; and that after counting they signed and sealed the boxes.

When asked by Mrs. Lungu she confirmed that the Head teacher at St. Marys was the presiding officer; that had they known they could have gone elsewhere; and that they had themselves to blame. She said after the papers were in order they were allowed in. She said they knew that some ballot papers were not stamped after one voter observed that her ballot was not stamped. She said the ballots were for presidential 15, parliamentary 17 and Local Government 5 and that the total was 37 and not 36.

Tracey Mundawalala is PW12. He is 29 years old, a resident of St. Marys. He was a PF polling agent at Shibuchinga polling station. He too said before 20th September the presiding officer refused to sign their papers which were later signed by the priest around 09.00 hours and they were allowed into the polling station around 10.00 hours. He said PW11 was in stream 1 and he was in stream 2 and that in his stream they sealed everything and then went to stream 1 to verify the votes.

Javan Mpondamali aged 26 years, unemployed of St Marys is PW13. His evidence is that on 20th September, 2011 around 10.00 hours he was at Gilliard's building when he saw a truck, crème white in colour go to Gilliard's house and he disembarked. He said in the evening he saw a lot of people at Gilliard's house drinking alcohol and munkoyo. He joined them. He said around 19.00 hours MMD chitenges were distributed but he was refused as he was PF. He said he is always found there because the house is next to the bar. When asked by Mr. Sinkala he said he knew some of the people distributing munkoyo, but he does not know their names; and that the ones who received chitenges were called members of MMD. He said the people would vote and go to that house in groups shouting "Pankoloko" and that he did not see the drinking and giving of chitenges before or during the voting. He admitted that Gilliard has a bar near the house but he has not seen people drink at the house.

Chief Inspector Francis Banda the officer-in-charge at Lufwanyama police post is PW14. He was in charge of patrolling Lufwanyama constituency on 20th September, 2011. He said he received a report from Mrs. Manda the council secretary that there were trucks in the area reportedly campaigning and giving out materials and other food stuffs. He said he received the same report from Miniver Mutesa and from the petitioner. He followed where the trucks were reported around St. Marys and Kalengwa road. He met two trucks, registration numbers ALC 6652 and ALC 6667. He looked for materials that were allegedly being distributed, but found none. When he interviewed the lady in charge of the trucks named bana Kamwendo, she refused that they were campaigning; she said they were in the area buying maize. He said during interviews she agreed that the trucks were four and were used for campaign during the campaign period.

Because he did not find any tangible evidence he explained to them that the day was for voting and that there was already an allegation that she was campaigning. He told her to leave the District and informed the council secretary who saw the trucks as they were leaving. He said he did not see any maize and the lady did not mention the farmers she was buying maize from. He said he also communicated to his superiors at Kitwe and Kalulushi. When asked by Mr. Sinkala he said he did not establish the owners of the trucks and did not find them distributing materials. He said Gilliard was not with the trucks and that the lady did not mention that the trucks belonged to the 1st respondent. In re-examination he said the trucks did not have to belong to the 1st respondent to be used for campaign and that the person in charge said the trucks were used by MMD.

Kennedy Kampamba aged 43 years of Mwamba village is PW15. He testified that he was refused to vote by Mrs. Musonda St. Marys because he had a 2005 voter's card. He said when he did the verification with the NRC and the card; he was told that he could use the card. He left and went to FRA depot where they were purchasing maize. He received a call from PW9 to watch out for the trucks heading his way. He went to the main road and found a truck registration number ALC 6667 without people though he had seen it pass by FRA with people. He took down the registration number. Later in the afternoon he saw the same truck. He organised four young men so that they could burn it, but Father Kapembwa advised them not to. He did not find out the owner of the truck. In cross examination by Mr. Sinkala he said vehicles were not allowed to campaign on voting day. When asked by Mrs. Lungu he said he went to vote at Kabunda ward and that his NRC and voter's card were checked. He said he was told that he could not vote with the 2005 card, but his colleagues who had 2005 cards voted.

Chisopa Katongo aged 35 years; of St. Josephs mission is PW16. He was a PF polling agent at Kalumbwa. He said the voting and everything went well and when they finished counting around 23.00 hours the presiding officer announced the results. He said at the totalling centre the results presented were only for stream 1. He said he informed the returning officer and showed them the results he had for stream 2 which they had not stuck. He said the presiding officer checked and returned with results similar to theirs.

He said members demanded for a recount, but others suggested that it would take long to do a recount from all the polling stations. He said the correct results were stuck and the matter settled. In cross-examination by Mrs. Lungu he confirmed that at the end the results announced are the ones he had and that the 1st respondent won at that polling station and that they all signed for the overall results. This is the petitioner's case.

The 1st respondent has also testified and called four other witnesses. I shall again endeavour to summarise their evidence. The 1st respondent's evidence is that she has been a member of MMD for the past fifteen years and is a National Executive Committee Member. She was adopted by her party on 20th July, 2011 to contest the parliamentary seat for Lufwanyama constituency. She started campaigning on 20th August, 2011. She had a campaign team of six members headed by Moses Chiyuka as campaign manager. She also had five polling agents including Moses Chiyuka. She said she had three vehicles for campaign, a Pajero registration No. AAN 5841, a Toyota bus ABE 2545 and a Toyota truck ABE 2546 which was branded in MMD colours.

She said her campaign started with a rally at St. Marys on 21st August and ended on 17th September, 2011 with a rally at St. Josephs. She said none of her campaign team used the two trucks; and that she never saw the trucks and would not know the owners. She refused that her campaign team distributed food, materials and money to voters. She said she personally knew the other contestants Miniver Mutesa and Elisha Matambo, but met the petitioner in court. She said her greatest rival was Miniver Mutesa who was well known in the area. She said the people of Lufwanyama had resolved that they wanted a woman, so it was either her or Miniver who came out second.

She said the results were free and fair and were certified by all the agents including the petitioner, so the court should declare that she was duly elected. She said there is no evidence that any one found her doing wrong things during the campaign or elections. She said she conducted her campaign in a lawful manner, that the elections were peaceful and that her agents were not found doing anything wrong. She said she moved out of Lufwanyama after she voted while the petitioner went all over.

In cross-examination by Mr. Chabu who was engaged later by the petitioner to co-prosecute the petition, she said the results were a true reflection of the votes cast; that her agents attended the verification exercise, but did not inform her of anomalies found. She said she was not given the returning officer's report at page 3 of the Bundle of Documents. She said her campaign team had no campaign materials which were with her. She denied that she gave her team money or bicycles. She said the bicycles were given out by her, four for each ward for transportation and sixty four in total. She said the bicycles were given to MMD members and were branded.

She said the chitenges were given out when they had rallies and that there was no need to give out money. When referred to the last sentence of para 5 of her answer she said that the campaign team had money for their food and that she was always with the team. She said they were sleeping in Kalulushi where the campaign centre was in a rented house; and that the minibus was to carry members of her campaign team as they were many. She said the tipper truck mentioned in para 9 of her answer only delivered things to her campaign team. She insisted that the people in Lufwanyama including their Royal Highnesses made it clear that they wanted a woman as Member of Parliament.

When asked by Mr. Mukolwe she said she heard from Mr. Banda that there were trucks used for campaigns. She denied knowledge that polling agents were denied access or that someone was refused to vote. In re-examination she said the MMD chitenges were given out to people mostly MMD members who attended their rallies; that bicycles were given to ward councillors to give to MMD foot soldiers; and that the money was given to her campaign team for food as they went round the constituency campaigning; and that the tipper truck only delivered food and the bicycles to their campaign centre.

Gilliard Ngwenya is RW2. He is a farmer and businessman. His evidence is that he was a politician in MMD for 13 years from 1988 to February, 2011 and was a councillor for Kabunda ward. Currently he does not belong to any political party as he is teacher at St. Marys High School. He was not in any campaign team nor was he a polling agent for any political party.

He refused ferrying voters to polling stations or telling them that President Rupiah Banda had sent the truck. He said he used a Fuso Fighter truck on 19th and 20th September, 2011 which he hired from Kitwe to transport maize from Mafuta to St. Marys FRA depot. He said on 20th he went to Mafuta early in the morning with his brother Emmanuel Ngwenya. They had a puncture at Funda. They got to his farm around 11.00 hours. They found that his parents had left for St. Marys to vote. He followed at Kambishi to get the keys. He passed by Chitete School because he was buying maize there. He found some drunken boys who asked for peace work. They agreed to load 200 bags for K100,000.00. He picked five including PWs 7 and 8 with two bicycles. The five men worked together with five of his workers, so he decided to split the money and gave each one K10,000.00, but three of them refused to accept the money. He gave K30,000.00 and the bicycles to Hendrix to give them. He said Chitete is 32 kilometers from St. Marys; that the people from Chitete vote at Funda, so he could not have ferried them; and that PW7's evidence was based on a grudge over the money.

He said he left the farm for St. Marys about 12.00 hours with his parents, sister, and brother, the two men who had accepted the money and three of his workers. He dropped the two young men on the road near Chitete and proceeded to the FRA depot. After offloading the maize he went home to collect money for fuel and to pay the driver. He escorted the driver to Funda turn off to buy fuel and returned home. He said the driver of the truck was Sichone, but he did not know the owner or pay attention to the registration number as the truck was hired. He refused telling people to vote for MMD or giving his phone number to anyone to call him after they finished voting. He said his house is about 10 metres from his shop where there is a bar; that on polling day he was not at home and did not see the chitenges or people distributing munkoyo and alcohol.

When asked by Mr. Chabu he said he met the 1st respondent for the first time when she asked him to be a witness and that he did not attend any of her campaign meetings. He said he became a councillor in 1998 and stopped in March, 2011 after being confirmed as a teacher. He insisted that he used the truck on 20th September to ferry maize which he sold to FRA although he has no documentary evidence of the transaction.

He said the maize was received by Francis Lubunga and FRA only gives a receipt which is at the bank. He refused that they ran out of fuel because they were ferrying people to polling stations. He said they loaded maize three times. He refused telling voters to vote wisely or for MMD or that there was munkoyo or beer at his house.

James Chileshe the MMD ward councillor of Luswishi ward is RW3. He testified that on 20th September, 2011 he voted at Lumwana polling station. He rested at home until 12.00 hours when he went to the main road to buy food for his polling agents as he was a candidate. His agents at Lumwana were Dimus Chinyemba and Lazarous Pundwe and at Mashinka the agents were Emmanuel Matepa and Abraham Mutumba. He said after he bought the food he got a lift to Mashinka polling station in a truck which had a passenger and a driver. He said at Lumwana they found PW3 a PF candidate in the same ward with Rosemary. He said Rosemary asked for a lift and was allowed, but PW3 got onto the vehicle without permission, so he was asked to get off.

He said they proceeded and stopped at Lumwana market where the driver and the woman disembarked. While there he saw PW3 pass and proceed to Mashinka and arrived before them. When they reached the polling station they found him with a police officer who spoke to the driver. He said he was dropped some meters away from the polling station. He bought some biscuits at a stall and went to the polling station. He gave the food to the same policeman to give to his polling agents. He went back to Lwisishi. He did not know the names of the driver or the woman or the policeman. He said PW5 lied that he prepared food. He said his house is in Luswishi Resettlement.

When asked by Mr. Chabu he said the vehicle was a truck, but he would not know the make; that Lufwanyama has 16 wards and the councillor for Kabunda ward is Venda Geoffrey and before that it was RW2 a fellow farmer. He said RW2 had retired by the time elections were held last year. He said he too grows maize and sells to FRA and that the latter issues a receipt. He said he did not know the 1st respondent's polling agents, but knew two of her campaign members. He said in his ward they only took chitenges, a few T-shirts and badges and four bicycles.

Boyd Daka aged 40 years a politician and farmer is RW4. He is also a member of MMD and was a candidate for Lufwanyama ward in the 2011 elections. He refused that on 20th September, 2011 he saw PW7 at his house or that food was prepared at his house or that he gave PW7 K20,000.00. He said his wife was not even there and that he does not even know Edwina Sandasanda. In cross-examination by Mr. Chabu he said he does not know PW7 or where he stays; that no one went to his house to eat food; that he voted in the elections; and that he knew the results after the announcement because his house is only about one hundred metres from the polling station. He said he knew RW2 as they were both councillors before he became a teacher, but he does not know the specific time RW2 stopped attending council meetings.

RW5 is Esther Kaluba Phiri aged 49 years, a farmer and marketeer of Musokotwane ward in Chief Nkana. Her evidence is that she has been the chairlady for MMD Lufwanyama District for seven years. On 20th September, 2011 she voted at Sokontwe ward around 07.00 hours. She was at home after voting. She said it is a lie that there is a chairlady at Lufwanyama District called Naomi Kashiwa or that Edwina Sandasanda is the District chairperson or that she was seen in a truck ferrying voters. When asked by Mr. Chabu she said she has a book with names of chairpersons at ward level; that at constituency level the chairperson is Faustina Lwiimba; and that she was appointed by the party in 2006. In a nutshell this is the case for the 1st respondent.

The 2nd and 3rd respondents have called six witnesses. I shall again summarise their evidence. RW6 who is their first witness is Bango Raphael Khondowe the acting council secretary for Lufwanyama District council. He was also an assistant returning officer. His role was to assist the returning officer in terms of recruitment of poll staff, distribution of election materials, inspection of polling stations, deployment of poll staff, receiving of results at the totalling centre, verification of results and handing over of election materials back to 2nd respondent. His evidence is that the process was conducted in a free environment and that elections were free and fair. He confirmed that at the totalling centre one observation was made by the stakeholders with regard to results for St. Josephs.

He said the presiding officer had two boxes for two streams, he submitted the results for stream 1, but forgot to do the same for stream 2. He said when this was noticed the stakeholders decided to add the results for stream 2 and the results tallied with what was added at the polling station and all stakeholders were happy. He said all double streams were scrutinised and every stakeholder was happy. He refused that there were anomalies at the verification exercise. He said some presiding officers did not use all the ballot papers, so when it came to verification by way of counting the counterfoils the difference could be noticed, but this was corrected when they opened the unused ballot boxes and what was on the unused ballots and on the counterfoils tallied. He said this was verified from the numbers given to them by ECZ and that at the end all stakeholders signed as an indication that elections were free and fair. He said the petition should be dismissed because during the polls the petitioner raised a lot of concerns which could not be substantiated such as at Kapenge polling station where he alleged that the ballot papers were cut, but the presiding officer expressed ignorance.

When asked by Mr. Chabu he said the report on the verification exercise at page 3 of the Bundle was signed by the returning officer Maureen Chama. He acknowledged the findings in the report and said they had over one hundred presiding officers and to take note of their names was not an issue. He said any anomaly raised was recorded and resolved. He said they had the reports on verification of ballot account form for all the polling stations and that at page 2 of the Bundle is the report for Lufwanyama constituency. He acknowledged the figures as recorded and said the difference noted was 647 ballot papers. He said they did not compile a report for every ward; that some ballot papers were rejected for different reasons; and that these were noted by stakeholders at polling stations and that the 2nd respondent should have the report. He said the total rejected ballot papers at page 16 of the Record of Proceedings was 514; for Shibuchinga at page 14 it was 39; for Chimoto at page 15 it was 45; and for other polling stations as given in the document. He said he did not personally make a follow-up on the figures, but stakeholders agreed at the polling stations the reasons for rejecting the ballots and signed that the results were a true reflection of what transpired. They did not receive a report that any aggrieved party or stakeholder refused to sign.

In cross-examination by Mr. Sinkala he stated that the number of ballot papers issued to the presiding officer of 35,900 as reflected at page 2 and the 35,253 ballots obtained from account forms do not represent the number of ballots cast and that it was noted in the report that the difference in the number of unused ballot papers as found on account forms and from physical check by returning officer was a result of some presiding officers not completing the ballot paper account form for the unused ballot books. He said the difference between these figures does not mean that those ballot papers were cast. In re-examination he said the actual ballot papers cast could not be opened by them and that they were only looking at the forms against what was received from the 2nd respondent. He said the total number of ballot papers issued is equal to the total number from physical check by returning officer and that the figures were correct.

RW7 is Maureen Kangwa Chama aged 54 years a teacher in Lufwanyama. She was the returning officer for Lufwanyama constituency. After giving her role in the elections, she too said the elections were conducted in a transparent and credible manner. She said on 20th September, 2011 presiding officers started arriving after 21.00 hours at the Civic Centre which was the totalling centre. She said all accredited stakeholders were present that the Record of Proceedings and Announcement of Results are used for the collation of results while the other forms are not touched. She identified the document at page 1 of the Bundle of Documents as the Declaration of the Results of the Poll.

She said after comparing the Announcement of Results Form and the Record of Proceedings from each polling station and ascertaining that the two were in agreement she would read out aloud that information and the assistant returning officer, RW6, wrote the information on the tallying board. When all the 55 polling stations were plotted the data was added and entered on the results transmission system by Peter Mwansa their IT officer. The stakeholders were asked if they had found the same totals and they were in agreement including the petitioner the only candidate present. Print outs were made and verified by stakeholders and they all signed the Announcement of Results and Declaration of Results of the poll forms agreeing with the proceedings. She confirmed that she signed the report on verification of ballot paper account at page 2.

She said the verification is required under the Electoral Act to account for ballot papers received in the constituency and to return each ballot paper to the 2nd respondent. She said the exercise was done on 27th to 30th September, 2011 in the presence of the petitioner and other stakeholders. She opened the envelopes which contained the ballot paper account form and read out the information written by presiding officers. They were also referring to the form used to issue ballot papers to presiding officers. She said this was done to find out if presiding officers had entered the correct number of ballot papers issued out. She confirmed that they found that in certain instances presiding officers did not write on the form serial numbers of carton boxes which they did not open; meaning when they added the data from the ballot paper account form and the data from the physical check, there was a disparity, but the physical check revealed that all the ballot papers she received from the 2nd respondent were accounted for.

She said she recorded the information in her report at page 2 as required by the 2nd respondent. She said they concluded that she had received 35,900 ballot papers for the National Assembly election and that all were found including counterfoils and submitted to the 2nd respondent. She said at page 13 of the Bundle are the results as obtained from presiding officers and was signed by her. She also confirmed that for St. Josephs the presiding officer Godfrey Sikambo submitted four forms, but they took two and read out the results and that afterwards a polling agent at St. Josephs pointed out the mistake. The presiding officer was called. It was established that St. Josephs had a double stream, but he had only submitted for one stream. The results for the stream 2 were submitted and the figures corrected. She confirmed that they verified all other double streams, but found no mistakes. They all signed the forms in agreement.

In cross-examination by Mr. Chabu, she said she got the ballot account forms from all presiding officers although these are not produced. She agreed that the document at page 2 was filled in after the announcement of results and declaration were done. She explained that there is no provision for rejected ballots on the Report on Verification of Ballot Paper Account and that spoiled ballot paper occurs before being cast by a voter at a polling station and is replaced by a fresh ballot paper.

She said the fresh ballot is captured in the number used excluding spoilt ballot papers. She explained further that a rejected ballot paper is only discovered during the count and is captured in the number used excluding spoilt ballot papers. She said the rejected ballot papers and votes for the candidate are not touched except under court order and these are part of the number used. She said each presiding officer is supposed to issue a statement of rejected ballot papers and these were submitted to the 2nd respondent, but have not been produced. She said there were many reasons for rejection, one being absence of official mark at the back which was supposed to be placed by the polling assistants who were issuing the ballot papers.

She acknowledged the number of rejected ballot papers on the Record of Proceedings and said her duty at the totalling centre was to receive the data and write it as it came and had no mandate to establish why there were so many rejected ballot papers. She said at the polling station the presiding officer must tell the stakeholders the reason for rejecting the ballots and that this must be agreed. She said that the polling assistant had a mandate to date stamp the ballot papers at the back and to write on the counterfoil and could not refuse. She said she did not go to Kakonge Mobile clinic because there was no report to her by any candidate but heard from the assistant returning officer and police officer that some ballot papers were torn to remove the face of a candidate. She said the verification of ballot paper account form does not deal with votes cast for a candidate which is done during totalling.

When asked by Mr. Sinkala she reiterated that the difference of 647 reflects part of the unused ballot papers and that the other unused ballot papers amounting to 21,502 were accounted for. She said all the votes for the petitioner are included in number used excluding spoilt ballot papers and that the unused ballot papers were not touched because of few voters. She said the difference of 647 has no bearing on the votes for the 1st respondent because they were not cast by anyone and would not affect the results in the constituency. She said the returning officer has no control over how rejected votes fluctuate and that the number of rejected votes do not indicate how many rejected votes belonged to who and that these could not be for any of the candidates.

Innocent Pwele aged 38 years the Chief Administrative officer at Lufwanyama District council is RW8. He was also an assistant returning officer. He too said the elections were conducted in a free and fair environment. He confirmed that all the results from the 55 polling stations were signed by polling agents who witnessed the counting and that there were no anomalies at the polling stations. He also confirmed that a concern was raised when they received initial results from St. Josephs polling station which has a double stream and that only results for one stream were handed over, but it was immediately noted by the polling agents and corrected. When asked by Mr. Chabu he confirmed that they received a report of cut presidential ballot papers from Kakonge, but when they called, a polling agent confirmed that everything was going on well.

Fabian Kanguya aged 36 years a teacher in Chingola is RW9. He was the Presiding officer at Lumwana polling station. He testified that the process was conducted in a free and fair manner; that the voting was peaceful and transparent and nothing happened to interrupt their voting. He refused that munkoyo and food were taken to the polling station. He said after assessing the voter turnout after 14.00 hours, when they had no voters, he instructed one female polling assistant Katenda to go and prepare food. He said the food was prepared at the house of the retired head teacher Mr. Lungu where they were accommodated and was taken to the classroom. He said he was assigning the polling staff one by one to go and eat and he ate last. When asked by Mr. Chabu he said their food was nshima and rice and that they went with the food as their resources. He said the food was prepared by polling staff and consumed by the polling staff. When asked by Mr. Sinkala he denied that RW3 prepared food for them.

Godfrey Chishika Sikambo the Head teacher for Kalumbwa High School is RW10. He was the presiding officer at St. Josephs polling station. He said he did his work diligently; and that all the candidates were represented by agents and no concerns were raised by them. He said the counting was done according to guidelines and the announcement of results done after filling in the relevant forms which were signed by agents and monitors. He said the results as announced are on the Announcement of Results of the Poll at page 9 of the Bundle.

He said at the totalling centre he had the results for both streams. He said he presented the results for stream 1 to the assistant returning officer without realising that he did not present the results for stream 2. He said this was noticed by PW16 who had been at the polling station. He presented the results for stream 2 and the figures tallied and all stakeholders agreed. He said he had no complaint that some parties had no agents.

In cross-examination by Mr. Chabu he said PF had two polling agents for the two streams, Kasemba and PW16. He said the results at page 9 are for both streams; that there were 31 rejected ballot papers, 16 for stream 1; and that the results for stream 1 are at page 8, but for stream 2 are not produced. He said the Ballot Paper Account at page 7 of the Bundle is also for stream 1. He said 1 ballot box was supplied and used and that there were 31 unused ballot papers. He said there were various reasons for rejecting the 31 ballots such as marking twice and not marking. He said there was no provision on the form to indicate the reasons for rejection of ballot papers. He said all the appropriate forms including the form for rejected ballot papers were signed.

Catherine Gondwe Musonda the Head teacher for St. Marys is RW11. She was the presiding officer at Shibuchinga polling station. Her evidence is that the elections were free and fair. She said slightly ten minutes before polling time on 20th September, 2011 she received two polling agents from PF and one councillor PW10. She said they had unfilled forms with a date stamp for Chibuluma CMML church in Kalulushi. She advised them to have their forms stamped by any commissioner in Lufwanyama and not Kalulushi. She said a few minutes later she was called by the petitioner; he was very furious and threatened her for refusing to sign the forms. She explained to him that according to the Electoral Code of Conduct she could not sign the forms because she was the presiding officer and the person to approve and verify the forms. She said she advised him to take the forms to the mission where the Priest was and a few minutes later the two women returned with forms signed by the priest. Her evidence is further that she had two cases of people with 2005 cards, an old lady and a gentleman. She allowed the old lady to vote because her name was appearing in the Register, but the gentleman's name was not in the register.

She said the gentleman told her that he did not go for verification hence his name not appearing. She testified also that some ballot papers were not stamped, but after the count it was discovered that those ballots were evenly spread, it was not one candidate affected, meaning the non- stamping was not intentional. When asked by Mr. Chabu, she said 39 ballot papers were rejected at her polling station for various reasons, one of which was non-stamping of the ballot papers. When asked by Mr. Sinkala she said it is common to forget to stamp ballot papers and it did not just happen at her polling station. This in brief is the case for the 2nd and 3rd respondents.

SUBMISSIONS

Mr. Chabu counsel for the petitioner has raised two issues first whether the election of the 1st respondent as Member of Parliament for Lufwanyama constituency should be declared null and void; and second whether the 2nd respondent had complied with the requirements of the election process as required under the Electoral Act. On the first issue he submits that there is sufficient evidence to prove that the 1st respondent, her agents and other members of the MMD had committed illegal and corrupt practices and other misconduct in connection with the election and as such the majority of voters were or might have been prevented from electing the candidate of their choice. He has cited section 18(2)(b) of the Electoral Act and urged that the court should declare the election of the 1st respondent void. He has referred me to *Mabenga v Wina and others* (1) and *Mlewa v Wightman* (2) where it was held that satisfactory proof of any one corrupt act or illegal act or misconduct is sufficient to nullify any election.

On the issue of ferrying voters, he submits that the trucks registration No. ALC 6667 was in Lufwanyama on 20th September, 2011 and that the only question is whether it was used to ferry voters or to ferry maize. He contends that none of the witnesses found maize in the truck and that 20th September, 2011 was a public holiday and that no proof was availed that maize was delivered to FRA or that workers were working. He says RW2's evidence that no document is given by FRA is contradicted by another witness who confirmed that receipts are issued and was lying that the truck was ferrying maize.

Counsel submits that the ferrying of people to named polling stations should be found to be an illegal practice. He argues that it is not disputed that the 1st respondent had given out chitenge materials, 64 bicycles and money to her campaign team; that the petitioner has proved that the said materials were given out to some of the voters; and that there is sufficient evidence to prove that the said materials were used to induce voters to vote for the 1st respondent thereby affecting the outcome of the election result.

In regard to the second issue Mr. Chabu submits that the 2nd respondent failed to comply with the requirements of the election process under Reg 31(b)(iii) of the Electoral (General) Regulations, 2006 in that some of the 2nd respondent's officials were not officially stamping ballot papers leading to rejection of some. He says that the total number of rejected ballot papers was 514 and that the respondents had not produced evidence to show the reasons for the rejected ballots as required by Reg 42(4). He argues that from page 2 of the Bundle of Documents 647 ballot papers were missing and were not accounted for by the presiding officers and that the Report on Verification of Ballot Paper Account form conducted on 30th September, 2011 and the documents at pages 5-12 do not show any ballot papers which were unused for each polling station. He prays that the election of the 1st respondent be declared null and void.

Mr. Sinkala submits for the 1st respondent that the burden of proof in an election petition is higher than proof on a balance of probabilities. *Lewanika and others v Chiluba* (3), *Mabenga v Wina and others* (1), *Mazoka and others v Mwanawasa and others* (4) and *Mumba v Daka* (5) are cited. He submits that the onus is on the petitioner to prove the allegations made to a degree of convincing clarity; that the petitioner did not bring any evidence to prove the allegations in paras 14 and 15 of the amended petition; that he failed to show any relationship between the 1st respondent or the MMD and the trucks or to point out any persons who were ferried in the trucks for purposes of voting or that the majority of voters were not able to vote for the candidate of their choice. It is also submitted by counsel for the 1st respondent that the polling agents were denied access to the polling stations as they had no validly signed forms.

Counsel says with force that no one was called to testify to having received money and food, that PW7's evidence cannot be believed because RW5 totally denied ever knowing him or giving him money or food and that PW8 who was with PW7 denied that they separated at any time until after voting. It is argued that PW5 did not see people eating food at RW9's house and that the latter denied ever preparing food for voters, but took refreshments for his polling agents. It is also argued that the event alluded to by PW13 (if it did happen) was after elections and could not affect the result and that RW2 refused having such event at his place.

On unaccounted for ballots it is stated going by RW1's evidence that some unused ballot papers were not recorded and that the difference in the figures does not mean that the votes were cast and could not affect the results. On the results for St. Josephs polling station, it is submitted that this was corrected when PW16 noted the mistake and could not have affected the petitioner's result; and that PW2 totally failed to show before this court the alleged anomalies. In conclusion counsel submits that the allegations as contained in the petition have not been proved as established in the authorities referred to and that the petition be dismissed with costs and the 1st respondent declared as duly elected Member of Parliament for Lufwanyama constituency.

Mrs. Lungu has urged that there must have been substantial non compliance with the electoral laws by the 2nd and 3rd respondents and that the non compliance affected the result of the poll. *Mazoka and others v Mwanawasa and others* (4), *Lewanika v Chiluba* (3) and *Kaira v Namugala and others* (6) are cited. She submits that the petitioner did not adduce any evidence to substantiate the allegations against them. She says by Reg. 30(3) of the Electoral (General) Regulations, the polling agents were required to take an oath or affirmation to be allowed in polling stations, but the ones not allowed did not have proper documentation as admitted by the petitioner and PW3; and that the actions of RW11 were in conformity with electoral laws and procedure. On the unstamped and rejected ballot papers, Mrs. Lungu submits that polling assistants do not know who the voter shall vote for when giving out ballot papers, so the allegation that the unstamped ballot papers were those marked with the PF symbol is unsubstantiated.

She notes that Shibuchinga had 39 rejected ballot papers; and that the rejection of ballot papers is in conformity with the law to make provision for unforeseen eventualities. Regulation 30(3) is cited. It is also submitted that when a ballot paper is rejected it is not done by the presiding officer alone, but through the consensus of all stakeholders and that the number of rejected ballots does not affect the result.

On failure to account for ballot papers, it is counsel's contention that the record of proceedings shows how the ballot papers were distributed for the constituency and the distribution according to the candidate's results and that these tally. It is argued that RW7 showed that at the verification exercise all the ballot papers for both used, unused, spoilt and rejected ballot papers were accounted for and that all stakeholders including the petitioner and his agents were in agreement with the findings and that the totalling of the results and verification were all done in conformity with the law under Reg. 46.

She also submits that the results that were finally announced for St. Josephs were the correct results as shown in the record of proceedings at the totalling and the declaration of the poll. She submits that the allegations of election officials campaigning for the MMD, and intimidating voters at Kambilombilo polling station and voters being locked up by police officers to prevent them from voting have not been proved as no evidence was led. She says the same applies to the allegation that ballot papers where dead names were appearing were marked in favour of the MMD. In conclusion it is urged that all the allegations against the two respondents should be dismissed for lack of sufficient proof.

THE LAW

Section 93 of the Electoral Act No. 12 of 2006, is the section which deals with the grounds upon which the election of a Member of Parliament shall be void if proved to the satisfaction of the trial court, not section 18 (2) cited by Mr. Chabu. Under subsection 2 (a) it must be proved that by reason of any corrupt or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate they preferred.

Under para (b) that there has been a non-compliance with the provisions of the law relating to the conduct of elections, and it appears to the trial court that the election was not conducted in accordance with the principles laid down in such provision and the non-compliance affected the results of the election; and (c) that any corrupt or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of the candidate's election or polling agents.

Subsection 3 provides that where, the trial court finds that any corrupt or illegal practice has been committed by, or with the knowledge and consent or approval of, an agent of the candidate whose election is the subject of such election petition, and the court further finds that such candidate has proved that:- (a) no corrupt or illegal practice was committed by the candidate personally or by the candidate's election agent, or with the knowledge and consent or approval of the candidate or his/her election agent; (b) such candidate and the candidate's election agent took all reasonable means to prevent the commission of a corrupt or illegal practice at the election; and (c) in all other respects the election was free from any corrupt or illegal practice on the part of the candidate or his/her election agent; the court shall not, by reason only of such corrupt or illegal practice, declare the election of the candidate void. Subsection 4 provides that no election shall be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the trial court that the election was so conducted as to be substantially in accordance with the provisions of the Act, and such act or omission did not affect the results of that election.

I consider, in agreement with what was said by the Supreme Court in *Mlewa v Wightman* (1), that the four paragraphs in s. 18 (2) of the Electoral Act No. 2 of 1991 (Now s. 93 (2) of the Act) are independent and separate paragraphs and that an election shall be void if any of the paragraphs is proved to the satisfaction of the court; and that where it is proved that there is wrong doing of a scale or type which has adversely affected an election, regardless of who the wrong doer is and even if the candidates personally were not involved, the election may be declared void.

The learned authors of Halsbury's Laws of England, 4th Edition, Volume 15 state at para 780 that due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery may, however, be implied from the circumstances of the case. Sections 79 to 86 of the Electoral Act provide for several corrupt practices and illegal practices and election offences.

As I said in the election petition between *Brigadier General Kenneth Kankinza and others v Sara Sayifwanda and another (7)*, a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the act was not authorised by the candidate or was expressly forbidden and that the reason for this stringent law is that a candidate put forward agents to act for them; and if it were permitted that these agents should play foul, and that the candidate should have all the benefit of their foul play without being responsible for it in the way of losing his seat, great mischief would arise. I said further that to prove agency it is not necessary to show that the person was actually appointed by the candidate. The crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of his work when done. In the absence of authorisation or ratification the candidate must be proved either by himself or his acknowledged agents to have employed the agent to act on his behalf, or to have to some extent put himself in the agent's hands. The candidate must have entrusted the alleged agent with some material part of the business of the election. Mere non-interference on the candidate's part with persons who, feeling interested in the candidate's success, may act in support of his canvass is not sufficient to saddle the candidate with any unlawful acts of theirs of which the candidate and his election agent are ignorant (See Halsbury's Laws of England (supra) paras 697 and 698).

Burden and standard of proof

It is trite law that the burden of proof in an election petition lies upon the petitioner. In *Lewanika and others v Chiluba* (3) the Supreme Court stated that “parliamentary election petitions are required to be proven to a standard higher than a mere balance of probabilities”. In *Mabenga v Wina and others* (1) the Supreme Court said that “an election petition is like any other civil claim that depends on the pleadings and that the burden of proof is on the challenger to that election to prove “to a standard higher than on a mere balance of probability; issues raised are required to be established to a fairly high degree of convincing clarity”.

Further in *Mazoka and others v Mwanawasa and others* (4) the Supreme Court stated “...that for the petitioners to succeed..., it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters.”

The same principle has been followed in other commonwealth jurisdictions such as Uganda where the Supreme Court in the Presidential election petition No. 1 of 2006, between Col (Rtd) *Dr. Besigye v EC & Museveni Yoweri Kaguta*, (8) also said that the burden of proof lies on the petitioner to satisfy the court on balance of probabilities that the non compliance under the law and principles affected the result of the election in substantial manner; that the standard of proof is higher than in an ordinary civil case and is similar to standard of proof required to establish fraud, but it is not as high as in criminal cases where proof beyond reasonable doubt is required. Again as I said in the election petition of *Brigadier General Kenneth Kankinza and others v Sara Sayifwanda and another* (7), the standard of proof is higher than the ordinary balance of probabilities because the subject matter of the petition is of critical importance to the welfare of the people and their democratic governance.

It is true that a petitioner has a duty to adduce credible or cogent evidence to prove his allegations on the requisite standard of proof; and that the evidence must be free from contradictions and truthful, so as to convince a reasonable tribunal to give judgment in the party's favour. On both principle and on authority, I am convinced that the allegations made in the petition if proved **must** affect the results of the election in a substantial manner. Without a bearing on the result, the election cannot be avoided.

It is interesting to glance again at the Ugandan case of *Nabukeera Hussein Hanifa v Kibule Ronald and another* (9) where it was said that in an election petition, just like in the election itself, each party is set out to win. Therefore, the court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection. It was also stated that "it would be difficult indeed for a court to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of the devil; further that "in election contests of this nature, witnesses most of them motivated by the desire to score victory against their opponents deliberating resort to peddling falsehoods. What was a hill is magnified into a mountain"; and that ".....The evidence of both parties is, in its entirety subjective and cannot be relied upon without testing its authenticity from a neutral and independent source" I cannot agree more with these observations.

THE ISSUES

From the pleadings and evidence it seems that five main questions arise for decision:

1. Whether the Movement for Multi Party Democracy was campaigning after closure of the campaign period and on polling day under pretext of haulage of maize from FRA satellite depots, reaching out to the electorate with campaign materials such as maize, chitenges, bicycles and money (para 12 of petition);
2. Whether MMD former councillor Gilliard Ngwenya with the 1st respondent's agents ferried people from Mafuta and Kabanga sections to Shibuchinga and Lufwanyama polling stations and whether the incumbent MMD councillor James Chileshe ferried people to Mushinka polling station in truck No. ALC 6667;

3. Whether PF polling agents were denied entry and access to their polling stations and whether some voters were disfranchised (para 13);
4. Whether after the verification exercise it was discovered that various polling stations had many PF marked ballot papers rejected on account of not having been officially stamped (para 14); and
5. Whether most presiding officers at different polling stations failed to account for ballot papers (para 14).

I will endeavour to deal with the points raised in the order as they are raised. As already observed by learned counsel for the three respondents, certain allegations made by the petitioner in the amended petition have not been proved as no evidence has been adduced to support these allegations which fall under para 13 where it is alleged that presiding officers were busy telling the electorate to vote for the MMD and were using intimidating methods to force people in Mushingashi ward to vote for MMD and that some voters were locked up at Kambilombilo Basic School by some police officers to bar them from exercising their right to vote and hence never voted; in para 15 that the MMD did not abide by the Electoral Code of Conduct and were seen in GRZ vehicles namely Land Rover registration number GRZ 629 CF distributing campaign materials even on polling day to the electorate which disadvantaged the PF parliamentary candidate and for Local Government PF candidates and PF in general which affected the election results; and in para 16 that on the voting day during counting it was discovered that even ballot papers where the names of dead people were appearing were marked in favour of MMD as if those people had risen from the grave to vote which act is impossible, implying that some people were bribed to mark those papers.

In my view these allegations can be disposed off quickly. As the Supreme Court said in *Mabenga v Wina and others* (1) an election petition is like any other civil claim that depends on the pleadings and the burden of proof is on the challenger to that election to prove "to a standard higher than on a mere balance of probability the issues raised. I will not waste my time on unsubstantiated allegations. It appears that the petitioner was simply searching for grounds to include in the petition. Accordingly these allegations fail.

1. CAMPAIGNS BY MMD

In her answer to para 12 of the petition, the 1st respondent has stated in para 4 that FRA had an ongoing programme of moving maize from Lufwanyama to Kalulushi and Chambeshi depots for safe keeping; that she was not involved in the haulage and distribution of maize; and that the fact that an election campaign is going on does not entail the stoppage of work. In answer to the allegation of distribution of campaign materials, she has averred that her campaign team used only MMD branded campaign materials in form of chitenge and bicycles which materials are allowed by the electoral laws and regulations; that reaching out to the electorate is the whole purpose and essence of a campaign; and that the only persons who received money from her were members of her campaign team, election agents and polling agents.

Clearly there is no evidence before me that the MMD was hauling maize from the FRA satellite depots before and on polling day. But if this did occur, then the 1st respondent's answer would suffice. If FRA had an ongoing programme to move maize from one depot to another for safe keeping the fact that campaigns are going on or that it is elections day does not entail the stoppage of work. There is no evidence that any maize was given out to the electorate or indeed that the 1st respondent was involved in the haulage of the maize. I do not see how that could be linked to bribery of the electorate.

However, a person is guilty of bribery if he, directly or indirectly by himself or by any other person corruptly does any of the acts prohibited in section 79(1)(a) to (h) of the Electoral Act. Under section 81 of the Act, a person shall be guilty of the offence of treating if before, during or after an election, directly or indirectly gives or provides or pays, wholly or in part, the expenses of, any food, drinks, entertainment etc to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving that person's vote at an election. In this case the evidence on the giving out of money and food and chitenges on polling day has come from Mirriam Lungandu (PW5) Chanda Chipande (PW7) and Javan Mpondamali (PW13). The petitioner himself did not observe any of the alleged acts although he stated that the MMD and their agents continued their campaigns and dishing out food and money.

I have considered Mr. Chabu's submission that the 1st respondent gave out chitenge materials, 64 bicycles and money to her campaign team. First, PW5 who was a PF polling agent at Lumwana polling station, said that munkoyo and food were taken to the polling station by Chinyemba and that she saw five people eating and that they all drunk the munkoyo. RW3 has disputed cooking food for voters or treating voters to food at his house. As properly submitted by Mr. Sinkala, PW5 did not see RW3 preparing food for voters and she did not see voters eating food at his house. Her evidence is based on what the MMD polling agent one Chinyemba purportedly told her. But this Chinyemba has not testified to confirm her story and there is no other independent evidence.

RW3's evidence which I find to be more credible is that he took food to Mashinka polling station in a plastic bag for his polling agents as he was a candidate for the position of councillor. He gave the food to the police officer and did not enter the polling room. PW3 who had met RW3 on the truck earlier said the latter took some food in a plastic bag into the polling room where they were not allowed to enter. Although he did not say where the food came from or what kind of food it was, he confirmed RW3's evidence that the food was in a plastic bag. RW3 may have taken food to Lumwana as well since he had polling agents there. PW9 who was the presiding officer at Lumwana polling station categorically refused that food or munkoyo were taken to the polling station. I accept that the only food which was taken there was cooked by the polling officers and consumed by the polling officers. I find the evidence of RW9 to be more credible and cogent as he is an independent witness who is non-partisan. I am not satisfied that any food was given to voters by RW3 or taken to the polling station for voters.

There is then the evidence of PW7 that RW4 prepared food and munkoyo for them which they consumed from the house of the chairlady Edwina Sandasanda which was away from the road as they did not want people to know what was going on and that afterwards RW4 gave him K20,000.00 which he used to buy tujilijili. Again as submitted by Mr. Sinkala RW4 has denied knowing PW7 or meeting him on elections day or treating him and others to food and munkoyo or giving him money.

In addition PW8 who travelled with PW7 on the truck from Chatete to the polling station refused that PW7 went anywhere before they got to the polling station. I accept that they were together until they voted and only left PW7 around 11.00 hours. I think that PW7 has fabricated the story of the food and money. If the food was given he could even have called the person from whom he purchased the munkoyo since he said RW4 sent him to buy the munkoyo or he could have called one of the people he eat with or drunk tujilijili with. Further, the money that the 1st respondent gave to her campaign team was for their own food. There is no evidence that RW4 was part of her campaign team or that he was given money to bribe voters. This allegation ought to fail.

I turn now to the evidence of PW13. Again there is no independent evidence to confirm that there were people drinking alcohol and munkoyo and distributing chitenges at RW2's house after the elections. RW2 has denied the allegation. PW13 has conceded that the house is near RW2's bar and that people meet at the bar to drink. Even if the event did occur, as urged by Mr. Sinkala, the petitioner would have to prove that the people were treated to alcohol and munkoyo and given chitenges for the purpose of corruptly influencing them to give or refrain from giving their vote at an election. This has not been shown. Moreover there is no evidence to show that the 1st respondent or her election agents were involved in the alleged treating of voters or that she was even aware and consented to or approved such conduct or that any of these people were her appointed agents or apparent agents for her to be answerable for their actions.

When one comes to the issue of bicycles, none of the petitioner's witnesses have testified on this issue. The only evidence is from the 1st respondent that four bicycles were given to MMD foot soldiers in each ward and that a total of 64 bicycles were given out in the constituency. There is no evidence at all that the bicycles were given to people generally or to individual voters to induce them to vote for the 1st respondent. The evidence by the 1st respondent which is not disputed satisfies me that the bicycles were given to ward councillors to give to foot soldiers or MMD members campaigning on foot for transportation and that the bicycles were branded. The petitioner has not proved these allegations with convincing clarity. These allegations fail.

2. FERRYING OF VOTERS TO POLLING STATIONS

It seems to me that the alleged campaign by the MMD on polling day was done during the ferrying of voters to the polling stations. The 1st respondent has averred in para 6 of her answer that she and her agents never ferried voters to polling stations. A number of witnesses including the petitioner have testified that there were two Bedford trucks registration number ALC 6652 and ALC 6667 which were ferrying people to polling stations. I accept that the two trucks were in Lufwanyama and were met in St. Marys area by PW14 the officer-in-charge for Lufwanyama police post after he received a report from the council secretary and from Miniver Mutesa and from the petitioner. This witness is a professional witness who I think is non partisan. I have no reason to doubt his evidence. I agree with Mr. Chabu's submission that the question to determine is whether the trucks were used to ferry voters or to ferry maize.

It is the petitioner's evidence that he saw some people in the trucks at St. Marys when he was coming from Fumbwe polling station and that the people were going to vote; that one of the trucks went round from Mafuta to Funda Basic School; and that the 1st respondent's agents also ferried people from Mafuta and Kabanga sections to polling stations. It is also the petitioner's evidence that he saw RW2 in the truck at Shibuchinga and a lot of people disembarking. PW9 who was with him confirmed that they met one truck registration No. ALC 6667 a short distance from Shibuchinga polling station carrying MMD members who were going to vote. He too mentioned RW2 among others.

PW3 also mentioned truck No. ALC 6652 in which he was given a lift with Rose before he was thrown out on the ground that he was a member of PF. According to this witness RW3, CPU Kalenga and Rose Chibwama were the people in the truck. He has not mentioned RW2. Further according to this witness the truck stopped at a market to pick voters and the woman from the truck told the people to vote for President Rupiah Banda. RW3 confirmed that the truck stopped at the market and that the driver and woman went out, but he did not follow and cannot dispute the alleged campaign message.

RW3 also confirmed that PW3 bypassed them and arrived at Mashinka before them. PW4 also saw the truck ALC 6652 by the road side after PW3 informed him. He too saw RW3 and Naomi Kashiwa the alleged chairlady for MMD Lufwanyama District. PW6 said he saw a Bedford truck at a corner driving off, but he did not see the registration number or the people in the truck and he did not see RW2 anywhere on that day. He was only told by a young man, apparently PW8 that he had come with RW2. It seems that he had a bone to chew with RW2 because he promised to kill wherever they met.

Further still, PW7 got on the truck ALC 6667 at Chatete Community school with PW8 and they were taken to Funda polling station to vote and they voted. Both mentioned that RW2 was on the truck. PW7 said RW2 told them that the truck had been sent by the President Rupiah Banda because in the past people did not turn out to vote because of distances to polling stations and that on the way he told them to vote for MMD President Rupiah Banda. According to PW8, RW2 told them not to vote for PF but for RB and if they could not read to vote on the clock. PW10 who was not on the truck said she saw RW2 on the truck when she was going to vote. PW13 also said he was at RW2's house, when he saw a crème white truck, go to the latter's house and, he disembarked. He has not given the registration number of the truck.

It seems to me that RW3 was on truck number ALC 6652 and RW2 was on truck number ALC 6667. But when PW14 met the two trucks RWs 2 and 3 were not on the trucks. The lady who was in charge of the trucks refused that they were campaigning and, said two other trucks were on the East side of the constituency. She conceded that they had used the trucks to campaign during the campaign period, but they were now buying maize. PW14 did not see any maize in the trucks and he did not find any materials that were allegedly being distributed. For that reason he could not detain the trucks. The 1st respondent has denied any connection to the trucks while RW2 says he used a hired Fuso fighter truck to ferry maize from his farm to the FRA satellite depot at St Marys and that PW7 has lied against him because he was one of the five workers he hired to load the maize, but refused to accept the wage of K10,000.00. RW3 says he only got a lift on the truck to go to the polling station to deliver food to his polling agents.

I admit that this issue does not seem to be an easy one to resolve. I have considered the evidence of all the witnesses that testified on this issue. With due respect for the spirited arguments by counsel for the 1st respondent, I am persuaded that RW2 was on truck number ALC 6667 on polling day and that the trucks indeed ferried people from Mafuta and Kabanga sections to Shibuchinga and Mashinka polling stations to vote. PW7's evidence is already questionable, but there are other witnesses, such as PWs 8 and 10 who saw RW2 on the said truck. Indeed it does not appear to me that the two witnesses are supporters of the petitioner. I am not sure that I can agree that RW2 used a hired truck to ferry maize from his farm to the FRA depot or that the only people he carried on the truck to go and vote were his parents, his sister and his brother. Apparently he hired a truck all the way from Kitwe and used it for two days, but failed to take note of the registration number! I reject his evidence. However, it is reasonable for me to accept that RW3 was not on the truck to campaign for MMD. PW3's evidence against him is not corroborated in any way. I accordingly accept that he got a lift to go to the polling station to deliver food to his polling agents at Mashinka.

However, the matter does not end here. For me I would go wider than that. The question in my view is whether transporting voters to polling stations is an offence. Regulation 21(l) of the Electoral (Code of Conduct) Regulations, 2011 prohibits the use of Government transportation or resources or facilities to transport voters to polling stations. Such would be illegal practice. But nothing is said in the regulation about the use of private transportation or resources or facilities to transport voters to polling stations. I think it is implied in this provision that voters may be transported to polling stations, but not by Government transport or resources. To take this point further, there is evidence that the trucks were sent by President Rupiah Banda to ferry people to polling stations because in the past many people including the elderly were failing to vote because of long distances to polling stations. I think that is a good and genuine reason to justify the transportation of voters to polling stations. I ought to add that in this case there was a campaign message attached to the transportation. People were told to vote for Rupiah Banda of MMD and/or to vote on the clock. I accept that words to that effect were uttered by RW2 and the woman mentioned by PW3 at the market.

In my judgment I am entitled in these circumstances to rely on the decision of the Supreme Court in *Webster Chipili v David Nyirenda* (10). In that case it was stated that where elections are tripartite elections embracing three elections in one mammoth election, political campaign that were mounted by the parliamentary candidates coincided with those of the presidential and local government candidates and that in this kind of scenario, it has to be shown by evidence in what way the appellant alone benefited to the exclusion of the presidential and local government candidates of the MMD from the distribution of the relief maize and sale of subsidised maize meal.

In this case there is no evidence that the trucks were campaigning for the 1st respondent or that she benefited from the campaign messages directed at the presidential candidate or that RWs 2 and 3 and the woman campaigning for the presidential candidate were her agents. Of course, a person may be deemed to be an apparent agent if that person conducts himself or herself as an agent though not specifically appointed. But in this case I am not persuaded that the people seen in the trucks acted like the 1st respondent's agents. I entirely agree with the learned authors of Halsbury's Laws of England (supra) at para 697, that mere non-interference on the candidate's part with persons who, feeling interested in the candidate's success, may act in support of his canvass is not sufficient to saddle the candidate with any unlawful acts of theirs of which the candidate and his election agent are ignorant. There is evidence by RW5 which is impugned that she is the MMD District chairlady and that the alleged chairlady who was seen campaigning and ferrying voters is not known to her. I am not satisfied that the petitioner has established this issue to a fairly high degree of convincing clarity.

3. POLLING AGENTS

The next allegation is that polling agents were denied access to polling stations. In para 7 of her answer the 1st respondent avers that the petitioner should have taken issue with the electoral officials, the conflict management committee and monitors/observers and Zambia police officers who were present at the scene if the alleged situation did occur.

In para 3 of their answer the 2nd and 3rd respondents deny this were allegation and aver that those that were not allowed to enter did not have proper affirmation forms as required by law. The petitioner testified that his agents were denied entry to Shibuchinga polling station because they had no affidavits from the 2nd respondent. He admitted that the documents they had were signed in Kitwe instead of Lufwanyama and did not comply with the law. He said the presiding officer at Funda polling station also denied their agents entry until he went there and raised a complaint with Caritas International and the council secretary. But he acknowledged that the affidavits that were given by PF at Kalulushi were supposed to be signed by Lufwanyama.

On his part PW9 conceded that the problem they had with the affirmation forms at Shibuchinga polling station was administrative although they started early on 18th September, 2011. At Funda polling station the head teacher also refused to sign, but when the petitioner went to Father Kapembwa the forms were signed. PW11 confirmed that the head teacher at St. Marys refused to sign their forms as she was the presiding officer and that she referred them to Mafuta. She also confirmed that on the 20th they went to Father Kapembwa who signed the forms. PW12 too confirmed the events and that on 20th after the priest signed their forms, they were allowed into the polling station. RW11's evidence is that the forms presented to her were unfilled with a date stamp for Chibuluma CMML Church in Kalulushi and that she could not sign the forms because she was the presiding officer. She confirmed that the forms were signed by the priest.

I agree with the submissions by Mrs. Lungu that under Reg. 30(3) of the Electoral (General) Regulations, 2006 polling agents are required to take an oath or affirmation in order to be allowed in a polling station on polling day and that several offices including that of Head teacher of a Government school or priest can administer the oath. I further agree that RW11 is credible and her evidence consistent with what the petitioner and his witnesses told the court and had good reasons to refuse to sign the forms. Her actions were supported by law. As properly submitted by both counsel for the respondents, upon the agents' forms being signed, they were allowed into the polling station. It seems to me that the petitioner cannot blame the 2nd respondent.

I am supported in that view by the decision of my learned brother Judge Musonda in *Simasiku Kalaluka v Geoffrey Lunggwangwa and others* (11) in which he held that it is the duty of a candidate to deploy party agents at polling stations and that the absence of agents at polling stations does not invalidate the election results. Clearly it is for the candidate to ensure that his polling agents have taken oath before the respective commissioners. This is not a responsibility of the 2nd respondent. Under Reg 10(1)(a) of the Electoral Code of Conduct, it is the duty of a political party and candidate to provide names and the contact details and addresses of party election agents and of other relevant office bearers and representatives and under Reg 11(1)(a) it is the duty of the election agent and polling agent to observe the opening and closing of a polling station assigned to them on polling day. If the petitioner's polling agents failed to do so because of administrative lapses in having the affirmation forms signed, they have only themselves to blame as conceded by PW11. This allegation must also fall away.

4. DISFRANCHISED VOTERS

I ought, however, to mention one other issue. In my judgment there was no evidence to substantiate the allegation in para 13 of the petition that some voters were locked up at Kambilombilo Basic School by some police officers to bar them from exercising their right to vote and hence never voted. Of course, in para 5 of their answer the 2nd and 3rd respondents denied that some voters were locked up by police officers at the said school and denied their right to vote. This allegation has already failed. However, in the course of his evidence, PW9 said that five PF cadres were not allowed to vote because they had 2005 voters' cards and only Frank Matandiko was allowed to vote. It is clear that this allegation has no bearing on the voters allegedly locked up at Kambilombilo Basic School and denied their right to vote. This particular allegation of disfranchising voters with 2005 voter's cards was not pleaded in the petition. Be that as it may, I have considered the issue. Frank Matandiko who was allowed to vote with a 2005 voter's card has not testified. Only PW15 has testified that he was refused to vote by RW11 who was in charge of voting at St. Marys because he had a 2005 voter's card despite being told at verification that he could use that card. He has not mentioned any other person that may have been disallowed to vote.

According to RW11, she only had two cases of people with 2005 cards, an old lady and a man. She allowed the old lady to vote because her name appeared in the register. She disallowed the man because his name did not appear in the voter's register. I believe that the man was PW15 and that RW11 did not allow him to vote because his name did not appear in the register and not because he had a voter's card for 2005. Obviously if PW15 had verified his details in the register when the exercise was conducted the omission would have been noted and corrected. I do not think that he did the verification. In any case as rightly submitted by Mr. Sinkala, his vote could not have significantly affected the election result had he succeeded in voting looking at the difference in the votes between the petitioner and 1st respondent. This too fails.

5. FAILURE TO ACCOUNT FOR MISSING BALLOT PAPERS

The 1st respondent denies the allegation under this head. The 2nd and 3rd respondents deny in para 6 of their answer that PF marked ballot papers were rejected during the verification at the totalling centre on grounds that they were not properly stamped and aver that counterfoils of the ballot paper booklets and not marked ballot papers are used during the verification process; and that all the people present, including all the polling agents agree which ballot paper is rejected and someone who is not present at the count cannot know which ballot paper has been rejected. They deny that ballot papers were missing at St. Josephs and Kapimbe polling stations and also aver that the discrepancies in the number of ballot papers was due to the fact that some presiding officers did not complete the ballot paper account forms for unused ballot papers and that during verification all ballot papers were accounted for.

The petitioner said that during the verification exercise from 27th to 30th September, 2011, the used and unused ballot papers from various polling stations were not accounted for and that it was difficult for them to do the exercise and they finally left it to the 2nd respondent. He said for St. Josephs and Kapimbe 600 ballot papers were not accounted for by the returning officer who acknowledged the anomalies. The pictures he allegedly took of the anomalies have not been produced. This evidence is supported by PW2, but he too did not have the papers on which he took his notes.

PW2 has conceded that although there was an anomaly at the totalling centre for St. Josephs, at the end of the day the figure was corrected. RW6 admitted that there was a mistake on the results for St. Josephs, but confirmed that the mistake was corrected and all stakeholders, including the petitioner and his agents agreed and all double streams were checked. On the unaccounted for ballot boxes he said there was a mix up in that some presiding officers did not use all the ballot papers and did not complete the ballot paper account forms, but this was also corrected when the unused ballots boxes were opened. He acknowledged the difference in the figures of 647 and that 514 ballot papers were rejected. This was confirmed by RW11 who was the returning officer.

On the evidence I am not persuaded that the 647 ballot papers were missing and not accounted for by the presiding officers as submitted by Mr. Chabu. Indeed the Report on Verification of Ballot Paper Account at page 2 of the Bundle of Documents shows a difference of 647 ballot papers between the details obtained from the ballot paper account forms of 35,253 and the details obtained from physical check by returning officer at 35,900. However, the evidence of RWs 6, 7 and 8 establishes that the difference in the figures came about because some presiding officers did not complete the ballot account forms for unused ballot papers and that a physical check of the unused ballot papers confirmed that all the ballot papers were accounted for. In addition, the report at pages 3 and 4 compiled by RW7 gives the same reason for the difference. The evidence also shows that the 647 ballot papers were in fact unused in that they were not cast by any voter. Accordingly these ballot papers could not have affected the result of the poll.

The report on verification was compiled after the announcement of results and declarations were done and it is clear from RW7's evidence that the verification is required under the Electoral Act to account for ballot papers received in the constituency. I accept that when conducting the verification they do not touch the actual ballots cast for the candidate or the rejected ballot papers unless under court order, so these were not used at verification. I have no reason to doubt the evidence of RWs 6, 7 and 8 as these are professional witnesses who are credible witnesses and non-partisan.

It seems to me that even if these 647 votes were cast in favour of the petitioner he would not have won the election. I have no reason also to doubt the respondents' evidence that the results that were finally submitted for St. Josephs were the correct results or that all stakeholders signed for the results. This is confirmed by PWs 2 and 16 who was a polling agent at St. Josephs. This is also captured in the Record of Proceedings at page 15 of the Bundle. On the whole I am not convinced that there were unaccounted for ballot papers or that the results for St. Josephs were wrong or that this could have affected the results. In my view the verification exercise was conducted in accordance with the Electoral Regulations. This allegation ought to fail.

6. FAILURE TO OFFICIALLY STAMP BALLOT PAPERS

The 2nd and 3rd respondents have denied in para 6 of their answer that Patriotic Front marked ballot papers were rejected during verification at the totalling centre on grounds that they were not properly stamped. The evidence on this issue comes mainly from PW11, one of the two polling agents at Shibuchinga polling station. She observed that when people were given ballot papers by Mr. Lungu who was in charge he forgot to stamp some of the ballot papers and that a total of 36 ballot papers were not stamped. Mr. Lungu has not testified, but RW11 confirmed that some ballot papers were not stamped, although she refused that this affected only one candidate. In her words after the count it was discovered that these ballot papers were evenly spread.

It is clear to me from the evidence that the unstamped ballot papers would end up as rejected ballots under Reg. 30(3) of the Electoral (General) Regulations. As rightly submitted by Mr. Chabu Reg. 31(b)(iii), requires that before issuing a ballot paper to the voter the presiding officer or assistant presiding officer shall stamp the back of such ballot paper with the official mark. However, I cannot agree with counsel that the non-stamping of ballot papers led to a high number of rejected ballot papers for Shibuchinga, Chimoto, St. Josephs, Shimukunami, Kansonka and Nkana Middle Basic polling stations. The total number of rejected ballot papers for all the 55 polling stations in Lufwanyama constituency was 514. Quite rightly the respondents have not produced evidence to show why the ballots were rejected.

But I agree with RW11 that the reasons for rejection of ballot papers may be various and valid and cannot be attributed solely to the non-stamping of some ballot papers. In addition, there is no evidence that the non-stamping of ballot papers was wide spread in the constituency or indeed that the unstamped ballot papers were found to have the PF symbol. PW11 who was at Shibuchinga polling station with PW12 and was called to stream one to verify the results did not mention the alleged unstamped ballot papers with the PF symbol. I think that in truth all the stakeholders at the polling station agreed when the ballot papers were rejected. I also concur with the submission by Mrs. Lungu that when polling assistants are giving out ballot papers to voters they do not know who the voter would vote for, so it would be difficult for any presiding officer or polling assistant to target one candidate or party by deliberately failing to stamp ballot papers.

I accept that there was failure at Shibuchinga polling station by election officials to comply with the provisions of the law under Reg 31 (b) (iii) of the Electoral (General) Regulations. But the question is whether the election was not conducted in substantial conformity with the law. In my judgment, the non-stamping of ballot papers was restricted to Shibuchinga polling station and was not wide spread. It is true, as Mrs. Lungu points out that for an election to be nullified on account of non-compliance with the electoral laws, it must be established that the non-compliance affected the election results and that the winner was partially favoured through the non-compliance. This was not the case in this election.

Indeed as the Supreme Court said in *Mazoka and others v Mwanawasa and others* (4) for the petitioners to succeed, it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters.

In conclusion, under section 93 (2) (b) of the Electoral Act, the election of a candidate as a member of the National Assembly shall be void if it is proved to the satisfaction of the trial court that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in the constituency were or may have been prevented from electing the candidate whom they preferred. In the present case I find that there is no evidence whatsoever that any corrupt practice or illegal practice or election offence connected with the election was committed by or with the knowledge and consent or approval of the 1st respondent or her election agent or polling agents. I am not satisfied either that the 2nd respondent failed to comply with its statutory duty to superintend the election process thereby legitimising the use of bribery, gifts, threats, intimidation, voter buying and actual violence in favour of the 1st respondent or that there should be fresh elections.

Under section 93 (2) (c) of the Electoral Act, in my judgment it must be proved that the non compliance with or defects in the management of elections were deep rooted and affected the results, that is to say, the election was not conducted in substantial conformity with the electoral law and that it was not free and fair. In this case, I am satisfied that the election was conducted in substantial conformity with the law and that the actions complained of did not affect the result of the whole constituency. I have come to the conclusion that the petitioner has failed to prove to the requisite standard any of the allegations in the amended petition. Therefore, I find no ground on which to declare the election of the 1st respondent as Member of Parliament for Lufwanyama constituency as null and void. In effect, therefore, in my judgment this petition should be dismissed. On the whole, I declare that the 1st respondent was duly elected as Member of Parliament for Lufwanyama constituency. Accordingly I dismiss the petition with costs to the three respondents to be taxed if not agreed. Leave to appeal is granted.

Delivered in Open Court at Kitwe this 26th day of March, 2012

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R.M.C. Kaoma
JUDGE