

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HP/EP/0059



IN THE MATTER OF:

**THE PARLIAMENTARY PETITION
 RELATING TO THE PARLIAMENTARY
 ELECTIONS HELD ON 11TH AUGUST,
 2016 FOR THE LUKASHYA
 CONSTITUENCY IN KASAMA
 DISTRICT OF THE NORTHERN
 PROVINCE OF ZAMBIA**

AND

IN THE MATTER OF:

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

AND

IN THE MATTER OF:

**ARTICLES 1, 2, 5, 9, 45, 46, 47, 48,
 49, 50, 54, 70, 71, 72 AND 73 OF
 THE CONSTITUTION OF ZAMBIA,
 CONSTITUTION OF ZAMBIA ACT,
 CHAPTER 1, VOLUME 1, OF THE
 LAWS OF ZAMBIA**

IN THE MATTER OF:

**SECTION 29, 37, 38, 51, 52, 55, 58,
 59, 60, 66, 68, 69, 70, 71, 72, 73,
 76, 77, 81, 82, 83, 86, 87 AND OF
 THE ELECTORAL PROCESS
 (ELECTORAL CODE OF CONDUCT)
 ACT NO. 35 OF 2016 OF THE LAWS
 OF ZAMBIA**

AND

IN THE MATTER OF:

**SECTION 96, 97, 98, 99, 100, 106,
 107 AND 108 OF THE ELECTORAL
 PROCESS (ELECTORAL CODE OF
 CONDUCT) ACT NO. 35 OF 2016 OF
 THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**THE ELECTORAL CODE OF
 CONDUCT 2016**

B E T W E E N:-

RODRICK CHEWE

PETITIONER

AND

MWENYA MUNKONGE
 ALFREDA KANSEMBE
 ELECTORAL COMMISSION OF ZAMBIA
 ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe in Open Court this
 14th day of November, 2016**

For the Petitioner:	Mr. L. M. Chikuta of Mumba Malila & Co.
For the 1 st Respondent:	Mr. D.M. Chakoleka & Ms. S.M. Sichalwe of Mulenga Mundashi Kasonde, Legal Practitioners.
For the 2 nd Respondent:	Major C.A. Lisita of Messrs Central Chambers.
For the 3 rd Respondent:	Mr. H. Mulenga of Phisong & Partners.
For the 4 th Respondent:	Mr. S. Nsomboshi, State Advocate Attorney General's Chambers

J U D G M E N T

Case Authorities Referred to:

1. **City Express Services Limited v Southern Cross Motors Limited SCZ/8/262/2006.**
2. **Admark Limited v Zambia Revenue Authority (2006) Z.R. 43.**
3. **Zambia National Holdings Limited and United National Independence Party vs. Attorney General (1994) (SJ) 22 (SC).**
4. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.**
5. **Khalid Mohamed v The Attorney-General (1982) Z.R. 66.**
6. **Bater vs. Bater (No. 2) (1950) ALL ER 458.**
7. **Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, The Electoral Commission Of Zambia, The Attorney General (2005) Z.R. 138.**
8. **Lewanika and Others vs. Chiluba (1998) Z.R. 79.**
9. **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo And George Samulela (2003) Z.R. 110**

**10. Reuben Mtolo Phiri v Lameck Mangani, Appeal No. 135 of 2012
Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114/2007**

Legislation Referred To:

- 1. Electoral Process Act No. 35 of 2016.**
- 2. Constitution of Zambia (Amendment) Act No. 2 of 2016.**
- 3. Electoral Process (General) Regulations S.I. No. 63 of 2016.**

This is the Election Petition of Rodrick Chewe against Mwenya Munkonge the 1st Respondent, Alfreda Kansembe the 2nd Respondent, the Electoral Commission of Zambia as 3rd Respondent and the Attorney General who is the 4th Respondent. At this stage I must state that Mwenya Munkonge the 1st Respondent was also the 1st Respondent in the Election Petition of Alfreda Kansembe in cause 2016/HP/EP/0001. The Petitioner, Alfreda Kansembe in cause 2016/HP/EP/0001 is now the 2nd Respondent in this case.

On 16th September, 2016, the Petitioner, **RODRICK CHEWE**, filed an Election Petition in which he stated that he was a candidate in the Lukashya Parliamentary Elections in the Northern Province of the Republic of Zambia, which were held on 11th August, 2016. That he contested to be elected as a Member of Parliament under the ticket of the United Party for National

Development (UPND). The Petitioner claims to have had a right to be elected to the position of Member of Parliament for the aforesaid Constituency at the aforesaid elections and initiates these proceedings to Petition against the 1st, 2nd, 3rd and 4th Respondents as a member of the public seeking redress of grievances regarding the manner in which the aforesaid elections were conducted.

The Petitioner states that aside from himself, the 1st Respondent, **Mwenya Munkonge** an independent candidate, and 2nd Respondent, **Alfreda Kansembe** of the Patriotic Front (PF), the following persons were also vying to be elected as Members of Parliament for Lukashya Constituency:-

- i) Geoffrey Bweupe – UDF,
- ii) Gabriel Kaliminwa – FDD, and
- iii) Ephraim Mutale – Rainbow Party.

The Petitioner states that on 13th August, 2016 the Returning Officer from the Electoral Commission of Zambia (ECZ) Mr. Robert Posa, declared the 1st Respondent duly elected Member of Parliament for Lukashya Constituency having received eleven thousand, eight hundred and seventy (11,870) votes whilst the 2nd Respondent received seven thousand, nine hundred and

thirty six (7,936) votes and the Petitioner four thousand, one hundred and eighty (4,180) votes. The other contestants results were as follows:-

- i) Geoffrey Bweupe – one thousand, one hundred and twenty three (1,123) votes,
- ii) Gabriel Kaliminwa – six hundred and seventy five (675) votes, and
- iii) Ephraim Mutale – two hundred and eighteen (218) votes.

In the Election Petition, the Petitioner gave the particulars of the alleged contraventions as follows:-

- “6. Your Petitioner states that during the campaign period inquestion, the said independent candidate was distributing and using PF campaign material including songs for hiscampaign.**
- 7. Your Petitioner states that the 1st Respondent has been amember of the Patriotic Front (PF) Party for a long timenow and the whole of his campaign team was comprised of PF members wearing PF ligulae.**
- 8. Your Petitioner states that when the 1st Respondent was declared winner, people in the PF ligulae celebrated with him.**
- 9. The Petitioner also states that during the same campaign period the 1st Respondent distributed mealie meal, cooking oil and beers to members of the public in Lukashya Constituency.**
- 10. The Petitioner states that the 1st Respondent gave out money to the members of the public during the campaign period for the August 2016 elections in Lukashya Constituency.**

11. Your Petitioner states that the 2nd Respondent was Deputy Minister in the Ministry of Labour and Social Security, a position she held even for most of the campaign period up until the stay in office was declared illegal by the Judgment of the Constitutional Court just a few days before voting day.
12. Your Petitioner states that the 2nd Respondent drew a salary and allowances as such from Government coffers for her personal use during the campaign period.
13. The Petitioner also states that the 2nd Respondent also participated in dishing out money and food to the residents of Lukashya Constituency during the campaign period and on the actual voting day on the 11th August, 2016.
14. Your Petitioner states that the 2nd Respondent was ordered by the Court to pay back money got from Government as a result of her illegal stay in office during the campaign period.
15. Your Petitioner states that the 2nd Respondent donated thirty (30) pockets of cement at Chilubanama Village in Lukashya Constituency aforesaid during the campaign period amongst others.
16. The 2nd Respondent engaged in distribution of bicycles to members of the public in Lukashya Constituency during the aforesaid campaign period for the August, 2016 general elections.
17. The Petitioner states that Dr. Chishimba Kambwili during his radio presentation at Radio Mano and during public rallies in my constituency was quoted and heard saying "do not vote for any UPND candidates because the Tonga niba Mwansakabinga" (They are very bad people and are devils).
18. Your Petitioner states that the 3rd Respondent herein neglected or omitted to issue Form Gen 12 to among other my polling agents in most if not all polling streams, polling station in Lukashya Constituency. The use of Form Gen 12 was to ensure among others that there was process control and avoidance of fraudulent activities within the electoral process of the said August, 2016 elections.
19. Your Petitioner states that without the Form Gen 12 issued for polling stations it became difficult to reconcile figures captured by our polling agents with

those had by the Returning Officer which figures were at variance.

20. Your Petitioner states that some of the Electoral Commission of Zambia (ECZ) accredited monitors for the UPND the party under which I contested the said Elections, were denied entry to the polling by police and the 3rd Respondent's agents who worked in connivance with the PF.
21. Your Petitioner shall say that the 3rd Respondent deliberately delayed in the counting and announcing results for the Constituency. Therefore, the Petitioner contends that the 1st Respondent was not validly elected and the results received by the 2nd Respondent were not obtained in a fair manner or at all.
22. Your Petitioner contends that the results announced by the 3rd Respondent's agent herein were not a true reflection of what the electorate voted in Lukashya Constituency of the Northern Province of Zambia.
23. Your Petitioner shall therefore aver that the 1st Respondent was not validly elected as Member of Parliament for Lukashya Constituency herein.
24. Your Petitioner further contends that the servants and/or agents of the 3rd Respondents in collusion with some operatives of the 1st and 2nd Respondents systematically, deliberately and/or fraudulently refused, neglects and/or omitted to perform the role to conduct free and fair elections to the detriment of your Petitioner herein.
25. Your Petitioner further states that the 1st and 2nd Respondent by themselves or through their agents clandestinely involved themselves into corrupt, illegal practices and/or other misconducts committed in relation to the Lukashya Constituency elections of 11th August, 2016. The general elections held on the 11th August, 2016 were against the spirit of the Republican Constitution, the Electoral Process Act No. 35 of 2016 and the Electoral Code of Conduct of 2016."

The Petitioner accordingly prayed for the following reliefs:-

- (i) A declaration that the 1st Respondent herein, was not validly elected as Member of Parliament Lukashya Constituency and as such his election was void;

- (ii) An order that the 2nd Respondent was not validly elected in the manner alleged by the 3rd Respondent in the past general election;
- (iii) An order declaring that the Petitioner was duly elected as the Member of Parliament for Lukashya Constituency during the general election of 11th August, 2016;
- (iv) An order that the Respondents herein bear the costs of this cause;
- (v) Any other relief that the Court deem fit."

The Petitioner filed an Affidavit in Support wherein he stated as follows:

- 8. That during the campaign period in question, the said independent candidate was distributing and using PF campaign materials including songs for his campaign
- 9. That the 1st Respondent has been a member of the Patriotic front (PF) party for a long time now and the whole of his campaign team was comprised of PF members wearing PF ligulae.
- 10. That when the 1st Respondent was declared winner, people in PF ligulae celebrated with him.
- 11. That during the same campaign period the 1st Respondent distributed mealie meal, cooking oil and beers to members of the public in Lukashya Constituency.
- 12. That the 1st Respondent gave out money to the members of the public during the campaign period for the August 2016 elections in Lukashya Constituency.
- 13. That the 2nd Respondent was Deputy Minister in the Ministry of Labour and Social Security a position she held even for most of the campaign period up until the stay in office was declared illegal by judgment of the Constitutional Court just a few day before voting day.
- 14. That the 2nd Respondent drew a salary and allowances as such from Government coffers for her personal use during campaign period.
- 15. That 2nd Respondent also participated in dishing out money and food to the residents of Lukashya Constituency during the campaign period and on the actual voting day on 11th August, 2016.
- 16. That the 2nd Respondent was ordered by Court to pay back money got from Government as a result of her illegal stay in office during the campaign period.

17. That the 2nd Respondent donated thirty (30) pockets of cement at Chilubanama village in Lukashya Constituency during the aforesaid campaign period amongst others.
18. That the 2nd Respondent engaged in distribution of bicycles to members of the public in Lukashya Constituency aforesaid during the campaign period for the August 2016 general elections.
19. That Dr.ChishimbaKambwili during his radio presentation at radio Mano and during public rallies in my constituency was quoted and heard saying do not vote for any UPND candidates because the Tongas nibamwansakabinga (they are very bad people and are devils).
20. That the 3rd Respondent herein refused neglected or omitted to issue Form Gen 12 to among others my polling agents in most if not all polling streams, polling stations in Lukashya Constituency. The use of the Form Gen 12 was to ensure among others that there was process control and avoidance of fraudulent activities within the electoral processes of the said August 2016 elections.
21. That without the Form Gen 12 issued for polling stations it became difficult reconcile figures captured by our polling agents with those had by the Returning Officer which figures were at variance.
22. That some of the Electoral Commission of Zambia (ECZ) accredited monitors for UPND the party, under which I contested the said elections, were denied entry to the polling stations by police and the 3rd Respondent's agents who worked in connivance with the PF.
23. That the 3rd Respondent deliberately delayed in counting and announcing results for the constituency.
24. That the results announced by the 3rd Respondent's agent herein, were not a true reflection of what the electorate voted in Lukashya Constituency of the Northern Province of Zambia.
25. That the 1st Respondent was not validly elected as member of Parliament for Lukashya Constituency herein.
26. That the servants and/or agents of the 3rd Respondent in collusion with some operatives of the 1st and 2nd Respondents systematically, deliberately and/or fraudulently refused, neglected and/or omitted to perform their role to conduct free and fair elections to the detriment of Your Petitioner herein.
27. That the 1st and 2nd Respondents by themselves or through their agents clandestinely involved themselves into corrupt, illegal practices and/or other misconducts committed in relation to the Lukashya Constituency elections of 11th August, 2016. The General Elections held on the 11th August, 2016 were against the spirit of the Republic Constitution, the Electoral Process Act No. 35 of 2016 and the Electoral Code of Conduct of 2016.

The 1st Respondent filed an Amended Answer to the Petition on 28th October, 2016. In his Amended Answer, the 1st Respondent begun by giving a brief overview of the elections so held as well as the results of the said election as previously stated herein. As regards the allegations contained in paragraph 6 and 7 of the Petition, the 1st Respondent stated that he neither distributed nor used PF campaign materials or the PF songs for his campaign as as alleged and averred that as an independent candidate, he had his own unique campaign symbol and campaign material, which he distributed and was also distinct from that of the PF regalia. He has never been a PF member and never took part in PF activities and would put the Petitioner to strict proof thereof.

The 1st Respondent agreed with the Petitioner in paragraph 8 of the Amended Answer that he was declared winner of the Lukashya Constituency Parliamentary seat, as an independent candidate. The 1st Respondent contented that members of various political parties, donned in their respective party regalia, celebrated his victory of their own accord.

As regards the Petitioner's allegation that during the campaign period the 1st Respondent distributed mealie meal,

cooking oil and beers, the 1st Respondent stated that he was responsible for the wellbeing of his campaign team before and after the election period. He disputed having distributed mealie meal or cooking oil to members of the public in Lukashya Constituency. He denied that he ever gave out money to members of the public as alleged by the Petitioner.

The 1st Respondent averred that he did not contest for the Bangweulu Constituency Member of Parliament seat nor did he collude with the 3rd Respondent as alleged or at all. The 1st Respondent further averred that neither he nor his agents were involved in corrupt, illegal practices and/or other misconduct during the Lukashya Constituency elections held on 11th August, 2016 and that the said election was held in a free and fair manner. Further, that the electorate were not prevented from voting for their preferred candidates.

The 1st Respondent concluded by stating that the Petitioner is not entitled to any of the reliefs sought in the Petition because the election was conducted in the spirit of the **Republican Constitution**, The **Electoral Process Act No. 35 of 2016** and the **Electoral Code of Conduct, 2016**.

The 1st Respondent file an Amended Affidavit Verifying the his Answer, where he stated as follows.

7. That in response to the contents of paragraphs 8 and 9 of the Affidavit Verifying Facts for the Petition, I dispute having distributed or used the Patriotic Front party ("PF") campaign materials or the PF songs for my campaign as alleged and I have never been a member of the PF as alleged or at all.
8. That in response to the contents of paragraphs 10 of the Affidavit Verifying Facts of the Petition, I will state that various members of political parties donned in their respective party regalia celebrated my victory at their own accord.
9. That in response to the contents of paragraph 11 of the Affidavit Verifying Facts of the Petition, I will state that I was Responsible for the well-being of my campaign team before and after the election period. I dispute having distributed mealie meal, cooking oil to members of the Public in Lukashya Constituency as alleged by the Petitioner.
10. That in response to the contents of the paragraph 12 of the Affidavit Verifying Facts of the Petition, I will state that I never distributed money to members of the public in Lukashya Constituency during the campaign period.
11. That in response to the contents of paragraphs 25 of the Affidavit Verifying Facts of the Petition, I will state that I was validly elected as member of Parliament for Lukashya constituency.
12. That in response to the contents of paragraph 26 of the affidavit verifying facts of the Petition, I wish to state that neither I nor any of my agents colluded with the 3rd Respondent or any of its agents and/or servants.
13. That in Response to the contents of paragraph 27 of the Affidavit verifying facts of the Petition, I will state that neither I nor my agents were involved in corrupt, illegal practices and/ or other misconduct during the Lukashya Constituency elections held on 11th august 2016. I further believe that the election was held in a free and fair manner and the electorates were not prevented from voting for their preferred candidates.
14. That in response to the contents of paragraph 26 of the affidavit verifying facts of the Petition, 1st Respondent will aver that the same are within the peculiar knowledge of the Petitioner. The 1st Respondent will aver that neither he nor his agents were involved in corrupt, illegal practices and/or other misconducts (sic) during the Lukashya constituency elections held on 11th August 2016.

The 1st Respondent further avers that it is within the peculiar knowledge of the Petitioner that the general elections held on the 11th of august 2016 were against (sic) the spirit of the Republican Constitution, the electoral Process Act No. 35 of 2016 and the Electoral Code of Conduct 2016.

The Petitioner filed a Reply to the 1st Respondent's Answer and Verifying Affidavit on 19th October, 2016. In Reply, the Petitioner, herein, stated that the reference to Bangweulu Constituency was in error and that the Constituency that he intended to name Lukashya Constituency. The Petitioner maintained that the 1st Respondent was not validly elected as a Member of Parliament for Lukashya Constituency.

The 2nd Respondent filed an Answer to the Petition on 1st November, 2016. She admitted that she was Deputy Minister and drew a salary and allowances but denied that her salary and allowances were used for her campaigns. The 2nd Respondent averred that it was in fact the Petitioner and the 1st Respondent who were distributing money and food to the electorate and not her, as they were first time candidates who did not understand the Electoral rules and regulations. She further denied engaging in the handing out of thirty (30) pockets of cement to Chilubanama Village or the distribution of bicycles to members of the public during the said elections.

It was the 2nd Respondent's contention that Dr. Chishimba Kambwili was not her election agent, as provided under the **Electoral Process (General) Regulations**, and further averred that if the said interview at Radio Mano ever took place it was neither with her knowledge, consent nor approval in any manner whatsoever either expressly or impliedly. She contended that the 3rd Respondent was never at any one time under her control over how it undertook its duties or performed its tasks. Further, that she was not even a candidate in Bangweulu Constituency.

In conclusion, the 2nd Respondent averred that the Petitioner is not entitled to any of the reliefs sought. Except for the admitted facts, the 2nd Respondent denied the rest of the allegations against her in the Petition.

The Petitioner filed a Reply to the 2nd Respondent's Answer on 2nd November, 2016 where he denied that he distributed money and food to the electorate. The Petitioner maintained that the 2nd Respondent corruptly issued bicycles in addition to the other things indicated to have been given by her to the electorate and members of the community in Lukashya Constituency. That the Petitioner had participated in previous elections as campaign

manager for the UNPD in Lukashya Constituency and thereby understands the Electoral rules and regulations.

The Petitioner admitted that the reference to Bangweulu Constituency was made in error and the Constituency that was he intended to name Lukashya Constituency. He maintained that the 1st Respondent was not validly elected as Member of Parliament for Lukashya Constituency and that the 2nd Respondent did not procure her vote in the said election in compliance with the **Electoral Process Act**.

The 3rd Respondent filed an Answer to the Petition on 27th September 2016 and begun by giving a brief overview of the elections so held as well as the results of the said election as previously stated herein. The 3rd Respondent averred that the Returning Officer declared Mwenya Munkonge as the duly elected Member of Parliament for Lukashya Constituency having received the highest number of votes validly cast.

The 3rd Respondent stated that the Form Gen 12 was available at all of the 71 polling stations in Lukashya Constituency and that all the candidates and their Agents were free to get a copy of the form after signing it, from the Presiding

Officers at the Polling Stations, where the form was prepared. That the Petitioner and his Agents actually signed sixty four (64) copies of the Form Gen 12 from sixty four (64) Polling Stations out of the 71 polling stations. The reason why the Petitioner did not sign the remaining seven (7) Form Gen 12s was that the Petitioner and or his Agents left the Polling Stations before the counting of the votes could be completed. The counting in some of the Polling Stations in Lukashya Constituency took long with some of them going into the second day after the elections. As a result, the Petitioner's signature and or that of his agents were not appended to the seven (7) Form Gen 12s and not because the Form Gen 12 was not availed to them as alleged.

The 3rd Respondent contended that it announced the correct results as confirmed both by the Declaration of the Result of the Poll-Member of Parliament form signed by the Petitioner and or his agent and the Record of Proceedings at the Totalling of the Votes-National Assembly Form reflected how the electorate voted in Lukashya Constituency.

The 3rd Respondent averred that contrary to the allegations in the Petition, it did not deny entry to the accredited monitors of the UPND as they were present during the entire election process.

This was evidenced by their signatures on the Form Gen 12s obtained from the Polling Stations. The 3rd Respondent counted and consequently announced the results for Lukashya Constituency on 13th August, 2016 as the counting in some of the polling stations took long because some of the polling stations were far away from the Totalling Centre such as Chimalilo Polling Station which is two hundred and twenty (220) kilometres away from Kasama.

The 3rd Respondent stated that as far as the legal electoral processes and procedures that involved the 3rd Respondent were concerned, the 1st Respondent was validly elected as Member of Parliament for Lukashya Constituency. Further, that the 3rd Respondent diligently discharged its duties and obligation in accordance with **the Constitution** and the **Electoral Process Act** and also in accordance with all the guidelines issued under the said Act. The 3rd Respondent averred that the Petitioner is not entitled to the reliefs sought or to any relief at all.

The Petitioner filed a Reply to the 3rd Respondent's Answer on 19th October 2016 wherein he contended that contrary to what is asserted in the 3rd Respondent's Answer, the 3rd Respondent generated the various Form Gen 12s after the announcement of

the 1st Respondent as winner of the said elections in Lukashya Constituency. The reason that the UPND agents did not sign any Form Gen 12s was because the same were withheld from their agents or not given to them at all in all polling stations in Lukashya Constituency.

That contrary to the 3rd Respondents averments, the announced results were not reflective of the actual results the Petitioner obtained as some of the Petitioner's results were suppressed to his detriment, while the results for either the 1st Respondent or the 2nd Respondent were increased in number. There was no polling station that had a huge number of voters to have warranted the delay in counting of votes to go up to 2 days in some cases as admitted by the said 3rd Respondent herein.

The Petitioner maintained that the 1st Respondent was not validly elected as Member of Parliament for Lukashya Constituency, and that therefore, the Petitioner herein is entitled to reliefs claimed.

The 4th Respondent filed an Answer to the Petition dated 25th October, 2016 wherein it disputed the Petitioner's claim of him having a right to be elected as Member of Parliament for

Lukashya Constituency and consequently is not entitled to any of the reliefs sought or at all.

At the hearing of the matter, the Petitioner called eight witnesses.

The Petitioner, **Rodrick Chishimba Chewe**, testified as PW1. He stated that he was one of the candidates in the 11th August, 2016 Parliamentary elections and stood on the UPND ticket. He went on to identify the issues he had with the 1st Respondent as being, firstly that the 1st Respondent was using PF regalia during campaigns and that secondly the 1st Respondent campaigned alongside PF officials despite him being an independent candidate. The Petitioner contended that the 1st Respondent distributed PF campaign regalia and was also engaging in corrupt activities of handing out cooking oil, mealie meal and money to the electorates.

The Petitioner told the Court that he had known the 1st Respondent as being a member of the PF for some time and was one even before the elections. That the PF had three types of campaign regalia, these being t-shirts, chitenge and sweat shirts or hoodies which the 1st Respondent used during his campaigns. The Petitioner stated that he was aware of the rules that guided

candidates on what to use during the election campaigns and each political party or actors were supposed to use their own campaign materials. To his surprise the 1st Respondent relied on PF campaign regalia. The Petitioner told the Court that between 7th and 10th August, 2016, there was an allegation which was aired on Radio Mano in which a PF Provincial Executive Member, Mr. Peter Mwansa, raised his concerns and advised the 1st Respondent not to continue using PF regalia and PF songs.

Every single day, the Petitioner made sure that he listened to the news bulletin on Radio Mano and Radio Lutando as well as the Zambia National Broadcasting Corporation (ZNBC) news whenever he had an opportunity. PW1 testified that on 10th August, 2016 between 18.00 hours and 22.00 hours on Radio Mano, there was a counter reaction from the 1st Respondent's campaign team member, a PF Constituency Chairperson for Lukashya Constituency, who said that Mr. Peter Mwansa had no right to ask the 1st Respondent not to campaign using PF regalia because Mr. Peter Mwansa, the 1st Respondent and every campaign member of Mwenya Munkonge were PF. He also stated that they would continue using PF regalia and PF songs.

It was the Petitioner's argument that the proof of his allegation was that in his Bundle, he stated that he was a PF member.

The Petitioner told the Court that the 1st Respondent's current position surprised him because he had turned around to say that he is not a member of the PF. He insisted that the 1st Respondent's actions and his pronouncements showed that he was a PF member. The Petitioner went on to recount that when the PF Presidential candidate visited the Constituency for a meeting, the 1st Respondent attended his campaign rally. It was the Petitioner's contention that had if he, as a member of another political party, attended that meeting, he would have been beaten, and hence his surprise at how Mr. Mwenya Munkonge could freely attend the PF rally without being beaten. He testified that the actions of the 1st Respondent gave the Petitioner the confidence to state that the PF had produced two candidates, one by documentation, actions and deeds, which is the 2nd Respondent whilst the 1st Respondent was a member by pronouncements and by action. Consequently, the Petitioner felt as though he had been systematically blocked and or deprived of winning the Parliamentary seat.

The Petitioner testified that he kept on receiving calls from Nkole Mfummu Village where people alleged that Mr. Mwenya Munkonge was throwing money at the people. He received another call from Soft Katongo on 10th August, 2016 at about 18:23 hours informing him that Mwenya Munkonge had released K500.00 to the electorates as well as bottles of cooking oil and bags of mealie meal, which were shared amongst the people who attended his meeting. He also received another call from Chiba Ward that Mwenya Munkonge had distributed beers and cooking oil there. He also got a call from Lusenga Ward that Mwenya Munkonge had distributed PF regalia, money and cooking oil.

The Petitioner told the Court that Mwenya Munkonge had posters of the PF Presidential candidate on his vehicles, a Toyota Canter Dyna whose registration number was BAD 2780. He stated that the Canter had speakers which were playing the PF song dununa reverse. The Petitioner stated that most of the campaign team members in the Canter were wearing PF campaign t-shirts. The Petitioner was able to identify the vehicle at page 5 of the 1st Respondent's Bundle and stated that the picture was taken from the front. Further, that the pictures of

the PF Presidential candidate were pasted at the back of the said vehicle.

As regards the 2nd Respondent, Alfreda Kansembe, the Petitioner testified that she was involved in corrupt practices. On a certain date, when he was listening to the afternoon news on Radio Mano on dates unknown but during the campaign period, he heard a representative of Sub-chief Chilubanama who came air thanking Alfreda Kansembe the 2nd Respondent for her donation of 30 pockets of cement. That representative went on to say that this was a better way of appreciating people during campaigns rather than giving out money, which caused them to buy beer and fight thereafter.

The Petitioner stated that Mr. Chipako, who once served as the UPND District Information Political Secretary in the Constituency was given bicycles by the 2nd Respondent to give to the UPND campaign members to stage a defection during the campaign period. The Petitioner stated that a person called Kelly who was the UPND, Lukashya Constituency Secretary, and Mr. Chanda from Soft Katongo Village were among those that got bicycles from the 2nd Respondent through Mr. Chipako. The Petitioner told the Court that he had information from the

members of his party that Alfreda Kansembe had given different people bicycles and those connected to her claimed that she had bought 4000 bicycles. The 2nd Respondent warned those who received her bicycles that if they did not vote for her or if she lost the election, she would get the bicycles back. Apparently, some persons who allegedly got bicycles from her resold them in fear she would grab them back after they heard that she had lost the election. The Petitioner did state that he used the word "alleged" because his information was based on hearsay.

The Petitioner told the Court that when Dr. Kambwili came to Kasama on his campaign trail he listened to him on the radio programme hailed as "Hot Issues" on Radio Mano, where Dr. Kambwili told the people of Northern Province not to vote for any UPND candidates because UPND was for the Tonga people and PF for the Bemba people. Dr. Kambwili went on to say that people of Northern Province did not know Tongas who he described with the expression "**aba tonga niba mwansakabinga**" meaning that they are evil people or devilish. It was the Petitioner's contention that this statement by Dr. Kambwili made during his campaign trail and campaigning for the PF, caused people who wanted to vote for the Petitioner to change their minds because he was

connected to the said "evil people". Further, that the 2nd Respondent having stood on the PF ticket, benefited from that statement, which she never distanced herself from.

As regards the 3rd Respondent, the ECZ, the Petitioner told the Court that the Form Gen 12 was not available at most of the polling centres. The Petitioner went on to name a few centres which to his knowledge had no Form Gen 12 such as Kapongolo Polling Centre and Chisoka Kabwe Polling Centre. That with regard to Chisoka Kabwe Polling Station, the Petitioner testified that he spoke to his Polling Agent who then referred him to the Presiding Officer who confirmed that he had no Form Gen 12 and this was in the afternoon of 12th August, 2016. The Petitioner stated that because he was at the Totalling Centre, it was very difficult for him to follow up on the issue, but informed his campaign manager of the development.

The Petitioner testified that when he had asked his Polling Agent about the number of votes he obtained from Chisoka Kabwe Polling Station, he was told that he got 8 votes. However, when the results came to the Totalling Centre, the figure changed to 6 votes. The Petitioner cited Kankosha Polling Station as one of the stations that did not have the Form Gen 12 and that the

Presiding Officer who was at the Polling Centre used a pencil to record the results. When the Petitioner's Polling Agent told him to use ink, he chased him away. The Petitioner also cited Lwaba Polling Station where there was no Form Gen 12, contrary to the ECZ records which indicated that there were Form Gen 12s in all the Polling Stations. When his Polling Agent at Lwaba Polling Station demanded for the Form Gen 12s he was chased.

The Petitioner told the Court that the other issue he faced was with regard to the polling stations themselves. Amongst the 71 Polling Stations provided by ECZ, there was no Lubushi and Kabulu Polling Centres.

The Petitioner testified that at Kapongolo Polling Station there was a Form Gen 12 provided to the Petitioner's Polling Agent and according to it, the Petitioner gained 177 votes. However, on the ECZ Form Gen 12, the Petitioner was shown to have attained 175 votes. He stated that the Form Gen 12s were given by two sources at one Polling Station. The Petitioner stated that at Chiba Modern Market Polling Station there were no Form Gen 12s, however, the information the Petitioner obtained was that he had attained 135 votes. However, on the Form Gen 12 the ECZ provided, the Petitioner polled 134 votes. Again at Chiba

Modern Market Polling Station, Alfreda Kansembe obtained 233 votes but the ECZ Form Gen 12 showed that she polled 323 votes.

The Petitioner told the Court that he received information that some of his Polling Agents were turned away at Polling Station despite having credentials that allowed them to monitor the elections. The Petitioner testified that the other issue he had was the delay in announcement of the election results. The ECZ attributed the delay to the expanse of the Constituency and gave an example of Mbusa Polling Station, which is about more than 200km away from Kasama and coupled with the poor state of the roads, takes over 10:00 hours to get there. He wondered why Mbusa Polling Station results were delayed from 11th August, 2016 up to Saturday, 13th August, 2016 in the afternoon despite having less than 200 registered voters.

The Petitioner testified that at the Totalling Centre, he was given the privilege by his party, UPND, to appoint representatives of his choice. He appointed six people namely, Felix Mwansa, Patrick Mwila, Dancewell Kunda, Charles Namushiya, Charles Kabwe and Evaristo Songiso. The Petitioner stated that on the Form Gen 12 produced at the Totalling Centre, none of his people

signed the Form Gen 12 signed on it. It was the Petitioner's testimony that according to the ECZ, the person who signed the Form Gen 12 was Francis Simpasa, however, the Petitioner stated that he did not know him. The Petitioner testified that at Chiba Polling Station there were no Form Gen 12s and that the Forms appearing in the 3rd Respondent's Bundle were not signed by his Agents. At the said Chiba Polling Station, the Petitioner had appointed Annie Chisando and Peter Bwalya who did not sign the Form Gen 12. The Petitioner contended that the Form Gen 12s in the 3rd Respondent's Bundle were not genuine more so because they were supposed to have been signed at the Polling Stations and not four days later at the Totalling Centre.

The Petitioner testified that not all of his Agents were allowed to monitor the elections at the Polling Centres despite having the same accreditation documents as the other political party representatives. He stated that the ECZ gave him Accreditation Forms on which he wrote the names of his chosen Polling Agents. The Petitioner gave examples of Nkole Mfumu Polling Station where the Petitioner's Polling Agent was only allowed to enter the Polling Station at 10.00 hours when the Station opened at 06.00 hours. He also mentioned Lwaba Polling

Station where the Petitioner's Polling Agents were allowed to enter but not allowed to witness the vote counting and were later chased away.

It was the Petitioner's contention in his testimony that the elections were not free and fair as the Form Gen 12s were not available at most polling centres. Further, the inclusion of Form Gen 12s that were signed by unknown people at the Polling Station and at the Totalling Centre also disadvantaged him. Furthermore, that the difference in the result and the inclusion of polling centres not established by ECZ in Lukashya Constituency also disadvantaged him.

The Petitioner testified that there were six candidates and therefore they should all have been given an opportunity to monitor the elections but the ECZ refused to allow some of his Polling Agents, whilst allowing the agents of the other political parties or actors. The Petitioner told the Court that he was not involved in corrupt practices and was almost stoned at Kashinka Polling Station in Lusenga Ward after he finished addressing a rally. The altercation came about when the people at the campaign meeting demanded for money saying that Alfreda

Kansembe had given them money and that they did not want chitenge materials which the Petitioner had taken.

The Petitioner's plea to this Court was that the election of the 1st Respondent as a Member of Parliament be nullified together with the results obtained by the 2nd Respondent for the reasons that they were both candidates from the same political party. Further, if possible the Petitioner pleaded to the Court to declare him the winner for Lukashya Constituency because he was disadvantaged by the 1st, 2nd and 3rd Respondents.

In cross-examination, by Counsel for the 1st Respondent, the Petitioner testified that he has lived in Chamba Valley for four years. He had been a UPND member since 2010. He was fully involved in his election campaigns at Lukashya Constituency and never attended the 1st Respondent's rallies. The Petitioner stated that he never personally saw the 1st Respondent distributing PF regalia. The Petitioner testified that he knew the requirements of joining the PF party and that all one needed to do was just to proclaim membership. He stated that he did not know if the PF Party has a constitution. He did not know when the PF President visited Kasama but stated it was at the beginning of August 2016 or before the end of July.

The Petitioner told the Court that despite not attending the PF rally, he saw the 1st Respondent on television at the PF rally that was held at Kasama Golf Course. The Petitioner stated that he did not know if his rallies were attended by UPND members only and if attending a rally was evidence of membership. He told the Court that he was not informed when a political party member of a party resigns from their party.

The Petitioner testified that in the area he was staying, the 1st Respondent's vehicle playing the song dununa reverse used to drive past frequently. He did not capture the image of the Toyota Dyna vehicle shown in the 1st Respondent's Bundle, which bore posters of the PF Party President on its side. The Petitioner stated that he had never seen the 1st Respondent's campaign materials shown in his Bundle.

The Petitioner also told the Court that he launched a complaint about the 1st Respondent's corrupt activities to his District Chairman who was also a member of the District Conflict Resolution Committee. As such it was up to him to pursue the complaint. He stated that he did not report the 1st Respondent's conduct to the police. The Petitioner also stated that he did not know if the 1st Respondent was part of the programme which was

aired on Radio Mano. Further, that the song dununa reverse is a PF song made and sponsored by the PF. The Petitioner testified that the 1st Respondent stood on the PF ticket by proclamation, although his election symbol was a foot, while the PF Party symbol was a boat. It was the Petitioner's evidence that it was wrong for people to support a candidate who did not belong to their political party. The Petitioner stated that he did not produce his list of his Polling Agents.

In cross-examination, by the 2nd Respondent's Counsel, the Petitioner told the Court that he did not know how many bicycles the 2nd Respondent gave Mr.Chipako nor did he see the 2nd Respondent giving Mr.Chipako bicycles. That he had campaign materials such as his own t-shirts, which he printed whilst the UNDP Party President t-shirts came from his Party. He also stated that he used his own vehicles during the campaign. The Petitioner stated that he knew that the source of bicycles was Alfreda Kansembe based on what he was told. He assumed that Mr.Chipako was part of Alfreda Kansembe's team and that he was her Electoral Agent. He also testified that he did not see the thirty pockets of cement being donated by Alfreda Kansembe nor

did he know if the Sub Chief's representative who appeared on Radio Mano was Alfreda Kansembe's agent.

The Petitioner further testified that it was during the campaign period when the 2nd Respondent donated the cement but failed to recall the date. He heard Dr. Kambwili's voice on the radio but did not know if Alfreda Kansembe was part of the programme or if she had listened to it and let alone if she was even aware of it. He stated that Dr. Kambwili was part of the 2nd Respondent's team because he went to Kasama to campaign for the PF Party. He testified that he did not witness the Kashinka Rally where the 2nd Respondent gave out money.

The Petitioner further told the Court that the person who won the August, 2016 elections was Mwenya Munkonge and that Alfreda Kansembe got more votes than he did at Kashinka Polling Station. According to the 3rd Respondent's Bundle, the Petitioner attained 35 votes, while Alfreda Kansembe got 19 votes.

In cross-examination by the 3rd Respondent, the Petitioner told the Court that he was familiar with the Electoral Process law. Further, he was at the Totalling Centre to witness the announcement of the results as a candidate and was able to

observe what was happening. As regards his Polling Agents, the Petitioner testified that he did not produce a list of their names into Court and had not mentioned his representatives as an afterthought. The Petitioner further told the Court that UPND Ward Officials selected his Polling Agents and he approved them. He had 188 agents and to qualify as an agent, one had to be a member of the UPND for a minimum of two years. He stated that remuneration of the Polling Agents was his Party's responsibility and that the agents were not paid upon producing Form Gen 12s. He also testified that money was released to UPND aspiring Councillors by the UPND Party to pay the Polling Agents so that they could buy provisions during the poll date. The Petitioner told the Court that he was not aware that some polling agents approached Presiding Officers for the Form Gen 12s so that they could be paid.

The Petitioner was shown the Form Gen 12 for Chisoka Kabwe Polling Station and testified that he did not know who signed the document on behalf of the UPND, even though a name did appear thereon. The Petitioner was then shown a Form Gen 12 from his Bundle and another Form Gen 12 from the 3rd Respondent's Bundle. He was referred to page 3 of the

Petitioner's Bundle and page 70 of the 3rd Respondent's Bundle. From these documents the Petitioner told the Court that the Form in his Bundle showing that the Presiding Officer as Musonda Emmison and bearing a figure identify of the Constituency, was different from the one in the 3rd Respondent's Bundle on the name of the Constituency and Polling Station.

The Petitioner testified that he had brought the correct Form Gen 12 to Court and it was not prepared by his Polling Agent for the purpose of payment. He could not tell if the Form Gen 12 in the 3rd Respondent's Bundle was written in pen or pencil because it is a photocopy. The Petitioner testified that his Polling Agent witnessed the signing of the Form Gen 12 and informed him that it was written in pencil and not in pen. He was not sure if his Agent agreed to sign the document as there was just a signature and not his name.

The Petitioner testified that there is only one polling station at Nkole Mfumu with two voting steams. He explained at page 111, line 5 of the 3rd Respondent's Bundle that the Form Gen 12 for Chiba Modern Market was signed by the UPND. He witnessed the announcement of results at the Totalling Centre by Mr. Posa. The Petitioner stated that he and the UPND Party did not agree

with the results shown at page 1 of the 3rd Respondent's Bundle and he did not know who signed them. He also stated that where one did not accept the results and felt that the computations did not tally, he could not commit himself to the figures by signing it. He testified he did not put in a written complaint to the 3rd Respondent because the best redress he had was through this Petition. The Petitioner concluded by stating that Francis Simpasya was not a UPND agent.

In re-examination, the Petitioner told the Court that the Form Gen 12 he produced showed the code numbers of the polling station and the number on his Form was for Kapongolo Polling Station. The 2nd Respondent donated the pockets of cement between 25th June and 10th August, 2016. It was difficult for him to tell when the pictures at page 8 and 9 of the 1st Respondent's Bundle were taken.

PW2 was **Lister Namuzoshya**. She testified that on 6th August, 2016 she saw Mr. Nsonsa who had a megaphone and was announcing that the Member of Parliament was expected to chair a meeting at that village at 10.00 hours. Then she saw a Toyota Canter with a musical system playing the song dununa reverse with a PF chitenge material which was being flown like a flag. In

another vehicle which followed the Toyota Canter, she saw Mwenya Munkonge. PW2 stated that when the occupants of the vehicles came out, they went to the place where the people had gathered. Then, Mr. Nsonso asked the crowd to show respect to the PF members by lifting their fists. Afterwards, Mr. Bernard Malama explained the purpose of their mission and told them that he had brought "the child" Mwenya Munkonge who was standing on the PF ticket. PW2 told the Court that Mr. Bernard Malama asked the meeting to vote for Mwenya Munkonge so that he could take development to the area. PW2 stated that Mr. Bernard Malama told them that since Alfreda Kansembe had been in power for ten years and she had done nothing to develop Lukashya Constituency so Mwenya Munkonge would change things.

PW2 testified that when Mwenya Munkonge was called to address the gathering he raised his fist and then explained his development agenda. He also told the meeting that he was one of them and his parent was Edgar Chagwa Lungu. He went on to state that the other contestants could not bring development, because the Petitioner was still young and that Alfreda Kansembe had done nothing. PW2 stated that when the meeting asked

about Alfreda Kansembe standing on the PF ticket, Mwenya Munkonge asserted that he was the only candidate that the PF had. For that reason the PF officials were campaigning with him, using PF campaign material. PW2 testified that all the PF leaders with him were dressed in PF regalia except for him. PW2 told the Court that she got a t-shirt, white in colour with green writing on it bearing the portrait of the PF Party President, which she produced in evidence as "P1"

PW2 told the Court that she took note of the licence registration number of Mwenya Munkonge giving it as BAD 2780. On the side of the doors of the vehicle there were posters stuck of the PF Party President and in front there were poster picture of Mwenya Munkonge. When PW2 was shown a picture of the said vehicle from the 1st Respondent's Bundle, she testified that she could not see the posters of the PF Party President as they were not visible in the Bundle. PW2 stated that at the meeting, Mwenya Munkonge left K600.00 for people to share and told them that they would find him on the PF ballot provision on 11th August, 2016.

In cross-examination by the 1st Respondent, PW2 stated that she was not a PF member. She did not know the make of

Mwenya Munkonge's vehicle but that if she was shown a picture she would recognise it. From the 1st Respondent's Bundle, PW2 was able to identify the said vehicle that carried Mwenya Munkonge. She stated that she knew the PF election symbol, which was a boat. She told the Court that she did not concentrate on the second vehicle where Mwenya Munkonge was but focused more on the Toyota Canter playing the song dununa reverse. PW2 stated that it was not possible to buy a PF t-shirt on the market and went on to state that she freely voted in the 2016 elections.

In re-examination, she told the Court that she saw Mwenya Munkonge give K600.00 to a person who shared the money to the people at the meeting. PW2 testified that she memorised Mwenya Munkonge's vehicle's licence registration number just in case of confusion, she would report the matter to the police. However, she did not memorise the number of the second vehicle which was parked far from where the people gathered. She stated that a lot of people attended the meeting and she could not count them.

PW3 was **Morris Mwape**. He told the Court that on 5th August, 2016 at around 15.00 hours he heard the song dununa reverse playing. He saw a Toyota Dyna Canter which had two

speakers behind playing the said song. In the front part of the Toyota Canter, there were three posters of Mwenya Munkonge stuck on it while the rear sides of the Toyota Canter had posters of the PF Party President. PW3 stated that the Toyota Canter stopped near his house about 30 metres away from where Mwenya Munkonge went to address a rally. There were three people behind the Canter who were dancing to the song *dununa reverse* and tossing flyers with the wording "vote for Edgar Lungu" into the crowd. One of the persons from the Canter announced that there would be a rally at Chishinkula School. As the Toyota Canter started moving towards the school, a Pajero which had posters of Mwenya Munkonge on it followed it.

PW3 told the Court that both vehicles drove to the school and he identified the Toyota Canter bearing licence registration number BAD 2780 as the one where the song *dununa reverse* was playing from. PW3 testified that Mwenya Munkonge, Bernard Malama and Lupando Munkonge came out of a Pajero and introduced themselves at the meeting. He testified that Bernard Malama told the meeting that he was the PF Party Constituency Chairman. As PF officials they had brought the PF candidate Mwenya Munkonge, who was not adopted due to

Alfreda Kansembe's fraudulent behaviour. PW3 observed that all the members of Mwenya Munkonge's team were clad in PF regalia except for him. After Bernard Malama, Mwenya Munkonge addressed the meeting and told the people that he was the PF and was going to work with the PF Party President in the Constituency.

Counsel for the 1st Respondent cross-examined PW3 who stated that he saw the two vehicles, a Prado and a Toyota Canter, on 5th August, 2016 but could not remember their licence registration numbers. The vehicles were covered in campaign posters for Mwenya Munkonge. Despite being semi-literate, PW3 was able to read the message on the campaign posters in the 1st Respondent's Bundle as "vote for Mwenya Munkonge" and to point to the election symbol of the foot. PW3 testified that it was unclear whether Mwenya Munkonge was standing as an independent candidate from the poster. PW3 testified that Mwenya Munkonge did not put on PF regalia when he went to Chishipula Village. He went on to state that he did not freely elect the person whom he preferred in the election. He was confused and voted for another person other than the one he wanted to vote for. PW3 told the Court that Alfreda Kansembe stood on the

PF ticket, but Mwenya Munkonge also said that he was a PF member.

PW3 also told the Court that he had been a PF supporter for 8 years but did not attend any of the PF rallies. He knew Bernard Malama who was the PF Chairperson for Lukashya Constituency. He did not know Mwenya Munkonge's position in the PF Party and only got to know of him during the campaign period. He knew Alfreda Kansembe well and that she was someone who he had interacted with. Further, she stood on the PF ticket in the elections. Mwenya Munkonge kept repeating the phrase "foot in a boat" during the campaign meeting and that PW3 did not see the electoral symbol, showing a foot in a boat when he went to vote. He concluded that such a symbol did not exist.

In re-examination, PW3 told the Court that Mwenya Munkonge was using his electoral symbol, the foot and the PF electoral symbol the boat, while Alfreda Kansembe only used the PF symbol. PW3 further stated that the Prado vehicle used by Mwenya Munkonge's campaign team was dark blue in colour and was covered with his posters.

PW4 was **Davis Chongo Kabwe**. He testified that on 1st August, 2016 around 15.00 hours he saw a Prado vehicle and a Toyota Canter, which were covered in posters of Mwenya Munkonge at TAZARA market. The Canter had portrait pictures of the PF Party President on its sides. The persons on the Canter were raising their fists chanting "pamaka" while from the two speakers in the vehicle the song dununa reverse was playing. PW4 told the Court that he saw Mwenya Munkonge, Mr. Nsonsa and his campaign team who went to address a campaign meeting at the market. Mr. Nsonsa told the meeting that Mwenya Munkonge was sent to stand in Lukashya Constituency by the PF Party President since Alfreda Kansembe, had done nothing in the Constituency. Mwenya Munkonge told the meeting that his electoral symbol was a foot. He was standing as an independent candidate because during the adoption process Alfreda Kansembe confused the party leadership in Northern Province. PW4 testified that Mwenya Munkonge urged the meeting to vote for him on his electoral symbol the foot, to vote for the PF Councillor and the PF Presidential candidate.

PW4 testified that he saw Mwenya Munkonge took out K600.00 which he gave to Mr.Nsonsa to give to the people that

attended the campaign meeting. Mwenya Munkonge also left PF chitenge materials and t-shirts for distribution to the people who had attended the meeting. He later drove off.

PW4 told the Court that on 8th August, 2016 at about 20.00 hours, Mr. Nsonsa and Mwenya Munkonge went to his house to give him a 25kg sack of mealie meal labelled Kasama Milling and a 2.5 litres container of Rina cooking oil. Mwenya Munkonge told him to work with him after he won the election, because he wanted to work with the youths. He also promised to represent the needs of the youth to the PF Party President. Afterwards, Mwenya Munkonge begged him to vote for him and the PF Party President on the day of the elections.

In cross-examination by the 1st Respondent's Counsel, PW4 told the Court that TAZARA market is very big and there could have been close to 500 people who attended the campaign meeting. He did not count the PF campaign materials that were distributed that day. As regards the K600.00, PW4 stated that it was left for six marketeers specifically to which PW4 was not a part of. PW4 maintained that on the night of 8th August, 2016 Mr. Nsonsa and Mwenya Munkonge went to his home using a Prado vehicle and gave him the provisions earlier stated. PW4 stated that he was a

PF supporter and had chosen the candidate of his choice in the election. He also told the Court that he knew PW3 whom he worked with but did not know PW2.

The witness was not re-examined.

PW5 was **Leonard Siwila**. PW5 testified that on 6th July, 2016, Mr. Shaft Sichilima went around the village announcing that Alfreda Kansembe would address a campaign meeting on the next day. The next day people gathered to hear what she had to say. PW5 testified that Alfreda Kansembe told the people that she was in that area as the candidate that the PF Party had adopted for Lukashya Constituency. She urged the meeting to vote for her. PW5 also told the Court that some people in the crowd challenged Alfreda Kansembe charging that she had been in office for the past ten years and had done nothing for them. Alfreda Kansembe's response was that she would ensure that they were given anything that they wanted. PW5 stated that Alfreda Kansembe thereafter, gave the youths, men and women K300.00 to divide amongst themselves in proportions of K100.00 per group.

PW5 further stated that on 11th January, 2016, he saw Alfreda Kansembe giving three bicycles to three Village Headmen, namely Edwin Sichilima, John Mulenga and Zion Sichilima.

In cross-examination by the Counsel for the 2nd Respondent, PW5 told this Court that the said bicycles were not given out at the meeting held on 7th July, 2016 at Bwacha Village, but that they were distributed to the two Sichilimas on 11th July, 2016 and the third bicycle was picked up later by Mr. John Mulenga. Further, that the vehicle that brought the bicycles to Kwacha Village was white and green in colour, bearing registration number ECL 2016 and had posters of Alfreda Kansembe stuck on it. It was PW5's testimony that the bicycles were given to the Headmen for purposes of campaigning for Alfreda Kansembe.

PW5 told the Court that he was a UPND member and Secretary for Mulenga Lyamishi Village. He attended Alfreda Kansembe's meeting in that capacity. He stated that he fully supports the Petitioner and did not feel good when he lost.

In re-examination, PW5 maintained that he attended the meeting in his capacity as Secretary of the Village. When Alfreda

Kansembe gave him the K100.00, she was not aware that he was a UPND member. Further, the said bicycles were still with the Headmen who were using them.

PW6 was **Peter Chikoti**, a UPND Polling Agent who testified that on 11th August, 2016 at around 06.00 hours he went to High Life Polling Station, which was called Chiba Polling Station by ECZ. He found the Election Officers from ECZ and Polling Agents from different political parties. He stated that the Election Officers told them to check the empty ballot boxes thoroughly and then to seal them. When the voters started to enter the room, to cast their votes, PW6 and other Polling Agents counter checked their names on their registers. They did this from 06.00 hours to 12.00 hours with no problems. However, things unravelled from 12.00 hrs to 17.00hrs.

PW6 told the Court that some voters who went to the Polling Station started making political signs to other voters who were outside. He complained about the behaviour to the Presiding Officer who told him that it was a police matter as it was occurring outside.

PW6 further testified that after the vote count he was given a form on which all the political parties signed. PW6 stated that this form was not a Form Gen 12. When he was asked to sign the Form Gen 12 the Presiding Officer told him that he had already entered the data in his records. Hence, there was no need to sign the Form Gen 12. Further, that the Presiding Officer did not allow him to witness the sealing of the ballot boxes once they finished counting the votes. PW6 also testified that the Presiding Officer told him that since he had the results, the sealing of the boxes would be done at the Totalling Centre and was told to go home. The event happened on the 12th August, 2016. It was PW6's contention in his testimony that none of the Polling Agents signed the Form Gen 12 at the Polling Station nor were they given copies of the said Form.

In cross-examination by the 3rd Respondent's Counsel, PW6 told the Court that there were some anomalies and confusion at the Polling Station. He did report the incident to the Presiding Officer. The Form he was forced to sign was not a Form Gen 12. When PW6 was given a document produced in the 3rd Respondent's Bundle, he stated that the top right side of the document said Form Gen 12. PW6 stated that he did not know

the name of the Presiding Officer at that Polling Station because he was not informed by ECZ.

The witness was not re-examined.

PW7 was **Simeyo Kalenga**, who testified that he was a Polling Agent for UPND at Kabila Polling Station. On 11th August, 2016 he reported to the Polling Station and completed the preliminary duties and preparation of the Polling Station. At 06.00 hours he and his fellow Polling Agents were asked to go outside the Polling Station. When the Presiding Officer let them back in, PW7 and his colleague, Moses Chishimba, were not allowed back into the Polling Station. They were only allowed to enter the Polling Station at 17.00 hours, without a valid explanation as to the reason why they had been denied entry, despite having the requisite authorisation documents from ECZ.

PW7 testified that when they were finally allowed to enter the Polling Station, they were asked to sign a document and initially refused to do so. However, PW7 stated that they were eventually forced to sign without knowing what they were signing by the ECZ officers. When PW7 asked for the Form Gen 12 from

the Presiding Officer, he was told that the Form was not available. Further, he never signed a Form Gen 12.

PW7 in cross-examination by the 3rd Respondent's Counsel, told the Court that he was the Petitioner's authorised Polling Agent recognised by ECZ. He did not understand why he was denied entry into the Polling Station. He was shown a Form Gen 12 from the 3rd Respondent's Bundle, which he recognised as the document he had signed.

In re-examination, PW7 testified that he took the oath on his own.

The 1st Respondent, called one witness **RW1, Mwenya Munkonge.**

RW1 told the Court that he did not distribute any campaign materials nor did he play or distribute any PF songs. He had his own distinct campaign materials namely, t-shirts, posters and flyers. Further, that his vehicles were also distinctly branded with his image and symbol which was a foot. RW1 stated that he only distributed his campaign materials and not those of the PF at his rallies, because he was an independent candidate. His posters and flyers all had his image and which read "Vote Mwenya

Munkonge" written on them with a bar at the bottom showing the way his ballot paper would appear; that is with his name, his symbol, then the word "Independent" and an **X** in the box.

With regard to PW2's testimony, RW1 told the Court that he did not give her a t-shirt at Amini Village or anywhere else for that matter because he had never seen her before. RW1 stated that he did not tell the crowd at Amini Village that he was a PF member. His biggest challenge throughout the campaign period was to educate the electorate to vote for him as an independent candidate. RW1 testified that he did not give K600.00 to the crowd at Amini Village as he appreciated that doing so would violate the Electoral Rules. He further stated that giving such a large crowd a little money could cause a security risk to himself and his campaign team and even to the persons receiving the money.

RW1 testified that contrary to PW3's testimony, he did not proclaim to be a PF member at the rally in Chishipula Village and neither did he give out PF hoodies or money. He stated that the rally at Chishipula Village was one of the biggest he had in terms of attendance and the crowd could have exceeded 500 people who filled half the football pitch. RW1 further testified that he did not

distribute any PF materials or money at TAZARA Market contrary to PW4's averments. There was a very large crowd at the market and did not know the six marketeers he is alleged to have given K500.00.

RW1 stated that he had never been and is not a PF member and that he has never attended any PF meeting or rally including the rally that was held in Kasama by the PF Party President. He stated that he had made donations to the PF Party either in monetary or material terms, as he has done with many other organisations of which he is not a member. RW1 testified that he did have members of the PF Party supporting him throughout his campaign and that some of them held and still hold positions in the Party. However, they chose to support him as an independent candidate. RW1 further testified that he also had support from other political parties and people who had no political affiliations.

RW1 stated that he did not distribute cooking oil, mealie meal or beers to members of the public. RW1 told the Court that on the day before the elections he distributed a 10kg bag of breakfast mealie meal and K50.00 per stream for his Polling Agents at each Polling Station to ensure that they were fed and did not leave their stations to look for food. Because of the size of

the Constituency, he and his campaign team distributed these provisions a day before the elections.

RW1 testified that on 10th August, 2016 he did not distribute anything. He had to attend to the removal of the branding on all of his vehicles so that the following day, which was Election Day, he and his team could use the vehicles for monitoring the elections. He testified that the Prado and the Landcruiser had full body branding which took some time to remove and required to go to the car wash to prevent dust from sticking on to the bodies. Because of this, he and his team could not have been in Soft Katongo Village, where it was alleged that he distributed mealie meal, cooking oil and beer to the public. RW1 denied leaving K500.00 at a rally at Soft Katongo Village and he did not give Davis Chongo Kabwe (PW4) cooking oil and mealie meal. Further, that he had never been to his home.

RW1 told the Court that he had three vehicles in his campaign, namely a Toyota Landcruiser GX, Toyota Landcruiser Prado and the third a Toyota Dyna Canter. The Landcruiser and the Prado had full body branding, whilst the Dyna had three big posters of himself on the front. The sides had smaller posters stuck to the body of the vehicle. He never at any time placed PF

posters on his campaign vehicles. He testified that the branding on his vehicles was made up of his image, the words "Vote Mwenya Munkonge Independent" and the Bemba expression **"umutima ukonka echoutemenwe"**

RW1 was referred to his Bundle where he was able to identify the images of the vehicles he used during his campaign, the posters and flyers used as well as the t-shirts.

RW1 was cross-examined by the Petitioner's Counsel and therein confirmed the vehicles he used during his campaign and the colour of the vehicles. RW1 further testified that *dununa reverse* was a public song which he heard in bars and shops. The main users of the song were PF members. He stated that there was harm in his using the song in his own campaigns. RW1 reiterated that he has never been a PF member during the campaign and was not aware that some Court documents stated that he was once a PF member and had resigned. He stated that the allegations regarding his membership of PF did not come with any evidence.

In his testimony, RW1 told the Court that it would have been wrong for him to campaign using the phrase "foot in a boat"

and to give PF campaign materials to people when he was an independent candidate. Further, that it would have been wrong to distribute food for the purpose of soliciting votes. He stated that he was aware that membership of PF was not by card and was unaware that such membership is deemed by proclamation or association.

In re-examination, RW1 maintained that it would have been wrong to distribute PF regalia when he was an independent candidate, to distribute cooking oil, mealie meal and money on the day of the election. He insisted that he did not think it wrong to supply his Polling Agents with provisions on the said day. He stated that he won the elections in a free and fair manner and followed the rules as provided by the ECZ and Electoral Rules.

The **2nd Respondent** called four witnesses.

RW2 was **Alfreda Chilekwa Kansembe Mwamba** who told the Court that she had never visited Bwacha Village during the month of July, 2016, but did visit in April 2016, when she was on leave from national duties as a Deputy Minister in the Ministry of Labour and Social Security. She testified that she had received a request from one of the people who lived in that area to

visit them in order to inspect the ongoing project of the construction of a community school, under the Constituency Development Fund Project, which had not been funded for two years. The said request was made earlier in the year but RW2 visited the project in April, 2016. She pledged to support it by using her own resources. RW2 testified that using one's own money was a common practice amongst Member of Parliament to fund community projects, and whilst at that village she addressed a small meeting.

RW2 testified that during the same time, the Catholic Church at Chilubanama Village requested for her help with building materials such as cement. She sent the money to one of her cadres, Danny Mubanga, who bought the cement and delivered it on her behalf to the church representatives who had made the request. It came as a surprise to her to hear long after her visit that a Sub Chief representative, whom she had paid homage to and had never, discussed the cement she bought, went onto a local radio station to pay tribute to her generosity over the cement. She stated that this was done during the campaign period.

RW2 testified that she was shocked by the allegation that had distributed 4000 bicycles to the members of public in Lukashya Constituency and three bicycles to three Headmen. RW2 told the Court that the PF party generally acquired bicycles for distribution in all 10 provinces of Zambia and that Kasama had a share of those bicycles. RW2 stated that Lukashya Constituency received three consignments of bicycles. The first was for 150 bicycles followed by two consignments of 50 and 30 bicycles. RW2 told the Court that the bicycles were distributed from the Party secretariat in Lusaka all the way to Ward level by party officials and not Members of Parliament.

As regards the allegation that she distributed three bicycles to three Village Headmen, RW2 testified that on one of her visits before the election campaigns, she had paid homage to the most senior chief in the Constituency Chief Nkole Mfumu. He made a special request through her to the Head of State that he wanted the President to help him provide transport for his Headmen, as communication and movement was difficult and laborious for them. RW2 testified that she communicated the message to the Republican President and Chief Nkole Mfumu was given 50

bicycles which she delivered in her official capacity. She never gave the bicycles to the Headmen at a public meeting.

As regards the allegation surrounding Dr. Kambwili and his pronouncements on Radio Mano, RW2 told the Court that Dr. Kambwili's visit was initiated by Kelvin Sampa who needed him to drum up his support and not her. At the time Dr. Kambwili went to Kasama, RW2 was in a remote part of her then Constituency and never attended any of his meetings. RW2 contended that Dr Kambwili visited Kasama Central Constituency and not Lukashya Constituency.

RW2 told the Court that she was not engaged in corrupt, illegal and other misconducts in relation to the elections of 11th August, 2016. She stated that she did not engage in any underhand methods to disadvantage anybody in the last elections.

In cross-examination by Counsel for the Petitioner, RW2 told the Court that Radio Mano has coverage in Lukashya Constituency and that Dr. Kambwili did not campaign for her, as he was specifically invited by those that were standing for the first time in a political arena.

RW2 echoed that she was only part of the entourage that delivered the bicycles to Chief Nkole Mfumu and also paid him a courtesy call. She did not know the Headmen by name and that Chief Nkole Mfumu gave out the bicycles. She admitted that it would be wrong to take a present to a Chief during the campaign period and that it would be wrong for a Headman to receive bicycles that were known to be at the instance of a Member of Parliament during election period. RW2 confirmed that none of the Headmen were part of her campaign team.

RW2 further reiterated that she went to the aid of the community school was in need of building materials and she donated 30 pockets of cement. This was not done during election time. When she made her visit in April, 2016 she did not go with her campaign vehicle, but with her official vehicle registration number GRZ 1829 and a bus which carried PF officials and the cement. The vehicle that carried the bicycles to Chief Nkole Mfumu was a Nissan Single Cab belonging to the PF Provincial Administration.

In re-examination, RW2 told the Court that she did not invite Dr. Kambwili to Kasama District or to her former Constituency. She stated Headmen received gifts from time to

time, however, gifts given during election campaign period could be misconstrued. The request for the bicycles was made through her and she delivered the message to the Republican President. She was only part of the entourage of the people who delivered the bicycles.

RW3 was **Doris Kalusa**. She told the Court that she is the Provincial Treasurer for the PF. At the provincial level, she received the PF campaign materials such as vehicles, bicycles, chitenge materials, t-shirts, hoodies, work suits, head dresses and posters. RW3 testified with regard to the bicycles that once the Province received them, they called the District Officials and shared them amongst the Districts. The District Officials then took them to the Constituencies and from there they are distributed to the Wards. At Ward level the bicycles were given to the individuals who used them for campaigns.

RW3 stated that she never received any bicycles for this election from RW2 and that the bicycles were never given to the Members of Parliament but to the people who went to campaign.

RW3 was cross-examined by the Petitioner's Counsel. RW3 told the Court that she did not know that officials who were

supposed to be campaigning for RW2 were campaigning for RW1. At her level as Provincial Treasurer she would not know which party officials received bicycles in Lukashya Constituency for distribution and that bicycles were only given to members of the PF Party. She confirmed that her interest was to mobilize the party and not to implement Government policies. RW3 stated that given the expanse of the Province, it was not possible for her to go to each district to see how they were distributing the bicycles at the grass roots level.

In re-examination, RW3 reiterated that her duty as Treasurer is to oversee all the goods that are brought to the Province and to share them out amongst the Districts. It was not possible for her to know if the bicycles were given to none PF members as the assumption is that they were given to party members to facilitate the campaigns.

RW4 was **Barnabas Mubanga**. He testified that he was the Secretary for the Campaign Committee for Pumabula Ward. When he was going about campaigning, he used to walk on foot. He made a request for bicycles from the Constituency and was given 10 bicycles. RW4 stated that he was able to remember

some of the people that distributed the bicycles namely, Delphister Lesa, Peter Chisanga and Monica Chileshe.

The Petitioner's Counsel cross-examined RW4. RW4 told the Court that the PF Provincial Treasurer kept a record of what was received by the Province and was in charge of the distribution of bicycles. As far as he knew, only PF Party members received bicycles.

The witness was not re-examined.

RW5 was **Daniel Chileshe Mubanga** who testified that in April, 2016 RW2 called him to ask him to collect money from Shoprite. She asked him to buy cement which the Church had requested for from PW2. RW5 told the Court that he bought the cement with the money sent by PW2 and delivered the cement to the leaders of the Church at Chilubanama. Further, that the leaders of the Church asked him to thank RW2 for the cement.

RW5 was cross-examined by the Petitioner's Counsel. He told the Court that he did not have the receipt from Shoprite or proof of having received money from RW2 in Court.

In re-examination, RW5 explained that he did not know that the receipts of the purchases he made would be required in

Court. He maintained that received money from RW2. He bought and delivered the cement in the month of April.

The 3rd Respondent called two witnesses.

RW6 was **Emison Musonda**. He told the Court that on 11th August, 2016 he was the Presiding Officer at Kapongolo School Polling Station in Pumabula Ward of Lukashya Constituency in Kasama. The witness explained that his role was to oversee the conduct of the elections at the Polling Station, to ensure that the elections were conducted in a free and fair manner, and to ensure that apart from the ECZ officials, the accredited party representatives and other election monitors were present. RW6 further stated that at the close of the voting, part of his duties were to count the votes in the presence of all the party representatives and election monitors.

RW6 testified that he did see the Petitioner's election monitors on the day and stated that the Petitioner to the polling station before the voting begun. At the end of voting, the votes were counted in the presence of the party representatives and election monitors. He announced the results and wrote them on the Form Gen 12. Then the representatives of the parties were

asked to sign to confirm that they had heard and agreed with the results. RW6 stated that there was another form where the results of the candidates were written and that this form was called the Ballot Paper Account Form. After the results were announced he entered them on the Announcement of Results Form, which is the Form Gen 12. From the Form Gen 12, he transferred the results to an even bigger form called the Zero Form, which was then stuck on a wall outside the Polling Station for all to see.

RW6 was shown the document at page 71 of the 3rd Respondent's Bundles which he identified as Form Gen 12. RW 6 testified that according to the Form, he was the one who announced the results. RW6 read the Petitioner's results from the Form and stated that two representatives of the Petitioner signed on the document at page 72 of the Bundles.

RW6 was then shown the documents at pages 2 and 3 of the Petitioner's Bundle. RW6 stated that the name of the Polling Station on the Form was Kapongoli School. That according to the document the person who announced the results was Musonda Emmison. RW6 went on to state that the document in the Petitioner's Bundle was different from the document in the 3rd

Respondent's Bundle. RW6 testified that there were a lot of anomalies in the document produced by the Petitioner. That firstly on the Petitioner's form, the name of the school was not written in full. Secondly, the name of the type of election taking place, that is Parliamentary Election, was also not marked. Thirdly, the name of the constituency was in number form and not written out in full. Fourthly, RW6 noted that the results of the Petitioner's votes were different in the form produced by the Petitioner in his Bundles. Further, that the document in the 3rd Respondent, Bundle stated that the Petitioner attained 175 votes, whilst the document in the Petitioner's Bundle showed 177 votes. Fifthly, the number of rejected votes was different on the Petitioner's document as it indicated 22 such votes and on the 3rd Respondent's document the number was 42. Lastly, RW6 observed that the section where representatives signed was also different. The Petitioner's document had only four political party representatives, whereas the 3rd Respondent's document had seven party agents and four monitors making it a total of 11 officials who signed. RW6 further stated that the signature on the Petitioner's document was not his and that he did not sign it.

RW6 maintained that he did not produce the document presented by the Petitioner.

In cross-examination RW6 told the Court that it was the duty of ECZ to issue Form Gen 12 and that these Forms were under the custody of ECZ until they were sent to the Presiding officer. After they were filled with election results, they were given to the Returning Officer. RW6 admitted that ideally, a political party kept a copy of the Form Gen 12 and the other copy was given to the Returning Officer. That however in this case, RW6 did not duplicate the Form Gen 12 at the Polling Station because he did not have enough forms at the Station, and had no access to a photocopying machine. RW6 stated that the Form Gen 12 was supposed to instill credibility and confidence in the system that the results transmitted to the Returning Officer were the same results given to the public at the Polling Station on the Zero Form.

RW6 testified that did know the number of the Polling Station appearing in the Petitioner's Bundle. He stated that ECZ did not deceive the Petitioner as the results that were displayed on the Form Gen 12 were publically agreed and were the ones that were displayed on the Zero Form before anyone left the

Polling Station. When referred to the document in the Petitioner's Bundle, RW6 stated that the document did not look like the document in the 3rd Respondent's Bundle.

In re-examination, RW6 stated that the Polling Station was Kapongolo Polling Station and not "Kapongoli" as written on the Petitioner's document. He never distributed a Form Gen 12 which showed the polling station as "Kapongoli". Further, that the counted votes were announced in the presence of the interested parties and when those results were agreed upon, they were written on the Zero Form and stuck on a wall for all to see.

RW7 was Posa Robert Mwenya. He testified that his role in the 11th August, 2016 election was to recruit the polling staff and Presiding officers at all 71 Polling Stations and to check polling stations. RW7 told the Court that Form Gen 12 was provided to all the 71 Polling Stations and that each Presiding Officer was given the Form Gen 12s with other papers including the Record of Proceedings at the Count, the Ballot Paper Account Form and the ballot papers. He testified that at the close of the election, the Presiding Officers were told to go to the Totalling Centre with the Form Gen 12s accompanied by a police officer. Once they arrived, RW7 would announce to the political party representatives

present and the candidates. RW6 stated that he would announce the results for each polling station as written on the Form Gen12 and then deposit the figures on the Zero Form. Thereafter, he tabulated the results on Form 14 and total the results on the Record of Proceedings and then on the Announcement Form. RW7 was presented with documents from the 3rd Respondent's Bundle and he was able to verify that all the political parties witnessed what happened at the Totalling Centre including the UPND. He stated that the general conduct of the elections was free and fair and that even the monitors who came from abroad were happy. The results of the election were announced within 48 hours.

In cross-examination by the Petitioner's Counsel, RW7 stated that he had not heard that there were widespread complaints about the Form Gen 12. Everyone that represented a political party had to sign on the Form Gen 12. RW7 stated that all Presiding Officers were given Form Gen 12 but in some cases they did not have enough as the supply was not sufficient in all the 71 polling stations. RW7 testified that he was not aware that the person he caused to sign namely Francis Simpasa was never on the list of persons that were agents for the Petitioner at the

Totalling Centre. Further, that it was not true that some polling stations did not receive adequate Form Gen 12s to enable him and the Presiding Officers to prejudice other political parties.

In re-examination, RW7 stated that being at the Totalling Centre he had no control over who signed or did not sign the Form Gen 12 at the Polling Station.

The 1st Respondent filed written Submissions dated 4th November, 2016, wherein Learned Counsel raised a point of law averring that this Court has no jurisdiction to hear the election petition as it was made pursuant to Article 51(a) of **the Constitution**. Since the Petitioner made reference to constitutional provisions, Counsel contended that the determination of those issues is the preserve of the Constitutional Court. He cited the case of **City Express Service Limited v Southern Cross Motors Limited**¹ where the Supreme Court held that:

"There can be no estoppels against a statute. A litigant can plead benefit of a statute at any stage."

He contended that in the case of **Admark Limited v Zambia Revenue Authority**² the Supreme Court acknowledged that it was competent to raise a point of law in submissions.

Counsel's substantive argument was that under Article 134(a) of **the Constitution**, while the High Court has been accorded unlimited and original jurisdiction in civil and criminal matters; it does not have authority under Article 128(b) of **the Constitution** to deal with matters relating to the violation or contravention of the Constitution. Counsel also argued that Article 1(5) of **the Constitution** accords the Constitutional Court as a matter of right, the power to hear matters relating to the Constitution. Since the alleged violation of the Article 51 of **the Constitution** fell within the provision of Article 128(1)(b) of **the Constitution**, then the Constitutional Court has exclusive jurisdiction. He relied on the case of **Zambia National Holdings Limited and United National Independence Party Vs Attorney General**³, where the Supreme Court defined what is meant by the High Court's unlimited jurisdiction as follows:

".....the jurisdiction of the High court on the other hand is not so limited; it is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law....."

Counsel submitted that Section 97(2)(a) of the **Electoral Process Act**, which allows this Court to void an election of a Member of Parliament is in conflict with Article 128 of **the Constitution**. The Article sets out the qualifications for the

election of Member of Parliament and the grounds for disqualification. Thus, the question of qualification or disqualification could only be determined by the Constitutional Court. He then resorted to Article 72(h) of **the Constitution** which sets out one of the grounds of vacancy in the office of Member of Parliament, being that, a member can be disqualified as a result of a decision of the Constitutional Court. Learned Counsel urged this Court to summarily dismiss the allegation against the 1st Respondent on the ground that the Court had no jurisdiction to determine the alleged breach of Article 51(a) of **the Constitution**.

I have seriously considered the point of law and the arguments canvassed Counsel for the 1st Respondent. I understand Counsel's contention to be that this Court has no jurisdiction to determine this election petition on the ground that the election petition makes reference to Article 51(a) and Article 73 of **the Constitution**, which are issues that can only be determined by the Constitutional Court. Counsel also submits that while the point of law was raised in submissions, the law permits the course of action that he has taken. I have no quarrel that position of law. The Supreme Court has in any event given

sufficient guidance on preliminary issues in a plethora of authorities including the case of **Admark Limited Vs Zambia Revenue Authority**² cited by him.

Article 51 of **the Constitution** provides that:

"51. A person is eligible for election as an independent candidate for a National Assembly seat if the person-

- (a) is not a member of a political party and has not been a member of a political party for at least two months immediately before the date of the election; and
- (b) meets the qualifications specified in Article 70 for election as a Member of Parliament."

On the other hand Article 73(1) provides that:

"A person may file an election petition with the High Court to challenge the election of a Member of Parliament."

Section 96(1) of the **Electoral Process Act** sets out thus:-

"A question which may arise as to whether-

- (a) A person has been validly appointed or nominated as a Member of Parliament;
- (b) The seat of an elected or nominated Member of Parliament, mayor, council chairperson or councilor, has become vacant, other than a question arising from the election of a candidate as a Member of Parliament; or
- (c) A petition may be heard and determined by the High Court or tribunal upon application made by-
 - (i) Any person to whom the question relates; or
 - (ii) The Attorney General;

may be determined by the High Court or a tribunal, as the case may be."

In my considered view, Article 51(a) and Article 73(1) of **the Constitution** predicate the application of Section 96(1) of the **Electoral Process Act**. By that, the sequence created in those provisions of law is deliberate but with purpose. Firstly, Article 51(a) lists the qualifications upon which a person can stand as an independent candidate. The criteria being that such person should not belong to a political party at the time of filing of nominations for Member of Parliament. Secondly, Article 73(1) invokes the process after an election has been held, where a person who is aggrieved by the result of an election of Member of Parliament can challenge such election in the **High Court**. Thirdly, Section 96(1) of the **Electoral Process Act** buttresses Article 73(1) to the extent that it sits election petition hearings with the **High Court**.

The central theme running in the **Electoral Process Act** is that the High Court is the Court that has jurisdiction at first instance to determine election petitions involving Members of Parliament. Under Section 99 of the **Electoral Process Act**, the High Court has power either to grant the relief that an election of

a Member of Parliament is void or that a candidate has been duly elected.

Counsel submitted that Article 134(a) and Article 128(b) of **the Constitution** confers the Constitutional Court with exclusive jurisdiction in as far as determining issues regarding **the Constitution**. He referred to Article 134(a) which provides that:

"134. The High Court has, subject to Article 128-

(a) unlimited and original jurisdiction in civil and criminal matters;.."

He then cited Article 128(b) of **the Constitution** which provides that:-

"128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-

(b) A matter relating to a violation or contravention of this Constitution;.."

Counsel further referred me to the case of **Zambia National Holdings Limited vs. United National Independence Party**³ where he argued that the jurisdiction of the Court is not limitless. It is bound by all the laws which govern the exercise of its jurisdiction.

Let me state that according to Article 73 of **the Constitution** as read with Section 96(1) of the **Electoral Process Act**, I have unlimited jurisdiction to hear and determine

questions relating to election petitions of a Member of Parliament. While there is a clear distinction between matters which fall under **the Constitutional Court's** jurisdiction and those under the High Court; my opinion is that the **Constitution** and **Electoral Process Act** confer me with jurisdiction to wholesomely determine issues that might arise under the said pieces of legislation. Being a Court of first instance I find fortitude in Article 128(1)(d) of **the Constitution** which provides that:-

"128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-

(d) Appeals relating to election of Members of Parliament and councilors;.."

As a consequence, I opine that the Constitutional Court will have jurisdiction to hear this election petition if it goes on appeal to that Court. Let me reiterate that in hearing this election petition, I have jurisdiction as the Court of first instance to sit with constitutional authority and any other jurisdiction conferred upon me by the Electoral Process Act. I therefore hold that the election petition is competently before me.

I want to state that one of the reliefs sought by the Petitioner is the **voidance of the 1st Respondent's election** and

not the **1st Respondent's disqualification from the election.** Thus, I find that the argument canvassed by the 1st Respondent in terms of Article 72(1)(h) of **the Constitution** is misconceived. It has no bearing on the nature of relief sought by the Petitioner in terms of Section 99 of the **Electoral Process Act**. Accordingly, I hold that this preliminary issue has no merit. It is hereby dismissed.

I will now deal with the Petitioner's allegations against the Respondent's. I have carefully considered the Petition and the Affidavit in Support, the Respondents Answers and supporting Affidavits, the evidence of the witnesses and the Submissions of the parties which are on record. I shall not reproduce the Submissions of the parties except to refer them where necessary in this Judgment.

It is common cause that the results for the Lukashya Constituency Parliamentary election showed that the 1st Respondent, **MWENYA MUNKONGE** got 11,870 votes of the total votes that were cast. The 2nd Respondent Alfreda Kansembe emerged second with 7,936 votes. It is not in dispute that the Petitioner came out third having polled 4,180 votes. It is also common cause that the Petitioner has disputed these results and

has made a number of allegations against the 1st and 2nd Respondents whom he alleges conducted themselves in a manner contrary to the **Election Process Act**.

Having established what is not in dispute, I will now consider the burden of proof and standard of proof applicable to the case in *casu*. It is trite law that he who alleges must prove. In the case of **Masauso Zulu v. Avondale Housing Project**⁴ it was stated that where a Plaintiff makes any allegation, it is generally for him to prove those allegations. That a Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case. Further, in **Khalid Mohamed v the Attorney-General**⁵ it was held that a Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. It follows that for the Petitioner to succeed in the present Petition, it would not be enough to say that the Respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity. Therefore, the Petitioner herein is obliged to call evidence and prove the case to the required standard and

that it is not for the Respondents to call witnesses to prove their innocence.

Having established that the burden of proof lies squarely on the Petitioner, the question remains as to what the required standard of proof is in the case in *casu*. It is trite law that in civil matters the standard of proof has traditionally been on the balance of probabilities. In **Bater vs. Bater**⁶, Lord Denning discussed the standard of proof required in civil and criminal matters. He stated that:-

"A civil Court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

Clearly in civil matters, depending on the subject matter and the allegations pleaded, the Court will require a higher degree of probability, than just a balance of probabilities. And, as stated above, the degree of probability must be commensurate with the occasion.

I am guided by the decision of the Supreme Court with regard to the degree of probability in election petition cases such

as the case in *casu*. In the case of **Anderson Kambela Mazoka, Lt General Christon Sifapi tembo, Godfrey Kenneth Miyanda v. Levy Patrick Mwanawasa, The Electoral Commission Of Zambia, The Attorney General**⁷ the Supreme Court made it clear that in civil cases, the standard of proof required to prove a presidential election petition is higher than the balance of probability and must be proved to a convincing degree of clarity. In **Lewanika and Others v. Chiluba**⁸ it was stated that:-

"As part of the preliminary remarks we make in this matter, we wish to assert that it cannot be seriously disputed that Parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore, that in this case where the petition has been brought under Constitutional provisions and would impact upon the governance of the nation and the deployment of the Constitutional power and authority, no less a standard of proof is required. It follows also the issues raised are required to be established to a fairly high degree of convincing clarity."

From the above authorities, one cannot dispute that parliamentary election petitions, as is the case with presidential election petitions, require to be proved at a higher standard than on a mere balance of probabilities. The Petitioner, having the burden of proof, must adduce evidence which must firmly

establish the allegations made in the Petition to a higher degree of convincing clarity.

The Petitioner pleaded several general and specific allegations relating to the electoral process. I will now consider the allegations made by the Petitioner and show which have and have not been proved and in so doing, I will not be making findings of fact on these found not to have been proved.

Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of the Election Petition contain the Petitioner's allegations against the 1st, 2nd, 3rd and 4th Respondents. In this judgment the findings and conclusions on each of the Respondents will be made under separate heads.

1ST RESPONDENT

The Petitioner's allegations against the 1st Respondent are more specifically stated in paragraphs 6, 7, 8, 9 and 10 of the Election Petition. The first allegation laid against the 1st Respondent is in paragraph 6 of the Petition, where the Petitioner states *that during the campaign period in question, the 1st Respondent was distributing and using PF campaign materials including songs for his campaign.* The first allegation is closely

related to the second and third allegations. The second allegation in paragraph 7 is *that the 1st Respondent has been a member of the Patriotic Front (PF) party for a long time and the whole of his campaign team was comprised of PF members wearing PF{(ligulae}*. In the third allegation in paragraph 8 of the Petition the Petitioner states *that when the 1st Respondent was declared winner, people in PF{(ligulae} celebrated with him.*

I must state that the first, second and third allegations are all related. Therefore, I will deal with all of them at the same time. The Petitioner (PW1), PW2, PW3 and PW4 led evidence on the first three allegations against the 1st Respondent. The gist of the evidence was that PW1 took issue with the 1st Respondent's use of PF regalia during the election campaigns. It was his evidence that the 1st Respondent campaigned alongside the PF party and its officials. During his campaign meetings, the 1st Respondent distributed PF campaign materials, namely t-shirts, chitenges, sweat shirts (*popularly referred to as hoodies*) giving particulars of the 1st Respondent's vehicle a Toyota Canter Dyna, registration number BAD 2780, bearing the PF Party President's poster. Further, that the 1st Respondent used and distributed PF songs such as Dununa Reverse during his campaigns.

PW1 wondered why the 1st Respondent campaigned with PF materials when he was an independent candidate, even though he knew the 1st Respondent as a PF member. He further testified that the 1st Respondent was allowed to attend PF meetings and even attended the rally that was held by the PF Party President in Kasama during the campaign period. It was also his evidence that because the PF Party had offloaded two candidates, namely the 1st Respondent and the 2nd Respondent, he was greatly disadvantaged in the election.

PW2's evidence was that on 6th August, 2016 the 1st Respondent addressed a campaign meeting at Amini Village in Kasama accompanied by PF officials including Mr. Nsonsa and Mr. Bernard Malama. PW2 confirmed PW1's evidence that she saw the PF Party President's posters on the 1st Respondent's vehicle a Toyota Canter Dyna bearing registration number registration number BAD 2780. She added that the song Dununa Reverse, was playing from the Canter. She testified that Mr. Bernard Malama introduced the 1st Respondent as the PF candidate who was the PF Party's preferred candidate although some of the participants of the meeting challenged Mr. Bernard Malama because they heard that the 2nd Respondent Mrs. Alfreda

Kansembe was standing as the PF Party candidate for Lukashya Constituency. PW2 testified that the Respondent and Mr. Bernard Malama gave the people who attended the campaign meeting PF t-shirts. She was given a t-shirt which she produced in Court.

PW3 testified that on 5th August, 2016 at about 15:00 hours he saw the 1st Respondent's Toyota Canter Dyna vehicle BAD 2780 playing the song dununa reverse at Chishinkula School. It had three posters of the 1st Respondent stuck on the front while the PF Party President's posters were stuck on its sides. The people in the vehicle were dancing to the song Dununa Reverse while tossing out flyers of the PF Party President. It was his evidence that the 1st Respondent went to Chishinkula school where he had a campaign meeting. He was accompanied by Mr. Bernard Malama and Mr. Lupando Munkonge who were PF Party officials. Mr. Bernard Malama introduced the 1st Respondent as the PF preferred candidate who was not adopted because the 2nd Respondent had outwitted him in the adoption process. He testified that the 1st Respondent and his campaign team distributed PF campaign materials and that he was given a sweat shirt which he produced in Court. It was his evidence that he

knew that the 1st Respondent stood as an independent candidate with his own election symbol which was a foot, which he referred to as "*foot in a boat*". PW3 testified that he knew the PF electoral symbol and had been a member of the PF party for the past eight years. However, because of the confusion on the identity of the PF candidate, he voted for another person. It was his evidence that the 2nd Respondent stood on the PF ticket.

PW4 testified that on 1st August 2016 between 15:00 and 16:00 hours, the 1st Respondent and his campaign team addressed a campaign meeting at TAZARA market. Just like the other witnesses before him, he described the appearance of the 1st Respondent's Toyota Dyna Canter bearing registration number BAD 2780. He also testified that the song Dununa Reverse was playing from the said vehicle whilst the people on it were raising their fists whilst chanting "***pamaka pamaka***". At the meeting Mr. Nsona introduced the 1st Respondent as the candidate that the PF Party President had sent to stand on the Lukashya Constituency seat as opposed to the 2nd Respondent who had done nothing in the Constituency. He testified that the 1st Respondent told the meeting that his electoral symbol was a foot and that he was standing as an independent candidate

because he was not adopted by the PF due to the 2nd Respondent's interference. PW4 also testified that the 1st Respondent told the meeting to vote for him as Member of Parliament on his electoral symbol, the foot, to vote for PF Party President and Councillors. Afterwards, the 1st Respondent and Mr. Nsonso distributed PF t-shirts and chitenge materials to all the people in the market.

The 1st Respondent is the only witness who called evidence against the first three allegations. His response was that he never distributed any PF campaign materials nor did he play or distribute any PF songs at any of his campaign meetings or rallies. He testified that he had his own distinct campaign materials namely t-shirts, posters and flyers. Further, that his vehicles were distinctively branded with his image and electoral symbol, the "foot" with no PF campaign material on them. He testified that he religiously distributed his own posters and flyers at his campaign meetings. Furthermore, that even if he had his own campaign t-shirts, he could not afford to distribute them to all the people who attended his campaign meetings or rallies. It was the 1st Respondent's evidence that he never gave PW2 a t-shirt or PW3 a sweat shirt and only saw the said witnesses for

the first time in Court. The 1st Respondent stated that as an independent candidate he had a great challenge throughout the campaign period in persuading voters to vote for him. The 1st Respondent insisted that he had never been a member of the PF party, nor had he even attended PF rallies.

However, he was sympathetic to the party and had on occasions made donations to it, just like he did to other social organisations where he was not a member. He, however, conceded that he received support from some members of the PF Party, some of whom held and still hold positions. Further, that he received support from other parties and people who had no political affiliation. It was his evidence that the song Dununa Reverse was a public song which was mainly used by the PF, and he saw no harm in using the song.

The Petitioner's evidence on the first three allegations against the 1st Respondent can be summarized thus:

- (a) The 1st Respondent was assisted in his campaigns by some PF party officials and members who consistently introduced him as the PF preferred candidate.

- (b) PF materials in the form of t-shirts and chitenges were distributed by the 1st Respondent and his campaign team at his campaign meetings and rallies. The song dununa reverse was played at the 1st Respondent meeting.
- (c) The 1st Respondent is a PF affiliated candidate, and he caused confusion amongst the voters in Lukashya Constituency.

From the Petitioner's witnesses, I find that there was no confusion on the 1st Respondent's identify and that he stood as an independent candidate in the Lukashya Constituency parliamentary election. Except for PW2, PW1, PW3 and PW4 all knew that the 1st Respondent had his own electoral symbol. PW1, PW2, PW3 and PW4 all gave evidence that the 1st Respondent was assisted by some PF Party officials in his campaigns. This has not been gainsaid by the 1st Respondent.

The 1st Respondent admitted that he saw nothing wrong with the use of Dununa Reverse which was a public song though mostly used by the PF Party. I also find that although PW2 and PW3 produced P1 and P2 in evidence, they did not convince me that they actually secured the said t-shirt and sweat shirt from

the 1st Respondent. I further find that the Petitioner in proving the first three allegations made reference to the 1st Respondent's evidence and did not provide documentary evidence or photograph evidence to prove the facts alleged in casu. The evidence presented by the Petitioner's witnesses was all unrelated and sourced from witnesses who all live in different areas. Thus, there was need to corroborate the evidence of the witnesses as the standard of proof in election petitions is much higher than the ordinary burden of proof. It can therefore not be shifted to the 1st Respondent.

I, however, wish to state that PW1, PW2, PW3 and PW4 all testified that the 1st Respondent was a PF member. In the case of PW1 he testified that even though the PF party had no membership cards, one could be considered a PF member by association. It was his evidence that since the 1st Respondent closely campaigned with PF officials, then he was a PF member. PW2 and PW3 alleged that the 1st Respondent was a PF cadre because he was introduced as the PF candidate by Mr. Bernard Malama, in the case of PW2 at the rally in Amini village. According to PW3, Mr. Bernard Malama introduced the 1st Respondent as the PF candidate at a campaign meeting at

Chishinkula school at Chipula village. PW4 testified that Mr. Nsonso introduced the 1st Respondent as the PF Candidate at a meeting held at Tazara market.

In his defence, the 1st Respondent testified that he had never been a PF member but had made donations to the PF party just as he had done to other social organizations.

Having carefully evaluated the evidence, I find that the Petitioner's witnesses did not prove that the 1st Respondent is a PF member. However, I might have been persuaded if the Petitioner had called a PF Party executive official in the Northern Province to testify whether or not the 1st Respondent is or was a PF member. As it is the evidence led on this allegation is nothing more but hearsay which is inadmissible. Let me point out that there was no evidence led on the third allegation in paragraph 8 of the Petition that when the 1st Respondent was declared winner, the people who celebrated with him were dressed in PF regalia.

The fourth allegation against the 1st Respondent laid out in paragraph 9 of the Petition was *that during the campaign period the 1st Respondent distributed mealie meal, cooking oil and beers to the members of the public in Lukashya Constituency.* The fifth allegation in paragraph 10 of the Petition is closely related to the

fourth allegation. The fifth allegation was that *the 1st Respondent gave out money to the members of the public during the campaign period for the August 2016 elections in Lukashya Constituency*. I will therefore deal with both allegations at the same time.

The Petitioner's evidence was that he received reports that RW1 had dished out cooking oil, mealie meal and money to the electorates in Lukashya Constituency. He also received phone calls from Nkole Mfumu village, where he was told that the 1st Respondent threw money at the residents of that village. He also received a call from Soft Katongo village where he was told that on 10th August, 2016 at about 18:23 hours, the 1st Respondent gave K500.00 to the people that attended his rally to buy cooking oil and mealie meal. He also received a phone call from Lusenga ward, where he was told that RW1 and his team dished out money and cooking oil. PW2 of Amini village gave evidence that the 1st Respondent gave K600.00 to the people who attended his meeting. PW3 testified that the 1st Respondent at his campaign meeting at Chishinkula school, Chipula Village gave K500.00 to the people who attended his campaign meeting.

PW4 of Tazara compound in Kasama testified that the 1st Respondent gave K600.00 to the marketeers that attended his

rally on 1st August, 2016. He also testified that on 8th August, 2016, the 1st Respondent and Mr. Nsonso visited him at his house at about 20:00 hours or thereafter and gave him a 25 kg bag of mealie meal branded Kasama Milling and a 2.5 litres container of Rina cooking oil.

In response, the 1st Respondent testified that he never distributed cooking oil mealie meal or beers to the members of the public. He always made it a habit to conclude his meetings by 18:00 hours. He also testified that he never distributed mealie meal, cooking oil or beer at Soft Katongo village as alleged by PW1. On 10th August, 2016 the 1st Respondent testified that he never travelled to Soft Katongo village, because he had to remove the branding on his vehicles, so that he could use the vehicles for monitoring elections on 11th August, 2016. He denied that he went to PW4's house to give him PW4 cooking oil and mealie meal.

The 1st Respondent also gave evidence that he never gave K500.00 to the people at Soft Katongo village nor did he give K600.00 to the people at Amini village. He equally did not give K600.00 to the people at Chipula village. The 1st Respondent also denied that he gave K600.00 to the marketeers at TAZARA

market, stating that he did not know anyone at that market level. The 1st Respondent averred that giving little money to a large crowd could have caused a security risk to his campaign team and the recipients of the money. The 1st Respondent testified that on the polling day, he gave a 10kg bag of mealie meal and K50.00 per stream to his polling agents, at each polling station so that they could buy food for themselves.

According to the Petitioner's evidence, the 1st Respondent is alleged to have committed the electoral corrupt malpractices at the following places:

1. At Nkole Mfumu Village where the Petitioner received a phone call that the 1st Respondent was throwing money at the residents of the village.
2. At Soft Katongo village, where the Petitioner received a phone call informing him that RW1 had given K500.00 to the people who attended his campaign meeting,
3. At Lusenga ward, where he received a phone call that RW1 had dished out cooking oil and money.
4. At Amini village, where PW2 testified that the 1st Respondent gave out K600.00 to a large crowd that attended his campaign meeting.

5. At Chishinkula school at Chipula village, where PW3 testified that RW1 gave K500.00 to about 500 people who attended his campaign meetings.
6. At TAZARA market where PW4 testified that RW1 gave K600.00 to marketeers.
7. At PW4's house where the 1st Respondent gave him a 25 kg bag of mealie meal branded Kasama Milling and a 2.5 litres container of Rina Cooking oil.

I find that the Petitioner's evidence regarding the 1st Respondent's election malpractices at Nkole Mfumu Village, Soft Katongo village and Lusenga ward is all based on hearsay and therefore inadmissible. The evidence of PW2 at Amini village, PW3 at Chipula Village and PW4 at TAZARA market and at his house has not been corroborated. It therefore falls far short of what the Petitioner is expected to prove on these allegations. The Court cannot rely on reports that were not corroborated by any of the Petitioner's witnesses.

I have been indulged by the Petitioner to declare that the Respondent's election as Member of Parliament for Lukashya Constituency should be declared void as the majority of voters were prevented from electing the candidate whom they preferred.

For the sake of clarity **section 97(1) of the Electoral Process Act** is reproduced herebelow:

“(1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall not be questioned except by an election petition presented under this part.”

“(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be that:

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-

(i) by a candidate, or

(ii) with the knowledge and consent or approval of a candidate or that candidate's election agent or polling agents and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that Constituency, district or ward whom they preferred.”

Let me state that the Electoral Process Act no longer provides for strict liability, where the proof of a single corrupt practice or act was enough ground to nullify an election as was

held in the cases in **Michael Mabenga v Sikota Wina & Others**⁹ and **Reuben Mtollo Phiri v Lameck Mangani**¹⁰, cited by Counsel for the Petitioner in his submissions. The current position of the law is that a malpractice must be such that it is capable of influencing the outcome an election in that the majority of voters are prevented from voting for a candidate of their choice.

I was also very perplexed by the Petitioner's allegation that the two candidates who were allegedly presented by the PF Party negatively affected him. In my view, the perceived confusion on who was the PF candidate in Lukashya Constituency should have worked to his favour as the PF voters were split according to Petitioner between the 1st and 2nd Respondent.

The Petition discloses the results obtained by the candidates in the Lukashya Constituency Parliamentary election as follows:

1. Mwenya Munkonge	Independent	11,870 votes
2. Alfreda Kansembe	PF	7,936 Votes
3. Rodrick Chewa	UPND	4,180 Votes
4. Geoffrey Bweupe	UDF	1,123 Votes
5. Gabriel Kaliminwa	FDD	675 Votes
6. Ephraim Mutale	Rainbow	218 Voters

The 1st Respondent polled **11,870 votes** while the other candidates shared amongst them **14,132 votes**. In effect, the results show that the majority of voters in Lukashya Constituency voted against the 1st Respondent. Therefore, and by implication, I find that the majority of voters in Lukashya Constituency were not prevented from electing the candidate in that Constituency whom they preferred. I also find that the 11,870 voters who voted for the 1st Respondent knew that he stood as an independent candidate and was most appealing to them. I, further, find that the 1st Respondent having received 11,870 votes being the highest number of votes cast in favour of a candidate in Lukashya Constituency won the election. I therefore, **hold** that **MWENYA MUNKONGE** the 1st Respondent was validly elected as **MEMBER OF PARLIAMENT for LUKASHYA CONSTITUENCY**.

Let me also state that when an election petition is nullified or declared void, the consequence is that a by-election will be held by the Electoral Commission of Zambia. A losing candidate cannot be elevated to a winning position simply because an election was declared void. As a consequence, I cannot declare

victory by this Judgment for the Petitioner who lost the Lukashya Constituency Parliamentary election.

2ND RESPONDENT

The allegations against the 2nd Respondent are stated in paragraphs 11, 12, 14, 15, 16 and 17 of the Petition. The first allegation against the 2nd Respondent laid in paragraph 11 of the Petition was that *the 2nd Respondent was Deputy Minister in the Ministry of Labour and Social Security a position held even for most of the campaign period up until her stay in office was declared illegal by judgment of the Constitutional Court just a few days before voting day.* The first allegation is closely related to the second and third allegations against the 2nd Respondent. The second allegation in paragraph 12 of the Petition was that *the 2nd Respondent drew a salary and allowances as such from Government coffers for her personal use during the campaign period.* In the third allegation in paragraph 14 of the Petition, the Petitioner averred that *the 2nd Respondent was ordered by the Court to pay back money from the Government as a result of her illegal stay in office during the campaign period.* I find that there was no evidence led on the allegations that as it may, the allegations contained in paragraphs 11, 12 and 14 contain issues

that are before the Constitutional Court. I also take judicial notice that there is a pending application relating to these allegations in the Constitutional Court. Consequently, I am unable to make a determination on them.

The fourth allegation laid by the Petitioner against the 2nd Respondent in paragraph 13 of the Petition was that *the 2nd Respondent also participated in dishing out money and food to the residents of Lukashya Constituency during the campaign period and on the actual voting day on 11th August, 2016.* The Petitioner and PW5 led evidence on the allegation. The Petitioner testified that he received information that the 2nd Respondent dished out money to the residents of Kashinka Village.

PW5 testified that on 7th July, 2016, the 2nd Respondent gave K300.00 to the youths, elderly women and men who attended her campaign meeting at Bwacha village. The 2nd Respondent gave the money to PW5, Memory Chanda and Prince Kabwe, in shares of K100.00 to give to the categories of people who attended her meeting. PW5 also testified that he was a UPND member but had attended the 2nd Respondent's meeting as the Secretary for Mulenga Yamishi Village. He also gave evidence that PW2 did not know that he was a UPND cadre.

In response, RW2 testified that she visited Bwacha village in April, 2016 and not in July, 2016. She also testified that she may have left money for a few people at that Village, adding that it was not unusual for Members of Parliament to give money to their constituents, whenever they visited them. She denied giving money to the people at Kashinka Village because when she went there to address a meeting, she found a very hostile audience.

After evaluating the evidence, my considered view, is that it falls short of what is expected to prove the allegation. In the case of the Petitioner, I find that his evidence is based purely on hearsay and is therefore, inadmissible. On the other hand, PW5's evidence was not corroborated and is quite astonishing in some respect. I find it unbelievable that RW2 could give PW5 a UPND cadre, who she did not know, money to give out on her behalf, when she travelled with her own campaign team members. This allegation fails.

The fifth allegation laid against the 2nd Respondent in paragraph 15 of the Petition, was that *the 2nd Respondent donated thirty 30 pockets of cement at Chilubanama village in Lukashya constituency during the campaign period amongst others.* The Petitioner is the only witness who led evidence on the

allegation. He testified that whilst listening to Radio Mano on an unknown date but during the campaign period, he heard the sub-chiefs representative thanking the 2nd Respondent for her donation of thirty pockets of cement. He added that the representative stated that RW2 had chosen a better way of appreciating people during campaigns, rather than giving people money, which they would only use to buy beer and fight.

In response, RW2 testified that she was approached by the Catholic Church Executive at Chilubanama village towards the end of December 2015 into January, 2016. The Church asked her for help with building materials for the Church structure. She heeded the request sometime in April 2016, and sent money to Dan Mubanga through Shoprite Kasama, who bought the cement on her behalf and delivered it to the said Catholic Church. The 2nd Respondent was not there when the cement was delivered to the Church. DW5 testified that sometime in April 2016, he received a call from the 2nd Respondent, asking him to collect money from Shoprite in Kasama, so that he could buy cement and deliver the same to the Catholic Church at Chilubanama Village, which he did.

From the evidence, I find that the Petitioner did not produce the recording where the sub-chief's representative is alleged to have uttered the allegation against RW2. In my view, this was vital in proving the allegation against her. The Petitioner's evidence is based on hearsay, which is inadmissible without corroboration. Thus the allegation fails.

The sixth allegation laid against the 2nd Respondent in paragraph 16 of the Petition was that *the 2nd Respondent engaged in the distribution of bicycles to members of the public in Lukashya Constituency during the campaign period for the August 2016 general elections.* The Petitioner testified that he heard that Mr. Chipako the former UPND District Information Political Secretary, now PF member, told some people that RW2 had given him bicycles to give the UPND campaign team members in Lukashya Constituency, so that they could stage a defection. Further, that Kelly, the UPND Lukashya Constituency Secretary and Mr. Chanda from Soft Katongo village received the said bicycles from Mr. Chipako. The Petitioner also testified that he received information that RW2 had bought four thousand (4000) bicycles, which she distributed during the campaign period. PW5 of Bwacha village testified that on 11th July, 2016, RW2 took three

bicycles to that village. She gave the bicycles to three Village Headmen namely, Mr. Edwin Sichilima, Mr. John Mulenga and Mr. Zion Sichilima. He together with Ms. Mutale Nkwilila, Mr. Jack Chanda, Mrs. Rosemary Kasonde and Mr. Peter Kabwe were present when RW2 took the bicycles. The RW2 told Mr. Edwin Sichilima and Mr. Zion Sichilima to use the bicycles to campaign for her.

In response, RW2 testified that she was astounded to learn that she had bought 4000 bicycles, whose cost she estimated at K2,400,000.00 because she had no means of doing so, being involved in politics as her mainstay. She testified that the PF Party had bought bicycles for all its campaign teams in the ten provinces. The PF Party Secretariat was responsible for distributing the bicycles to the provinces. She also testified that the Provincial PF officials were responsible for distributing the bicycles to the Districts, Constituencies and Wards. As a Member of Parliament, she had no role to play. She further testified that Lukashya Constituency received two hundred and thirty (230) bicycles.

The 2nd Respondent gave evidence that the bicycles she allegedly gave to headmen were not part of her campaign, but

were given to Chief Nkole Mfumu through the Republican President, who stepped in to ameliorate the transport and communication crisis that the three hundred (300) headmen in his were facing. She testified that Chief Nkole Mfumu was given fifty (50) bicycles by the Republican President, which she delivered in her then official capacity. She denied that she told any headman to campaign for her.

RW3, the PF Provincial Treasurer for Northern Province testified that she was in charge of receiving all the PF campaign materials and goods, including bicycles that were sent to Northern Province during the election campaign period. After she received the bicycles, the leadership at the provincial dispatched them to the Districts, Constituencies and Wards, only giving them to PF Party members. She also testified that Members of Parliament were not consulted on the distribution of bicycles. She further testified that after the campaign period, the bicycles remained with the recipients who were expected to continue with the PF party mobilization activities in the Province. RW4 testified that as a member of the PF Party Pumabula Ward Campaign Team, he received a bicycle which he used during the campaigns.

After the elections, he kept the bicycle so that he could use it for the Party's mobilisation activities.

From the evidence before me, I find that the Petitioner's evidence is largely based on hearsay. In respect of PW5, the evidence has not been corroborated. The result is that the Petitioner has failed to prove the allegation.

The seventh allegation against the 2nd Respondent in paragraph 11 of the Petition was that *Dr. Chishimba Kambwili during his radio presentation at Radio Mano and during public rallies in the Constituency was quoted and heard saying do not vote for any UPND candidates because the Tongas niba mwansakabinga (they are very bad people and are devils)*. The Petitioner's evidence was based on a programme that he listened to on Radio Mano, where Dr. Kambwili is alleged to have made the utterances. He testified that because of that statement people were dissuaded from voting for him and as a result the 2nd Respondent benefited from that statement.

In response, the 2nd Respondent testified that she never asked for Dr. Kambwili's support and only became aware of his utterances in the Election Petition.

My finding is that in the absence of a recording from Radio Mano, the Petitioner's evidence is nothing more than hearsay, which is inadmissible.

All in all, I hold that the Petitioner has failed to prove any of the allegations against the 2nd Respondent. I cannot declare that RW2 was not elected as she was, as doing so will create an absurdity on an event that has no consequence. The Petitioner in the first place should not have been brought RW2 to Court as there is no relief against her.

3RD RESPONDENT

The first allegation laid by the Petitioner against the 3rd Respondent in paragraph 18 of the Petition, was that *the 3rd Respondent refused, neglected or omitted to issue Form Gen 12 to among others my polling agents in most if not all polling streams, polling stations in Lukashya Constituency. The use of the Form Gen 12 was to ensure among others that there was process control and avoidance of fraudulent activities within the electoral processes of the said August 2016 elections.* The first allegation is closely related to the second, third and fourth allegations. The second allegation against the 3rd Respondent in paragraph 19 of

the Petition was that *without the Form Gen 12 issued for polling stations it became difficult to reconcile figures captured by our polling agents with those had by the Returning Officer which figures were at variance.* In the third allegation against the 3rd Respondent in paragraph 20 of the Petition, the Petitioner averred that *some of the Electoral Commission of Zambia (ECZ) accredited monitors for UPND Party, under which I contested the said elections were denied entry to the polling stations by police and the 3rd Respondent's agents who worked in connivance with the PF.* In the fourth allegation against the 3rd Respondent in paragraph 21 of the Petition, the Petitioner further averred that *the 3rd Respondent deliberately delayed in counting and announcing results for the constituency.* I will therefore deal with the allegations in paragraph 18, 19, 20, 21 and 22 of the Election Petition at the same time.

The Petitioner testified that Form Gen 12 was not available at most polling centres, citing Kapongolo Polling Station, Chisoka Kabwe Polling Centre, Lwaba Polling Station and Chiba Polling Station, which he knew had no Form Gen 12. He also testified that the Presiding Officer at Chisoka Kabwe Polling Station told him over the phone that he did not have Form Gen 12.

The Petitioner further testified that his results were altered at some of the polling stations and were different from the results he had received from his polling agents. He gave an example of results at Kapongolo Polling Station where he received 175 votes when his polling agent informed him that he polled 177 votes. He also cited Chiba Modern Market Polling Station where his polling agent told him that he received 135 votes and yet the Form Gen 12 credited him with 134 votes. The Petitioner's evidence was that the Form Gen 12 at Kankosha Polling Station was filed in pencil and not pen. He gave evidence that Lubashi Polling Centre and Kabulu Polling Centre were not approved by the 3rd Respondent as polling stations but appeared on the results announced by the 3rd Respondent. The Petitioner further testified that some of his polling agents were turned away from the polling stations even though they had been accredited by the 3rd Respondent. Further, that the 3rd Respondent delayed to announce the results of the elections, taking up to 13th August, 2016.

The Petitioner gave evidence that at Nkole Mfumu Polling Station his polling agent was only allowed to enter the polling station after 10:00 hours instead of 06:00 hours, when the

polling station opened. At Lwaba Polling Station, his agents were not allowed to witness the vote counting. As a result of the 3rd Respondent's actions, he was greatly disadvantaged in the elections. PW6 testified that he was the Petitioner's polling agent accredited by the 3rd Respondent at High Life Polling Station. He participated in the pre-voting activities until 06:00 hours and went on to cast his vote. He monitored the elections which were disturbed from 12:00 hours to 17:00 hours when some voters at that polling station started to wave their party electoral symbol. He laid complaints with the Presiding Officer and to the police officers who were manning the polling station. After the votes were counted he was not given a Form Gen 12 to sign but signed some other form.

PW7 testified that he and Moses Chishimba took part in the pre-voting activities at Kabila Polling Station until 06:00 hours when the Presiding Officer asked all the polling agents to exit the room so that he could officially open the Polling Station. Afterwards, the Presiding Officer allowed other political representatives to enter the room but denied PW7 and Moses Chishimba entry until 17.00 hours. He observed what he could but after the voting, he was not given the Form Gen 12 to sign.

He, however, conceded that the signature on Form Gen 12 in the 3rd Respondent's Bundle was his.

In response, RW6 testified that on 11th August, 2016 he was the Presiding Officer of Kapongolo Polling Station. Voting at that Polling Station started at 06:00 hours and ended at 18:00 hours. He also testified that the Petitioner's polling agents monitored the elections and that the Petitioner visited the polling station before people started to vote. RW6 further testified that after counting the votes he publicly announced the election results. He thereafter entered the results of the candidates on the Form Gen 12 and the Zero form which was pasted on the wall of the polling station. It was his evidence that all the party representatives of the candidates including those of the Petitioner, election observers and monitors signed the Form Gen 12.

He denied that he signed the Form Gen which was produced by the Petitioner, insisting that it substantially differed from the one that he had prepared. RW6 conceded that he did not have enough copies of the Form Gen 12 at the polling station. DW7 who was the returning officer for Lukashya Constituency in August, 2016 elections testified that he gave all the Presiding Officers in the seventy-one (71) polling stations the Form Gen

12s. After the elections, he received all the Form Gen 12s which he had given to the Presiding Officers.

I have carefully considered the Petitioner's evidence on the allegations against the 3rd Respondent, which I find is largely premised on reports that he received from his polling agents. I find that the evidence of the Petitioner falls far short of what is expected to prove the allegations. It is not enough that he relied on reports that were not corroborated by anyone of his witnesses. In the case of PW7, he was not even aware that he had signed a Form Gen 12 when he did. As a result, I hold that the Petitioner has failed to prove any of his allegations against the 3rd Respondent.

4TH RESPONDENT

The 4th Respondent was brought into this Petition though the allegation laid against it in paragraph 20. In the course of the trial, it was clear that there was no evidence led against it. That being the case, I find that it was not necessary for the 4th Respondent to file written submissions, as it did not have to defend itself.

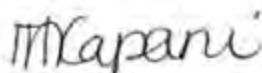
On the basis of the foregoing findings and conclusions, I hold that the Petitioner has failed to prove any of the allegations laid against the Respondents to the required standard.

I wish to state that the manner in which this Petition was handled is highly undesirable. In my view, the Petitioner should have joined hands with the 2nd Respondent in petitioning the 1st Respondent who won the elections. Petitioning the 2nd Respondent who equally lost the elections added no value but rather caused the Court great inconvenience. I have had to deliver two Judgments on the same Constituency, when I would have delivered one had the Petitioners joined hands. It was also tedious for the Court to make pronouncements on the 2nd Respondent who lost the election for the sake of an academic exercise.

I therefore award costs to the 1st, 2nd and 3rd Respondents to be taxed in default of agreement.

Leave to appeal is granted.

Delivered this 14th day of November, 2016.



M. Mapani-Kawimbe
HIGH COURT JUDGE