

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

Appeal No. 6 of 2016

IN THE MATTER OF: ARTICLE 159 OF THE CONSTITUTION OF
THE REPUBLIC OF ZAMBIA

AND

IN THE MATTER OF: SECTIONS 81, 83 & 97 OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTION
TRIBUNAL RULES, 2016 (STATUTORY
INSTRUMENT NO. 60 OF 2016)

AND

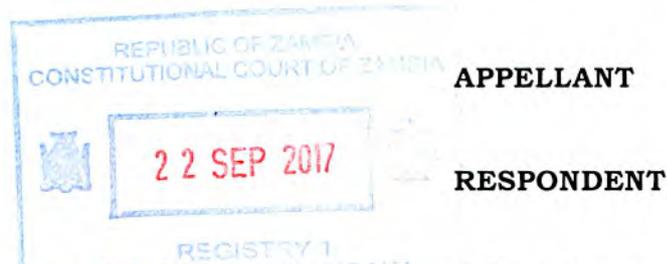
IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS FOR
COUNCIL CHAIRPERSON FOR SIKONGO
HELD IN ZAMBIA ON 11TH DAY OF AUGUST
2016.

BETWEEN:

SITALI SITALI

AND

NAMUCHANA SEPISO



Chibomba PC, Mulenga, Mulembe, Mulonda and Munalula JJC on the 10th
January, 2017 and 22nd September, 2017

For the Appellant:

Mr. N.N Inambao of ICN Legal Practitioners.

For the Respondent:

Mr. E. Khosa of Nganga Yalenga and
Associates.

J U D G M E N T

Mulonda, JC, delivered the Judgment of the Court

Cases Referred to:

1. Anderson Kambela Mazoka & 2 Others v Levy Patrick Mwanawasa & 2 Others (2005) Z.R. 138.
2. Josephat Mlewa v Eric Wightman (1995-97) Z.R. 171
3. Leonard Banda v Dora Siliya & Another SCZ Judgment No. 20 of 2013
4. Michael Mabenga v Sikota Wina & Others (2005) Z.R. 138.
5. Priscilla Mwenya Kamanga v Attorney-General & Peter Ngandu Magande (2008) Z.R. 7.

6. **Brelsford James Gondwe v Catherine Namugala SCZ Judgment No. 75 of 2012.**
7. **Attorney-General v Kakoma (1975) Z.R. 212.**
8. **Malawo v Bulk Carriers of Zambia Ltd. (1978) Z.R. 185.**
9. **Attorney-General v Marcus Kampumba Achiuma (1983) Z.R 1.**
10. **Mushemi Mushemi v The People (1982) Z.R 71.**
11. **Undi Phiri v Bank of Zambia SCZ Judgment No.21 of 2007.**
12. **Nabukeera Hussein Hanifa v Kibule Ronald and Another (2011) UGHC 72.**
13. **Christopher Kalenga v Annie Munshya, ECZ and Attorney General 2011/HK/EP/03.**
14. **OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited, Amanita Milling Limited (2011) 1 Z.R. 170.**
15. **Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114 of 2007.**
16. **Mohamed v Attorney - General (1982) Z.R. 49**
17. **Attorney General v Achiume (1983) Z.R.1.**

Legislation Referred to:

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016.**
2. **The Electoral Process Act No. 35 of 2016. Sections 81, 83, 93 (2) and 97 (2).**

Other works:

1. **www.businessdictionary.com/definition/philanthropy.html.**

When we heard this appeal, our sister Justice Mulenga sat with us. She is however out of jurisdiction. This is, therefore, a judgment of the majority.

The appellant appeals against the Judgment of the Local Government Elections Tribunal (hereinafter 'the Tribunal') dated 29th September, 2016 which nullified the election of the appellant, Sitali Sitali, as Chairperson for Sikongo District Council. The appeal was filed on 13th October, 2016. Before the

Tribunal, the appellant was the respondent while the respondent was the petitioner.

It is common cause that both parties were candidates for Council Chairperson in the Sikongo Local Government Elections held on 11th August, 2016. The respondent contested on the Patriotic Front ('PF') ticket while the appellant contested on the United Party for National Development ('UPND') ticket. The appellant was declared the duly elected Council Chairperson for Sikongo District Council after polling 8,029 votes whilst the respondent polled 4,903 votes.

The respondent petitioned the Tribunal and prayed that the election results for Sikongo Council Chairperson be declared null and void as the appellant had not been duly elected. The respondent alleged that the appellant's electoral campaign was not free and fair due to the involvement of vitiating factors such as excessive violence, undue influence and corruption contrary to the **Electoral Process Act No. 35 of 2016 (EPA 2016)**.

It was further alleged that the elections had been characterised by the giving of money and mealie meal to voters and threats to PF supporters of eviction from villages by headmen. It was also

alleged that houses for PF supporters had been burned down by UPND supporters and that PF supporters were denied access to a community borehole. The respondent further alleged that the headman of Mbao Village denied his wife the opportunity to vote by confiscating her National Registration Card and voters' card while PF women supporters were allegedly beaten by UPND cadres. It was further alleged that a vehicle belonging to the PF was damaged and that the PF aspiring candidates for Member of Parliament and Council Chairperson for Sikongo respectively and their supporters were attacked by UPND cadres.

The respondent tendered oral evidence and called 8 witnesses in support of the allegations. In response to the petition, the appellant filed an answer denying all the allegations. The appellant also tendered oral evidence in rebuttal and called 8 witnesses.

Having reviewed the petition and the answer as well as the evidence and submissions on record from both parties, the Tribunal concluded that the petition presented 11 issues for its determination. These are listed as follows:

- 1. Whether or not the Respondent distributed money- ZMW 50.00, salt and mealie meal to voters.**

2. Whether or not on the 4th July, 2016 the aspiring M.P and the Respondent gave ZMW 1,000.00 to the SDA Dorcas Mothers Rally meeting held at Sikongo Primary School.
3. Whether or not on 19th July, 2016 headman for Nesha Village threatened PF members of Wakunja Village to leave the area.
4. Whether or not on 11th August, 2016 headman Sitenge of Sambangula Village threatened to chase PF supporters from the village.
5. Whether or not there were houses for PF members that were burned down by UPND cadres.
6. Whether or not PF members were denied access to the community borehole by headman Ndelwa of Sishosho village.
7. Whether or not the headman of Mbao Village confiscated his wife's NRC and voter's card so that she should not vote.
8. Whether or not they were PF women supporters that were beaten by UPND cadres.
9. Whether or not there was any PF vehicle or property of PF supporters damaged by some UPND cadres.
10. Whether or not the PF aspiring MP and Council Chairperson and their supporters were attacked by UPND cadres.
11. Whether there was any corrupt practice committed by the Respondent.

According to the Tribunal the respondent sought to have the appellant's election nullified pursuant to sections **81, 83** and **97** of the **EPA 2016**. Although the Tribunal dismissed all the 10 allegations pleaded, it found that the un-pleaded allegations of corrupt and illegal practices of bribery and undue influence had been proved. The Tribunal based its decision to consider the un-

pleaded allegations on the authority of **Anderson Mazoka v Levy**

Patrick Mwanawasa¹ where the Supreme Court stated that:

“In a case where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the court will attach to the evidence of unpleaded issues.”

The Tribunal went on to find that the majority of voters in Sikongo District may have been prevented from voting for their preferred candidate due to fear caused by the corrupt and illegal practices of bribery and undue influence. This was based on the ground that **PW2** who was bribed and threatened happened to be the Chairperson of the Community Welfare Assistance Committee (CWAC) which is entrusted with the responsibility of disbursing funds to the elderly and orphaned within the community and was scheduled to disburse funds the following day on the 10th August, 2016.

It went on to declare the nullification of the election of Sitali Sitali as Council Chairperson for Sikongo and ordered fresh elections for the position of Council Chairperson in Sikongo District as provided by law.

The appellant, being dissatisfied with the judgment of the Tribunal, now appeals against the whole judgment on the following grounds:

Ground One

The Learned Members of the Tribunal erred in both law and fact when it nullified the election of the Appellant on grounds of corruption and bribery when it held that the Appellant had paid a sum of Two Hundred Kwacha (K200.00) and gave a bag of mealie meal to Kapoba Kabalu when the same was not supported by evidence to the required standard.

Ground Two

That the Learned Members of the Tribunal erred in fact and in law when it found that the Appellant didn't comply with the provisions of section 97(2) of the Electoral Process Act No.35 of 2016.

Ground Three

The Learned Members of the Tribunal erred in fact and in law when they considered the testimony of the Petitioner in the absence of corroborative evidence when his testimony clearly serves his own interest.

Ground Four

The Learned Members of the Tribunal erred in fact and in law when they attached due weight to the testimony of PW1 which was speculative in nature without corroborative evidence.

Ground Five

The Learned Members of the Tribunal erred in fact and in law when they attached due weight to the Testimony of PW2 who was a witness with an interest to serve in the absence of corroborative evidence.

Ground Six

The Learned Members of the Tribunal erred in law and in fact when they attached due weight to the testimony of PW3 in the absence of evidence in corroboration.

Ground Seven

The Learned Members of the Tribunal erred in fact and in law when they held that the evidence of the Petitioner and his witnesses who were witnesses with an interest to serve was sufficient to nullify the election of the Appellant as Council Chairperson for Sikongo District.

Ground Eight

The Learned Members of the Tribunal erred in law and in fact when they did not consider the provisions of section 100 (2) of the Electoral Process Act No. 35 of 2016 when delivering their Judgment.

Ground Nine

The Learned Members of the Tribunal erred in fact and in law when they held that the Respondent was involved in corrupt practice when the same does not implicate the Appellant.

Ground Ten

The Learned Members of the Tribunal erred in fact and in law when they held that the evidence of witnesses with an interest to serve was enough to reach the standard of proof required in election petitions in order to nullify an election in the absence of corroborative evidence.

It is important from the outset to state that while the appellant in his Memorandum of Appeal filed on the 13th October, 2016 advances 10 grounds of appeal, the heads of argument in support of the appeal on record, filed on the 17th October, 2016 only argued out two grounds. The further heads of argument filed on 5th December, 2016 were expunged from the record as the same were filed without leave of court. We shall therefore proceed on the basis of the two grounds of appeal argued in the appellant's Heads of Argument.

Ground One

The Court below misdirected itself both on a point of law and fact when it nullified the election of the appellant on the ground of corrupt practice of bribery when it held that the appellant had paid Two Hundred Kwacha (K200.00) and a bag of mealie meal when in fact not.

Ground Two

The Court below erred in fact when it found as a fact that the appellant on the 9th of August, 2016 visited PW2 Kapoba Kabalu

and gave him money and a bag of mealie meal to influence voters to vote for the appellant.

The thrust of the arguments filed in support of the appeal in summary by the appellant are that in accordance with the case of **Mlewa v Wightman**,² the respondent did not prove any of the alleged corrupt and illegal practices but simply made wild allegations without specific proof or proof beyond the balance of probability. Counsel further submitted that philanthropic acts or activities do not constitute electoral malpractices as the law stands in Zambia today, that even when they have some influence on voters, they are not an illegal practice and cannot be the basis of a petition. Counsel cited the case of **Leonard Banda v Dora Siliya & Another**³ in support of this submission where it was held that only acts which go beyond normal philanthropic acts may lead to nullification of an election.

Counsel further submitted that the Tribunal erred when it found as a fact that the appellant, on 9th August, 2016 visited **PW2, Kapoba Kabalu** and gave him money and a bag of mealie meal to influence voters to vote for the appellant. It was submitted that the standard of proof is well settled and the case of **Michael Mabenga v Sikota Wina & Others**⁴ was cited where the Supreme Court of Zambia held that in an election petition, the standard of

proof is higher than on a balance of probability but lower than beyond all reasonable doubt. Further guidance was sought from the case of **Priscilla Mwenya Kamanga v Attorney-General & Peter Ngandu Magande**⁵ where it was held that election malpractices are required to be established to a fairly high degree of convincing clarity. It was counsel's submission that the respondent did not prove his case to the required standard in an election petition.

In oral submission, Mr Inambao, counsel for the appellant, submitted that the Tribunal finding that the appellant together with one, Mundia Ndalamei, had gone to **PW2's** village and gave him a **K200.00** and mealie meal was a misdirection of fact as the said Mundia Ndalamei was never in the area in question on the material day. Counsel further argued that the record was clear that **RW7**, Vincent Mapunga, told the Court that around 22:30 hours, he met with Mundia Ndalamei in Mongu and therefore, he could not have been in Sikongo at the same time. Counsel submitted that the allegation was not sufficiently established and called in aid the case of **Brelsford James Gondwe v Catherine Namugala**⁶ where it was held that the burden of proof is on the petitioner to establish the allegation to a fairly high degree of

convincing clarity. Mr. Inambao argued that the respondent never proved that Mundia Ndalamei and the appellant, Sitali Sitali, were actually in Sikongo at 22:30 hours and that the testimony of **RW7** went unchallenged and so did the testimony of **RW8**, Sishwashwa Mbingi, which showed that the allegation that the appellant and Mundia Ndalamei were in Sikongo was not proved. It was counsel's submission that the allegations of corrupt and illegal practices of bribery and undue influence upon which the Tribunal based the nullification of the election were not properly established as the said **K200.00** referred to was only mentioned by **PW2** and no other witness saw the money.

In response, the respondent through filed heads of argument of 21st December, 2016 submitted that the learned members of the Tribunal were on firm ground when they nullified the election of the appellant on the ground of corrupt and illegal practices of bribery and undue influence respectively. Counsel contended that the argument by the appellant that the respondent did not prove the allegations of corrupt and illegal practices of bribery and undue influence to a fairly high degree of convincing clarity was not correct because the Tribunal addressed its mind to the required standard of proof in an election petition. The case of

Brelsford James Gondwe v Catherine Namugala⁶ was cited where the Supreme Court held that:

“The burden of establishing any one of the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The ground(s) must be established to the required standard in election petitions namely a fairly high degree of convincing clarity.”

It was submitted that the Tribunal took into account and weighed the evidence of witnesses for both the appellant and the respondent in arriving at its final decision with regard to the allegations of corrupt and illegal practices of bribery and undue influence.

Counsel went on to submit that the Tribunal rightly did not find for the appellant when his witness **RW3**, Mundia Ndalamei, put up an alibi that he was not with the appellant on the night of 9th August, 2016. Counsel stated that the Tribunal made it sufficiently clear that the testimonies of witnesses called by the appellant in respect of the alibi were inconsistent. Counsel, further, argued that the law in Zambia is clear on instances when there are two opposing views on an issue in contention before a court. The case of **Attorney-General v Kakoma**⁷ was cited where the position is that a court is entitled to make findings of fact where the parties advance directly conflicting stories and the

court must make those findings on the evidence before it having seen and heard the witnesses giving that evidence. According to counsel, the finding by the Tribunal that the appellant's witnesses on the allegations of corrupt and illegal practices of bribery and undue influence were not credible should not be easily overturned or turned down by the Court. Counsel cited the cases of **Malawo v Bulk Carriers of Zambia Ltd**⁸ and **Attorney-General v Marcus Kapumba Achiume**⁹ where it was established that where questions of credibility are involved, an appellate court which has not had the advantage of seeing and hearing witnesses will not interfere with findings of fact made by the trial judge unless it is clearly shown that the court has fallen into error.

Counsel also cited the case of **Mushemi Mushemi v The People**¹⁰ where the Supreme Court held that the credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness.

Counsel went on to submit that the appellant, having stated that he was at home on 9th August, 2016 did not call any witnesses to support his claim. It was counsel's submission that **RW3** stood

on the UPND ticket for Member of Parliament and was campaigning with the appellant thus putting the appellant within purview of being aware of the corrupt and illegal practices that **RW3** engaged in during the campaign period.

Counsel submitted, in conclusion, that the learned members of the Tribunal were on firm ground when they found as a fact that the appellant, on the 9th August, 2016 visited **PW2 Kapoba Kabalu** and gave him money and a bag of mealie meal for him to influence voters to vote for the appellant and nullified the election of the appellant as Council Chairperson for Sikongo District. Counsel urged the Court to uphold the Judgment of the Tribunal.

In reply, counsel for the appellant submitted that the record clearly shows that **RW1** and **RW3** were never at the house of **PW2** on the night of 9th August, 2016 and that **RW3** was in Mongu at a filling station at the material time.

We have carefully considered the grounds of this appeal; the evidence adduced at trial by both parties and their witnesses; submissions made by the parties before us in support and in opposition and the Judgment of the Tribunal. We are grateful to counsel on both sides for the authorities cited to us.

In grounds one and two of the appeal, the appellant invited this Court to fault the Judgment of the Tribunal for nullifying the election of the appellant on the grounds of corrupt and illegal practices of bribery and undue influence when it held that the appellant gave **K200.00** and a bag of mealie meal when in fact not; and when it found as a fact, that the appellant, on 9th August, 2016 visited **PW2** and gave him money and a bag of mealie meal to influence voters to vote for the appellant.

We must point out here, as ably demonstrated in the Judgment of the Tribunal that the law relating to election petitions has changed following the passing of the **EPA of 2016**. Previously, it was possible to nullify an election by proof of a single act of corruption not necessarily committed by the respondent under **section 93 (2) (a)** of the **2006 Electoral Act**. Under that law, it did not matter who committed the wrong and based on this, the court, in that case of **Mlewa v Whiteman²** which was brought under the provision held that the 4 paragraphs under **section 93 (2)** of the **2006 Electoral Act** were independent and separate paragraphs upon which an election could be nullified. Thus, the court was able to uphold the nullification of the election based on acts of the sponsoring party which were held to have affected the

election notwithstanding the finding that the respondent himself was innocent of any wrong doing. In contrast, **section 97 (2) (a) (i) (ii) of the EPA 2016**, penalises the candidate for acts done by himself or with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent. This departure in law calls for the court to satisfy itself that a respondent to an election petition was in fact part and parcel either explicitly or implicitly of a proscribed practice sufficient to void an election.

In addition to the new provision above, a petitioner is required to prove that as a result of the corrupt practice, illegal practice or other misconduct, 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.

Section 97 (2) (a) of the EPA 2016 which applies to the present appeal provides as follows:-

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

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election— (i) by a candidate;

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

Having set out the law applicable to this appeal, the issue that calls for our immediate consideration is that

put up by the appellant that the corrupt and illegal practices of bribery and undue influence were not pleaded and as such should not have formed the basis for the nullification of the election. At this point, we wish to state that election matters are *sui generis* and as such, must be properly pleaded. In this respect, we wish to reiterate the position taken by the Supreme Court of Zambia in the case of **Anderson Mazoka v Levy Patrick Mwanawasa**¹ cited above where the Court held that:-

"The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the Court has to take them as such".

We note that although these grounds were not specifically pleaded before the Tribunal, the Tribunal allowed them in evidence on the basis that the evidence when adduced by the respondent was not objected to by the appellant. In finding as it

did, the Tribunal relied on the cases of **Anderson Mazoka v Levy Patrick Mwanawasa**¹ already cited and the case of **Undi Phiri v Bank of Zambia**¹¹ where it was established that the court is not precluded from considering the evidence which was not pleaded if the party on the other side has not objected to it. We note from the record that the evidence on the allegations of corrupt and illegal practices of bribery and undue influence graced the record with no objection from the appellant.

That having been said, we wish to state what we consider to be the main issues for our determination. These are whether the appellant, based on the evidence on record and within the contemplation of section **97 (2) (a) (ii)**, committed the corrupt and illegal practices of bribery and undue influence respectively and secondly whether, if committed, the corrupt and illegal practices of bribery and undue influence were of a nature that the majority of voters in the district were or may have been prevented from electing the candidate they preferred.

We note from the appellant's written submissions that it is argued that philanthropic acts or activities do not constitute electoral malpractice as the law stands in Zambia and as such, not subject to petition. The appellant in this respect calls in aid

the case of **Leonard Banda v Dora Siliya & Another**³ where the Supreme Court of Zambia affirmed this position. While agreeing with this position as stated in the cited authority, it is our firm view that it only applies to acts that do not go beyond normal philanthropic acts. According to the **Business Dictionary**¹, philanthropy is defined as

“an idea, event or act that is done to better humanity and usually involves some sacrifice as opposed to being done for a profit motive.”

The above definition makes it clear that for an act to qualify as philanthropic in nature, it should not have any attached conditions.

It was the respondent's submission that the Tribunal was on firm ground when it found as a fact that the appellant on 9th August 2016 visited **PW2** and gave him **K200.00** and a bag of mealie meal. The testimony of **PW1** on record shows that he was informed by one, Kelly Walubita that the appellant had approached **PW2**, a PF supporter and Chairperson for the CWAC in Lwamba and gave him **K200.00** and a bag of mealie meal in order for him to influence members of the CWAC to give the appellant support in the election. **PW1** testified that **PW2** stated that for fear of being removed as CWAC Chairperson, **PW2** voted

for UPND and told CWAC members to vote for UPND. It was argued that this evidence was supported by **PW2** who stated that on 9th August, 2016 around mid-night, whilst asleep at home, the appellant in the company of Mundia Ndalamei and one Katongo, a UPND cadre knocked on his door and he let them in and that Mundia Ndalamei proceeded to give **PW2 K200-00** and a bag of mealie meal and requested **PW2** in the company of the appellant to help tell his friends to vote for UPND. Further, that if **PW2** did not help the appellant, **PW2** would be removed from the position of CWAC Chairperson once UPND President, Hakainde Hichilema won the election. And that this was confirmed by **PW3**, Mwakamui, who was present and spent a night at the home of **PW2**. **PW3** testified to having been given **K50.00** and told to vote for UPND despite being PF and that she voted as instructed.

In response, the appellant denied having gone to the home of **PW2** on 9th August, 2016 and pleaded an alibi. According to the alibi, on 9th August, 2016 the appellant left Lulanguni Primary School around 06:00 hours and proceeded to Sikongo in the company of **RW3**. And that he arrived at Honge Primary School at 09:30 hours where the appellant's last meeting was held. The appellant further testified to having been home around 23:00

hours in Sikongo Boma. The appellant called three witnesses in support of the alibi. **RW3**, testified to seeing **PW2** for the first time in court and that on 9th August, 2016 at the material time, **RW3** and **RW5** were in Mongu after being called by the Provincial Vice-Treasurer to collect logistics for election agents. According to **RW3's** testimony, fuel was only obtained the following day on 10th August, 2016 around 09:00 hours as a fuel drum could not be secured upon arrival the previous night. The witness produced a fuel print out which was discounted by the Tribunal as it did not bear the named filling station. **RW5** equally testified to having travelled with **RW3** to Mongu on 9th August, 2016. **RW5's** testimony was that fuel was obtained between midnight and 01:00 hours and that the two of them left for Sikongo the following day around 05:00 hours. In further support of the appellant's alibi, **RW7**, the Provincial Vice-Treasurer for UPND entrusted with the program of procuring fuel for seven constituencies in the province testified to having summoned **RW3** among others to Mongu. **RW7** testified to meeting the appellant at Kobil filling station at about 22:30 hours and an hour later, to having supplied them with fuel. **RW7** further testified to having parted company with **RW3** and **RW5** between 03:00 hours and 04:00 hours.

In considering the evidence of the witnesses for the appellant and the respondent, the Tribunal cautioned itself on the danger related to evidence of witnesses who are party members and usually have their own interest to serve at all costs. The Tribunal directed its mind to the Ugandan case of **Nabukeera Hussein Hanifa v Kibule Ronald and Another**¹² cited by Justice Kaoma in the case of **Christopher Kalenga v Annie Munshya, ECZ and Attorney General**¹³ where it was stated that: -

“In an election petition, just like in the election itself, each party is set out to win. Therefore, the court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of all partisans must be viewed with great care and caution, scrutiny and circumspection.”

Upon warning itself as it did, the Tribunal went on to discount the appellant's alibi on the basis that the three witnesses for the respondent who testified regarding the alibi contradicted each other in a serious manner which affected the credibility of their story. It is however our firm view that, notwithstanding the appellant's discounted alibi, the petitioner bears the burden to prove his case to the required standard as set out in the case of **Michael Mabenga v Sikota Wina and Others**.⁴ Further, the failure of a defendant's defence does not in any way shift this burden. We wish therefore to agree with the Supreme Court in

the case of **Mohamed v the Attorney General**,¹⁶ where the Court said regarding the burden of proof that:

"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. 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 judgement. I would not accept a proposition that even if a plaintiff's case has collapsed of its inertia or for some reason or other, judgement should nevertheless be given to him on that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence.

The Tribunal accepted the evidence of the respondent's testimony on the corrupt and illegal practices of bribery and undue influence. From the evidence on record, in particular J27 of the Tribunal judgment, the Tribunal took note of the fact that the evidence of **PW2** and **PW3**, the people who testified that the appellant had approached them was not challenged in cross examination. We take note of the Tribunal's slip up of referring to **PW2** and **PW3** as **RW2** and **RW3** on page 27, paragraph 17 in that regard. It is however our view that this slip up did not affect the substance of what the Tribunal was saying and we will proceed as such. The Tribunal noted that the testimony of **PW2** that the appellant had gone to his house in the night and gave him **K200.00** and a bag of mealie meal was confirmed by **PW3** whose evidence was not challenged.

The Tribunal went on to find that the money which **RW3** gave to **PW2** was given with the knowledge and consent of the appellant who could not have gone to **PW2's** house without knowing what the purpose of the visit was all about. We wish to disagree with the Tribunal findings that **RW3** in the company of the appellant and with his knowledge and consent did visit **PW2** and committed the corrupt and illegal practices of bribery and undue influence respectively. We do so bearing in mind the well settled principle that findings of fact by a trial court should be sparingly reversed by the appellate court. This position was affirmed in the case of **Attorney General v Achume**.¹⁷ What we see as the issue is whether the evidence of **PW2** and **PW3** can be considered sufficient to nullify or void an election. The record is clear that the two witnesses were PF party cadres whose evidence required corroboration. **PW2** is on record as having influenced members of the CWAC group. However, none of the members of the CWAC were called to testify to this assertion. In addition, the Vice Chairperson who was allegedly given **K50.00** by **PW2** and the Induna Lwandamo who allegedly was informed about the visit respectively were not called to testify. In fact the Tribunal itself found **PW2** to be a very elusive witness. We are at pains to appreciate the weight attached to **PW2's** evidence by the

Tribunal. We are equally of the view that **PW3's** testimony needed confirmation having stated above that she was a witness with a possible interest to serve and who was also on record that she was given a **K50.00** to vote for UPND. **PW3** could therefore not corroborate **PW2's** testimony as her own evidence required corroboration. The Tribunal, equally, noted a discomfoting demeanour from **PW3** as the record of proceedings states at page 54 that "the witness never at any time looked at the Tribunal."

Accordingly, we take the position that the Tribunal's findings of fact that the appellant and **RW3** committed the offences of bribery and undue influence contrary to **Section 97 (2) subsection (a) (ii)** of the **EPA 2016** were perverse and as such, this is a proper case in which we as the appellate court can reverse the findings of fact made by the Tribunal. As for ground two, having held that the Tribunal erred when it nullified the election of the appellant on the grounds of corrupt and illegal practices of bribery and undue influence, it follows that ground two of this appeal becomes otiose. We need not address it.

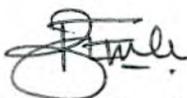
In conclusion, we are satisfied that the respondent failed to prove the alleged corrupt and illegal practices of bribery and undue influence against the appellant contrary to **section 97(2) (a) (ii)**

of the **EPA 2016**. In the circumstances, the appeal is upheld and we quash the declaration by the Tribunal nullifying the election of the appellant as Chairperson of Sikongo District and declare Sitali Sitali as the duly elected Chairperson for Sikongo District.

As the matter is of a constitutional nature and raised important constitutional questions we order that each party shall bear its own costs of the appeal.



.....
H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT



.....
E. Mulembe
Judge
CONSTITUTIONAL COURT



.....
P. Mulonda
Judge
CONSTITUTIONAL COURT



.....
M.M. Munalula
Judge
CONSTITUTIONAL COURT