

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

**2021/HP/EP/0062**



**IN THE MATTER OF:**

**A Parliamentary Election Petition for Chiengi Constituency situate in the Chiengi District in the Luapula Province of the Republic of Zambia held on 12<sup>th</sup> August 2021**

**IN THE MATTER OF:**

**Sections 83, 84, 97 and 98 of the Electoral Process Act No.35 of 2016**

**IN THE MATTER OF:**

**The Schedule to the Electoral Process Act No.35 of 2016**

**IN THE MATTER OF:**

**The Electoral (Code of Conduct) Regulations 2011, Statutory Instrument No.52 of 2011**

**AND IN THE MATTER OF:**

**The Electoral Commission of Zambia Act No.25 of 2016**

**BETWEEN:**

**PRUDENCE CHRISTINE CHIPOTA**

**PETITIONER**

**AND**

**GIVEN KATUTA**

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

**ELECTORAL COMMISSION OF ZAMBIA**

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

**Before Hon. Madam Mrs. Justice Irene Zeko Mbewe in Open Court**

*For the Petitioner:*

*Ms. L. Chipeta and Ms. T. Mvula of Messrs Ituna Partners*

*For the 1<sup>st</sup> Respondent:*

*Mr. C. Banda (SC) and Ms. Mushibwe of Messrs Chifumu Banda & Associates*

*For the 2<sup>nd</sup> Respondent: Mr. M. Chisunka of Nkuswila, Nachalwe & Advocates*

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## JUDGMENT

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### Cases referred to:

1. *Stephen Masumba v Elliot Kamwendo (2017) 3 ZR*
2. *Mbololwa Subulwa v Kalye Mundandi selected Judgment No.25 of 2018*
3. *Akashambatwa Mbikusita Lewanika and 4 Others v Fredrick Jacob Titus Chiluba (1998) ZR 79*
4. *Michael Mabenga v Sikota Wina & Others (2003) ZR 43*
5. *Saul Zulu v Victoria Kalima S.C.Z Judgment No.2 of 2014*
6. *Orubu v NEC (1988) 5 NWLR pt. 94*
7. *Reuben Mtolo Phiri v Lameck Mangani-SCZ No.2 of 2013*
8. *Levison Achitengi Mumba v Peter William Mayambe Daka, SCZ Appeal No.31 of 2003*
9. *Chizonde v The People (1975) ZR 66*
10. *Alex Cadman Luhila v Batuke Imenda-2002/HP/EP/0017*
11. *Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General, Selected Judgment No.51 of 2018*
12. *Mubita Mwangala v Inonge Mutukwa Wina, SCZ Appeal No.80 of 2007*
13. *Borniface Chanda Chola and 2 Others v The People (1988-89) ZR 163*
14. *Christopher Kalonge v Annie Munshya- 2011/HK/EP/03*
15. *Mubika Mubika v Poniso Njeulu, SCZ Appeal No.114 of 2007*
16. *Sunday Chitungu Maluba v Rodgers Mwewa and the Attorney General, C.C.Z Appeal No.4 of 2017*
17. *Giles Yamba Yamba v Kapembwa Simbao Selected Judgment No 8 of 2018*

**Legislation and other work referred to:**

1. *Constitution of Zambia (Amendment) Act No.2 of 2016*
2. *Electoral Process Act No. 35 of 2016*
3. *Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 15*
4. *Black's Law Dictionary, 8<sup>th</sup> Edition, Thomson Reuters, 2004*

This Petition arises out of the 12<sup>th</sup> August, 2021 general elections where the Petitioner Prudence Christine Chipota contested to be elected Member of Parliament for the Chiengi on the Patriotic Front (PF) ticket.

On 14<sup>th</sup> August, 2021, the returning officer declared Given Katuta an independent candidate as the duly elected Member of Parliament for Chiengi constituency.

Dissatisfied with the outcome of the election and declaration, on 30<sup>th</sup> August 2021, the Petitioner filed this petition challenging the election of Given Katuta, the 1<sup>st</sup> Respondent herein, as Member of Parliament for Chiengi constituency in the 12<sup>th</sup> August, 2021 general elections.

Apart from the Petitioner and the 1<sup>st</sup> Respondent, the other candidates were Favourite Musangu of United Party for National Development (UPND), Kaputo Freeman of the Democratic Party (DP) and Kalyango Chansa of Socialist Party (SP).

The Petitioner prays for a declaration that the 1<sup>st</sup> Respondent was not duly elected and the election should be declared null and void.

### **Allegations in the Petition**

The Petitioner has raised several grounds in her petition and alleges the 1<sup>st</sup> Respondent was not duly elected as the election was not held in an atmosphere which was free and fair due to electoral malpractice.

The Petitioner contends the 1<sup>st</sup> Respondent violated sections 81 and 83 of the *Electoral Process Act No.35 of 2016* by giving a gift of a motor vehicle to Ntamba Mweru football club during the campaign as inducement for votes.

The Petitioner further alleges the 1<sup>st</sup> Respondent and her campaign team told voters in the constituency not to vote for her because she was married to a Chinese national who would take away the mins from the electorate.

The Petitioner avers that the 1<sup>st</sup> Respondent whilst speaking on Kalungwishi television falsely accused the Petitioner to have petrol bombed the radio station and incited the listeners to rise against the her. As a result of this, the Petitioner's Land Rover campaign vehicle, a house and market shelter were damaged.

The Petitioner went to the police for protection but the mob followed her and broke the cells thereby causing her to retreat to Chiengi boma and could not campaign freely.

The Petitioner therefore prays for the following, namely:

- i. The 1<sup>st</sup> Respondent was not duly elected and that the election be nullified.
- ii. The Respondents bear the costs for and incidental to this petition.

The Petition is supported by the affidavit verifying petition where the Petitioner avers that during the campaign period the 1<sup>st</sup> Respondent was engaged in acts of bribery by distributing money and assorted food stuffs contrary to the Electoral Commission of Zambia rules and regulations.

The Petitioner states the 1<sup>st</sup> Respondent in Munungu area gave a vehicle to a football team a few weeks before polling day as a way of bribing the would-be voters.

On the voting day the 1<sup>st</sup> Respondent in Kalungwishi ward, Mununga ward and Chitutu ward arranged various food stuffs to give voters on their way to vote.

On 7<sup>th</sup> August 2021, the 1<sup>st</sup> Respondent's sympathisers damaged the Petitioner's car, house and market shelter and organized a mob which attempted to burn the Petitioner alive.

The Petitioner avers there was widespread non-compliance of both the *Electoral Process Act No 35 of 2016* and the Electoral Code of Conduct by the 1<sup>st</sup> Respondent and her campaign team.

During meetings and rallies, the 1<sup>st</sup> Respondent by herself, campaign manager and campaign team would utter unpalatable at the Petitioner.

According to the pleadings, the returning officer declared the 1<sup>st</sup> Respondent as the duly elected Member of Parliament for Chiengi parliamentary constituency and announced the results as follows:

Given Katuta 12, 646 votes;

Prudence Christine Chipota 10, 735 votes;

Favorite Musangu 11, 154 votes;

Kaputo Freeman 428 votes; and

Kalyango Chansa 597 votes.

The Petitioner contends there was widespread non-compliance with the EPA and the Electoral Code of Conduct and as a result the elections were not free and fair.

### **1<sup>st</sup> Respondent**

In an answer filed on 13<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent avers the vehicle referred to in paragraph 3 of the petition is her personal vehicle used by Ntamba Mweru Football Club Limited, in which the 1<sup>st</sup> Respondent and her husband are guarantors and directors.

She denied ever referring to the Petitioner's marital status in her campaign and states it was the Petitioner that called the 1<sup>st</sup> Respondent a prostitute during campaigns in Mununga, Chibamba and Chipungu wards.

The 1<sup>st</sup> Respondent avers that at the time the radio station was gutted, the 1<sup>st</sup> Respondent was not in Chiengi and only returned two days after the incident had happened. She learnt about an audio by the PF Constituency Secretary threatening to burn down a radio station and the matter was reported to the police.

The 1<sup>st</sup> Respondent further avers that due to the Covid-19 pandemic campaign programmes were restricted and unlike the Petitioner and other candidates, the 1<sup>st</sup> Respondent did not have structures throughout the constituency to carry out campaigns on her behalf.

She contends the Petitioner's loss cannot be attributed to the allegations contained in the Petition but due to the high cost of living, unruly behavior by PF cadres and undelivered promises by the PF.

The 1<sup>st</sup> Respondent said that the Petitioner had the necessary support in her campaigns such as an organization of civil servants called Good Governance Zambia (GGOZA).

The 1<sup>st</sup> Respondent avers she was duly elected and declared as winner of Chiengi constituency parliamentary elections as such this Petition should be dismissed with costs.

## **2<sup>nd</sup> Respondent's answer**

The 2<sup>nd</sup> Respondent is the Electoral Commission of Zambia a statutory body established under the *Electoral Process Act No 35 of 2016*.

In the 2<sup>nd</sup> Respondent's answer to the Petition it averred that the 2<sup>nd</sup> Respondent is a constitutional body established under Article 299 of the Constitution of Zambia and mandated to conduct elections. Following the general elections conducted by the 2<sup>nd</sup> Respondent on 12<sup>th</sup> August, 2021, the returning officer declared the results as follows:

Katuta Given (Independent candidate) 12,646

Musangu Favorite (UPND) 11,154

Chipota Christine P (PF) 10,735

Chansa Albert (SP) 597

Kaputa Freeman (DP) 428

The 2<sup>nd</sup> Respondent denies the allegations by the Petitioner and contends the said allegations do not relate to the 2<sup>nd</sup> Respondent.

According to the 2<sup>nd</sup> Respondent, Chiengi parliamentary elections were conducted in conformity with the Constitution of Zambia and the *Electoral Process Act No 35 of 2016* together with the regulations under the said Act.

Therefore, the Petitioner is not entitled to the reliefs sought and prays for the Petition to be dismissed with costs.

A supporting affidavit of the 2<sup>nd</sup> Respondent's answer to the Petition was deposed to by Joseph Shula Chanda. In it, he avers he was the returning officer for the Chiengi constituency parliamentary elections held on 12<sup>th</sup> August, 2021.

On the 14<sup>th</sup> August 2021, he declared the 1<sup>st</sup> Respondent who polled 12,646 votes as the duly elected Member of Parliament for Chiengi constituency whilst the Petitioner polled 10,735 votes.

According to the deponent, the 2<sup>nd</sup> Respondent is guided in its performance of its functions by the relevant electoral laws and the elections in Chiengi constituency were duly conducted in conformity with the said electoral laws and procedures.

#### **Petitioner 's evidence**

When the matter came for trial, the Petitioner called nine (9) witnesses.

The Petitioner, Prudence Christine Chipota the adopted candidate for the Patriotic Front (PF) party.

She testified that during the campaign period, the 1<sup>st</sup> Respondent knowingly engaged in some prohibited acts. She stated there are some limitations imposed on candidates by the law which the 1<sup>st</sup> Respondent did not comply with.

The Petitioner said she started marketing herself to the electorate in 2017 and when the 1<sup>st</sup> Respondent heard the Petitioner had gained momentum in Chiengi constituency she started using her radio station to tarnish the Petitioner's image.

On 24<sup>th</sup> June 2021, around 05:00 hours, the Petitioner was standing outside her house when she saw Chongo the 1<sup>st</sup> Respondent's campaign manager and heard him saying '*the people you sent to burn the radio station have been caught*' and added that the Petitioner would be burnt alive.

The Petitioner was able to see the market shelter being destroyed as her house was on a hill about 25 meters away. She witnessed the mob destroy her market shelter and got away with sheets and iron bars. Whilst this was going on, someone told her to run for her life as the mob was coming for her and she ran into the house. Shortly thereafter, the mob started stoning her house, and damaged the windscreen of her car.

According to the Petitioner when the police came and tried to rescue her, they were equally stoned by the mob. Eventually, soldiers intervened and took the Petitioner and her team to the police station. However, the mob followed them to the police station and broke into the police cells causing the inmates to escape.

The Petitioner was taken to Chiengi boma where she remained and was unable to campaign. During this period, the 1<sup>st</sup> Respondent was telling

people that the Petitioner had been arrested for petrol bombing the radio station. However, photos of the burnt radio station showed that only the air-conditioning was destroyed.

Due to the violence and disparaging remarks by the 1<sup>st</sup> Respondent that the Petitioner has a bad heart, had set ablaze the radio station and being a former soldier, she was a savage, many people opted not to vote for her.

The Petitioner further alleged that the 1<sup>st</sup> Respondent via telephone interview on her radio station sounded very happy as she was saying the following:

*“people of Chiengi, the only radio station you have was burnt by the PF. I told you this person is a soldier and is heartless. Is this the person you can vote for? She is a prostitute married to a Chinese and wants to take your land and mines. She is a satanist who will initiate your and the money she is using is from satanism. I have bought a bus for the football club Ntamba Mweru but the PF are trying to burn it.”*

According to the Petitioner, the 1<sup>st</sup> Respondent repeated the same words during her meeting in Puta, Lambwe Chomba, Muchinga and Mununga.

It was the Petitioner's testimony the 1<sup>st</sup> Respondent was using the radio station as a tool to de-campaign and damage her reputation, whereas the Petitioner had no access to the said radio station.

The 1<sup>st</sup> Respondent told people that the same way the Petitioner burnt the radio station, she would also start beating them. The Petitioner averred people in rural areas perceive things differently, as when they hear a lie, they believe it and because of the 1<sup>st</sup> Respondent's utterances many people did not vote for her.

It was the Petitioner's evidence that Chiengi constituency has about 62,000 registered voters and the radio station broadcasts has wide coverage in Chiengi, therefore the Petitioner could not reach everyone when conducting door-to-door campaigns as opposed to the 1<sup>st</sup> Respondent who was always aired on radio.

Furthermore, the Petitioner stated that the 1<sup>st</sup> Respondent was using violence by sending people to beat up anyone who was campaigning for her and this affected the outcome of the elections. The Petitioner testified that the 1<sup>st</sup> Respondent told people the Petitioner was dumb and deaf as such she was unable to represent the electorate in Parliament.

In cross examination, by Counsel for the 1<sup>st</sup> Respondent Mr. Chifumu Banda SC, the Petitioner initially stated she knew the owner of Ntamba Mweru football club then later on said she did not know the owner but was aware the football club had been in existence for three years. She maintained she did not know that the football club belonged to the 1<sup>st</sup> Respondent and her husband.

The Petitioner went on to state that the 1<sup>st</sup> Respondent bought a mini-bus and gifted it to the football club although she could not remember the registration number but it was written “*Ntamba Mweru Football Club*”.

It was the Petitioner’s evidence that she verified the owners of the mini-bus which was brought in June 2021 to Chiengi during the campaign period an act prohibited by section 85 of the *Electoral Process Act No 35 of 2016*.

She said she was unaware the bus was purchased on 20<sup>th</sup> November, 2020 as she only saw it in Chiengi in June 2021.

In response to where she resides, the Petitioner said she ordinarily lives in Lusaka and started going to Chiengi for purposes of campaign in May 2021. There was a campaign programme showing which candidate would campaign at a specific period and place, and the PF was campaigning in all areas but the Petitioner only had one team which was not in all areas.

She managed to cover the whole constituency but there was destruction from the 1<sup>st</sup> Respondent’s team and this disturbed her campaign. The Petitioner told the Court her campaign manager was Chipili and the other ward officials were not campaigning for her.

She admitted that from the time the PF has been in power since 2001, the party recorded successes and failures but it was not her duty to state

the failures as she had not seen any. She was aware other candidates were telling people in Chiengi that the PF had not put the tarmac from Kashikishi to Nchelenge as promised.

Further, the people of Chiengi were not happy with the Republican President but in her view that did not affect her as the parliamentary candidate as the electorate consider the personality of the candidate and how that candidate has helped the people. She said the people of Chiengi were not happy with the President and the area Member of Parliament as they failed to fulfil their promises.

The Petitioner in response to a question pertaining to the role of the Member of Parliament in road constructions said it was the responsibility of a Member of Parliament to speak for the people of Chiengi in their capacity as a mediator between the people and the Government on development and to push the Government to do so.

She stated the 1<sup>st</sup> Respondent got 12,646 votes whilst she got 10,703 votes. It was PW1's testimony that her campaign was effective but it was disturbed as her reputation was destroyed therefore, she could not reach everyone to refute the disparaging allegation by the 1<sup>st</sup> Respondent. She said she never campaigned on the same day with the 1<sup>st</sup> Respondent.

In response to the issue of burning the radio station, the Petitioner said the radio station was burnt on 24<sup>th</sup> June, 2021 and the 1<sup>st</sup> Respondent

was heard on radio telling people that the Petitioner is the one who burnt it.

The Petitioner reiterated the electorate preferred her but did not vote for her due to the words uttered by the 1<sup>st</sup> Respondent. It was her testimony that even the members of the UPND had been campaigning for her until the 1<sup>st</sup> Respondent told them she is a bad person and this tarnished her reputation.

The Petitioner conceded she is married to a Chinese national and that although people of Chiengi believed the 1<sup>st</sup> Respondent's accusations, her husband did not have power to give or take away land.

It was her testimony that the 1<sup>st</sup> Respondent did not personally tell her the disparaging remarks but told the crowd at a meeting in Lambwe Chomba area at the clinic.

The Petitioner said she had reported the 1<sup>st</sup> Respondent's misconduct to the Conflict Management Committee of which Robert Besa a member of the PF was part of, but her complaint was not taken seriously, therefore she reported the matter to the police.

Furthermore, she said she was only aware of Kalungwishi radio station in Mununga area and that people who burnt the radio station were never apprehended. She denied moving with Shi Kabwe during the campaigns and maintained that both men were never arrested for burning the radio station.

She admitted she never personally went to the radio station after it was burnt but from what was posted on social media she saw that the cables were burnt and by 13.00 hours the radio station was back on air.

The Petitioner reiterated the 1<sup>st</sup> Respondent's group led by Chongo her campaign manager damaged her Land Rover although she never saw Chongo break the motor vehicle.

According to the Petitioner, the 1<sup>st</sup> Respondent did not participate in damaging the vehicle. However, it was the 1<sup>st</sup> Respondent's campaign team who threw stones at her vehicle and the market shelter, damaged her campaign posters and stoned the house belonging to Mr. Kabwe.

The Petitioner told the Court she owned a market structure which was also damaged by Chongo and the group. She said at the material time, she was near the market and was 25 metres away.

In respect to the damage to the land rover, the Petitioner told the Court she reported the matter to the police and a docket was opened but an arrest could not be made as Chongo was nowhere to be found.

In further cross examination, the Petitioner stated the police came to her rescue and took her to Munungu police station and was frightened that the mob that followed would kill her. The Petitioner narrated the mob threw stones at the police station resulting in inmates escaping. She stated that at the material time the 1<sup>st</sup> Respondent was not present.

Thereafter, she retreated to Chiengi boma on the same date being 24<sup>th</sup> June 2021 which is within the constituency and failed to campaign on that particular day.

According to the Petitioner, she did not do well in Chiengi and did not know how many polling stations were in Chiengi boma nor did she know which candidate got the highest votes there though she said it was not her.

She denied addressing a meeting at Mununga Secondary School during campaign periods as that was during the time of the fracas. She told the Court the PF got 12 Councillors and there were no independent Councillors.

The Petitioner said the 1<sup>st</sup> Respondent like the PF and UPND had party structures on the ground. She maintained the 1<sup>st</sup> Respondent whilst being FDD had applied for adoption under the PF but was not adopted but took some party structures with her when she stood as an independent candidate.

In respect to the ownership of the football club, the Petitioner said it had no membership and that the 1<sup>st</sup> Respondent and her husband had bought the mini bus.

When referred to page 7 of the 1<sup>st</sup> Respondent's bundle of documents, the Petitioner responded that the document thereon related to Ntamba

Mweru football club registered on 26<sup>th</sup> November, 2020 and the particulars of the directors showed the 1<sup>st</sup> Respondent and the husband.

In continued cross examination by Counsel for the 2<sup>nd</sup> Respondent Mr. Chisunka, the Petitioner stated she was aware the Electoral Commission of Zambia (ECZ) is the body mandated to regulate elections. She reported the electoral malpractices to the police as ECZ was not active in the area.

In respect to the alleged malpractices, the Petitioner told the Court she did not report it to the ECZ but the police as the ECZ were inactive in the area.

In re-examination, the Petitioner clarified she stays in Mununga area, Kanchekwe village near the market and that Ntamba Mweru football club belongs to Chiengi constituency and at one point they even asked her for assistance but she had no money to give them.

She clarified the PF could not campaign properly due to the false statements made against her by the 1<sup>st</sup> Respondent as such she could not reach all the electorate and refute the uttered statements. It was the Petitioner's evidence that she was inside her house when the market shelter was being destroyed by a group led by Chongo.

PW2 was Bwalya Kennedy a resident of Kazembe area, Chiengi.

With regard to PW2, the gravamen of his evidence is there were differences in the manner in which people were being persuaded during the campaigns.

He elaborated there are three chiefdoms in Chiengi namely Puta, Mununga and Lambwe Chomba and each chiefdom has sub-chiefs. PW2 narrated that the late subchief Mwabu Kasenge has not been replaced. The differences in the chiefdoms and sub-chiefdoms caused people not to submit to other chiefdoms.

In the chiefdom is a big ward known as Lwabu. According to PW2, the 1<sup>st</sup> Respondent held rallies in these chiefdoms and told people that the Petitioner was dumb and unable to speak and further that if chosen as member of parliament they would not have a successor as she was in good terms with Senior Chief Puta.

The 1<sup>st</sup> Respondent also said the Petitioner is married to a Chinese national and once voted as a Member of Parliament she would bring investors to take over the land.

PW2 testified that the 1<sup>st</sup> Respondent used Kalungwishi radio station which is in Mununga chiefdom which covers almost all the areas in Chiengi except Lambwe Chomba. It was PW2's testimony that the 1<sup>st</sup> Respondent used the radio to campaign and tell people that the PF had set ablaze her radio station used as a medium to bring development in

the area. The 1<sup>st</sup> Respondent also referred to the PF government as a bunch of thieves thereby causing people to lose hope in the Petitioner's.

PW2 disclosed that sometime in July 2021, the 1<sup>st</sup> Respondent held a rally in Chipungu ward where she alleged the PF had brought rice and mealie meal and were distributing it to the electorate whilst they had not been doing so before the campaigns.

The 1<sup>st</sup> Respondent told people to get the items and urinate on them in order to destroy the charms put by the PF with a view to entice people not to vote for her. The 1<sup>st</sup> Respondent also gave K100.00 to two elderly women to share and were told to vote for her.

Further, PW2 overheard a telephone conversation between the 1<sup>st</sup> Respondent and Samson Sunday in which the 1<sup>st</sup> Respondent said she was going to Lusaka as the PF had employed six people whom they had paid K7,000.00 each to assassinate her.

The 1<sup>st</sup> Respondent told Sunday she was going to Lusaka and return with trained officers as one of the people engaged to assassinate her had disclosed the information to her.

According to PW2, due to the utterances of the 1<sup>st</sup> Respondent, the election was generally affected. The witness stated the radio station was set ablaze but it became operational the same day.

In cross examination by Counsel for the 1<sup>st</sup> Respondent, PW2 explained he is from Chief Puta's chiefdom. He informed the Court he did not know how many votes PW1 got in that chiefdom or in Lambwe Chomba but stated PW1 secured a lot of votes in Mununga chiefdom. The Petitioner's image was tarnished in other chiefdoms due to the 1<sup>st</sup> Respondent's allegations that she was close to Senior Chief Puta.

PW2 reiterated the 1<sup>st</sup> Respondent held a rally in June 2021 at Mwabu Primary polling station and was not aware the 1<sup>st</sup> Respondent had Covid-19 from May to June 2021 as he saw her at the said rally.

At the time of the rally, PW2 testified that he was with Joseph Chimpinde where the 1<sup>st</sup> Respondent told people not to vote for the Petitioner due to wrangles between the two chiefdoms.

According to PW2, whilst on air on radio and during a rally, the 1<sup>st</sup> Respondent said the Petitioner was married to a Chinese national. The witness conceded there was no problem with marrying a Chinese national but the 1<sup>st</sup> Respondent had said the PW1's husband would bring investors who would grab land from the people of Chiengi.

It was PW2's evidence that in 2016 he witnessed the 1<sup>st</sup> Respondent telling the late Chief Mwabu not to allow investors as they would take away their land and the chief took heed of the 1<sup>st</sup> Respondent's advice.

PW2 disclosed that the owner of Kalungwishi radio station is the 1<sup>st</sup> Respondent as such she was the only one who used to campaign on the

radio. PW2 informed the Court he was unaware other political parties such as the UPND or the PF mayor used the radio station for their campaigns.

In further cross examination, PW2 said he did not know the people that had set the radio station ablaze as he was in Mununga. He disclosed that the phone call between the 1<sup>st</sup> Respondent and Sunday did not affect the results but had the potential to reduce the number of the votes for the Petitioner. Further, that the issue of the road from Kashikishi to Chiengi pertained to the presidency and not parliamentary elections.

PW2 admitted knowing Raphael Musonda and having gone to Repete radio station situated in the Democratic Republic of Congo. He denied having gone on Repete radio to campaign but to express his views over the 1<sup>st</sup> Respondent in Chiengi. He disclosed that the Petitioner was close to Senior Chief Puta.

PW3 said he attended a meeting in Mwabu Primary School which is a polling station and the 1<sup>st</sup> Respondent was given permission by the Conflict Management Committee to campaign on that day on the basis that no candidate should go where another candidate is campaigning from.

When prodded further, PW2 said he was not aware the 1<sup>st</sup> Respondent had contacted COVID19 as he saw her in Mwabu conducting

addressing a rally and was in the company of Joseph Chimpinde at the time but could not remember the date of the rally.

The message at the rally from the 1<sup>st</sup> Respondent was for people not to vote for the Petitioner as they were wrangles between the 2 chiefdoms. He said he was present in 2016 when the 1<sup>st</sup> Respondent met the late Chief Mwabu who stopped investors from coming to her chiefdom.

PW2 testified that he also heard the 1<sup>st</sup> Respondent on radio saying the Petitioner is married to a Chinese though he conceded there was nothing wrong with this. He was not aware other candidates had used the same radio station to campaign.

He testified that he did not know who burnt the radio station but the 1<sup>st</sup> Respondent alleged it was the PF.

He also maintained that he witnesses the 1<sup>st</sup> Respondent give two elderly women K100.00 to share and knew their names. He was not aware that the Petitioner had not mentioned this incident in her Petition.

In respect to the conversation he heard between Sunday and the 1<sup>st</sup> Respondent, PW2 said it could not have affected the results of the elections in Chiengi but could have reduced on the number of people who could have voted for the Petitioner.

He attributed the Petitioner's loss in popularity to the 1<sup>st</sup> Respondent's utterances against the Petitioner which cast doubts in the minds of the electorate.

In respect to the failure of the Government to construct a road between Kashikishi and Chiengi, PW2 said this would reflect badly on it and not in a person.

When queried as to whether he sold a motor bike in Mporokoso belonging to Lawrence Mwelwa the 1<sup>st</sup> Respondent's husband, he replied that it had nothing to do with the petition before Court.

There was no cross examination of PW2 by Counsel for the 2<sup>nd</sup> Respondent nor was there re-examination.

PW3 was James Kabwe of Mwewa Kansapule, Mununga area. His evidence was that on 24<sup>th</sup> June, 2021 around 02:00 hours he received a phone call from John Musunga telling him he had been informed by the Office of the President (OP) that the radio station had been set ablaze and was tasked to take photos of the same.

PW3 met with John Musunga and together they went to Kalinso's house. On the way back they saw a mob of people going to the radio station and it was explained to the mob that they too wanted to go to the radio station.

The mob accompanied them to Kalungwishi radio station and when they got to the radio station, PW3 and Mutunga were accused of being behind the burning of the radio station. When the officer-in-charge tried to intervene, he was accused of siding with them and the police ran away.

PW3 and Mutunga were then put in a house and accused of being sent by the Petitioner to set the radio station ablaze. Eventually, they were rescued by the Zambia Army and taken to Chiengi Boma.

According to the witness, around 13:00 hours on the same day the radio station was operational. PW3 disclosed that the mob wanted PW3 and Mutunga to accuse the Petitioner of burning the radio station because she was popular.

Further, the mob destroyed the Petitioner's house, chairs, other goods and got away with a sum of K2, 220.00 which was on the table.

In cross examination by Counsel for the 1<sup>st</sup> Respondent Mr. Chifumu Banda SC, PW3 stated the OP called Mutunga though he did not know how Mutunga related with the OP. Further, PW3 said he was a PF member and lives in the same area with Mutunga who was once the area councilor.

PW3 said the one who was assigned to take photos of the burning radio was Mutunga who is not a cameraman, but owns a smartphone. The witness admitted the officer in charge Mr. Kayenga had a smartphone

but did not know how Mutunga related with OP. He said the police did not apprehend anyone over the burning of the radio station but only took statements.

The 2<sup>nd</sup> Respondent did not cross examine PW3 nor was there re-examination of the witness.

**PW4** was Samuel Mufimbi of Mununga area who testified that on 24<sup>th</sup> June, 2021 around 05:00 hours he heard his neighbours Mr. and Mrs. Yumba saying the Petitioner has burnt their friend's radio station.

When he went outside the house, the couple asked PW4 if he knew the radio station had been burnt by the Petitioner and responded he was unaware. PW4 then went to ask the Petitioner about the rumour of her burning the radio station and she was surprised and refused having done so as she too was benefitting from the radio station.

PW4 met Cosmas Musonda Mwila who told him he had been to the clinic to see the security guard from the radio station who had been attacked and his legs were broken.

Before Cosmas could cross the bridge, the mob came and accused him of being the person who had been sent by the Petitioner. PW4 narrated that Cosmas told him the mob destroyed the market shelter and followed him to the bridge and the mob was shouting that the Petitioner had burnt the radio station.

PW4 was at the camp with the Petitioner when the mob started harassing her and followed her to the police station whilst PW4 remained at the camp. The mob threatened to burn the house and motor vehicle and started throwing stones on the roof of the house where the Petitioner was inside.

The witness was able to recognise Chongo, Ng'ambi, Oswald, Chishala, Arnold and Dimus as ring leaders of the mob. PW4 approached Chishala the commander for the 1<sup>st</sup> Respondent, and told him what they were doing was an offence and asked him why they had not gone to the houses of the people they had apprehended.

The mob then started saying they would not vote for the Petitioner as she had burnt the 1<sup>st</sup> Respondent's radio station and was married to a Chinese who would come and grab their land.

In cross examination by Mr. Chifumu Banda SC, PW4 said he did not know who burnt the radio station neither did the Petitioner know. He said the 1<sup>st</sup> Respondent was not there when the mob was shouting that the Petitioner is married to a Chinese national. PW4 averred he is non-partisan.

The 2<sup>nd</sup> Respondent did not cross examine PW4.

In re-examination PW4 said he heard the mob saying they would not vote for the Petitioner as she had burnt the radio station and because she is married to a Chinese national who would take their land.

PW5 was Naomi Mwaba of Tuta. It is her testimony that on 28<sup>th</sup> June 2021, the 1<sup>st</sup> Respondent held a political rally at Puta Kasoma's area where she told people the Petitioner is a satanist and a prostitute married to a Chinese national and the basis for this was that they do not pay dowry when marrying women they meet at the bars. Further, that the Petitioner is a soldier and a savage and had burnt the radio station.

PW5 said the 1<sup>st</sup> Respondent's words affected her as she could not vote for a prostitute, a soldier with savage mannerism and someone who burnt a radio station which is a positive development in the area. When PW5 heard the 1<sup>st</sup> Respondent's utterances she could not keep them to herself and told others.

In cross examination by Counsel for the 1<sup>st</sup> Respondent Mr. Chifumu Banda SC, PW5 said the rally was in Puta Kasoma ward in the late afternoon, and not Katete ward neither was she aware that Puta Kasoma is related to the 1<sup>st</sup> Respondent. PW5 was not aware that the 1<sup>st</sup> Respondent had been banned from holding meetings or rallies in Puta Kasoma as she had attended one such meeting.

When asked as to whether the Petitioner was her sister, she responded that she knew her as far back as in 2017.

PW5 denied campaigning for the Petitioner. The witness said she never told the Petitioner about the things the 1<sup>st</sup> Respondent said as she had gone on a business trip to Feira from 10<sup>th</sup> July 2021 to 20<sup>th</sup> July, 2021.

Furthermore, PW5 stated she did not vote for the Petitioner because the 1<sup>st</sup> Respondent said she is a prostitute and has a savage mind. When asked whether she had served the petition on the 1<sup>st</sup> Respondent claiming she was from Messrs Ituna Partners, PW5 said she did not come to Court to talk about such things and denied that assertion. She reiterated she lives in Puta Kasoma and not Lusaka.

In re-examination PW5 clarified that the rally was held in Puta Kasoma where the 1<sup>st</sup> Respondent called the Petitioner a satanist and a prostitute as she has never seen a white man who has ever paid dowry or married from the bar.

The 2<sup>nd</sup> Respondent did not cross examine PW5.

PW6 was Tikambenji Mvula of Lupiya village. She testified that in June 2021, the 1<sup>st</sup> Respondent held a meeting at a market in Lupiya where she was telling people not to vote for the Petitioner as she is married to a Chinese national who would take away their land.

The 1<sup>st</sup> Respondent also told people that if the Petitioner is voted for, she would take away their land, that she burnt the radio station and as a former soldier she is a savage. PW6 said during the campaigns, the 1<sup>st</sup> Respondent's words discouraged people from meeting the Petitioner.

In cross examination by Counsel for the 1<sup>st</sup> Respondent Mr. Chifumu Banda SC, PW6 said according to her recollection, the 1<sup>st</sup> Respondent held a meeting on the last day of June 2021 in Lupiya area. The witness

stated she lives in Lupiya village and does not know the Petitioner but only volunteered to come and testify when she heard about the election Petition.

PW6 said she believed the 1<sup>st</sup> Respondent's utterances that the Petitioner is married to a Chinese and was discouraged from meeting the Petitioner whenever she called for meetings. She disclosed she had never seen a Chinese national before.

Further, she did not know the chief of her area nor the ward and only knew she stayed near the market that is Lupiya village.

In re-examination she clarified that the 1<sup>st</sup> Respondent held a meeting in Lupiya near the market during the month end of June 2021 where she said the Petitioner was married to a Chinese and had set ablaze the radio station.

The 2<sup>nd</sup> Respondent did not cross examine PW6.

PW7 was Charles Mumba of Chilele village and his evidence was that on 3<sup>rd</sup> July, 2021 he held a meeting for polling agents with about 25 people in total. After the meeting he saw two vehicles a Harrier written Kalungwishi FM and a mini bus.

He narrated that amongst the people that disembarked from the vehicles were John Kapya, Charles Chansa, Kawene and the 1<sup>st</sup> Respondent. The

1<sup>st</sup> Respondent instructed the men she came with to beat the people who were attending the meeting with PW7.

PW7 called the officer in charge and whilst waiting for the officer, they apprehended Joseph Chansa and kept him. The police took everyone to the police station where John Kapyia was arrested for the assault of John Ngoi.

Due to what transpired on that day, some voters did not vote as they were scared. According to PW7, the 1<sup>st</sup> Respondent did not want to hear the Petitioner's name that is why she went to cause confusion at PW7's house.

In cross examination by Counsel for the 1<sup>st</sup> Respondent Mr. Chifumu Banda SC, PW7 said he only knew of ward programmes prepared by ECZ but was not aware of the constituency programme. He said he was campaigning for the PF.

He told the Court, Lupiya is a village in Chiengi and is in Chibamba ward. PW7 said he worked with the police as a team and not individually. It was his testimony that the police were there to protect them as a political party because they had been attacked.

When asked whether he knew Kalungwishi radio station, PW7 responded in the negative and disclosed he did not know Samuel Musonda the station manager. He refuted the assertion he called Samuel

Musonda to threaten him with burning the radio station for giving coverage to the 1<sup>st</sup> Respondent.

PW7 denied organizing thugs to assault the 1<sup>st</sup> Respondent. He denied locking up the driver of Ntamba Mweru football club and damaging the mini-bus.

PW7 disclosed that Lupiya is a village under headman Julius Kaluba in Chiengi ward and he is the headman of Chilele village in Chibamba ward.

PW7 told the Court that the PF as a political party were being protected by the police due to the attacks on the party.

PW7 said John Kapya was arrested for assaulting John Ngoi and currently there was a case in Court in Chiengi. He maintained the case was still active as he had received summons to go and testify in Nchelenge and dismissed the assertion that it had been dismissed.

There was no cross examination by the 2<sup>nd</sup> Respondent nor re-examination.

PW8 was Florence Kabaso of Lambwe Chomba, Chiengi District whose testimony was that the 1<sup>st</sup> Respondent held a meeting in Lambwe Chomba where she said the Petitioner is married to a Chinese and would be taking money meant for development of the area to China.

The 1<sup>st</sup> Respondent further said the Petitioner is a satanist and the money used to campaign was from the underworld, is dumb and deaf as such would not be able to represent people in Parliament.

It was PW8's evidence that due to the 1<sup>st</sup> Respondent's utterances she failed to vote for the Petitioner as she could not vote for a person who got money from the underworld and someone who is dumb and married to a Chinese. She informed the Court the 1<sup>st</sup> Respondent's meeting took place at the clinic grounds.

In cross examination by Counsel for the 1<sup>st</sup> Respondent Mr. Chifumu Banda SC, PW8 said the meeting was held towards the end of June 2021. It was her testimony she was not supporting any candidate and did not vote for the Petitioner because the 1<sup>st</sup> Respondent told them she is married to a Chinese who would take all the money to China therefore there would be no development in Chiengi.

In further cross examination, PW8 said she was unaware the 1<sup>st</sup> Respondent was in Lusaka from 21<sup>st</sup> May, 2021 till the end of June 2021. She maintained the 1<sup>st</sup> Respondent held a meeting at the clinic grounds on 28<sup>th</sup> June 2021 on a Monday and that the clinic was not operating as she did not see any patients. She did not record the meeting as she did not have a phone.

The witness went on to state she registered as a voter at the same clinic where the meeting was held as it was a polling station. She informed

the Court she did not know the Petitioner but used to see her face on posters.

In re-examination PW8 clarified that the meeting was held towards the end of June 2021 and did not know the Petitioner whom she only used to see on campaign posters.

There was no cross examination of PW8 by the 2<sup>nd</sup> Respondent.

**PW9** was Raphael Musonda of Kalima village Sub-chief Chipungu Chipumu.

His testimony was that the 1<sup>st</sup> Respondent went to Kazembe market in Chipungu ward and told people not to vote for the Petitioner as she is dumb and could not represent them well in Parliament. He witnessed the 1<sup>st</sup> Respondent give K100.00 to two women and told them to vote on the chair symbol on 12<sup>th</sup> August 2021 as she was tough and could express herself in Parliament.

Furthermore, PW9 said the 1<sup>st</sup> Respondent held a meeting in Mwabu and told people not to vote for the Petitioner because she relates with Chief Puta who was not in good terms with Chief Mwabu and that if they voted for the Petitioner, they would not have their chieftom.

PW9 disclosed that whilst the 1<sup>st</sup> Respondent was on Kalungwishi radio she said the PF on the instruction of the Petitioner sprinkled 20 litres of petrol on the radio station and set it ablaze and assaulted the watchman.

According to PW9 as a resident of Chiengi, he was affected by these statements.

In cross examination by Counsel for the 1<sup>st</sup> Respondent Mr. Chifumu Banda SC, PW9 admitted he had been in politics for a long time and in 2016 he was the campaign manager for the 1<sup>st</sup> Respondent whereas in 2021 he was not campaigning for anyone.

PW9 disclosed that in the company of PW2, he went to a radio station in DRC which radio station has coverage in Chiengi, and expressed his views on why he stopped campaigning for the 1<sup>st</sup> Respondent. Whilst there, PW9 also talked about the promises the 1<sup>st</sup> Respondent made which she did not fulfill and how she never refunded his personal money used during the 2016 campaign.

He disclosed his intention for going on radio was to make the 1<sup>st</sup> Respondent fulfill her promises of building him a house, boosting his business and giving his wife computer accessories. The witness went on to state he was happy with the 1<sup>st</sup> Respondent's candidature as he is a Christian and had forgiven her for her transgressions.

PW9 admitted the 1<sup>st</sup> Respondent had bought him a motor bike which he used during the 2016 campaigns and it became his personal bike after the campaigns. He explained he sold it and used the money for his treatment as he was involved in an accident and the 1<sup>st</sup> Respondent never sent him any money.

PW9 reiterated that the 1<sup>st</sup> Respondent held a meeting at Kazembe market near Kabanse's shops in June 2021 and did not tell the Petitioner about the 1<sup>st</sup> Respondent's utterances.

There was no re-examination nor did the 2<sup>nd</sup> Respondent cross examine PW9.

This marked the end of the Petitioner's case.

### **1<sup>st</sup> Respondent's Evidence**

The 1<sup>st</sup> Respondent called three (3) witnesses.

Her testimony was she knew the Petitioner as the losing candidate of the Chiengi parliamentary elections who stood on the PF ticket. The two had never met in the field during the campaigns.

The 1<sup>st</sup> Respondent disclosed that the other candidates in the elections where she was duly elected as Member of Parliament for Chiengi were Chansa Albert Kalyango of SP; Freeman Kaputo of DP and Favorite Musangu of UPND.

It was the 1<sup>st</sup> Respondent's testimony that for purposes of campaigns she had no structures. On 21<sup>st</sup> May 2021 she left Chiengi for Lusaka as she had taken ill. Before reaching Lusaka, she was admitted at Musekele Private Hospital in Mkushi and the following day rushed to Lusaka.

Upon arrival in Lusaka, she was taken to a private hospital where they suspected she had Covid19 and was later admitted at Chainda clinic.

On 24<sup>th</sup> June 2021, she received a call that Kalungwishi radio station had been petrol bombed. Upon receipt of this news, she left Lusaka on 24<sup>th</sup> June 2021 and spent a night in Nchelenge and arrived in Chiengi around 11:00 hours on 25<sup>th</sup> June 2021.

In relation to paragraph 3 of the petition on gifting the football team, the 1<sup>st</sup> Respondent said she created Ntamba Mweru football club for the youths of Chiengi and registered it with the Football Association of Zambia (FAZ) in division 2.

On 26<sup>th</sup> November 2020, the football club was further registered with Patents and Companies Registration Agency (PACRA) as shown on D1 (page 7 and 13 of the 1<sup>st</sup> Respondent's bundle of documents). The 1<sup>st</sup> Respondent and her husband are the directors and guarantors of the football club.

She disclosed that when the football club was promoted to division 1 there was a requirement for the team to have transport in order to fulfill fixtures.

The 1<sup>st</sup> Respondent and her husband then purchased a motor vehicle, a white Toyota Hiace mini-bus for the club. The bus is written Ntamba Mweru Football Club and is used to transport the team to various places within Luapula Province. She refuted the allegation of bribing her own

club with the mini bus or bought it as an inducement for the team to vote for her.

The 1<sup>st</sup> Respondent further denied saying the Petitioner was married to a Chinese and said it was difficult to campaign in Chiengi as an independent candidate. She went on to explain she only managed to campaign when she returned to Chiengi after being discharged from hospital.

The 1<sup>st</sup> Respondent denied holding a meeting in Chiengi and stated she had a briefing upon her arrival from Lusaka. At the said briefing she told people about how they had been oppressed and neglected by the PF government.

She further talked about the abuse of human rights, high costs of living, unfulfilled promises by the President such as the promise of construction of a tarred road between Kashikishi and Muchinga.

The 1<sup>st</sup> Respondent spoke about fisherman's rights as they were beaten by marine soldiers and reminded people to bring everything to an end as they did not live like Zambians.

She denied ever issuing any derogatory or insulting statements about the Petitioner and said the allegations by the Petitioner are false.

It was the 1<sup>st</sup> Respondent's testimony that she never held a meeting at the clinic in Lambwe Chomba ward or at Kazembe market but held one

in Lupiya as that was the only place where Senior Chief Puta permitted her to hold meetings.

Reacting to PW9's evidence, the 1<sup>st</sup> Respondent denied ever holding a meeting at Kazembe market and in a like manner denied using words to demean the Petitioner. She said Chief Puta and subchief Nongo of Chipungu stopped her from having a meeting in Kazembe. She however did so two weeks prior to the elections. The witness also denied giving K100.00 to two women adding that she was the poorest candidate in the campaign.

She admitted PW9 was her campaign manager in 2016 but stated she never promised him heaven on earth as alleged. During the time that PW9 was campaigning for her in 2016, she bought him two motor bikes for use in the campaigns. When she later enquired about the motor bikes PW9 told her that one was sold and he did not know where the second one was.

The 1<sup>st</sup> Respondent narrated that PW9 started demanding for money from her which he allegedly used during the 2016 campaigns. In 2021, PW9 was very annoyed when she dropped him from her campaign team.

Reacting to PW5's evidence that she held a meeting at Puta Kasoma, the 1<sup>st</sup> Respondent said she never had a meeting in the said area as no one was allowed to receive or welcome her including her relatives. The

Chief even ordered her to remove a campaign banner that was displayed at the market.

In respect to the allegation of holding a meeting in June in Mwabu, the 1<sup>st</sup> Respondent said it was held in August towards the election. She denied telling voters not to vote for the Petitioner as she was not in goods books with Chief Puta.

She reiterated she did not speak on radio on 24<sup>th</sup> June 2021 but received a call that the radio station had been petrol bombed and she left Lusaka thereafter. She equally refuted PW2's testimony that the radio station was operational around 13:00 hours on the same day it was purportedly burnt.

The 1<sup>st</sup> Respondent said she was not aware the Petitioner's Land Rover, house and market shelter were damaged and had no idea the Petitioner had a house and a market shelter in Chiengi. Further, on the material day the Petitioner's properties were allegedly damaged, the 1<sup>st</sup> Respondent was in transit from Lusaka.

The 1<sup>st</sup> Respondent disclosed she was not aware the Petitioner had retreated to Chiengi Boma as the Petitioner stood on the PF ticket and had state security at her disposal, therefore she was unaware of any form of intimidation on the Petitioner.

The 1<sup>st</sup> Respondent told the Court that the independent candidate for the mayoral position, the parliamentary candidates from UPND and DP all

had access to the radio station. She disclosed that Kalungwishi radio station is owned by Pastor Victor Tembo and Mrs. Precious Chipili Mwango.

She further denied the allegations in paragraph 3 (vii) of the Petition that after the radio station was gutted, she misinformed the electorate that the Petitioner had been detained at Chiengi Boma and therefore they should not vote for her.

The 1<sup>st</sup> Respondent said she did not know how the radio station got gutted neither did, she know where the Petitioner was at the material time.

She reiterated her message during the campaign was about the failures of PF, abuse of human rights in Chiengi, caderism in the civil service and high cost of living. Her campaign message was that the PF should be kicked out as the people of Chiengi were oppressed.

The 1<sup>st</sup> Respondent narrated that due to the Covid-19 pandemic, ECZ issued campaign guidelines and candidates were urged to use social media, radio stations and door to door campaigns as opposed to rallies.

She encountered difficulties in her campaign as she could not conduct door-to-door campaigns because she was banned from going to some places.

In her campaigns, she followed the campaign schedule as produced in Court and marked “D2” which was agreed to by the candidates and the Dispute Management Committee (page 1 of the 1<sup>st</sup> Respondent’s bundle of documents).

She prayed that the Court dismisses the Petition with costs and declare her as the duly elected Member of Parliament for Chiengi constituency.

In cross examination by Counsel for the Petitioner Ms Chipeta, the 1<sup>st</sup> Respondent said she had traveled to Lusaka on 21<sup>st</sup> May, 2021 and tested positive for Covid-19 on 26<sup>th</sup> May, 2021. She was first taken to Coptic Hospital before being admitted at Chainda hospital where she remained for a week and a few days.

She maintained that she adhered to Covid19 guidelines of campaigning through social media, radio and door-to-door campaigns as meetings were not allowed. The 1<sup>st</sup> Respondent said she held no meetings except where she was meeting her people.

In further cross examination by Co-Counsel for the Petitioner Ms Mvula, the 1<sup>st</sup> Respondent said she recovered from Covid-19 sometime in June 2021 and travelled back to Chiengi before the end of June 2021. She refuted the allegations of calling the Petitioner disparaging names stating her campaign team told her the Petitioner was the one calling her a prostitute.

It was the 1<sup>st</sup> Respondent's testimony that she received the phone call about the burning of the radio station on 24<sup>th</sup> June 2021.

As regards the mini-bus for the football club, the 1<sup>st</sup> Respondent said she purchased it in February 2021 and gave it to the club in June 2021. Further, that the white book is in the name of Robert Mwelwa from whom the bus was purchased from.

When asked whether she gifted the football club a mini bus during the campaign period, the 1<sup>st</sup> Respondent said she did not know the exact dates for the campaign period. She said she gave the bus to the club in June 2021 when the team qualified to division 1. Further that the owners of the club did give Ntamba Mweru football club a mini-bus.

The 1<sup>st</sup> Respondent admitted the members of the football club were residents of Chiengi and the membership is a mixture of all age groups.

It was the 1<sup>st</sup> Respondent's testimony that during the campaign, she went to Muchesi, Fupu, Muchinga. As for Chief Puta's area, the 1<sup>st</sup> Respondent said it was vast and from Luchinda to Lambwe Chomba. She denied the assertion that she was restricted in campaigning in Senior Chief Puta's area due to the violence she exhibited.

The 1<sup>st</sup> Respondent told the Court her meeting in Lambwe Chomba was towards the end of July 2021 and her campaign manager was Matthews Kalumba.

In re-examination by Ms. Mushibwe, the 1<sup>st</sup> Respondent clarified she was in Lusaka on 24<sup>th</sup> June 2021 when she received a call from the police that the radio station had burnt.

She visited some of her people in Muchese, Puku, Mwabu, Kazembe at one of her pillar's house. Whilst in Chiengi ward she went to meet her organisers in Chakaba and stated she had challenges in most of these areas with the chiefs. She stated she had no meeting in Maoma and denied having held a meeting in Katete ward.

She further explained that she bought the bus from Robert Mwelwa in February 2021 for the football club she owns with the husband. It was paid for through instalments with the first instalment in February 2021 and the last in April 2021. The members of the club are from Nchelenge, Chiengi and DRC.

During her campaign period she visited Chipungu and Musangu villages in Lambwe Chomba chiefdom.

RW1 stated she never aspired to be a PF candidate in 2021 but in 2016 when she was not adopted. She told the Court she was a victim of violence by the PF.

The 2<sup>nd</sup> Respondent did not cross examine the 1<sup>st</sup> Respondent.

RW2 was Samson Musonda of Mukonko village, Chiengi District a radio announcer and acting station manager of Kalungwishi radio station. His duties include conducting interviews and playing music.

He testified that the radio station conducted programmes for several political parties namely DP, UPND, PF and independent candidates.

The radio station had hosted the former Republican President Mr. Edgar Chagwa Lungu, the mayoral candidate for the PF, the provincial youth chairperson for PF and all these people campaigned for the PF party at all levels in the parliamentary seat contested by the Petitioner.

The radio station equally hosted candidates for local government and Members of Parliament for UPND, DP and the 1<sup>st</sup> Respondent.

When hosted on radio, the 1<sup>st</sup> Respondent used to explain what she did during her tenure and her plan if re-elected and never called any candidate names. The radio station was gutted on 24<sup>th</sup> June 2021 damaging the transmission cables that remit to the transmitter and air conditioning.

He stated that the radio station did not resume operations on the same day but resumed after 48 hours on 26<sup>th</sup> June, 2021. The 1<sup>st</sup> Respondent's first appearance was on 30<sup>th</sup> June, 2021.

He admitted knowing PW7 as the constituency chairperson for PF in Chiengi district.

Prior to the fire at the radio station, Charles Mumba had called him around 05:00 hours and threatened to burn the radio station. In respect to the fire at the radio station, RW2 disclosed that two suspects were caught by the villagers.

He disclosed that on the material day, the villagers called for manpower from Chiengi Boma and around 06:00 hours the Zambia Army fought running battles with the mob. Shi Kabwe a PF youth chairperson and John Tonga a teacher and former PF councilor were subsequently arrested.

RW2 said the radio station never received any complaints from the Petitioner over the alleged disparaging remarks made by the 1<sup>st</sup> Respondent whilst appearing on the radio station.

He explained that any grievance should be made within 14 days and if the complainant is not satisfied with the action of the radio station the matter can be escalated by reporting it to the Independent Broadcasting Authority (IBA).

In cross examination by Counsel for the Petitioner Ms Chipeta, RW2 said he knew the 1<sup>st</sup> Respondent as a Member of Parliament and as a guest at the radio station. He identified Dr. Lawrence Mwelwa in Court and said he is a co-director of the radio station but has no say over the programing as the radio station has an editorial policy. The witness said he knew Dr. Mwelwa as the 1<sup>st</sup> Respondent's husband.

According to RW2, the radio station was gutted after midnight on 24<sup>th</sup> June 2021 and due to the phone call he received earlier on in the year from Charles Mumba, he suspected Charles Mumba, but he was never apprehended.

He narrated that Kalungwishi radio station is in Chiengi Boma and Lambwe Chomba is very far from the radio station. The 1<sup>st</sup> Respondent went to the radio station on 30<sup>th</sup> June 2021 and was not aware she was in Lambwe Chomba that day.

In re-examination by Ms Mushimbwe, RW2 clarified that when the radio station was burnt, he suspected Charles Mumba because of the call he made threatening to burn it. What also came to his mind was that the people who had planned to burn the radio station had succeeded.

He said the radio station is owned by shareholders and the 1<sup>st</sup> Respondent's husband is a co-director.

The 2<sup>nd</sup> Respondent did not cross examine RW2.

RW3 was Kalumba Matthews the 1<sup>st</sup> Respondent's campaign manager. He testified that following the filing of nominations, ECZ and the police called aspiring candidates from all political parties and agreed on a campaign timetable. According to the said timetable, candidates were not allowed to be in the area where the opponent was campaigning.

The 1<sup>st</sup> Respondent left Chiengi for Lusaka on 21<sup>st</sup> May 2021 and returned on 25<sup>th</sup> June 2021. Therefore, she did not hold any meetings during that period.

When the 1<sup>st</sup> Respondent returned, she conducted door-to-door campaigns in Mununga ward, Muma ward, Chitutu ward, Kalobwa, Chipamba ward, Ifuna ward, Luawu ward, Luchinda ward, Chitunda ward, Muchinga ward and Lambwe Chomba wards. Katete and Chiengi wards were not covered as senior chief Puta ordered people not to receive any independent candidate. RW3 denied that a rally was held in Katete ward.

It was disclosed that due to the Covid-19 pandemic, the 1<sup>st</sup> Respondent never held any meeting in Mwabu. He asserted it would be a lie if someone alleged that the 1<sup>st</sup> Respondent held a meeting in Mwabu.

In cross examination, the witness said he campaigned with the 1<sup>st</sup> Respondent in Mununga, Kalungwishi, Munua, Kalobwa, Chipamba, Ifuna, Luau, Luchinda, Chitundu and Lambwe Chomba wards from 1<sup>st</sup> July, 2021.

RW2 said the 1<sup>st</sup> Respondent was in Lusaka from 21<sup>st</sup> May 2021 to 25<sup>th</sup> June 2021 where she had Covid-19. The 1<sup>st</sup> Respondent never held meetings but conducted door-to-door campaigns.

This marked the end of the 1<sup>st</sup> Respondent's case.

## **2<sup>nd</sup> Respondent's evidence**

The 2<sup>nd</sup> Respondent did not call any witnesses and relied on the answer and affidavit before Court.

## **Petitioner's submissions**

In the Petitioner's submissions, Counsel recounted the evidence of the Petitioner, PW2, PW3, PW4, PW5 and PW5 and submitted that the 1<sup>st</sup> Respondent was making false statements which damaged the Petitioner's reputation which caused the majority of voters to be prevented from voting for the Petitioner.

Reference was made to case of *Stephen Masumba v Elliot Kamwendo*<sup>1</sup>, where the grounds for nullifying election were provided as follows:

- i. *“That a corrupt practice or an illegal act or other misconduct was committed in connection with the election;*
- ii. *The illegal act or misconduct complained of was committed by the Respondent or by his election agent or polling agent or with the Respondent's knowledge, consent or approval;*
- iii. *As a result of the corrupt or illegal act or misconduct committed, the majority of the voters in the constituency were or may have been prevented from electing a candidate whom they preferred;*
- iv. *Where it appears to the High Court or Tribunal that the election was not conducted in accordance with the Act or the*

*Law and that as a result of the non-compliance, the results were preferred;*

- v. The candidate was at the time of the election a person qualified to stand elections.”*

Counsel submitted that the 1<sup>st</sup> Respondent by issuing false statements that the Petitioner is a satanist, prostitute and married to a Chinese man who would steal land from the people of Chiengi committed an illegal practice contrary to section 84 of the *Electoral Process Act No 35 of 2016* which caused the elections not to be free and fair.

Counsel explained that in order for a statement to qualify as character assassination pertaining to a candidate in an election, the statement must be false and must relate to the personal character or conduct of a candidate, and calculated to influence the voters in an election.

It was Counsel’s submission that the testimonies by PW2 to PW7 show that they were prevented from voting for the Petitioner because of the false statements made by the 1<sup>st</sup> Respondent.

Although section 84 (1) and (2) of the *Electoral Process Act No 35 of 2016* only prohibits publication of statements relating to the illness, death or withdrawal of another candidate, regulation 15 (1) of the *Election Code of Conduct* which prohibits character assassination when read together with section 97 (2) (a) of the Act, shows that the Act does

not only restrict nullification of an election for publication of false statements about the death or withdraw of a candidate from the election.

To augment this, the case of *Mbololwa Subulwa v Kalye Mandandi* <sup>2</sup>, was cited where it was said that the nature of the statement complained of must be one that causes harm to the reputation of the individual and adversely affects how he or she is perceived by its recipients, who in an election are the voters.

It was Counsel's submission that under section 81 (c) of the *Electoral Process Act No 35 of 2016*, in order to constitute a bribe, the Petitioner ought to show that money, offer, promise or gift was given for the benefit of the voter.

In the present case, the 1<sup>st</sup> Respondent testified that she purchased the bus in February 2021 and gifted it to Ntamba Mweru football club in June 2021 during the campaign period. It was submitted that the purpose of gifting the bus during campaigns was to win the football club players and supporters' votes.

It was Counsel for the Petitioner's prayer that the election of the 1<sup>st</sup> Respondent be declared null and void.

### **1<sup>st</sup> Respondent's submissions**

Counsel for the 1<sup>st</sup> Respondent in relation to the first allegation submitted that the 1<sup>st</sup> Respondent bought a mini bus for Ntamba Mweru

as a way of inducing the members to vote for her is purely anchored on suspicion as there is no evidence that the 1<sup>st</sup> Respondent bribed her own company (football club).

It was argued that this allegation was not confirmed by the Petitioner's witnesses as none of them testified they were induced not to vote for the Petitioner due to the gift of the mini bus to the football club.

My attention was drawn to the *Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 15*, page 425, paragraph 780, where the learned authors said the following on proof of bribery:

*“clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Furthermore, a corrupt motive must in all cases be strictly proved. For this purpose, a corrupt motive in the mind of the person bribed alone is not enough; the question is as to the intention of the person who bribes him.”*

Further reference was made to the case of *Lewanika and Others v Chiluba*<sup>3</sup>, in which the Supreme Court held that:

*“We have tried to see where the allegations in the petition and in the evidence of various political leaders donating to community projects might fit in, without success. The timing of such public philanthropic activity is not prohibited by the Regulations and we*

*can do no more than to urge the authorities concerned to address this lacuna so that there can be closed season at election time for any activity suggestive of vote buying; including any public and official charitable activity.”*

On the strength of these authorities, it was submitted there is no law that prohibits philanthropic activity resulting in charitable gifts given during election season, and do not constitute corruption and consequently, this allegation fails.

As regards the second allegation that the 1<sup>st</sup> Respondent was telling people not to vote for the Petitioner as she is married to a Chinese national who would take away their land, Counsel submitted that all the Petitioner’s witnesses who testified on this aspect made statements that were contrary to the Petitioner.

In any case, the Petitioner failed to prove this allegation to the required standard of meeting a fairly high degree of convincing clarity as stated in the case of *Mabenga v Wina*<sup>4</sup>, therefore it fails.

Counsel went on to submit the Petitioner at trial never led any evidence that the 1<sup>st</sup> Respondent ‘incited listeners on radio to rise against her as allegedly claimed in her Petition but instead brought in new allegations which were not included in the Petition.

Further, the evidence of RW2 showed that the Petitioner never raised a complaint to the radio station for constantly airing the 1<sup>st</sup> Respondent’s

alleged defamatory statements. Counsel contends that this allegation should fail.

In respect of the fourth, fifth and sixth allegation that the Petitioner was attacked by a mob which damaged her car, house and market shelter, the Petitioner said the 1<sup>st</sup> Respondent was not present when the incident occurred. This was confirmed by PW4 who was at the camp house with the Petitioner.

The Petitioner went on to testify that she did not report the alleged malpractice to ECZ despite knowing it was the body mandated to conduct and regulate elections. Counsel submitted that the Petitioner failed to prove undue influence as contained in section 83 (1) (a)-(g) of the EPA, therefore the allegations fail.

In relation to the allegation that the 1<sup>st</sup> Respondent misinformed the electorates the Petitioner and her campaign team had been detained in Chiengi boma and should not vote for her, Counsel submitted the election results showed a very close race amongst the top three candidates.

The Petitioner polled 10,735 votes, Favorite Musangu of UPND 11,154 votes and the 1<sup>st</sup> Respondent 12,646 votes, therefore it cannot be said that the voters formed a single electorate college such that the majority of the voters were prevented from electing their preferred candidate.

Further, the Petitioner testified that she managed to campaign in the whole constituency with the help of her campaign team. It was Counsel's submission that this allegation should equally fail.

In summary, Counsel submitted that based on the evidence presented before Court, the Petitioner failed to prove to a standard higher than on a mere balance of probability and to that of a fairly high degree of convincing clarity that the alleged acts by the 1<sup>st</sup> Respondent resulted in the majority of voters being prevented from voting for the candidate of their choice as per section 97 (2) of the *Electoral Process Act No 35 of 2016*.

It was Counsel for the 1<sup>st</sup> Respondent's prayer for the Court to find that the 1<sup>st</sup> Respondent was duly elected and declared winner of the Chiengi constituency parliamentary elections and the Petition be dismissed with costs.

## **2<sup>nd</sup> Respondent's submissions**

It was Counsel's submission on behalf of the 2<sup>nd</sup> Respondent that section 97 (2) of the *Electoral Process Act No 35 of 2016* outlines the factors that should be proved in order to nullify an election petition relating to a parliamentary seat. Counsel submits the Petitioner has to establish the following:

1. There was an illegal or corrupt practice.

2. The said practice was either done personally by the candidate or by the candidate's electoral agent with the candidate's knowledge and consent.
3. The said practice affected the electorates to the extent that they were prevented from voting for their preferred candidate.

Counsel submitted that the Petitioner bears the burden to prove the alleged malpractice or misconduct to a degree that is higher than a mere balance of probability but not beyond reasonable doubt as stated in the case of *Lewanika v Chiluba*<sup>3</sup>. To augment this submission further, my attention was drawn to the cases of *Mabenga v Wina*<sup>4</sup> and *Saul Zulu v Victoria Kalima*<sup>5</sup>.

In the present case, the Petitioner's evidence was anchored on allegation of bribery, defamation, violence and vandalism. Particularly, the Petitioner alleged the 1<sup>st</sup> Respondent attempted to bribe the electorate by donating a bus to Ntamba Mweru football club, damaged the Petitioner's reputation by telling the electorate she was married to a Chinese national and that her agents damaged the Petitioner's house amongst other things.

Counsel for the 2<sup>nd</sup> Respondent submitted that contrary to the Petitioner's allegations about the gift of a bus, the 1<sup>st</sup> Respondent owned the football in question and the bus was purchased long before the campaign period. Further, on the allegation that the 1<sup>st</sup> Respondent

damaged the Petitioner's reputation, it was submitted that these allegations were constituted by hearsay.

As regards the allegation the Petitioner's house was damaged by the 1<sup>st</sup> Respondent, Counsel submitted that the Petitioner could not identify who vandalized the properties. Further, that the Petitioner did not report any of the alleged malpractice to the 2<sup>nd</sup> Respondent as required by procedure.

It was further submitted the Petitioner had indicated she did not come into contact with the 1<sup>st</sup> Respondent during her campaign and no one prevented her from campaigning. The evidence of PW2, PW3, PW4 and PW5 did little to substantiate any of the Petitioner's claims as neither of them led evidence to show any malpractice or misconduct by the 1<sup>st</sup> Respondent or 2<sup>nd</sup> Respondent.

In light of the foregoing, Counsel submitted that the Petitioner's evidence in this case falls far below the threshold required by the law in proving her claims.

It was Counsel's submission that none of the evidence adduced by the Petitioner proves any malpractice by the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent or their agents. Further, that there was no evidence led by the Petitioner to show the majority of the electorates were prevented from voting for their preferred candidate for any reason.

According to Counsel, this shows that the elections were conducted in accordance with the provisions of the law and the declaration of the 1<sup>st</sup> Respondent as the duly elected Member of Parliament of Chiengi constituency by the 2<sup>nd</sup> Respondent continues to be valid.

Counsel submitted that the Petitioner failed to prove her claims as such this Petition should be dismissed with costs.

### **Analysis and consideration**

I have considered the Petition, answers, verifying affidavits, written submissions and viva voce evidence of all the witnesses that came before Court.

From the evidence presented by the rival parties, I make the following findings of fact. It is not in dispute that on 12<sup>th</sup> August 2021, the Petitioner and the 1<sup>st</sup> Respondent together with three other candidates stood for parliamentary elections for Chiengi constituency.

The Petitioner stood on the PF ticket and polled 10,739 votes whilst the 1<sup>st</sup> Respondent stood as an independent candidate and was declared as the duly elected Member of Parliament for Chiengi constituency after polling 12,646 votes. Favorite Musangu of UPND polled 11,154, Kaputo Freeman of DP polled 428 and Kalyango Chansa of SP polled 597.

Being dissatisfied with the declaration of the 1<sup>st</sup> Respondent as the winner and duly elected Member of Parliament for Chiengi constituency, on 30<sup>th</sup> August, 2021 the Petitioner filed a Petition.

The Petitioner seeks to nullify the 1<sup>st</sup> Respondent's election due to alleged electoral malpractices characterized by publicising of defamatory statements by the 1<sup>st</sup> Respondent against the Petitioner, violence and intimidation, bribery and giving of a gift during the campaign period in contravention of the *Electoral Code of Conduct*.

According to the Petitioner, the acts complained of caused the majority of the people in Chiengi constituency not to vote for their preferred candidate.

I shall briefly outline the general principles and electoral laws which guide election petitions in Zambia.

Elections are the cornerstone in a democratic state. Every five (5) years except where there is a by-election, presidential, parliamentary and local government elections are held in Zambia.

Every citizen is free to participate in the democratic dispensation, make political choices as to whom the person shall vote for to represent him by way of secret ballot.

A citizen has a right to free and fair elections in line with the universal suffrage. This is provided for under Article 45 of the *Constitution of Zambia (Amendment) Act No 2 of 2016*.

Ideally, an election should represent the will of the people. I echo the words of the Judge in the case of *Hassan Aden Osman v IFBC and 2 Others, Nairobi Election Petition Appeal No 11 of 2018* where it was stated that:

*“..... to invalidate an election is a weighty prospect and it requires compelling and credible evidence because invalidation of an election has wider implications beyond the contestants, the right of the voters to non-interference with their already cast votes without satisfactory results.*

The proceedings before Court have a special jurisdiction and are neither criminal nor civil and are guided by the Constitution and statute. The Court is put on a strait jacket without the common law or equity.

It is worthy of note therefore that in view of the peculiar nature of election petitions, guidance in its adjudication is to be drawn only from the relevant statute from which the Court derives its jurisdiction.

Election matters are *sui generis* and do not deal with the civil rights and obligations of parties. In the case of *Orubu v NEC*<sup>6</sup>, the Appeal Court of Nigeria held that:

*“election petitions are peculiar in nature, and because of this peculiarity and importance to the wellbeing of a democratic society, they are regarded with aura that places them over and above normal day to day transaction between individuals which give rise to ordinary claims in Court.”*

Article 73 (1) of the *Constitution of Zambia (Amendment) Act No.1 of 2016*, confers the High Court with jurisdiction to hear parliamentary election petitions and provides that:

*“(1) A person may file an election petition with the High Court to challenge the election of a Member of Parliament.”*

It follows that once an election result is declared, it can only be altered or declared null and void by the Court.

The Court’s role is to settle electoral disputes so as to maintain the electoral integrity. Therefore, it is not the duty of this Court to subvert the will of the electorate but to ensure that the election was free and fair and reflects the will of the electorate.

In our jurisdiction, the instructive law on nullification of parliamentary elections is section 97 (2) of the *Electoral Process Act No 35 of 2016* which 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;*

*(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or*

*(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.”*

Going by this provision of law, in order for this Court to nullify the election of the 1<sup>st</sup> Respondent on account of the grounds raised by the Petitioner, it must be established that:

- i. The alleged widespread electoral malpractices, corruption and illegal practices were done in connection with the parliamentary elections of 12<sup>th</sup> August, 2021 for Chiengi constituency;
- ii. The alleged electoral malpractices, corruption and illegal practices were committed by the 1<sup>st</sup> Respondent or with her knowledge and consent or approval of her election agent or polling agent; and
- iii. The majority of voters in Chiengi constituency were or may have been prevented from electing their preferred candidate.

It is important to note that the Electoral Commission of Zambia has the responsibility to ensure that voting processes and systems are not only secure but also transparent.

In determining this election Petition, it is my solemn duty to look at the credibility of the witnesses, the probative value of evidence and to establish where possible, the truth or falsehoods of facts, the relevancy of the surrounding circumstances, the relationship with other evidence so as to put in place the mosaic of evidence into a clearer probable picture.

### **Burden of Proof**

I shall now turn to consider the burden and standard of proof in election petitions. The threshold of proof in election petitions is above the balance of probability, though not as high as beyond reasonable doubt. In this respect both Counsel referred to the same authorities and principles and were in tandem and agreement. I am alive to the principle that he who asserts must prove and this is what is expected of the Petitioner herein.

The Supreme Court in *Michael Mabenga v Sikota Wina & Others*<sup>4</sup>, guided that:

*“proof of an election petition, although a civil matter was higher than balance of probability but less than beyond all reasonable doubt....As the allegations in an election petition are of a criminal nature”*

In *Abuid Kawangu v Elijah Muchima Appeal No 8 of 2017*<sup>5</sup>, the Constitutional Court held that:

*“The standard remains higher and distinct from that required in an ordinary civil matter but lower than the standard of beyond reasonable doubt required in criminal matters.....”*

In an election petition, the Petitioner bears the legal burden of proof and must prove all issues raised to a fairly high degree of convincing clarity. This is because the outcome of election petitions has an impact upon

the governance of the nation and the deployment of the constitutional power and authority.

Therefore, imposing a high evidential hurdle on Petitioner is meant to deter unmeritorious petitions designed to destabilise the new holders of constitutional offices.

I shall now proceed to determine in detail the allegations and issues seriatim.

### **1. Bribery**

Bribery is a serious electoral malpractice. It has connotations of a quasi-criminal aspect. As bribery is a serious allegation, the Petitioner should therefore adduce cogent and reliable evidence to support it.

*Black's Law Dictionary, 6<sup>th</sup> Edition, Thomson Reuters* defines bribery as:

*“the offence committed by one who gives or promises to give or offers money or valuable inducement to an elector, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting.”*

In paragraph 3 (i) of the Petition, the Petitioner alleges the 1<sup>st</sup> Respondent violated sections 81 and 83 of the *Electoral Process Act*

*No.35 of 2016* by giving a gift of motor vehicle to Ntamba Mweru football club during the campaign as inducement that they vote for her.

In paragraph 8 (c) of the affidavit verifying the petition, the Petitioner averred that prior to the election day, the independent candidate gave a vehicle to a football team in Mununga area as a way of bribing the would-be voters. This vehicle was labeled Ntamba Mweru football club and was given to the team during campaigns a few weeks before poll day.

Section 81 (1) (c) of the *Electoral Process Act No 35 of 2016* provides that:

*“(1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly—*

*(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;”*

Section 83 of the *Electoral Process Act No 35 of 2016* is on undue influence and states as follows:

*“(1) A person shall not directly or indirectly, by oneself or through any other person-*

- (c) *do or threaten to do anything to the disadvantage of any person in order to induce or compel any person-*
  - (i) *to register or not to register as a voter;*
  - (ii) *to vote or not to vote*
  - (iii) *to vote or not to vote for any registered political party or candidate;*
  - (iv) *to support or not to support any political registered party or candidate; or*
  - (v) *.....*

In the case of *Colonel (Rtd) Dr. Besigye Kizza v Museveni Kaguly and Another EP No. 1/2001*, which is of persuasive value, the Chief Justice, enlisted 3 ingredients of bribery as being:

- (1) A gift was given to a voter.
- (2) The gift was given by the candidate or his agent and that
- (3) It was given with the intention of inducing the person to vote.

Therefore, the offence of bribery is committed by two people, the giver and the receiver. Proof of bribery requires more than merely seeing one person give money to another. The motive should be clear and linked to an inducement by the giver.

Having outlined the definition and principles applicable to the electoral malpractice of bribery, I shall now outline the alleged acts of bribery as pleaded by the Petitioner.

### **Bribery of giving K100 at Kazembe market meeting**

The allegation of bribery has to be carefully evaluated as there is a tendency for witnesses to go out of their way, fabricate stories which are presented to Court in support of their candidate.

The case of bribery rests in the incident of allegedly giving K100 to the two women at a meeting held by the 1<sup>st</sup> Respondent at Kazembe market in Chipungu ward.

The Petitioner through the evidence of PW2 and PW9 alleged that during a meeting at Kazembe market, the 1<sup>st</sup> Respondent gave two women K100 each as an inducement for their vote.

In rebuttal, the 1<sup>st</sup> Respondent said she never held a meeting at Kazembe. Even though this was not pleaded, the 1<sup>st</sup> Respondent did not object to it and I have proceeded to determine the allegation.

During cross examination of both PW2 and PW9 it came to my attention there is a case of stolen motor bikes that were bought by the 1<sup>st</sup> Respondent against the duo.

PW9 further said the 1<sup>st</sup> Respondent promised to boost his business and his wife's business and owes him money he used for 2016 election campaigns during the time he was her campaign manager, but the 1<sup>st</sup> Respondent has not fulfilled the promises.

The two witnesses further confirmed they had gone to Repete radio station in DRC which has wide broadcasting coverage in Chiengi, to express their views of the 1<sup>st</sup> Respondent.

At trial, I observed the demeanor of both PW2 and PW9 who were evasive during cross examination and failed to answer questions put across to them. Due to the type of witnesses these are, there is need for other evidence to support their assertion and veracity about bribery by the 1<sup>st</sup> Respondent.

Both PW2 and PW9 had a guarded response and disingenuous approach to responding to questions giving the impression they had a grind to axe with the 1<sup>st</sup> Respondent.

It is on record the relationship between PW9 and the 1<sup>st</sup> Respondent had soured. In cross examination, PW9 explained that the 1<sup>st</sup> Respondent had given him two motor bikes which he used during the 2016 campaigns. Following an accident, he sold the bikes and used the money for his treatment following an accident.

From PW9's evidence, I discern there is a turbulent relationship between him and the 1<sup>st</sup> Respondent. PW9 admitted he went to a radio station in DRC with the intention of making the 1<sup>st</sup> Respondent fulfill her promises of building a house for him. In cross examination, he told the Court he had forgiven the 1<sup>st</sup> Respondent.

When questioned on the second motor bike, PW9 could only state he was not in Court to testify about the motor bikes but on the Petition and became elusive and guarded. It is on record that the 1<sup>st</sup> Respondent reported the matter of the missing or stolen motor bikes to the police.

I am of the considered view this led to acrimony between PW9 and the 1<sup>st</sup> Respondent. It is only human to develop a grudge or misgivings towards the 1<sup>st</sup> Respondent especially that the matter of the missing motor bikes was reported to the police. PW9 had previously been RW1's campaign manager in the 2016 parliamentary election.

I have gone to lengths to show why I find PW9's evidence on this issue untruthful. It is my finding that PW9 is a partisan witness. I further find his evidence lacks particularity and is of no evidential benefit to the Petitioner.

In the case of PW2, he testified that at a rally held in Kazembe in Chipungu ward, he witnessed the 1<sup>st</sup> Respondent give two elderly women K100.00 and urged the duo to vote for her.

As to PW2's visit to radio Repete in DRC, he testified his presence was to express his views over the 1<sup>st</sup> Respondent and not to campaign. I do not understand why PW2 as a voter would during campaigns deem it fit to go to a foreign jurisdiction to air his opinions on the 1<sup>st</sup> Respondent who was a candidate in the election. In my view, the only motive was to disparage the 1<sup>st</sup> Respondent.

For the stated reasons, I find both PW2 and PW9 to be unreliable, interested and partisan witnesses and these types of witnesses tend to exaggerate claims as to what might have occurred during the campaign period. Their evidence required corroboration.

Beyond the evidence of PW2 and PW9, there is no other independent evidence that the two women were identified, that they received the K100 as an inducement to vote for the 1<sup>st</sup> Respondent. PW2 said he was able to identify the women but never did so.

I find that the allegation of bribery was never reported to the police and cannot be verified or substantiated nor can I rely on the evidence of PW2 and PW9 as clearly, they have an axe to grind with the 1<sup>st</sup> Respondent. I take the evidence adduced by PW2 and PW9 with a pinch of salt.

The Petitioner has failed to prove the allegation of bribery to the satisfaction of this Court to the required standard of meeting a fairly high degree of convincing clarity.

I need not exert my energies on the second tier that as a result of bribery, the majority of the electorate were or may have been prevented from voting for a candidate they preferred.

This allegation is dismissed.

### **Gifting of mini-bus**

*Black's Law Dictionary, 4<sup>th</sup> Edition at page 2267* defines inducement as the act or process of enticing or persuading another person to take a certain course of action.

At trial, the Petitioner reiterated the 1<sup>st</sup> Respondent gifted Ntamba Mweru football club of Chiengi a mini bus as inducement for the members of the club to vote for the 1<sup>st</sup> Respondent.

Contrary to her averment in the affidavit that the bus was given to the football club a few weeks before polling day, the Petitioner at trial averred the mini bus was given to the football club during campaigns in June 2021. She further conceded she was not aware that the football club belonged to the 1<sup>st</sup> Respondent and her husband.

Reacting to this allegation, the 1<sup>st</sup> Respondent informed the Court she registered the football club as a private company limited by guarantee with her husband Lawrence Mwelwa on 26<sup>th</sup> November, 2020. The football club was also registered with FAZ under division 2.

In cross examination, the 1<sup>st</sup> Respondent denied the assertion she gifted the bus to the football club during the campaign period which was from 14<sup>th</sup> May 2021 to 11<sup>th</sup> August, 2021 and that she did not know when the campaign period started.

In re-examination the 1<sup>st</sup> Respondent clarified the mini bus was purchased for the football club in February, 2021 and was given to the football club in June 2021 following the club's promotion to division 1,

and to fulfill the requirements of the fixture. However, the 1<sup>st</sup> Respondent did not produce any evidence to substantiate this.

Having considered the testimonies of both the Petitioner and the 1<sup>st</sup> Respondent, I find it is not in dispute that the 1<sup>st</sup> Respondent bought a mini bus for Ntamba Mweru football club as evidenced by the white book. I also find that it was given to the football club during the campaign period.

The issue for determination is whether the 1<sup>st</sup> Respondent at the time of giving the mini bus to the football club asked the members and the football club supporters to vote for her.

It was Counsel for the 1<sup>st</sup> Respondent's submission there is no law that prohibits philanthropic activity resulting in charitable gifts given during election season as they do not constitute corruption. To augment this submission, my attention was drawn to the holding of the Supreme Court in *Lewanika & Others v Chiluba*<sup>3</sup>.

Counsel for the 1<sup>st</sup> Respondent argued suspicion is not enough proof to constitute a corrupt motive and that the Petitioner being the party alleging bribery, has to clearly and unequivocally prove the corrupt motive.

The Petitioner further failed to prove the giving of the mini-bus by the 1<sup>st</sup> Respondent was followed by an express and open request for votes from the football club members.

I am guided by the case of *Reuben Mtolo Phiri v Lameck Mangani*<sup>7</sup>, whose brief facts were that about a week after filing nominations the appellant sank boreholes in about six places within the constituency, and the Respondent contended that this was in bid to procure votes from the residents of the areas in question.

The Supreme Court found that sinking of boreholes was an ongoing developmental project under the office of the District Commissioner and fell under philanthropic activities.

The Supreme Court went on to define philanthropic activities as the practice of helping the poor and those in need, especially by giving money and services.

A distinction can be drawn from the case of *Mumba v Daka*<sup>8</sup>, where the appellant who was the Minister of Health then, was seen personally driving a government ambulance and delivered it together with drugs and staff to a clinic that was not operational for five (5) years.

Thereafter, the appellant addressed a meeting at the clinic and openly asked people to vote for him. The clinic was re-opened about a day before the election. His election was nullified by the High Court and the Supreme Court upheld the nullification.

The actions of the appellant in the *Mumba case* went beyond philanthropic activities as espoused in the cases of *Lewanika v Chiluba* and *Reuben Mtolo Phiri*. The acts of re-opening of a clinic, delivery of

an ambulance, drugs and staff about a day before elections and addressing a campaign meeting by the appellant was a pure breach of the *Electoral Code of Conduct Regulations*.

In the present case, I am inclined to agree with Counsel for the 1<sup>st</sup> Respondent that the Petitioner's allegation in relation to the gift of a mini-bus has not been substantiated by further evidence to show that the same was done with the intention of enticing members of the football club to vote for the 1<sup>st</sup> Respondent.

As guided by the Supreme Court in the cited cases, I find that the 1<sup>st</sup> Respondent's giving of a mini bus to her football club did not offend the *Electoral Code of Conduct* regulations.

Further, as rightly argued by Counsel for the 1<sup>st</sup> Respondent philanthropic activities are not petitionable as they do not fall under illegal or corrupt practices envisaged under the *Electoral Process Act No.35 of 2016*. This is an undesirable provision as it can be manipulated under the guise of charitable activities.

I opine the law be amended so that certain activities are expressly excluded during the campaign period.

The Petitioner's allegation that the football club were gifted as an inducement to vote for the 1<sup>st</sup> Respondent fails as the onus was on her to prove the allegation to the required standard of a fairly high degree of convincing clarity.

I need not proceed to determine whether the majority of the electorate were or may have been prevented from voting for a candidate they preferred.

The allegation is unproven and dismissed.

**a) Giving of food and money**

The Petitioner in paragraph 8 (d) and (e) of her affidavit verifying petition averred that the District Commissioner distributed 10kg and 25 kg bags of mealie meal, cooking oil and rice to voters.

Section 81 (1) of the *Electoral Process Act No 35 of 2016* is relevant to the alleged wrong on the part of the 1<sup>st</sup> Respondent and creates the offence of bribery. Subsection (1) paragraph (a) provides as follows:

*“(1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly:*

*(c) make any gift, loan, offer, promise, procurement or agreement to or benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate or any election or the vote of any voter at any election.”*

The Petitioner testified that the District Commissioner was distributing mealie-meal, cooking oil and rice to voters as alleged.

Further, PW2 testified that the 1<sup>st</sup> Respondent alleged the PF was distributing mealie-meal and rice and the 1<sup>st</sup> Respondent urged people in Chipungu ward to get the foodstuffs and eat them and urinate on whatever would remain in case they had put something in the food to make people not to vote for the 1<sup>st</sup> Respondent.

I must state from the onset, I find it strange the Petitioner is insinuating that the District Commissioner who is the most senior civil servant at district level, was working under the instruction of the 1<sup>st</sup> Respondent who happened to be an independent candidate.

However, the Petitioner did not show that the District Commissioner did the alleged acts of distribution of foodstuffs with the 1<sup>st</sup> Respondent's knowledge and consent.

PW2's testimony does not help the Petitioner's case as it speaks of the 1<sup>st</sup> Respondent's allegation that the distribution of foodstuffs was being done by the Petitioner's political party. There is no evidence on record that the 1<sup>st</sup> Respondent was directly or indirectly involved in the distribution of foodstuffs to the purported electorate.

The elements in section 97 (2) (c) of the *Electoral Process Act No 35 of 2016* cited at page J13 have not been satisfied to the required standard of a fairly high degree of convincing clarity.

The onus was on the Petitioner to prove the allegation of distribution of food and that as a result of the giving of foodstuff on voting day, the

majority of the electorate were or may have been prevented from voting for a candidate they preferred.

The allegation remains unproved and is dismissed.

### **Distribution of food on voting day**

In the verifying affidavit, the Petitioner alleged that on voting day in Kalungwishi, Mununga and Chitutu wards, the 1<sup>st</sup> Respondent arranged foodstuffs to be given to voters on their way to voting.

It is my finding that there is insufficient evidence in relation to the allegation, and further the Petitioner has failed to prove the allegation of the distribution of food on the voting day by the 1<sup>st</sup> Respondent, as the malpractice must be directly or indirectly be connected to the candidate or her appointed agent by way of cogent evidence. None of the witnesses testified to a fairly high degree of convincing clarity.

Again, I need not go to the second tier that as a result of the giving of foodstuff on voting day, the majority of the electorate were or may have been prevented from voting for a candidate they preferred.

The allegation is without merit and is dismissed.

## **2. False statements**

The Petitioner in paragraph 3 (ii) of the Petition, alleges that the 1<sup>st</sup> Respondent and her campaign team went around the constituency

telling the voters not to vote for the Petitioner because she was married to a Chinese national who would take away the mines from them.

According to the Petitioner these words were uttered by the 1<sup>st</sup> Respondent during her radio interviews and at meetings held in various locations in the constituency.

In approaching this allegation made in the petition and sought to be proved by the Petitioner herein, instructive is Regulation 15 (1) (c) of the *Electoral Code of Conduct* which provides that:

*“(1) A person shall not—*

*(c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election;”*

**a) Radio interview**

Counsel for the Petitioner submitted that the making of false statements damaged the Petitioner’s reputation and as a result, the majority of the voters were prevented from voting for the petition and relied on section 84 (1) of the *Electoral Process Act No 35 of 2016* as follows:

*“(1) A person shall not, before or during an election, publish a false statement of the illness or death or withdrawal from election of a candidate at that election for the purpose of promoting or*

*procuring the election of another candidate, knowing that statement to be false or not believing in to be true.*

*(2) A person who contravenes subsection (1) commits an illegal practice, unless that person had reasonable ground for believing and did believe, the statement to be true.”*

It was the Petitioner’s testimony at trial that the 1<sup>st</sup> Respondent was heard on Kalungwishi radio station saying the Petitioner is a satanist, prostitute and is married to a Chinese national who would come and get mines from the people of Chiengi. The Petitioner said the 1<sup>st</sup> Respondent was always heard on radio issuing disparaging words about her.

PW2 also testified that the 1<sup>st</sup> Respondent was on several occasions heard on Kalungwishi radio telling people not to vote for the Petitioner as she is married to a Chinese national who would take away their land.

The Petitioner attempted to submit as evidence a flash disk of a recording and the 1<sup>st</sup> and 2<sup>nd</sup> Respondent objected to the production as they did not have an opportunity to hear the audio. Secondly that a foundation had not been laid which was contrary to section 8 (1) and (2) of the *Electronic and Telecommunication Act No 6 of 2020*.

I did not admit the flash disc into evidence as no foundation was laid and it was difficult to ascertain its authenticity, genuineness and reliability.

There is no official recording of any of the instances that the 1<sup>st</sup> Respondent was on radio issuing the alleged statements produced by the Petitioner or PW2. All I have as a basis for determination of these allegations is the credibility of the witnesses alone.

At trial, the Petitioner only spoke about the 1<sup>st</sup> Respondent being on radio via telephone interview on 24<sup>th</sup> June, 2021 where she told people that the Petitioner had petrol bombed the only radio station the people of Chiengi had. The Petitioner did not adduce any other evidence to establish when the 1<sup>st</sup> Respondent was issuing defamatory statements that she is married to a Chinese national who would take away people's land.

PW2's evidence had selective gaps and he equally did not give an indication as to the time, date or even month that the 1<sup>st</sup> Respondent was heard on radio uttering the said remarks.

RW2 the radio announcer and acting station manager of the radio station on which the 1<sup>st</sup> Respondent is alleged to have uttered the defamatory statements refuted the allegations and told the Court it is unethical for the radio station to allow someone to issue such statements during an interview.

As rightly observed by Counsel for the Petitioner, in order for a statement to qualify as character assassination pertaining to a candidate

in an election, the statement must be false and relate to the personal character or conduct of the candidate.

The onus was on the Petitioner to prove to this Court that the 1<sup>st</sup> Respondent was heard uttering the alleged disparaging words on radio on various days.

However, in the absence of such evidence and owing to the demeanor of the Petitioner and PW2, I find the 1<sup>st</sup> Respondent's witnesses to be more credible and as such I am inclined to believe that the alleged radio interview did not occur where the alleged disparaging words were uttered. I find that section 84 (1) of the *Electoral Process Act No 35 of 2016* has not been proved.

Having found no meeting took place, it is my finding that there is a lack of cogent evidence to support this allegation to the required standard of a fairly high degree of convincing clarity.

The onus was on the Petitioner to prove the allegations of the character assassination by the 1<sup>st</sup> Respondent and that as a result of the disparaging words, the majority of the electorate were or may have been prevented from voting for a candidate they preferred.

The allegation is accordingly dismissed.

## **b) Meetings**

In the verifying affidavit, the Petitioner at paragraph 11 alleged the 1<sup>st</sup> Respondent at her meetings and rallies on several occasions by herself, campaign manager and campaign team on several occasions directed her campaign team to utter unpalatable things at the Petitioner by means of character assassination by the electorates to the effect that the Petitioner is a woman of low virtue with bad character.

The Petitioner alleged that the 1<sup>st</sup> Respondent repeated the utterances she was a satanist, prostitute and married to a Chinese national who would come and get mines from the people of Chiengi. This was allegedly done during her campaign meetings in Puta, Lambwe Chomba, Luchinda and Mununga wards.

### **Meeting at Lambwe Chomba**

The Petitioner testified she was present at the meeting held by the 1<sup>st</sup> Respondent in Lambwe Chomba at the clinic. The Petitioner stated she had gone to visit her sister-in-law when she heard the 1<sup>st</sup> Respondent on the speaker telling people that the Petitioner was dumb and deaf, a prostitute, satanist, a savage and married to a Chinese.

This evidence was corroborated by PW8 who said the 1<sup>st</sup> Respondent held a meeting at the clinic ground in Lambwe Chomba towards the end of June 2021. At the said meeting the 1<sup>st</sup> Respondent said the Petitioner was a satanist, was dumb and deaf and married to a Chinese.

The 1<sup>st</sup> Respondent admitted having held a meeting in Lambwe Chomba in the month of July 2021 but refuted the allegations that she made the defamatory remarks in relation to the Petitioner.

The evidence of the Petitioner and PW8 places the 1<sup>st</sup> Respondent at the meeting in Lambwe Chomba, and the 1<sup>st</sup> Respondent herself also admitted having held a meeting in Lambwe Chomba.

The question that begs an answer is whether the 1<sup>st</sup> Respondent uttered the alleged disparaging statements in reference to the Petitioner.

In the case of *Alex Cadman Luhila v Batuke Imenda*<sup>10</sup>, Munthali J. as he then was, said the following:

*“Those who think they can find their way to Parliament on the platform of lies and calumnies intended to defame the characters of opponents, those who think they can find their way to Parliament on the platform of illegal practices of various shades, those who think they can find their way to Parliament on the platform of bribery and corruption, the message is this: The Courts will not hesitate to show them the door.”*

Can I show the 1<sup>st</sup> Respondent the door herein?

According to the Petitioner, she was in Lambwe Chomba visiting her sister-in-law when she passed near the clinic ground where the 1<sup>st</sup> Respondent held a meeting and uttered disparaging words against her.

During trial, it was the Petitioner's evidence that when one candidate was campaigning, the others were not to be in the same area. The explanation of going to the same area to visit a sister-in-law was rather mischievous on the part of the Petitioner and clearly contrary to the campaign guidelines.

Suffice to state, from the evidence of PW8, I am satisfied that the 1<sup>st</sup> Respondent at the meeting held at Lambwe Chomba uttered the disparaging words that the Petitioner was dumb and deaf, a satanist and married to a Chinese.

At the trial PW8's testimony remained unshaken, calm and collected and maintained her stance that she heard the 1<sup>st</sup> Respondent utter the disparaging words about the Petitioner and I believe her. In rebuttal the 1<sup>st</sup> Respondent vehemently denied she defamed the Petitioner as her campaign was issue based.

I find that PW8 did not have any reason to falsely accuse the 1<sup>st</sup> Respondent of uttering the disparaging words. Therefore, I find the 1<sup>st</sup> Respondent did utter the disparaging words that the Petitioner is a satanist, savage, dumb and deaf and married to a Chinese national who would take away their land. The uttered words are defamatory in the sense that the 1<sup>st</sup> Respondent did not substantiate them.

I agree and adopt the observations by the Supreme Court in the case of *Mbololwa Subulwa v Kalye Mandandi* <sup>2</sup> cited by Counsel for the

Petitioner that the statement complained of must cause harm to the reputation of the individual and adversely affect the perception by the voters.

However, the issue does not end there and the next cardinal issue is whether the said utterances affected the election results by causing the majority of voters in the constituency not to vote for their preferred candidate.

In *Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General*<sup>11</sup>, the Constitutional Court said:

*“In addition to proving the electoral malpractice or misconduct alleged, the Petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.”*

I am also guided by the case of *Mbololwa Subulwa v F Mandandi*<sup>2</sup> Constitutional Court where in discussing the issue of widespread had this to say:

*“This is because there is no evidence of the number of wards in the constituency as what was given as 38 is the number of polling stations in Sioma Constituency. We have failed to decipher the number of wards in the constituency which could have been the*

*basis for the trial judge's conclusion that the character assassination was indeed widespread and that it did affect or may have affected the election results."*

PW8 testified that due to the disparaging words uttered by the 1<sup>st</sup> Respondent, she did not vote for her.

In the present circumstances, beyond PW8's evidence, there is no other evidence led by the Petitioner to establish the number of people that attended the said meeting and heard the 1<sup>st</sup> Respondent's utter the disparaging words. I am persuaded by holding in *Christopher Kalonge v Annie Munshya*<sup>13</sup> that:

*"allegations made in the petition if proved must affect the results of the election in a substantial manner. Without a bearing on the results, the election cannot be avoided."*

I take judicial notice that Chiengi constituency has 15 wards and the utterances in one ward cannot be said to have affected the election.

The Petitioner has failed to adduce cogent evidence that the uttered disparaging words were so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice. The standard of a fairly high degree of convincing clarity has not been met.

I dismiss the allegation accordingly.

## **Meeting at Lupiya village**

The Petitioner through PW6 alleged the 1<sup>st</sup> Respondent uttered defamatory words at a meeting held at the market in Lupiya village. According to PW6, the 1<sup>st</sup> Respondent told people not to vote for the Petitioner as she is married to a Chinese national who would take over their land, she was a soldier and a savage who would always be beating them.

The meeting was said to have been held towards the end of June 2021. The ECZ campaign timetable appearing on page 1 of the 1<sup>st</sup> Respondent's bundle of document shows that the 1<sup>st</sup> Respondent was scheduled to campaign in Chiengi ward from 26<sup>th</sup> June to 28<sup>th</sup> June 2021.

The 1<sup>st</sup> Respondent herself confirmed she had a meeting in Lupiya. It is my finding the 1<sup>st</sup> Respondent did have a meeting in Lupiya village towards the end of June as asserted by PW6.

Having established that the 1<sup>st</sup> Respondent held a meeting in Lupiya village, the next issue for determination is whether the 1<sup>st</sup> Respondent uttered the alleged disparaging words that the Petitioner is married to a Chinese national who would grab land from people, that the Petitioner is a soldier and a savage and she burnt the radio station and the effect of these or statements on the electorate.

The evidence in proof of the utterances was given by PW6 who was calm and collected at trial and her testimony was not discredited by the 1<sup>st</sup> Respondent, I am therefore inclined to believe her testimony that she heard the 1<sup>st</sup> Respondent utter the alleged disparaging words.

This brings me to the second limb as to whether due to the 1<sup>st</sup> Respondent's utterances the majority of voters in Chiengi constituency were prevented from electing their preferred candidate.

In *Mubita Mwangala v Inonge Mutukwa Wina*<sup>4</sup>, though decided on the *Electoral Act of 2006*, but the principles to the extent stated herein, the Supreme Court held that:

*“In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct, it must be shown that the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.”*

It is my observation that PW6 did not adduce any evidence regarding the number of people who attended the meeting. This would have assisted the Court in ascertaining whether a substantial number of people heard the disparaging words and were affected by them.

In *Mubika Mubika v Poniso Njeulu*<sup>14</sup>, the Supreme Court held that:

*“The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or might have been prevented from electing a candidate of their choice, it is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate.”*

The Constitutional Court in the case of *Sunday Chitungu Maluba v Rodgers Mwewa and the Attorney General*<sup>15</sup>, stated that the “majority” is the greater number of a part, and it is only used with countable nouns.

As earlier stated, I take judicial notice that Chiengi constituency has 15 wards and even though the 1<sup>st</sup> Respondent uttered the disparaging words at Lupiya village, I consider this to be an isolated incident and not widespread.

The evidence adduced falls short of proving that the disparaging words were widely disseminated resulting in the majority of the electorate

being prevented from voting a candidate they preferred. The standard of a fairly high degree of convincing clarity has not been satisfied.

The allegation is not proved and is dismissed.

### **Meeting at Puta Kasoma**

PW5 alleged that on 28<sup>th</sup> June 2021, the 1<sup>st</sup> Respondent held a political rally on 28<sup>th</sup> June 2021 in Puta Kasoma where she uttered similar words that the Petitioner is a satanist, a prostitute who sleeps with any man that comes her way during campaigns, married to a Chinese national who would take away land from them and with savage mannerisms having being a soldier.

In response to this allegation, the 1<sup>st</sup> Respondent said she did not hold any meeting in Puta Kasoma as it was one of the areas she was not allowed to go to by the senior Chief Puta.

This evidence was corroborated by RW3 the 1<sup>st</sup> Respondent's campaign manager who said the 1<sup>st</sup> Respondent never had any rally in Puta Kasoma which is in Katete ward as the Chief had ordered people not to receive any independent candidate.

In my observation of PW5, she was elusive and not truthful at trial. I say this as under cross examination, when asked to as whether she served the petition on the 1<sup>st</sup> Respondent, her brusque response was that she was not in Court to talk about that. This was telling on the

truthfulness of the PW5. This to me, is indicative of an unreliable witness as all she had to do was respond truthfully.

PW5 was the only witness that testified about the alleged meeting in Puta Kasoma and there was no independent or corroborating evidence. Due to her evasive demeanor, I am inclined to believe the 1<sup>st</sup> Respondent's evidence and RW3 her campaign manager that there was no meeting in Puta Kasoma as she was denied access by the area Senior Chief Puta.

The evidence of a meeting at Puta Kasoma towards the end of June 2021 is not proved conclusively or satisfactorily since it conflicts with the campaign program issued by ECZ (page 2 of the 1<sup>st</sup> Respondent's bundle of documents).

From the shaky evidence of PW5, I take it the meeting was a fabrication and did not take place due to the restrictions imposed by the Senior Chief Puta which I accept and which evidence was not challenged by the Petitioner.

Having found that no meeting took place, it is my finding there is a lack of cogent evidence to support this allegation to the required standard of a fairly high degree of convincing clarity.

The allegation is dismissed.

### **Meeting at Kazembe market**

It is alleged by PW2 and PW9 that the 1<sup>st</sup> Respondent held a meeting at Kazembe market where she told people that the Petitioner is dumb and is married to a Chinese national who would take away their land.

The 1<sup>st</sup> Respondent on the other hand averred she never held a meeting at Kazembe market but met her supporters at one of her pillar's house.

RW3 also told the Court the 1<sup>st</sup> Respondent never held any meeting or rally but was conducting door to door campaigns. I take judicial notice that the ECZ guided that parties hold door to door meetings due to the COVID19 pandemic.

Of persuasive value, I wish to refer to a criminal case of *Borniface Chanda Chola and 2 Others v The People*<sup>12</sup>, where it was stated that:

*“The critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence.”*

Without being too repetitive, PW2 and PW9 are partisan witnesses with an axe to grind with the 1<sup>st</sup> Respondent as stated at pages J67-68.

The evidence of PW2 and PW9 raises doubt as to whether there was a meeting held at Kazembe market. Both PW2 and PW9 are what I would

call suspect witnesses whose evidence needed to be corroborated by independent evidence, which was not done.

In the absence of independent corroborating evidence or that “other” evidence to support PW2 and PW9’s testimony and veracity, I am inclined to believe the evidence of the 1<sup>st</sup> Respondent and RW3 that there was no meeting held at Kazembe market by the 1<sup>st</sup> Respondent.

Arising from my finding, the assertion that the 1<sup>st</sup> Respondent made disparaging statements at Kazembe market fails.

Having found that no meeting took place, it is my finding that there is a lack of cogent evidence to support this allegation to the required standard of a fairly high degree of convincing clarity.

For the foregoing reasons, it is an exercise in futility to make a determination on the second tier as to whether the majority of the electorate were affected by the alleged actions of the 1<sup>st</sup> Respondent.

The allegation is dismissed.

### **Luchinda, Mununga wards**

The Petitioner testified that the 1<sup>st</sup> Respondent made the same disparaging utterances in Luchinda and Mununga wards. However, she called no supporting evidence and for that reason, the allegation is dismissed.

### **3. Undue influence and intimidation**

#### **a) Violence**

The Petitioner in paragraph 3 (iii) of the petition alleged that the 1<sup>st</sup> Respondent whilst speaking on Kalungwishi television falsely accused the Petitioner to have petrol bombed the radio station and incited the listeners rise thereby putting the Petitioner's life in danger.

In paragraph 3 (iv) it was alleged that as a result of the radio broadcast by the 1<sup>st</sup> Respondent, the Petitioner's campaign vehicle, a Land Rover was damaged. Also damaged were the Petitioner's house and market shelter.

Section 83 (1) (a) of the *Electoral Process Act No 35 of 2016* provides that:

*“(1) A person shall not directly or indirectly, by oneself or through any other person—*

*(a) make use of or threaten to make use of any force, violence or restraint upon any other person;”*

At the trial, the Petitioner clarified there is no Kalungwishi television but only Kalungwishi radio station. The Petitioner testified that during a radio interview, the 1<sup>st</sup> Respondent accused her of having petrol bombed the radio station.

PW2 also testified the 1<sup>st</sup> Respondent was always heard on radio claiming the Petitioner had burnt the radio station. He went on to state the radio station was operational around 13:00 hours on the same day it was reported to have been gutted.

In rebuttal, RW2 the station manager and radio announcer of Kalungwishi radio station said the 1<sup>st</sup> Respondent never made such accusations during her radio interview. He further said the radio station was petrol bombed and only resumed operations after 48 hours and not around 13:00 hours on the same day as alleged by the Petitioner.

It was the Petitioner's testimony that due to the 1<sup>st</sup> Respondent's accusation that of having petrol bombed the radio station, the 1<sup>st</sup> Respondent's campaign team destroyed her house, damaged her vehicle and a market shelter.

I am failing to follow the sequence of events in the Petitioner's evidence due to inconsistencies.

In her affidavit verifying the petition, the Petitioner averred that on 7<sup>th</sup> August 2021, the 1<sup>st</sup> Respondent's sympathisers damaged her car house and market shelter. She went on to state that the incident was intimidating in nature and it disadvantaged the Petitioner from campaigning.

However, at trial the Petitioner averred her vehicle, house and market shelter were destroyed around 05:00 hours on 24<sup>th</sup> June, 2021.

Further, the evidence on record as presented by the Petitioner's witnesses reveals that the radio station was gutted or petrol bombed on 24<sup>th</sup> June, 2021.

Therefore, it is not clear as to when the 1<sup>st</sup> Respondent was heard on radio inciting listeners to destroy her property and when exactly the Petitioner's property was destroyed and what led to such destruction.

The Petitioner's pleadings show her property was destroyed on 7<sup>th</sup> August 2021 and not 24<sup>th</sup> June 2021. Clearly there are inconsistencies on the date and selective gaps in the chronology of events.

In support of this allegation, PW4 testified that on 24<sup>th</sup> June 2021, his neighbours told him the radio station had been set ablaze by the Petitioner. On his way to the radio station, as he crossed the bridge a mob approached him and accused him of having been sent by the Petitioner to burn the radio station.

PW4 was at the camp with the Petitioner when the mob arrived and started harassing the Petitioner and followed her to the police station. The mob threatened to burn her motor vehicle and started throwing stones on the roof of the house. He recognized the ring leaders as Chongo, Ng'ambi, Oswald, Chishala, Arnold and Dimus.

According to PW4, he approached Chongo the 1<sup>st</sup> Respondent's commander to advise the mob to stop what they were doing. PW4 heard the mob say they would not vote for the Petitioner as she had burnt the

radio station and was married to a Chinese who would take their land away from them.

The Petitioner did not avail the Court with sufficient evidence to prove that the 1<sup>st</sup> Respondent actually uttered those words on radio and incited the listeners to rise against the Petitioner, neither did she produce evidence of the alleged damaged car, house and market shelter. PW4 only heard the mob threaten to burn her motor vehicle but did not witness the actual event.

The Petitioner admitted the 1<sup>st</sup> Respondent was not present at the time of the incident. It was the Petitioner's evidence at trial that Chongo the 1<sup>st</sup> Respondent's campaign manager was the ring leader of the mob. PW3 and PW4 also testified that the mob was led by Chongo.

From the evidence in rebuttal by the 1<sup>st</sup> Respondent, she said her campaign manager was RW3 which evidence was confirmed by RW3 himself.

It is my finding the Petitioner has failed to prove that Chongo was the 1<sup>st</sup> Respondent's election agent or polling agent or that he was acting with her knowledge or consent. It is my finding that the alleged violence cannot be attributed to the 1<sup>st</sup> Respondent.

In respect to the allegation that the Petitioner's motor vehicle, house and market shelter were damaged after the radio station was set ablaze, the Petitioner has not shown that the alleged acts by a mob were done

with the 1<sup>st</sup> Respondent's knowledge and consent or approval or his election or polling agent. I find that the names mentioned as those who destroyed the property had no connection to the 1<sup>st</sup> Respondent.

Having found that the alleged violence cannot be attributed to the 1<sup>st</sup> Respondent or her election or polling agents, there is no need to determine whether as a result of these acts of violence, the majority of voters were or may have been prevented from electing a candidate whom they preferred.

These allegations have not been proved with a fairly high degree of convincing clarity and are dismissed.

#### **Allegation of assault by the 1<sup>st</sup> Respondent's agents**

In her petition, the Petitioner generally alleges that the campaigns were characterized by electoral malpractices. The Petitioner alleges in her examination in chief that the 1<sup>st</sup> Respondent was using violence by sending people to beat up anyone who was campaigning for her and this affected the outcome of the elections.

In support of this allegation, PW7 testified that on 3<sup>rd</sup> July 2021 whilst having a meeting with four polling agents, after the meeting he saw a Toyota harrier written Kalungwishi FM and a mini-bus where people disembarked from together with the 1<sup>st</sup> Respondent. According to PW1, the 1<sup>st</sup> Respondent instructed the people she came with to assault those attending the meeting.

Arising from the fracas that ensued, the police were called and John Ngoi was arrested.

I find that this allegation was not pleaded and only arose during examination in chief of the Petitioner and PW7. The rules of procedure are clear that only issues raised in the pleadings should be dealt with. The Petitioner should provide their case as pleaded and cannot go beyond its pleadings.

Therefore, the Court cannot frame any issue not pleaded. And in this instance Counsel for the 1<sup>st</sup> Respondent brought it to the attention of the Court as an observation. Consequently, I cannot exert any energies on this issue.

### **Undue influence**

In paragraph 3 (v) to (vii) of the Petition, it was alleged that the Petitioner ran to a police post for protection but the mob followed and broke the cells resulting in the prisoners to escape. The Petitioner retreated to Chiengi boma to save her life and thereby was not free to campaign in the constituency.

Section 83 (1) (g) of the *Electoral Process Act No 35 of 2016* provides as follows:

*“(1) A person shall not directly or indirectly, by oneself or through any other person –*

*(g) unlawfully prevent the holding of any political meeting, march, demonstration or other political event.”*

At trial the Petitioner averred that on 24<sup>th</sup> June, 2021 around 05:00 hours she was attacked by the 1<sup>st</sup> Respondent's sympathisers who followed her to the police station and broke the police cells causing the inmates to escape. She further testified she retreated to Chiengi boma and could not campaign as she was not free.

According to the Petitioner, the 1<sup>st</sup> Respondent and campaign team seized that opportunity to misinform the electorates that the Petitioner and her campaign team were detained at Chiengi boma and therefore they should not vote for her.

However, in cross examination the Petitioner said she campaigned in the whole constituency. This contradicts her allegation that she was not free to campaign.

In support of this allegation, PW3 testified that on 24<sup>th</sup> June 2014 after receiving a phone call from an officer from Office of the President, he and John Mutunga went to the Kalungwishi radio station and they were accused of being behind the burning of the raid station by a mob found at the station.

The officer in charge failed to protect them and were rescued by Zambia Army and taken to Chiengi. PW3 did not mention where the Petitioner

was at the material time. The Petitioner's evidence in this respect to those of PW3 are not in sync.

PW4 testified that on 24<sup>th</sup> June 2021, he was informed by his neighbours that the radio station had been burnt and it was rumoured to have been done by the Petitioner. I cannot rely on the evidence adduced by PW4 as part of it is hearsay and he failed to prove that the mob were sent by the 1<sup>st</sup> Respondent.

I find it odd that despite the Petitioner making a serious allegation of the 1<sup>st</sup> Respondent's sympathisers breaking into the police cells resulting in inmates escaping, the Petitioner did not call any police officer to confirm this piece of evidence. In this respect, the evidence is unreliable and it is not safe to rely on it.

Premised on the above reasons, I find that there is no cogent evidence to the required standard of a fairly high degree of convincing clarity that the Petitioner was stopped from campaigning in Chiengi constituency by the 1<sup>st</sup> Respondent. This allegation of intimidation is unsubstantiated and unproven.

I therefore dismiss the said allegation.

## **2<sup>nd</sup> Respondent**

The Petitioner has an omnibus allegation against the 2<sup>nd</sup> Respondent that there was widespread non-compliance of both the *Electoral*

*Process Act No 35 of 2016 and Electoral Code of Conduct Regulations* therein and as a result the election was not free and fair.

In its answer, the 2<sup>nd</sup> Respondent denied the allegations advanced by the Petitioner as it conducted the elections in conformity with the Constitution of Zambia and the *Electoral Process Act No 35 of 2016*. It was stated that the allegations did not relate to the 2<sup>nd</sup> Respondent.

Section 97 (2) (b) of the *Electoral Process Act No 35 of 2016* states as follows:

(2) *The election of a candidate as 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 -*

*(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election;”*

From a reading of section 97 (2) (b) of the *Electoral Process Act No 35 of 2016*, it calls for the nullification of an election in the event there was

non-compliance with the principles laid out in the *Electoral Process Act No 35 of 2016* relating to the conduct of elections.

I heed the guidance of the Constitutional Court in the case of *Giles Yamba Yamba v Kapembwa Simbao*<sup>17</sup> that Article 229 (2) (b) of the *Constitution of Zambia* expressly gives the function to conduct elections to the Electoral Commission of Zambia.

In my considered view, from a reading of Article 229 (2) (b) of the *Constitution of Zambia (Amendment) Act No 2 of 2016* concerns itself with non-compliance to the provisions of the Act by ECZ, the body charged with the conduct of elections and not the candidates to an election or their agents. This should be read with subparagraph (4) which reads as follows:

(4) *An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or tribunal that the election was so conducted to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election."*

Therefore, cogent evidence must be adduced by the Petitioner to prove the non-compliance affected the results of the election.

I agree with Counsel for the 2<sup>nd</sup> Respondent, that the allegations all relate to alleged malpractices by the 1<sup>st</sup> Respondent.

It is my finding that the Petitioner did not make out any allegation concerning the 2<sup>nd</sup> Respondent non-compliance with the provisions of the *Electoral Process Act No 35 of 2016*.

There is nothing in the evidence that pinpoints to the 2<sup>nd</sup> Respondent and since the allegations against the 2<sup>nd</sup> Respondent are vague, there is nothing to go by on record.

The Petitioner has failed to prove the threshold that there was non-compliance with the electoral laws by the 2<sup>nd</sup> Respondent which affected the election results.

The allegations against the 2<sup>nd</sup> Respondent are devoid of merit and dismissed.

### **Disposal**

By way of disposal, having found that the Petitioner has failed to prove all of the allegations set out in the Petition to the required standard of a fairly high degree of convincing clarity, the Petition herein is dismissed.

I therefore declare that the 1<sup>st</sup> Respondent, Given Katuta was duly elected as Member of Parliament for Chiengi constituency.

### **Costs**

The Petitioner seeks an order for costs in her favour. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent prays that the Petition be dismissed and costs awarded in their favour.

In order to prevent injustices and promote access to Courts when it comes to matters involving constitutional and governance issues affecting the country such as the present election petition, parties must not easily be condemned in costs. Therefore, costs should not be ordered as a punitive measure.

I am guided by the Supreme Court in the case of *Saul Zulu v Victoria Kalima*<sup>5</sup> and in the case of *Lewanika v Chiluba*<sup>3</sup> elucidated that:

*“However, it is clearly in the proper functionality of our democracy that challenges to the election of President which are permitted under the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs.”*

I adopt the cited passage.

The parties herein shall bear their own costs.

Leave to appeal is granted.

Delivered and dated at Lusaka this 22<sup>nd</sup> day of November, 2021.



.....  
**IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**