

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

2021/HP/EP/0042

IN THE MATTER OF:

THE PARLIAMENTARY ELECTION

RELATING TO MFUWE CONSTITUENCY HELD

ON 12<sup>TH</sup> AUGUST, 2021.

AND

IN THE MATTER OF:

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

AND

IN THE MATTER OF:

ARTICLES, 1, 2, 5, 8, 9, 45, 46, 48, 49, 50,  
54, 70, 71, 72 AND 73 OF THE CONSTITUTION  
OF ZAMBIA, CONSTITUTION OF ZAMBIA ACT,  
CHAPTER 1, VOLUME 1 OF THE LAWS OF  
ZAMBIA.

AND

IN THE MATTER OF:

SECTION 29, 37, 38, 51, 52, 55, 58, 59,  
60, 66, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82,  
83, 86, 87, AND 89 OF THE ELECTORAL  
PROCESS (ELECTORAL CODE OF CONDUCT)  
ACT NO. 35 OF 2016 OF THE LAWS OF  
ZAMBIA.



2. *Akashambatwa Mbikushita Lewanika and 4 Others -V- Fredrick Titus Jacob Chiluba (1998) ZR 49.*
3. *Abiud Kawangu -V- Elijah Muchima 2016/CC/A039*
4. *Sikota Wina and Others -V- Michael Mabenga SCZ No. 15 of 2003.*
5. *Christopher Lubasi Mundia -V- Sentor Motors Limited (1982) ZR 66.*
6. *Steven Masumba -V- Elliot Kamwendo Selected Judgment No. 53 of 2017.*
7. *Richard Sikwebele Mwapela -V- Miyuyu Chinga 2016/CC/A037*

**Other Works Referred to:**

1. *Constitution of Zambia Act No. 2 of 2016.*
2. *Electoral Process Act No. 35 of 2016.*

The Petitioner, Newton Isaiah Ng'uni of the United Party for National Development (UPND), and the 1<sup>st</sup> Respondent, Maureen Mabonga of the Patriotic Front (PF), were Electoral Candidates during the General Elections held on 12<sup>th</sup> August, 2021. The two competed for election as Member of Parliament for Mfuwe Constituency in Lavushimanda District of Muchinga Province. The 2<sup>nd</sup> Respondent, Electoral Commission of Zambia (ECZ), organised and conducted the elections pursuant to its Constitutional mandate under Article 229 of the Constitution of Zambia.

Following the elections, the 1<sup>st</sup> Respondent was declared the winner and duly elected Member of Parliament for Mfuwe Constituency. The election results record of proceedings which is produced in the Affidavit in Opposition as exhibit 'MM2' shows that the 1<sup>st</sup> Respondent polled 5,101 votes whilst the Petitioner

came out third and polled 1,809 behind an Independent Candidate Peter Chipasha who got 2,695 votes all of which was out of 12,393 votes cast which represented a 61.75 percent voter turnout.

### **PLEADINGS**

The Petitioner filed this Petition on 27<sup>th</sup> August, 2021. The Petition is brought under Article 73 of the Constitution and Sections 97(2)(a) and (b) as well as 98 of the Electoral Process Act No. 35 of 2016 among others.

For ease of reference, the aforementioned article and sections will be quoted as follows:

Article 73(1) of the Constitution provides that:-

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

Section 97(2) of the Electoral Process Act provides that:-

***“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,”*

Section 97(4) of the Electoral Process Act provides that:-

*“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 a tribunal that the election was so conducted as 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.”***

I must hasten to mention at the outset that this Petition is properly before me. This is because it complies with the Constitution of Zambia Act No. 2 of 2016 as cited above and Section 98 of the Electoral Process Act which requires that a Petitioner ought to have been a candidate at the election to which the election petition relates, and this was the case herein for the Mfuwe Parliamentary Constituency seat.

With regard to the Petition, in paragraph 18, the Petitioner has alleged that contrary to the Returning Officer's declaration that the 1<sup>st</sup> Respondent was duly elected, she was not validly elected. The reasons advanced for that allegation are contained in paragraphs 3 to 17 of the petition and there is an Affidavit in Support of the petition augmenting the same arguments. The said allegations will be dealt with in detail later in the Judgment.

In paragraph 17 of the petition it is contended that the illegal practices committed by the 1<sup>st</sup> Respondent during the campaign period and on voting day did not promote conditions conducive to promote free and fair elections. He prays that the election of the

1<sup>st</sup> Respondent as a member of the National Assembly for Mfuwe Parliamentary Constituency be declared null and void and that the illegal practices committed by the 1<sup>st</sup> Respondent and/or her agents so affected the election results and that the same ought to be nullified. He further prays for costs to be borne by the Respondents.

The 1<sup>st</sup> Respondent filed her Answer on 13<sup>th</sup> September, 2021 which is accompanied by her Affidavit in Opposition to the Petition. She pleads in paragraphs 1 and 14 of her Answer that she was duly and validly elected as Member of Parliament for Mfuwe Constituency in the 12<sup>th</sup> of August, 2021 elections. The 1<sup>st</sup> Respondent through paragraphs 2 to 16 of her Answer denies all allegations made in the petition.

She contends that the Petitioner's allegations that she distributed or directed others like the District Commissioner and Chief Chiundaponde to distribute campaign items, money and bicycles are false. The 1<sup>st</sup> Respondent also avers that accusations that she intimidated voters, abused government resources like social cash transfer and vehicles to her advantage are false. She adds that the Petitioner lost the election because he was unpopular as seen in the results and that he has failed to show any violations on her part hence the petition must be dismissed with costs.

The 2<sup>nd</sup> Respondent did not file any pleadings but appeared for the petition hearing.

## **THE EVIDENCE**

The petition came up for hearing on 28<sup>th</sup> September, 2021 at Chinsali in Muchinga Province. The Petitioner called a total of 14 witnesses while the 1<sup>st</sup> and 2<sup>nd</sup> Respondent opted to rely on the Answer and Affidavit in Opposition earlier filed. Both parties filed written submissions.

The Petitioner was the first witness for his case and will be referred to as PW1. His evidence was that he witnesses abuse of government resources by the District Commissioner, Yvonne Chisenga, when she distributed money and bicycles to village headmen and voters that live in Chief Chiundaponde's chiefdom. According to him, this information came from Christopher Chisenga his Campaign Manager, Chief Chiundaponde himself and the other witnesses before this Court.

The Petitioner also testified that Mwenda Kabala was ferrying people using a motor vehicle registration number BEA 5231 to Chiundaponde polling station on election day. He added that this same vehicle was suspected to be property of the Electoral Commission of Zambia (ECZ) because it was once seen at Lavushimanda District Council with other vehicles that were hired by ECZ. However, he admitted that when a search was done it was found that the registration number was fake.

During cross-examination, the Petitioner described the motor vehicle registered BEA 5231 as a white Foton Twin Cab which had no ECZ branding. He stated that he was only informed that

it was an ECZ vehicle by Mervis Nalwimba and George Bwalya. The Petitioner when asked if he had any evidence linking the 1<sup>st</sup> Respondent to the malpractice answered in the negative. -

The second witness was Christopher Chisenga of Mwansa Mumba village in Chief Chiundaponde's chiefdom hereinafter referred to as PW2. His evidence was that on 31<sup>st</sup> July, 2021 he and other village headmen including Kalandu Kunda, Chisala Chabu and Molofeni were called by PF party officials that included the 1<sup>st</sup> Respondent, Mr. Chitema, Prof. Nkandu Luo, Humphrey Katemba, Alfred Mwape and Given Lubinda who disembarked from two planes. He told the Court that he and the other village headmen, 42 in number, were in a classroom when Prof. Nkandu Luo told them to vote for all the PF candidates in the general election. He added that Prof. Nkandu Luo then gave the 1<sup>st</sup> Respondent an envelope containing cash. According to him, the 1<sup>st</sup> Respondent gave each one of them K150.00 from the said envelope.

PW2 added that they were told by the 1<sup>st</sup> Respondent that the money was for them to convince others to vote for PF and that she would bring bicycles to the Chief's palace at a later date. He also gave testimony that after they were given money, he saw the 1<sup>st</sup> Respondent give unknown amounts of money to church leaders.

PW2 further testified that on 5<sup>th</sup> August, 2021 upon hearing loud music from Muwele Primary School he and his friend Kapilineti

decided to go there. When they arrived, they saw two vehicles with PF stickers. One came with the 1<sup>st</sup> Respondent while the other came with Humphrey Katemba. He stated that a plane later landed carrying PF officials that included Mwimba Malama and Joe Malanji and that after this, he heard the latter instruct Alfred Mwape to organise the people, who were about 300, in 3 queues. He told the Court that Joe Malanji gave two separate bunches of K20.00 notes to the 1<sup>st</sup> Respondent and Alfred Mwape both of whom started to distribute the said money and gave each of them K40.00.

PW2 also told the Court that on 6<sup>th</sup> of August, 2021 he received word from the chief through headman Molofeni that they were supposed to collect the bicycles they were earlier promised by 1<sup>st</sup> Respondent from the chief's palace. On 7<sup>th</sup> August, 2021 he and Molofeni proceeded to the chief's palace where, according to him, they found visitors one of whom was Yvonne Chisenga, the District Commissioner, who came in a grey Toyota Hilux.

PW2 further gave testimony that the Chief in the presence of Yvonne asked him and the other headmen, totalling 87 in number, whether he had campaigned for or even given the UNPD a motor vehicle to use to which they responded in the negative. He added that the chief Chiundaponde told them that the 1<sup>st</sup> Respondent is the one who brought the bicycles which were packed in 20 boxes and that when she was around she showed him a video plus warned him that former President Lungu was upset with him and that if the PF lost he would be dealt with.

According to PW2's further evidence, the Chief told him and the other headmen to instruct their villages to vote for PF which he admits he personally did on the 9<sup>th</sup> of August, 2021 and that according to him this was the right thing to do according to Bisa culture because they did not want the Chief to be dealt with by the former President.

In cross-examination, PW2 acknowledged that it was the Chief who instructed them to vote and campaign for PF and not the 1<sup>st</sup> Respondent. He also admitted that the video he earlier referred to was not before the Court. Also, that there was no evidence apart from his testimony that Joe Malanji, Prof. Nkandu Luo, Mr. Chitema, Chief Chiundaponde, Yvonne Chisenga or Headman Molofeni acted on behalf of the 1<sup>st</sup> Respondent or that they were her election agents.

In further cross-examination, PW2 stated that he had no other evidence apart from his testimony that he or any other person was given money by the 1<sup>st</sup> Respondent. He also said that he did not report the malpractice to any relevant authority.

The Petitioner called his third witness Mr. Lagern Lexton Mumba who is also known as Chief Chiundaponde but hereinafter referred to as PW3. PW3's evidence was that he and other traditional leaders had earlier met former President Lungu at Chitulika Village in Mpika where they were promised bicycles.

According to him, these bicycles were later brought to his palace by the 1<sup>st</sup> Respondent, and they came in 21 boxes which were later unpacked by palace staff and on a later date distributed to the village headmen in his chieftdom in the presence of the District Commissioner, Yvonne Chisenga, but the 1<sup>st</sup> Respondent was not present.

PW3 also confirmed that the 1<sup>st</sup> Respondent told him that the former President Lungu was not happy with him because of the suspicion that he was working with UPND as she showed him a video of her and the former President, that had no sound, in which the said warning was made. He told the Court that she also warned him that he would be dealt with if PF lost in his area.

PW3 added that he gave the bicycles to 83 village headmen. The people he remembers from this group were, Abraham Chulu and Douglas Chimfwembe.

During cross-examination, PW3 reiterated that the 1<sup>st</sup> Respondent brought the bicycles, but she was not present when they were being distributed. He also admitted that the 1<sup>st</sup> Respondent's election agent as listed on exhibit "MM1" in their Affidavit In Opposition was Edina Lungu and that the former President was not working under the 1<sup>st</sup> Respondent's instructions.

The 4<sup>th</sup> witness was Mr. Douglas Bwalya of Kabinga Village in Chief Chiundaponde's Chiefdom hereinafter called PW4. His evidence was that on 27<sup>th</sup> July, 2021 he saw two planes land at Chiundaponde Primary School. One of the people PW4 said he identified from the planes were the 1<sup>st</sup> Respondent, Prof. Nkandu Luo and Given Lubinda.

PW4 added that he and other village headmen, 46 in number, from Lulimala ward sat in a classroom and were addressed by Prof. Nkandu Luo. According to his testimony, they were told the money being given to them was for them to vote for all PF candidates in the general elections. The 1<sup>st</sup> Respondent then got a bunch of cash from a bag and gave them K200.00 each.

Furthermore, PW4 gave evidence that on 7<sup>th</sup> of August, 2021 all village headmen, 87 in number, were called to Chief Chiundaponde's palace to collect bicycles which had been brought by the 1<sup>st</sup> Respondent. His evidence was that the bicycles were distributed by the District Commissioner, Yvonne Chisenga, in the presence of Chief Chiundaponde. According to PW4, Yvonne and the Chief told them the bicycles were given to them to ensure that the all PF candidates including the 1<sup>st</sup> Respondent won and this they did because as per Bisa culture they follow what the Chief says.

During cross-examination, PW4 insisted that the Chief instructed them to vote for PF and its candidates and also that there were 87 village headmen at the palace. PW4 added that he did not

know the owner of the bag from which the 1<sup>st</sup> Respondent got the bunch of cash.

When quizzed further in cross-examination, he admitted that the 1<sup>st</sup> Respondent's election agent was Edina Lungu and that he had no proof that the District Commissioner was working under the 1<sup>st</sup> Respondent's instructions. He also insisted that he saw the 1<sup>st</sup> Respondent dispatch the bicycles at the Chief's palace despite the Chief's evidence that only his family was home on the material day.

The 2<sup>nd</sup> Respondent's Counsel asked PW4 if he had reported any of his grievances to ECZ, but he stated that he did not.

In re-examination, he recanted that the number of village headmen was 83 and not 87 and that their meeting with Prof. Nkandu Luo was on 27<sup>th</sup> of August, 2021.

The fifth witness was a Mr. Ng'andwe Mulima of Mweni Village in Chief Chiundaponde's Chieftdom hereinafter referred to as PW5. In his testimony, PW5 told the Court that on 31<sup>st</sup> July, 2021 he was informed by Chisala Chabu that he and other Village Headmen were needed at Muwele Primary School to attend a meeting. PW5 stated that whilst at the School they were divided into three different groups consisting Village Headmen, Health Personnel and Church Leaders. He averred that they were 42 Village Headmen addressed by Prof. Nkandu Luo in one classroom. The 1<sup>st</sup> Respondent, according to PW5, started giving

K150.00 to each one of the Headmen in the classroom and told them that this was given to them so that they vote for all PF candidates in the General Elections.

Furthermore, PW5 testified that the 1<sup>st</sup> Respondent at the same meeting told them that she would bring bicycles to the Chief's palace for the village headmen. He stated that after being notified of the arrival of the bicycles by church elders on 6<sup>th</sup> August, 2021, he and other headmen went to the Chief's palace on 7<sup>th</sup> August, 2021 to collect them. The witness added that the total number of village headmen on that day was 84 and at around 13 hours they were addressed by the District Commissioner who told them that the bicycles were given to them so that they vote for all the PF candidates in the impending General Election.

PW5 also told the Court that in accordance with his culture he went ahead and told the people in his village to vote for PF.

During cross-examination, PW5 confirmed that it was the District Commissioner who told them to vote for PF when they were being given bicycles and that he was not there when the 1<sup>st</sup> Respondent dropped off the bicycles at the Chief's palace. He also told the Court that the money the 1<sup>st</sup> Respondent distributed came from Prof. Nkandu Luo.

The sixth witness for the Petitioner was a Mr. Chanda Kabula of Lupiya Village in Chief Chiundaponde's Chiefdom herein to be

referred to as PW6. He testified that on 31<sup>st</sup> July, 2021 he and other village headmen were summoned to Muwele Primary School where they found the 1<sup>st</sup> Respondent, Prof. Nkandu Luo and the District Commissioner Yonne Chisenga. PW6 stated that before being given money, Nkandu Luo told them that the money was being given to them so that they vote and campaign for all the PF candidates in the General Election. He added that they were told to form queues after which Nkandu Luo and the 1<sup>st</sup> Respondent distributed the money and each of them got a K150.00.

Regarding the distribution of bicycles, PW6 told the Court that close to election day the bicycles arrived at Chief Chiundaponde's palace there were 87 village headmen present. He testified that before being given the bicycles, the District Commissioner and Chief Chiundaponde told them to campaign for all the PF candidates in the General Election failure to which he would be chased, and the bicycles would be grabbed from them. He therefore did what he was told and campaigned for all the PF candidates.

In cross-examination, PW6 reiterated his position that Yvonne and the Chief told them to campaign for PF candidates but admitted that he had no other proof apart from his testimony that the 1<sup>st</sup> Respondent had instructed Prof. Nkandu Luo or Yvonne to do what they did. When asked about Edina Lungu the Electoral Agent for the 1<sup>st</sup> Respondent and the other parliamentary candidate Peter Chipasha, he said he not know them both.

The Petitioner's seventh witness was David Ndashe of Kabinda Village in Chief Chiundaponde's Chiefdom hereinafter referred to as PW7. He testified that on 5<sup>th</sup> August, 2021 a plane landed at Chiundaponde Primary School. From the people who got off this plane, he was able to identify the 1<sup>st</sup> Respondent and Joe Malanji who told the 300 people present to form three queues so that they could be given money for them to vote for PF. He said that Joe Malanji handed the 1<sup>st</sup> Respondent some money from a laptop bag, and they started distributing it.

During cross-examination, PW7 testified that he had no other evidence aside from his testimony that Joe Malanji was working under the 1<sup>st</sup> Respondent's instructions and that he did not know who Edina Lungu was.

In re-examination, he explained that he was of the view that Joe Malanji and the 1<sup>st</sup> Respondent were working together as they were both PF.

The eighth witness was Selisho Yumba of Mwelalala Village in Chief Mpumba's Chiefdom who will be referred to as PW8. PW8 stated in his testimony that on 21<sup>st</sup> July, 2021 he received a phone call from the 1<sup>st</sup> Respondent who informed him to be by the roadside the next day because she would bring bicycles. He added that he told fellow village headmen Spooni, Chibulu and John Yumba to accompany him to the roadside at about 08 hours in the morning.

PW8 averred that after waiting for the 1<sup>st</sup> Respondent up to around 19 hours she arrived with some people he did not know and gave them the bicycles however the condition was that they were supposed to vote and campaign for PF. He stated that they were told to write down names, National Registration Card Numbers and Voters Card Numbers for twenty people each and that they had to inform others to do the same.

It was PW8's further evidence that he and his fellow village headmen Spooni, Kalonde and Ngosa Kayani were later taken to Mununga for a meeting using one of the 1<sup>st</sup> Respondent's vehicles, a grey Toyota Landcruiser. According to him, they were given envelopes containing K200.00 each by the 1<sup>st</sup> Respondent when they arrived, in appreciation of the personal details they earlier recorded on her behalf.

PW8 also told the Court that the 1<sup>st</sup> Respondent told them to vote for the PF and that when they went back home, they told their people to do the same.

During cross-examination, PW8 stated that Chief Mpumba did not distribute any bicycles. He insisted that he was given four bicycles by the 1<sup>st</sup> Respondent and that his testimony was the only evidence he had of this.

The Petitioner's ninth witness was Precious Bwalya Bowa of Salamu Village in Chief Mpumba's Chiefdom hereinafter referred

to as PW9. She told the Court that on 21<sup>st</sup> July, 2021 PF Officials including the 1<sup>st</sup> Respondent, Ketemba Ketemba and Chibesa Kabomba came to Salamu Village. According to PW9, the 1<sup>st</sup> Respondent told them that if they did not vote for PF, Social Cash Transfer and fertiliser support benefits would be withdrawn from their village.

PW9 also testified that they were told by Katemba to write down their names, National Registration Card (NRC) numbers and Voters Card Numbers that is, ten people for each piece of paper. He added that when the PF officials came back from delivering bicycles at a nearby school, they came back to collect the filled in pieces of paper. Furthermore, the 1<sup>st</sup> Respondent called out names that were on the pieces of paper and gave money to Katemba who gave them K150.00 each.

In addition, PW9 told the Court that on 31<sup>st</sup> July, 2021 a Mr. Chibesa at a funeral announced that there would be a PF meeting. This meeting was held at Brian Sali's house where Mr. Chibesa and Yvonne, the District Commissioner, distributed PF chitenges and caps. According to PW9, they were later told to line up in queues at which point the 1<sup>st</sup> Respondent arrived and started distributing K20.00 and K50.00 notes after which she warned them that if they did not vote for PF she would know because she had their names.

In cross-examination, PW9 was asked if she knew about election petitions or whether she reported the above incidences of

malpractice to the ECZ to which she responded that she did not. Furthermore, she admitted that the only evidence she had was her testimony.

The Petitioner called Constance Chilufya, hereinafter referred to as PW10, as their tenth witness. She was from Nakasongo Village which is under Chief Mpumba's Chiefdom. According to her testimony, on 12<sup>th</sup> August, 2021 she was inside Mpumba Polling Station working as a polling agent for Independent Parliamentary Candidate Peter Chipasha.

PW10 told the Court that at about 12 hours on election day she saw the 1<sup>st</sup> Respondent enter the polling station and shortly went outside to see someone. She added that she followed the 1<sup>st</sup> Respondent who had gone to the other polling station. She said that she noticed that people who were going to vote were coming from where the 1<sup>st</sup> Respondent was, and that she saw her give a K100.00 note to one person who she told to vote for all PF candidates and if he did not, show would know.

During cross-examination, PW10 confirmed that she understood her duties as a polling agent, but she still admitted that she did not report the malpractice incidences she claimed to have seen, either to the police or to ECZ.

The Petitioner's eleventh witness was Peggy Mwale of Mabonga Village in Chief Mpumba's Chiefdom which is in Chikanda Ward. She will be referred to as PW11. PW11 told the Court that on

12<sup>th</sup> August, 2021 whilst at Mabongo Primary School polling station with four of her friends namely Lyness Kaluba, Precious Mwape, Fridah Muma and Glenda she saw four male PF members who came to their queue to get voters and national registration cards.

According to her testimony, the 1<sup>st</sup> Respondent at around 10 hours gave these four men K100.00 each and a book to write down people's details. She added that she was also given a K50.00 by the 1<sup>st</sup> Respondent so that she would hand over her national registration and voters cards to one of the four men and also that she should vote for PF.

PW11 also gave testimony that the book that was being used to take down people's details at the polling station was later grabbed from the four men by the police officers that were present.

In addition, it was PW11's testimony that on 26<sup>th</sup> September, 2021 the 1<sup>st</sup> Respondent and Sara Kasama came to Mabonga Village to look for her. She said they found her at a football pitch then started accusing her of being a false witness, but she refuted claims that she was Peggy Mwape and pointed them to another person who they followed. She further stated that at this point she feared for her life and ran home.

In cross-examination, she was asked how the 1<sup>st</sup> Respondent gave her the K50.00 and if she was the only person on the queue

to be given money. She said that she was standing at the end of the queue that is why she is the only one who was given the money. She also admitted that she did not report the alleged malpractice to the police.

In further cross-examination, PW11 stated that she did not know if the 1<sup>st</sup> Respondent had the list of witnesses.

The Petitioner's twelfth witness was George Bwalya of Changwe Village in Chief Mpumba's area of Lavushimanda District hereinafter referred to as PW12. His testimony was that on his way to Mpumba Polling Station at around 10 hours on the 12<sup>th</sup> August, 2021 he saw about 30 people gathered. From the crowd he heard shouts of "vote pabwato" and among them he identified a PF member by the name of Mercy Kunda whom he cautioned against the alleged misconduct. PW12 averred that after this he reported to the police officer who was at Mpumba Polling Station, but the officer declined to help because she was apparently too junior and that she could not leave the polling station. He also said that one of their election monitors by the name of Moshu came to him to complain about the PF's alleged vote buying. After this the two of them went to complain to the police officer who was at Mpumba Polling Station 2 who called their Commanding Officer, but they did nothing.

Furthermore, PW12 told the Court that whilst trying to get a video of the PF members on his phone, he saw the 1<sup>st</sup> Respondent at the barrier of the Polling Station where she appeared to give

people K100.00 notes but could not get closer because he was threatened. He added that when he told the police about it, they went there but the 1<sup>st</sup> Respondent left before they could get close.

PW12's further evidence was that in the second week of July, 2021, the Presidential empowerment program bicycles were at the 1<sup>st</sup> Respondent's house which was also the PF'S Command Centre. He stated that the 1<sup>st</sup> Respondent is his grandmother, and she did not notice that he was at her house when she was giving bicycles to village headmen one of whom he identified as Chitala from Luangwa Valley. He added that he also heard her tell the group of headmen to vote for PF.

During cross-examination, PW12 admitted that he stood on the UPND ticket as a Councillor and that he and his polling agent reported the incidences of malpractice to the ECZ even though evidence of the same was not brought before Court.

The thirteenth witness, hereinafter referred to as PW13, was Ivy Mushili of Muwele Village in Chief Chiundaponde's Chiefdom. She testified that on 5<sup>th</sup> August, 2021 two planes and two motor vehicles arrived at Muwele Primary School at around 13 hours. The 1<sup>st</sup> Respondent disembarked from one of the two vehicles and was given a black bag containing cash by one of the people that came off the plane. It was PW13's further testimony that the 1<sup>st</sup> Respondent gave some of the cash to the candidate for the position of Councillor and another person who came off the plane. She added that the three of them started distributing

K40.00 to the people present who were about 3000 in number and told them that the money was given to them to vote for the 1<sup>st</sup> Respondent and PF.

In addition, PW13 also gave evidence that the 1<sup>st</sup> Respondent warned them that if they did not vote for her and the PF they would know because there were machines that would capture them on election day. She stated that the warning extended to social cash transfer for the old and vulnerable which would be withdrawn as a result.

In cross-examination, PW13 stated that she did not report any of these incidences of malpractice to either the police or ECZ. She clarified in re-examination that this was because she stays in a remote village and the police station is very far.

The fourteenth witness was Coillard Chita of Spooni Village in Chief Mpumba's area who will hereinafter be referred to as PW14. During the hearing, he told the Court that at around 15 hours on 17<sup>th</sup> July, 2021 the 1<sup>st</sup> Respondent, Chibesa Kabomba the PF Councillor candidate and Yumba came to Spooni School. He stated further that the 1<sup>st</sup> Respondent told them that they should not vote for Newton Ng'uni, the Petitioner, who was using the Corona Virus symbol otherwise social cash transfer would be withdrawn from them.

PW14 averred that they were told to queue up in groups of 10 men and women separated. He told the Court that the 1<sup>st</sup>

Respondent got some money from a white motor vehicle and gave some of it to Chibesa Kabomba. According to him, Chibesa gave K100.00 notes to the men's group while the 1<sup>st</sup> Respondent gave the women's group K150.00s. He testified that she warned them that if they did not vote for her and the PF she would know.

During cross-examination, PW14 admitted that he did not report any of these incidences to either the police or the ECZ. He clarified in re-examination that this was because he did not know that he had to.

**Issues for Determination.**

1. *Whether the 1<sup>st</sup> Respondent committed any corrupt practice or illegal practice within the meaning of Section 97 of the Electoral Process Act, either by herself or through her election agent or polling agent or any other person with her knowledge and consent.*
2. *If so, or by reason of other misconduct whether the majority of voters in Mfuwe Constituency were or may have been prevented from electing the candidate whom they preferred; and*
3. *Whether the 2<sup>nd</sup> Respondent did not conduct the elections in accordance with the electoral laws and if so whether the non-compliance affected the*

***results of the said election in a substantial manner.***

In Order for this Petition to succeed, it is incumbent upon the Petitioners to prove his case on a balance of probabilities. In such cases, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity<sup>1</sup>.

**A. Distribution of Money**

It is alleged in paragraph 8 of the petition that the campaigns were characterized with bribery and corruption of voters by the 1<sup>st</sup> Respondent and her agents as well as other PF Senior Members acting with the knowledge, consent and under the direction of the 1<sup>st</sup> Respondent and her agents contrary to the provisions of the Electoral Process Act No. 35 of 2016. The 1<sup>st</sup> Respondent denies the Petitioner's allegations and avers that these are within the peculiar knowledge of the Petitioner.

On this issue, the evidence from PW2 was to the effect that on 31<sup>st</sup> July, 2021 Prof. Nkandu Luo gave the 1<sup>st</sup> Respondent an envelope containing cash. From this envelope the 1<sup>st</sup> Respondent distributed K150.00 to each of the village headmen present for them to convince others to vote for her and the other PF candidates. PW2 also indicated that on 5<sup>th</sup> August, 2021 at Muwele Primary School, Joe Malanji, a PF official, gave two separate

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<sup>1</sup> Anderson Kambela Mazoka and Others -V- Levy Patrick Mwanawasa and Others (2005) 7R 138

bunches of K20.00 notes to the 1<sup>st</sup> Respondent and Alfred Mwape both of whom distributed the said money by giving out K40.00 to each person.

Furthermore, the evidence of PW4 was that on 27<sup>th</sup> July, 2021 at Chiundaponde Primary School the 1<sup>st</sup> Respondent gave him and his fellow village headmen K200.00 each for them to vote for her and the other PF candidate in the General Election.

PW5 gave similar testimony to that of PW2 that on 31<sup>st</sup> July, 2021 at Muwele Primary School, the 1<sup>st</sup> Respondent got money from Prof. Nkandu Luo and gave K150.00 to each one of the 42 village headmen present. Additionally, PW6 also told the Court that on 31<sup>st</sup> July, 2021 at Muwele Primary School, Prof. Nkandu Luo and the 1<sup>st</sup> Respondent gave K150.00 each to him and his fellow village headmen as a way of canvassing for votes.

Furthermoe, PW8 told the Court that when the 1<sup>st</sup> Respondent took them to Mununga, she gave them envelopes containing K200.00 each in appreciation of the names, national registration card numbers and voters card numbers that she had asked them to record.

In addition, PW9 stated in her testimony that the 1<sup>st</sup> Respondent gave money to a Mr. Katemba to give them K150.00 each on 21<sup>st</sup> July, 2021.

## **B. Distribution of Bicycles**

PW3's evidence indicates that the 1<sup>st</sup> Respondent brought bicycles in 21 boxes to his place. These were later unpacked by palace staff and on a later date distributed to the village headmen in the presence of the District Commissioner Yvonne Chisenga. The 1<sup>st</sup> Respondent was however not present for the distribution. He confirms that he gave the bicycles to 83 village headmen. The people he remembers from this group were Abraham Chulu and Douglas Chimfwembe.

PW6 and PW2 also stated that close to election day, on 7<sup>th</sup> August, 2021, they were part of a group of 87 village headmen who were called to the chief's palace to collect bicycles. They testified that Yvonne Chisenga the District Commissioner, who came in a grey Toyota Hilux, and Chief Chiundaponde were present and told them to campaign for all the PF candidates because they had been given bicycles. There was no proof however that they were instructed by the 1<sup>st</sup> Respondent to distribute the bicycles and ask for votes.

In addition, PW8 indicates in his evidence that he was called by the 1<sup>st</sup> Respondent on 21<sup>st</sup> July, 2021 to collect bicycles the following day. He did so with fellow village headmen and at 19 hours the 1<sup>st</sup> Respondent gave them the bicycles however the condition for getting them was that they were

supposed to vote and campaign for all the PF candidates including the 1<sup>st</sup> Respondent.

PW12 claims in his testimony that in the second week of July, 2021, the 1<sup>st</sup> Respondent did not notice that he was at her house when she was giving Presidential Empowerment Program bicycles, in packed boxes, to village headmen one of whom he identified as Chitala from Luangwa.

### **C. Social Cash Transfer**

According to PW9, the 1<sup>st</sup> Respondent told them whilst at Salamu that if they did not vote for the PF candidates, social cash transfer and fertiliser support would be withdrawn from their village.

PW14 avers that on 17<sup>th</sup> July, 2021 the 1<sup>st</sup> Respondent, whilst in the company of other PF officials at Spooni School, told them that they should not vote for the Petitioner who used the corona symbol otherwise social cash transfer would be withdrawn from them.

### **D. Use of Threats**

PW3 avers that the 1<sup>st</sup> Respondent told him that he would be dealt with if PF lost in his Chieftom. Additionally, according to PW13 and PW14's testimony, the 1<sup>st</sup> Respondent warned them that if they did not vote for her and the other PF candidates she would know because there were machines that would capture them on election day and

as a result even social cash transfer money for the old and vulnerable would be withdrawn from them.

#### **E. Conducting campaigns on polling allegations**

With regard to events that transpired on election day, PW10 claims she saw the 1<sup>st</sup> Respondent give a K100.00 note to one person at Mpumba Polling Station and told them to vote for her and the other PF candidates.

Furthermore, PW11 also told the Court that whilst at Mabonga Primary School Station, the 1<sup>st</sup> Respondent gave her a K50.00 note with the instruction that she hands over her personal details and also that she should vote for all the PF candidates. Further, she added that the 1<sup>st</sup> Respondent gave four men K100.00 each to collect people's personal details.

#### **F. Abuse of Government Resources**

Allegations of abuse of government resource were made by the 1<sup>st</sup> Respondent in his pleadings and his testimony. However, with regard to the motor vehicle registered BEA 5231 he admitted that the registration number search showed that it did not belong to the ECZ contrary to his allegations.

Evidence was also led, and it was alleged that government resources were used by Yvonne Chisenga, the Lavushimanda District Commissioner, when she distributed

bicycles and other campaign materials as well as campaigned on behalf the 1<sup>st</sup> Respondent and other PF candidates in the run up to the General Elections. The 1<sup>st</sup> Respondent in response averred that she neither instructed the District Commissioner nor the Chief to campaign or distribute any items to the electorate on her behalf.

### **ANALYSIS**

- (i) *The Petitioner's Counsel, Ms. Mwiinga, contends that all the witnesses confirmed that the 1<sup>st</sup> Respondent was engaged in widespread distribution of money across Mfuwe Constituency as they gave a detailed account of the dates, time, and places she distributed the money as well as the names of people she was with. The 1<sup>st</sup> Respondent's Counsel, Ms. Nambao, however submitted that there is no video or pictorial evidence to support the testimony given by the Petitioner's witnesses and also that no evidence was adduced to show the number of people present at the meetings where money was distributed and whether this affected the majority of voters in Mfuwe Constituency.*

*In my considered view, it can be discerned from the evidence that it was more probable than not that there was distribution of money done by and with the knowledge and consent of the 1<sup>st</sup> Respondent. In *Lewanika and Others -V- Chiluba*<sup>2</sup> decision however,*

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<sup>2</sup> (1998) ZR 49.

*the Supreme Court stated that "Parliamentary Election Petitions are required to be proven to a standard higher than a mere balance of probabilities." In the absence of any physical, pictorial or video evidence I find that the evidence adduced has not established to a fairly high degree of convincing clarity that there was distribution of money for the purpose of winning the election. Additionally, the evidence does not clearly convince me that this distribution affected the majority of registered voters in the Constituency by preventing them from electing their preferred candidate especially that the Petitioner came out third in the polls.*

- (ii) *With regard to the issue of distribution of bicycles, the Petitioner's Counsel contends that all the village headmen who testified directly linked the 1<sup>st</sup> Respondent to the distribution of bicycles which was done to induce them to command the people in their village to ensure victory for the 1<sup>st</sup> Respondent. On the other hand, the 1<sup>st</sup> Respondent's Counsel contends that the village headmen who testified on the issue of the bicycles confirmed that they were not present when the 1<sup>st</sup> Respondent brought them.*

*I have noted that it is the evidence of PW3 and PW8 that directly links the 1<sup>st</sup> Respondent to the distribution of bicycles unlike the other witnesses who did not directly receive bicycles from her. The*

*aforementioned two witnesses' testimony is clear regarding receipt of bicycles thus the first element of nullification was met.*

*When it comes to the second element of nullification, I am guided by the Constitutional Court decision in *Abiud Kawangu -V- Elijah Muchima*<sup>3</sup> where it was held inter alia that there is a further element to nullification under Section 97(2) (a) of the Electoral Process Act 2016, as mere proof of a corrupt act does not suffice. The evidence has to show that the majority of voters were or may have been prevented from electing the candidate whom they preferred as a result of a proven proscribed act.*

*It is abundantly clear that there is insufficient evidence upon which to consider the second element of the offence. The evidence presented by the Petitioner has failed to outline the impact this distribution of bicycles by the 1<sup>st</sup> Respondent had on the majority of the voters in Mfuwe Constituency.*

*(iii) With regard to social cash transfer allegations, the Petitioner's Counsel argues that the 1<sup>st</sup> Respondent used social cash transfer as a tool to induce or to threaten voters in Salamu and Spooni Village when according to PW9 and PW14 she told them that the*

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<sup>3</sup> 2016/CC/A039

*money for the vulnerable would be taken away if they did not vote for her.*

*The 1<sup>st</sup> Respondent's Counsel on the other hand contends that there was no evidence presented in Court that the witnesses were voters or that meetings in Salamu and Spooni Village took place and whether the majority of voters attended the meetings especially that none of them reported the incidences to the relevant authorities.*

*It is settled law that the burden of proof in an election petition lies upon the Petitioner. There is authority to be found in Mabenga -V- Wina and Others<sup>4</sup> for the position that an election petition is like any other civil claim that depends on the pleadings and that the burden of proof is on the challenger to that election to prove to a standard higher than on a mere balance of probability the issues raised that are required to be established to a fairly high degree of convincing clarity.*

*I find that the evidence submitted on the allegation of abuse of social cash transfer does not discharge the high burden of proof placed upon the Petitioner owing to the absence of corroboration of PW9 and PW14's evidence and the absence of real evidence. It is clear*

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<sup>4</sup> SCZ Judgment No. 15 of 2003

*therefore that since the first element of nullification has not been met, it is not necessary to interrogate the second one.*

- (iv) The Petitioner's Counsel contended that it is clear from the evidence of PW6, PW9, PW10, PW13 and PW14 the 1<sup>st</sup> Respondent used threats because there was no voter education in their community. The 1<sup>st</sup> Respondent did this by taking down names, NRC and Voters Card Numbers and told them that she would know if they did not vote for her because there was a machine that would capture them on election day.*

*On the other hand, the 1<sup>st</sup> Respondent's Counsel argued that there was no evidence that these threats were made to a majority of registered voters in Mfuwe Constituency, and this is compounded by the fact that none of the Petitioner's witnesses reported these incidences to relevant authorities. Counsel further contends that the issue of lack of voter education, raised during the hearing, was not pleaded by the Petitioner and it should therefore not be considered as it is fatal.*

*Even though there is evidence that threats were made by and on behalf of the 1<sup>st</sup> Respondent, it is my firm view there is no sufficiently clear evidence showing that as a result of the threats or misconduct*

*complained of, or even lack of voter education, the majority of the voters in Mfuwe Constituency were or may have been prevented from electing the candidate whom they preferred.*

*On the issue of pleadings, it is trite that the function of pleadings as aptly stated in the case of Munda -V- Sentor Motors Limited<sup>5</sup> is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties.*

*It is my considered view that during the hearing the 1<sup>st</sup> Respondent's Counsel having not objected to the evidence immediately it was tendered means that this Court is not precluded from considering that evidence and has therefore considered it. The issue is only the weight that has been attached to the evidence which was let in on unpleaded issues.*

- (v) Regarding the issue of campaigning on poll day at the polling station, the Petitioner's Counsel contends that the evidence of PW10, PW11 and PW12 shows that the 1<sup>st</sup> Respondent acted in breach of the electoral code of conduct. This is because she was campaigning in the vicinity of the polling stations while handing out money and telling the voters to vote for her.*

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<sup>5</sup> (1982) ZR 66

*In response, the 1<sup>st</sup> Respondent's Counsel contends that PW11 gave contradicting statements regarding who gave her a K50 note, and that PW10 did not adduce any evidence that she was a polling agent or that majority of voters were affected by the K100 given to one person. Counsel added that PW12 failed to show the report he allegedly made to the 2<sup>nd</sup> Respondent and also failed to show proof of the video he claims to have taken.*

*The Petitioner has not presented enough evidence to prove to the requisite high standard of proof the allegation that the 1<sup>st</sup> Respondent was campaigning on election day. For instance, in the case of PW12's testimony, as per the case of Steven Masumba -V- Elliot Kamwendo<sup>6</sup> witnesses from a litigant's own political party are partisan witnesses who should be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood. There was no corroboration of PW12's evidence therefore I find that it falls below the standard of proof required in election petitions.*

- (vi) The Petitioner's Counsel also contends that the 1<sup>st</sup> Respondent used government resources such as motor vehicles and the District Commissioner and her official*

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<sup>6</sup> SJ No. 53 of 2017

*vehicle for campaigns. On the other hand, the 1<sup>st</sup> Respondent's Counsel contends that there was no evidence adduced by the Petitioner or his witnesses that government vehicles were used by the 1<sup>st</sup> Respondent or that she instructed the District Commissioner to act on her behalf to campaign or distribute bicycles.*

*Clearly, the vehicle that that District Commissioner was using has not been identified. Not one witness has identified that it was a government vehicle. The very fact that the District Commissioner was using a vehicle during campaigns surely does not make that particular vehicle a government property.*

*Only one motor vehicle whose registration number was later confirmed by the witness as having been a false one came close to being identified. It was not. That vehicle was BEA 5231. As I said it was a false number*

*In the absence of specific evidence of pictorial or video evidence showing vehicle registration numbers and the fact that BEA 5231 turned out to be a fake registration number, there is no cogent evidence that government resources were used in connection with the election by the 1<sup>st</sup> Respondent. It is also not clear that there was use of government resources with her knowledge, consent or approval. Furthermore, even though there*

*is testimony that the District Commissioner was seen in a number of places campaigning and distributing things prior to the election, there is no evidence which shows that the 1<sup>st</sup> Respondent, her election or polling agent abused government resources leading to the majority of voters in Mfuwe Constituency being prevented from electing the candidate of their choice.*

All told, the following appear very clear in the totality of the evidence;

- (a) Not one witness ever exhibited in evidence any bicycle that was allegedly given out by 1<sup>st</sup> Respondent, on indeed by anyone. There is not even a picture of any such bicycle.*
  
- (b) There was a mention by PW2, Mwansa Mumba that the 1<sup>st</sup> Respondent had said that she would deliver bicycles to them. However, on 6<sup>th</sup> August, 2021, it was PW3 - the Chief, who sent word that the bicycles had arrived. And when, on the 9<sup>th</sup> August, 2021, they were distributed, it was PW3, the Chief with his retainer who did so. The 1<sup>st</sup> Respondent was conspicuously absent.*
  
- (c) PW3 Chief Chiundaponde, testified that bicycles were delivered as promised by the then Republican President Edgar Lungu. PW5 was not present at*

*the time as only the Chief with his family were present. So PW5's testimony as to who delivered the same is strongly questioned.*

*(d) Further, evidence of PW3, PW4 and PW5 is grossly at variance. They each have different numbers of who attended at the time of collecting these bicycles. They even differ as to the number of boxes containing bicycles.*

*(e) The video alleging that the then President, Edgar Lungu, was shouting at the 1<sup>st</sup> Respondent had not been availed in evidence. It leaves the Court guessing as to whether such a video in fact existed.*

*(f) There are various meetings alleged to have taken place, and on divers dates. No evidence however, has been properly led as to how many people attended the same. I have noted with caution, the contradictory testimonies in the material particular here.*

*(g) It is not even in evidence that any of the 14 witnesses called for and on behalf of the Petitioner was registered as a voter in that none produced the voter's card. This may not be necessary for the sake of being a witness, but it*

*may be so to show that they did not vote for a candidate of their choice.*

- (h) And none of the 14 witnesses therefore, was able to show that the Petitioner was their preferred candidate but that they voted otherwise.*
- (i) PW2, PW4 and PW5 testified that it was not the 1<sup>st</sup> Respondent who told them to tell their people in villages to vote for her but that PW3, the Chief told them to vote for the Patriotic Front (PF) and they followed this because the Bisa Culture says so.*
- (j) So many breaches of the Electoral Code of Conduct Act have been alleged, yet not one witness has mentioned reporting this to the Electoral Commission of Zambia or indeed the Conflict Management Committee as advised by Regulation 12 and 13 of the Code aforementioned.*

*One incident is said to have been reported to the police officer at a polling station on the polling day. The witness said he recorded a video on his phone. This is very good. Unfortunately, this video which could have assisted greatly in evidence in favour of the Petitioner was not put*

*into evidence which now leaves the Court wondering as to whether this ever took place.*

*(k) None of the witnesses testified that the 1<sup>st</sup> Respondent gave Chief Chiundaponde and or the District Commissioner instructions to do any of the alleged illegal acts on behalf of the 1<sup>st</sup> Respondent.*

*(l) Now, even assuming that money and bicycles were given, were these given to the majority of voters? I doubt if the answer to this my own question would be in the affirmative.*

*(m) There are also threats of withdrawal of social cash transfer as well as machines to record them as they cast votes. These threats were never reported to anywhere. It is thus not very easy to believe such unaided pieces of evidence. Evidence of this sort leaves the Court at large.*

### **DECISION**

Having had occasion to carefully scrutinise the total body of evidence presented, it is my considered view having found that there were instances of malpractice that there is still no material upon which to consider the second element of the offence, which

is the impact those incidences had on the majority of the voters in Mfuwe Constituency. In the case of ***Richard Sikwebele Mwapela -V- Miyuyu Chinga***<sup>7</sup>, the Constitutional Court pronounced itself on the issue of whether the Appellant had proved to the requisite standard the allegations levelled against the Respondent. It held that according to Section 97(2)(a) of Electoral Process Act 2016, the election of a candidate can only be nullified if the Petitioner proves to the satisfaction of the Court that the candidate personally committed a corrupt or illegal practice or other misconduct in relation to the election or that the corrupt or illegal practice or misconduct was committed by another person with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent.

The Court further stated that a Petitioner must also prove that as a result of the corrupt or illegal practice or misconduct complained of, the majority of the voters were or may have been prevented from electing the candidate whom they preferred.

It is therefore not sufficient for a Petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without further proving that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of the voters from electing a candidate of their choice.

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<sup>7</sup> 2016/CC/A037

With regard to the 2<sup>nd</sup> Respondent, their conduct of the elections in Mfuwe Constituency was sufficiently in accordance with the electoral laws and any instances of non-compliance did not affect the results of the election in a substantial manner, or at all.

This petition has been brought under Constitutional provisions and has a bearing on national matters of governance and deployment of constitutional power. The high standard of proof required to settle matters of this nature and the establishment of issues to a fairly high degree of convincing clarity is therefore justified.

On the whole and in view of the foregoing, I accordingly find and Declare that the 1<sup>st</sup> Respondent, Maureen Mabonga was validly elected as Member of Parliament for Mfuwe Constituency and that the election was free and fair. Accordingly, I dismiss the petition and condemn the Petitioner in costs to be taxed if not agreed.

Leave to Appeal is granted.

**Delivered in Open Court at Chinsali this 25<sup>th</sup> day of  
November, 2021**

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**E. MWANSA  
HIGH COURT JUDGE**

