

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT CHIPATA
(Constitutional Jurisdiction)

2021/HP/EP/0037

IN THE MATTER OF: ARTICLES 47(2), 51, 54, 68, 72(2) C, 73(1) OF
THE CONSTITUTION OF ZAMBIA

AND

IN THE MATTER OF: SECTIONS 81, 89, 97(1), 98(C), 99, 100(2)(a)
OF THE ELECTORAL PROCESS ACT NO. 35
OF 2016

AND

IN THE MATTER OF: CODE OF CONDUCT RULES 12, 15(a) (h)
AND (k)

AND

IN THE MATTER OF: VUBWI CONSTITUENCY ELECTIONS HELD
IN ZAMBIA ON THE 12TH DAY OF AUGUST,
2021.

BETWEEN:

ALFONSO KAZICHE PHIRI

AND

BANDA ACKLEO IA
ELECTORAL COMMISSION OF ZAMBIA



PETITIONER

1ST RESPONDENT

2ND RESPONDENT

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 23rd
November, 2021.

For the Petitioner: Mr. G Lungu, Messrs Muleza Mwiimbu & Company

For the 1st Respondent: Mr J Chirwa, Messrs Ferd Jere & Company

For the 2nd Respondent: Mr H Mulenga, Messrs Philsong & Partners

JUDGMENT

Cases referred to:

1. *Abuid Kawangu vs Elijah Muchima*, Appeal No.8 of 2017
2. *Richwell Siamunene vs Sisalunalo Gift*, Selected Judgment No. 58 of 2017
3. *Jonathan Kapaipi vs Newtown Samakayi CCZ* Appeal No. 13/2017
4. *Khalid Mohammed vs The Attorney General* (1982) Z.R 49 (S.C)
5. *Wilson Masauso Zulu vs Avondale Housing Project Limited* (1982) Z.R 172
6. *Anderson Kambela Mazoka, Lt General Christon Sifapitembo, Godfrey Kenneth Miyanda vs Levy Patrick Mwanawasa, The electoral Commission of Zambia, The Attorney General* (2005) Z.R 138 (S.C)
7. *Austin Chisangu Liato vs Sitwala Sitwala SCZ* No. 23 of 2018
8. *Alex Cadman Luhila vs Batuke Imenda* 2002/HP/EP/0017
9. *Mubika Mubika vs Poniso Njeulu*, Appeal No. 114 of 2007
10. *George Musupi vs The People* (1978) Z.R 271
11. *Kambarage Mpundu Kaunda vs The People* (1990/1992) Z.R 215
12. *Simasiku Kalumiana vs Lungwangwa Geoffrey Lungwangwa and The Electoral Commission of Zambia*, 2006/HP/EP007
13. *Mubita Muwanga vs Inonge Mutukwa Wina SCZ* Appeal No. 80 of 2007
14. *Nkandu Luo and The Electoral Commission of Zambia vs Doreen Sefuke and the Attorney General*, Selected Judgment No. 51 of 2018
15. *Akashambatwa Mbikusita Lewanika, Hichunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba vs Frederick Jacob Titus Chiluba* (1998) Z.R 79
16. *Michael Mabenga vs Sikota Wina, Mafo Wallace Mafyo and George Samulela* (SCZ Judgment No. 15 of 2003)
17. *Priscilla Mwenya Kamanga vs The Attorney General and Hon. Ng'anda Peter Magande* SCZ Judgment No. 31 of 2008
18. *Mbololwa Subulwa vs Kalieye Mandandi* Selected Judgment No. 25 of 2018
19. *Sydney Chisanga vs David Chisupa*, Electoral Commission of Zambia, Attorney General, Appeal No. 10 of 2007
20. *Richard Sikwbele Mwapela vs Miyutu Chinga*, Appeal No. 14 of 2017
21. *Afrop Zambia Limited vs Anthony Chate, Sylvia Chali, Patson Mushisha, Wellem Ngosa, Dainess Chembe, Stanley Mukandwire*, Appeal No. 160/2013
22. *Augustine Kapembwa vs Danny Maimbolwa and Another* (1981) Z.R 127
23. *Muvi TV Limited vs Killian Phiri and Kennedy Musweu*, Appeal No. 13 of 2015
24. *OTK Limited vs Amanita Zambian Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited and Amanita Limited*, 2005/HPC/0199
25. *Charles Kajimanga (Hon Judge) vs Marmetus Chilemya* Appeal No. 50/2014
26. *Harry Mwangi Nkumbula and Simon Mwansa Kapwepwe vs United National Independence Party* (1978) Z.R 388 (H.C)
27. *Crispin Silingwa vs Stnaly Kakubo* Appeal No. 7 of 2017
28. *Brelsford James Gondwe vs Catherine Namugala* Appeal No. 175 of 2012
29. *Steven Masumba vs Elliot Kamondo*, Selected Judgment No. 53 of 2017
30. *Mwenya Musenge vs Mvula Mutale*, 2016/CC/A041

Legislation referred to:

The Citizenship of Zambia Act No. 33 of 2016

The Constitution of Zambia, Chapter 1 of the Laws of Zambia

The Electoral Process Act No. 35 of 2016

The National Registration Act Chapter 126 of the Laws of Zambia

Other works referred to:

Bryan A. Garner, Black's Law Dictionary, 9th Edition, West Publishing Co. © Thomson Reuters, 2009

Collin Tapper, Cross & Wilkins Outline of the Law of Evidence, Collin Tapper, Sixth Edition, Butterworths, London, 1986

Edward J. Imkwinkelried, Evidentiary Foundations, 4th Edition, Lexis Law Publishing, Charlottesville, Virginia, 1998

Joseph Chirwa, A Concise Manual of Immigration, Refugee and Citizenship Law in Zambia, Juta and Company (Pty) Ltd, Claremont, 2020

1.0 INTRODUCTION

This petition emanates from the parliamentary elections for Vubwi Constituency, held on 12th August, 2021. The petitioner is challenging the declaration of the 1st respondent as the duly elected Member of Parliament (M.P) for Vubwi constituency.

2.0 THE PETITION EVIDENCE

The petition of Alfonso Kaziche Phiri reveals that having been adopted and nominated by the United Party for National Development (UPND), he participated in the Vubwi constituency parliamentary elections which were held on 12th August, 2021. Other candidates for the said elections included Banda Ackleo IA, Banda Dominic, Miti Margaret and Sakala Oscar. Following the elections, which were conducted by the Electoral Commission of Zambia (ECZ), the Returning Officer declared the following results;

Banda Ackleo IA	PF	7,255
Banda Dominic	SP	194
Miti Margaret	IND	3,487
Phiri Alfonso	UPND	4,309
Sakala Oscar	IND	706

Premised on the above results, the 1st respondent was declared as the duly elected M.P for Vubwi constituency. The petitioner alleges that the 1st respondent was not validly elected for the following reasons;

- i. Prior to the elections, the Patriotic Front (P.F) registered a lot of foreign nationals from Mozambique and Malawi as voters in Zambia at various polling stations.

- ii. The D.C for Vubwi, Miss Eneless Banda, being a public officer, was seen campaigning for the P.F candidate in the P.F branded vehicle without number plates. The number plates were deliberately removed to disguise the voters.
- iii. The Government of the Republic of Zambia (GRZ) vehicle was seen transporting bags of mealie meal in the district, which was intercepted by alert UPND cadres before distribution. The said bags of mealie meal are currently being kept at Vubwi Police Station as evidence.
- iv. Seliano Sakala, a P.F cadre, was seen preparing food at Headman Mchima's shop, which shop was used as a camp. The food was distributed to voters covering almost all the people around Mchima Polling Station.
- v. P.F cadres, namely; James Mwanza, Patson Chisi and Yotamu Sakala were seen transporting voters in a 3 tonne truck belonging to Elisha of Guma Village in Mbozi area from Tsumba, Kamwendo and Sankhani Villages in Malawi to Muzigawa Polling Station in Zambia.
- vi. The three (3) P.F cadres mentioned under (v) above told voters that they should go and eat food at Alick's home at Chidambo Village in Malawi after voting.
- vii. A P.F cadre, Daliso Mwale, who is the son of the P.F Chairman for Vubwi District Council, was seen transporting voters from Lifuledi Village in Malawi to Chigwe Polling Station in Zambia, in a 3 tonne yellow canter with a white ribbon on the trailer, registration number BAT 2941.
- viii. The voters referred to under (vii) above were seen being fed at the home of Faustina Banda and Henry Zulu, who are P.F cadres, at Chigwe Village before and after voting.
- ix. The UPND Youth Chairman, one Patrick Banda, was attacked by P.F cadres while using a P.F branded vehicle and the notable people in the said vehicle were Akcleo Banda, the 1st respondent herein, Austin Mbewe, Franco and other unknown persons.

- x. The attack referred to under (ix) above arose after the P.F cadres in the vehicle flashed their P.F symbol and Patrick Banda flashed the UPND symbol which made the P.F cadres reverse their vehicle and attack the said Patrick Banda.
- xi. The matter was reported to Vubwi Police and a medical report obtained from Vubwi Hospital.
- xii. The UPND constituency Vice Chairman, Blackwell Banda, was attacked and beaten by Alfonso Kamuna Phiri, a P.F cadre, after a chopper landed in the bush 2 days before the election day and when Blackwell Banda wanted to find out what the said chopper had brought, he was attacked.
- xiii. The matter was reported to Vubwi Police Station and a medical report was obtained from Vubwi Hospital.

That as a consequence of the aforesaid illegal practices committed by the 1st respondent and his agents, the majority of the voters in the affected area and/or polling stations were prevented from electing the candidate in the constituency whom they preferred.

For the foregoing reasons, the petitioner prayed for the following reliefs:

1. A declaration that the election of the respondent as Member of Parliament for Vubwi Constituency is NULL AND VOID AB INITIO.
2. A declaration that the illegal practice committed by the 1st respondent and/or his agents affected the election result and that the same ought to be nullified.
3. Such other declarations and orders as this Honourable Court may deem fit.
4. An Order that costs occasioned by the Petitioner be borne by the Respondent.

2.1 THE PETITIONER'S AFFIDAVIT EVIDENCE

The petition was accompanied by an affidavit verifying facts, wherein the petitioner, Alfonso Kaziche Phiri, deposed that he was a candidate

in the Vubwi constituency parliamentary elections held on the 12th August, 2021, having successfully filed his nomination papers under the UPND. The election was conducted by the 2nd respondent, and four other candidates participated in the said elections. Contrary to the Returning Officer's declaration, the 1st respondent was not validly elected as member of parliament for Vubwi constituency because prior to the elections;

- i) The P.F registered a lot of foreign nationals from Mozambique and Malawi as voters in Zambia at various polling stations.
- ii) The District Commissioner (D.C) for Vubwi, Miss Eneless Banda, being a public officer, was seen, in Galimoto Village, Mozambique, campaigning for the P.F candidate in a P.F branded vehicle without a number plate.
- iii) A GRZ landcruiser vehicle was seen transporting bags of mealie meal in Vubwi district, which was intercepted by alert UPND cadres before distribution.
- iv) The UPND Youth Chairman, Patrick Banda, was attacked by P.F cadres while using a P.F branded vehicle, in which the 1st respondent was a passenger and participant of the attack.
- v) The UPND constituency Vice Chairman, Blackwell Banda, was attacked and beaten by Alfonso Kamuna Phiri, a P.F cadre, when he wanted to check what a chopper had brought and dropped in the bush for P.F cadres.
- vi) The audio recording sent to the petitioner's mobile phone via WhatsApp media clearly confirmed that foreign nationals, particularly from Mozambique, participated and actually voted in Zambia in favour of the P.F candidate after being given food, which was an enticement.

As a result of the aforesaid practices committed by the 1st respondent and his agents, and the unprofessional behaviour exhibited by the 2nd respondent by allowing foreign nationals to participate in voting in Zambia, the majority of Vubwi constituency voters were prevented from

electing their preferred candidate. The petitioner was disadvantaged as the playing field was not levelled.

3.0 THE 1ST RESPONDENT'S ANSWER

The 1st respondent filed an answer on 7th September, 2021, wherein he denied the allegations contained in the petition. His answer discloses that: the petitioner and four others participated in the Vubwi constituency parliamentary elections on 12th August, 2021. On 13th August, 2021, he was declared as the duly elected M.P for Vubwi constituency by the Returning Officer. He had no knowledge of how voter registration was conducted as it is the constitutional mandate of the 2nd respondent. Eneless Banda was neither his agent nor that of the P.F, and therefore the 1st respondent cannot be held accountable for her actions as an independent public officer. The P.F cadres and truck owner alleged to have transported voters are unknown to him, and were never his agents nor part of his team. He prayed that his election as M.P for Vubwi constituency be declared valid, and the petition dismissed with costs.

30.1 THE 1ST RESPONDENT'S AFFIDAVIT EVIDENCE

The 1st respondent filed an affidavit in support wherein he deposed as follows: he was a candidate in the parliamentary elections for Vubwi constituency held on 12th August, 2021, having successfully filed his nomination papers under the P.F. The said elections were contested by himself, the petitioner and three other candidates, namely Dominic Banda, Margaret Miti and Oscar Sakala. The said elections were conducted by the 2nd respondent. The election was properly, lawfully and validly declared in his favour by the Returning Officer. There is no reason to hold the said declaration otherwise, for the following reasons;

- i) He was not a party to the registration of voters as alleged by the petitioner in his affidavit in support.
- ii) Eneless Banda was not his agent nor part of his campaign, nor was she working under his direction or orders.

- iii) He never distributed mealie meal in Vubwi District as he has no capacity to do so. He has no information concerning the vehicle allegedly used.
- iv) He was never a party to the alleged attack on Patrick Banda, and neither did his agents nor campaign members participate in the same.
- v) He was not aware of any incident in which Blackwell Banda was allegedly attacked, nor does he know the perpetrators.
- vi) He is not aware of any activities perpetrated by Eneless Banda who was neither his agent nor a member of his campaign team.

He never committed illegal and unlawful activities, nor did his agents. The petitioner was never disadvantaged in any way as none of the allegations made were committed by the 1st respondent or his agents.

4.0 THE 2ND RESPONDENT'S ANSWER

The 2nd respondent filed an answer on 8th September, 2021 wherein it denied registering foreigners as voters as every voter was required to present a National Registration Card (NRC) before being registered. Further that no voter and/or majority voters were prevented from voting for their preferred candidates. That the 1st respondent was validly elected in accordance with the rules, and as such the petitioner is not entitled to any of the reliefs sought.

4.1 THE 2ND RESPONDENT'S AFFIDAVIT EVIDENCE

The 2nd respondent's affidavit, deposed to by one Martin Sakala, the Returning Officer for Vubwi constituency, reveals that; he declared the 1st respondent as the duly elected M.P for Vubwi constituency on the basis that he obtained the highest votes cast. The election was held in a free and fair environment. The 2nd respondent has never registered foreigners as voters. Every voter is required to present a Zambian NRC before voting. No voter and/or majority of voters were prevented from voting at the polling stations or constituency level.

The playing field was fair and levelled, given that no foreign national was allowed to vote. The allegations that foreign nationals were allowed to vote are mere fabrications, and in any case, no voter register in Vubwi constituency showed any foreign national. The candidates had an opportunity to seek votes within Vubwi constituency, and that no formal report of foreigners voting was availed to him.

5.0 THE PETITIONER'S REPLY TO THE 1ST RESPONDENT'S AFFIDAVIT

In response to the 1st respondent's petition, the petitioner deposed as follows; the elections were not free and fair, and that the 1st respondent was fully aware of the registration of foreigners, particularly from Malawi and Mozambique, especially that the 1st respondent was serving as a P.F Councillor for M'lawe ward in Vubwi constituency at the time. Eneless Banda was the one who introduced the 1st respondent to the D.C for Mozambique as the sole candidate in Zambia, and encouraged Mozambicans to vote for him. The 1st respondent was fully funded by the P.F, and together with his agents, did distribute several bags of mealie meal. The 1st respondent was using a Toyota Hilux whose registration number had been removed. The said vehicle was the 1st respondent's official vehicle, and he was the one who ordered the driver to reverse and attack Patrick Banda.

The 1st respondent is a well-known P.F cadre, who was easily seen by everyone to have gone to the Chopper in a P.F branded vehicle, and consequently attacked Blackwell Banda. The 1st respondent is fully aware that even Alfonso Kamuna Phiri was arrested and detained at Vubwi Police Station following the incident. The 1st respondent performed a lot of illegal activities, including sponsoring a football tournament where he distributed money. He distributed money to voters in Matemba and Chisiya wards. The illegal activities were conducted either by the 1st respondent personally or through his agents and supporters but with his full knowledge.

6.0 THE PETITIONER'S REPLY TO THE 2ND RESPONDENT'S AFFIDAVIT

In response to the 2nd respondent's affidavit, the petitioner deposed that: the declaration of the 1st respondent as a winner was wrong as the figures contained foreign nationals, from Malawi and Mozambique, as voters. The elections were not held in a free and fair environment, considering that foreign nationals were allowed to vote for the P.F candidate. The said foreign nationals were fed food before and after voting. The 2nd respondent registered a lot of foreign nationals as voters in Zambia, thereby disadvantaging the petitioner considering the foreign nationals were specifically instructed to vote for the P.F candidates. The voter registers contained numerous names of foreign nationals who were registered as voters in Zambia. There were massive foreign voters in Vubwi constituency and he had not fabricated stories. There was no formal report to the 2nd respondent due to the fact that some of the events were discovered following the announcement of the election results.

7.0 THE HEARING

The Petitioner's Case

At the hearing, the petitioner called a total of 11 witnesses.

7.1.0 The Testimony of PW1

The first witness, PW1, was the petitioner himself. His testimony was as follows: he contested for the 2021 parliamentary elections for Vubwi constituency under the UPND, against 4 other contestants. Following the said elections, the 1st respondent, Ackleo Banda, was wrongfully declared as a winner. Prior to the elections, Ackleo Banda participated in the supervision and registration of voters from Malawi and Mozambique. The said supervision and registration was widespread as it covered 8 out of 9 wards in Vubwi constituency, namely; Matemba, Chisiya, Chimpanje, M'lawe, Zozwe and Sindemisale, which are on the Malawian border. Along the Mozambican border, the supervision and

registration covered Zozwe, M'lawe, Vubwi and Mbozi. In all the polling stations along the borders, people of foreign nationals were included in the voter's register, and given specific instructions to vote for P.F candidates, thereby giving the P.F candidates an upper hand.

The documents exhibited from pages 1 to 95 of the petitioner's bundles of documents are from the Zambian voter register, and they contain information of foreign nationals from Malawi and Mozambique who voted. While some individuals on the said pages are Zambians, others are not, and the Non-Zambians outnumbered the indigenous Zambians, which posed a security risk in Zambia as they took part in the election of a leader. On page 1 of the petitioner's bundle of documents, number 5 from the left, under the last row, the name of Mbewe Galasiana is a Malawian, whose identification card, exhibited on page 2 of the petitioner's bundle of documents, proves the same. The same person has a Zambian voter's card bearing number 33960272, and she voted from Muzigawa primary school, a polling station in Chisiya Ward, Zambia. This kind of scenario was widespread throughout the 8 wards in Vubwi constituency.

The Mozambicans alone were estimated at 10, 000 while the Malawians were estimated at 7,500. Though the figures may not have been verified, there were a number of trucks that ferried the voters from Malawi and Mozambique to various polling stations in Zambia, on the 12th of August, 2021. The said voters were ferried from Kabango village in Malawi to Chankhandwe polling station under the supervision of the 1st respondent. The 1st respondent used government personnel during his campaign, specifically the Vubwi D.C, Eneless Banda, who was availed a P.F branded vehicle to use for campaigns in Mozambique. The D.C is not, by virtue of being a government employee, allowed to participate in active politics. The P.F used a government vehicle to ferry mealie meal to voters in the district. The vehicle, whose number plate had been removed, was intercepted by alert UPND cadres and part of the mealie meal is currently at Vubwi Police Station.

A P.F member, Seliano Sakala, co-ordinated preparation of food at Mchima polling station, which was used to feed the people of the areas surrounding Mchima. The food was supplied by the P.F leadership, and the 1st respondent is part of the P.F. The 1st respondent was the one in charge of the campaigns and was responsible for all the campaign activities in the district. The P.F cadres transported people from Malawi to Mzigawa polling station. Other voters were transported from Lifuledi Village in Malawi to Chigwe polling station in M'lawe ward, Zambia. They were transported using a canter, yellow in colour with a white ribbon, driven by Daliso Mwale. The vehicle belongs to the 1st respondent.

The elections were characterised by violence, which caused fear in the UPND supporters and thereby rendering the election not free and fair. At Chigwe polling station, the UPND Youth Chairman, Patrick Banda, was badly beaten by the 1st respondent and his crew for flashing the UPND symbol. The issue was reported to the police and a medical report obtained. Blackwell Banda, the UPND constituency Vice Chairman, was equally beaten by the 1st respondent and his crew. The incident was similarly reported to the police station and a medical report obtained. The illegalities of food distribution, violence and vote buying were widespread throughout the constituency and disadvantaged the petitioner.

PW1 prayed for a declaration that the election of the M.P for Vubwi constituency is null and void ab initio, and for a declaration that the illegal practices committed by the 1st respondent and/or his agents affected the election result and hence the same ought to be nullified. PW1 prayed for costs.

7.1.1 Cross Examination of PW1 by the 1st Respondent

When cross examined by counsel for the 1st respondent, the petitioner responded as follows: foreigners used the border between Zambia and

Malawi, which has no registered border structure, to enter Zambia on 12th August, 2021. He did not see all the foreigners but just saw one on the queue at Muzigawa, following which he, his driver, Gabriel Miti and another person called Chola, commenced investigations to determine how many more Malawians voted. They queried the foreigner they found at Muzigawa. PW1 could not remember the foreigner's names. He revealed that he was Malawian and was in possession of a Malawian identification card. He was given a Zambian NRC and voter's card. The foreigners were under instructions to vote for Ackleo Banda.

According to the ECZ figures, the registered number of voters for all the 9 wards in Vubwi constituency was 27, 000. An estimated number of 17, 000 foreigners registered as voters, but some did not vote. Ackleo Banda got 7, 255 votes. If all the registered voters had voted, there would have been more votes. The foreigners voted from Matemba, Chisiya, Chimpanje, M'lawe, Zozwe, Sindemisale, Vubwi and Mbozi wards, which are along the border. The petitioner won in Mbozi ward. He could not comment on who won in Muzigawa and Chisiya wards as he did not have the figures. Mbande ward is in the central part of Vubwi constituency and not along the border. He does not know anyone by the name of Ackim Phiri from Vubwi District. He funded the construction of a clinic in Malawi, but that the same was not intended to persuade Malawians to come to Zambia to vote for him. The construction commenced in 2020 and was handed over in July, 2021, during the campaign period.

He did not have the white book for the vehicle registered as BAT 2941, nor did he check with the Police or the Road and Transport Safety Agency (RTSA). The mealie meal exhibited in the petitioner's bundle of documents is for the Disaster Management and Mitigation Unit (DMMU). Vubwi District was declared as a place of disaster. The vehicle that was used to distribute the mealie meal had a GRZ number plate but the same was removed. He did not know whether Ackleo Banda works for DMMU. There was no date shown on the pictures of the

vehicles carrying the mealie meal as the camera used had no provision for dates. He did not take the pictures. He could not tell who did. The 1st and 2nd respondents were registering voters in Zambia although he could not tell the date and place where the two met to agree on the same. He did not have any written communication with the Malawian Government to confirm that the exhibited identification cards belong to its citizens. He similarly did not have communication from the Mozambican and Zambian Governments. The identification cards were not fake because they were collected from the owners. The village headmen could be subpoenaed so that verifications can be made from the village register. The identification cards produced before court were proof that foreigners were registered as voters.

There were many incidents of beatings but only two were reported to the police. The police recorded Blackwell Banda's beating as an alleged assault because he was not swollen, bruised or bleeding. The incident was reported to the ECZ Conflict Management Committee but there was no response. Blackwell Banda was assaulted by Alfonso Kamuna Phiri, a P.F cadre. The medical report issued for Patrick Banda by the police did not name Ackleo Banda as the assailant. Neither the police nor ECZ summoned Ackleo Banda. There were local and international observers present during the elections. He did not have any written report from the local or international observers regarding the beatings. He did not bring copies of the letters he wrote to ECZ.

7.1.2 Cross Examination of PW1 by the 2nd Respondent

When cross examined by the 2nd respondent's counsel, PW1 responded as follows: he was aware that a complaint to ECZ is supposed to be in writing. He wrote to the ECZ Conflict Management Committee to complain. He had not brought a copy of the complaint before the court. He registered as a voter. He was registered as a voter upon presentation of his NRC.

Page 1 of the petitioner's bundle of documents contains the NRC numbers and photos of voters. No one appearing on that page bears Malawian or Mozambican nationalities. The court would not see NRCs from Malawi or Mozambique on the Zambian voter's register because they were not there. There was nothing wrong with ECZ registering a person as a voter upon presentation of a Zambian NRC. He had heard of dual nationality in Zambia through social media. He felt bad that foreigners registered as voters.

He obtained his NRC from the Ministry of Home Affairs and not ECZ. In spite of the fact that NRCs are issued by the Ministry of Home Affairs, ECZ has a mandate to verify who is indeed Zambian before issuance of a voter's card. Page 2 of the petitioner's bundle of documents contains a Zambian NRC for Mbewe Galasiana. If Mbewe Galasiana presented her NRC to ECZ, the commission would think she was Zambian. Names along the Zambian and Malawian borders are similar. He did not know if Mbewe Galasiana lied to the Ministry of Home Affairs to obtain her NRC. A person who possess two NRCs cannot be trusted. He signed some documents when obtaining his NRC. He had no written proof from the Malawian Government that shows that Mbewe Galasiana's documents are genuine. One's nationality cannot be determined by looking at the face but by their NRC.

The extracts of the register exhibited from pages 1 to 93 do not show that the persons are foreigners as they all have Zambian NRCs. Out of 35 voters on page 1 of his bundles of documents, only one person, Mbewe Galasiana, was identified as a foreigner. On page 3 of his bundle of documents, only one person, Yobu Banda, was marked as a foreigner. Two people, Major Maxwell and Mbewe Agness, were marked as foreigners on page 6 of his bundle of documents. On page 8, only Mbewe Maria was marked as a foreigner but there were many more others. On page 10, only Edward Phiri of Siatu, Chisiya-2 was marked a foreigner. On page 12, two foreigners were marked. On page 16 two people, from Chisiya-2, were marked as foreigners. On page 19, he marked three

foreigners from Chisiya-2. On page 21, two, from Chisiya-2, were marked as foreigners. On page 23, one from Chisiya-2 was marked as a foreigner. On page 25, one from Chisiya-3 was marked as a foreigner. On page 27, one was marked as a foreigner. On page 29, one was marked as a foreigner. On page 32, one from Chisiya-3 was marked as a foreigner. On page 34, one from Chisiya-3 was marked as a foreigner.

The registration of foreigners as voters was widespread though he had not brought all the documents to prove that, due to limited time. There are 9 wards in Vubwi constituency. Out of the 9 wards, he had only shown 3 wards that contained foreign registered voters. A voter shown on page 88 of his bundle of documents shows a foreign voter by the name of Maxwell Zulu. He came to know of the registration of foreign voters on the 12th August, 2021. He had not brought any written proof from Malawi and Mozambique to show that the people were its citizens. The foreign identity cards were not fabricated.

7.1.3 Re-Examination of PW1

In re-examination, PW1 clarified as follows: the documents exhibited in his bundles of documents were merely extracts for Chisiya ward. He contributed to building a clinic in Malawi in the year 2020 but did not bring any Malawians or Mozambicans to Zambia to vote. The 1st respondent distributed the mealie meal. He did not have the actual date or time-frame when hunger was declared in Vubwi district but distribution of the mealie meal was done during the campaign period. The letter of complaint was with the ECZ Conflict Management Committee. He did not know the procedure for attainment of dual citizenship.

7.2.0 The Testimony of PW2

PW2, was Charles Nyoka, a 51 year old farmer of Chaoleka Village, under Chief Pembamoyo, Vubwi District. He testified as follows: on 15th June, 2021, Ackleo Banda called to tell him that Nkandu Luo the running mate for Edgar Chagwa Lungu was coming. He went to Mbozi

ground, in Mbozi ward to attend a meeting at which Nkandu Luo was being introduced as the running mate. He and Ackleo Banda agreed that PW2 would assist in the campaign. From 15th June, 2021, he and Ackleo Banda started campaigning in Mbande ward, using a Toyota Hilux which was branded with P.F colours and Ackleo Banda's image. There were not enough people at the meeting at Mbande.

In the evening, after the meeting, he, Ackleo Banda, Bonex Mushanga and Kamuna went to the government house for the D.C for Vubwi, Eneless Banda. They found campaign materials. They found 18 bales of chitenge materials, 9 bales of T-shirts, and bicycles. The T-shirts had images of Edgar Lungu and Nkandu Luo. They informed the D.C, Eneless Banda that the meeting did not go well as they did not have campaign materials to give to the people. The D.C told them that the materials which had come were for the 9 wards of Vubwi constituency, and that they were in the hands of Ackleo Banda.

After 2 days had passed, Ackleo Banda told PW2 he would be going to Mozambique to organise people to vote. The votes were banked votes for P.F members. He, Ackleo Banda and other P.F members travelled to Mozambique. They carried one bale of chitenge material. After cutting the chitenge material into 2 metre pieces, they had 300 pieces. They reached Mozambique at Jairos village, and met with Chief Musipu. On 11th August, 2021, Ackleo Banda got 6 canters which they used to carry people from Malawi to Zambia, with instructions to vote for Ackleo Banda. They distributed mealie meal at the Malawian and Mozambican entry points, and the people were encouraged to go and eat after voting. PW2 was surprised to see that Ackleo Banda was using a white land cruiser, with tinted windows on the sides and some dots spelling NRPC, to take food to areas with bad roads between Malawi and Zambia, and Mozambique and Zambia. He used to see the same vehicle at the office of the Permanent Secretary, and they were in the company of the D.C, Eneless Banda, in her vehicle when they went to collect the land cruiser from the Golf Club where it was being washed. The land cruiser was

white in colour, tinted, with a carrier on top and it had no registration number. On the side it has some dots written NRPC. The land cruiser was meant to take food to some areas where there are no good roads at the entry points for both Malawi and Mozambique.

On the 12th August, 2021, he and Ackleo Banda separated. Ackleo Banda went to the Mozambican side, near Malawi. He parted company with Ackleo Banda. He only saw him 2 days later when he heard that Ackleo Banda had won the elections. He met with Ackleo Banda last week. Ackleo Banda told him he had received a petition due to some wrangles among the party members. The D.C helped Ackleo Banda in his campaigns by keeping mealie meal at her house, usage of the GRZ vehicle and influencing Malawian and Mozambican people to vote for Ackleo Banda. There is only one chief in Vubwi District. There are 9 wards in Vubwi District, 4 wards on the Malawian side, and 5 wards on the Mozambican side. Mbande ward is in the middle of Vubwi District. It is difficult to share resources, such as food and fertilizer, in Vubwi District because there are foreigners in the border areas. Ackleo Banda promised the people of Mozambique and Malawi that they would share the Community Development Fund and Social Cash Transfer with the Zambian people. He promised them that if there was poverty, he would provide them with mealie meal. Ackleo Banda gave PW2 K200 daily for lodging from 8th July, 2021 to the date of voting, except for Sundays when PW2 would visit his family in Matemba ward.

7.2.1 Cross Examination of PW2 by the 1st Respondent

When crossed examined by the 1st respondent's counsel, PW2 replied as follows: he used to be found with Ackleo Banda and they went to meet the D.C together. He did not know who a political optimist was. The UPND had not promised him anything for his testimony. He was merely protecting the country. He was not expelled or suspended from the P.F, and had not joined the UPND. He did not know Mwendapole. He did not know the owner of the Hilux they were using during campaigns. He thought it belonged to Ackleo Banda as it was branded

with his image. He took a picture of the vehicle but Ackleo Banda was not in the picture. The picture was not before the court but he could bring it if given time.

At the meeting of 15th June, 2021, at the D.C's house, he was with Eneless Banda and Ackleo Banda. He was not threatened for his testimony. He started to campaign separately from Ackleo Banda on discovery that Ackleo Banda was using the land cruiser belonging to the office of the Permanent Secretary. He did not wait until after the election to be patriotic. He told Ackleo Banda that what he was doing was wrong. The land cruiser did not have a registration number. They got the vehicle on 9th August, 2021. He did not have a picture of the land cruiser.

He knew Ackleo Banda's plans as they did everything together. He had messages on his phone. He had not brought the phone before the court. He saw the canters that Ackleo Banda used to ferry voters with his own eyes. The canters had no registration numbers because they were going into Malawi and Mozambique. The canter mentioned in the petition could be one of the canters that was used to ferry voters but the ones he saw had no registration numbers. He could not remember all the drivers, just Elias. He could not remember Elias' surname. He followed the canter driven by Elias to Kabangu, in Malawi where there was Alick. He did not follow the other 5 canters. He followed the canter so that he could have proof so that he could protect the country and his children from what was happening. Vubwi ward is in Vubwi constituency, in Vubwi District. It borders Mozambique. That was where Ackleo Banda was getting people to vote for him. He could not recall the name of the person who won in Vubwi ward as he did not master the people who won ward by ward.

Banked votes were votes that were kept in Mozambique. There were 10,000 banked votes in Mozambique. Ackleo Banda won by 7,255 votes. Not all banked voters came as over 9,000 were blocked by the UPND cadres. Only 1000 people came to vote. He did not count the voters: 4

wards are shared with the Mozambican border. Mbande ward is in the middle of Vubwi constituency. It is not near a border. He did not know the person who won in Mbande ward. He had videos and Whatsapp chat messages on his phone that proved that he was working with Ackleo Banda. He did not give the same to counsel. He recorded the videos on his phone. Other than himself, only his children have access to his phone. The Chief from Mozambique and the trees were proof that the video was shot in Mozambique. Ackleo Banda was in the video. He took a picture of the Toyota Hilux, which was branded with P.F colours. Ackleo Banda was not in the picture.

No one was giving him money prior to joining Ackleo Banda's team on the 16th July, 2021. No one gave him money after 11th August, 2021. He finds his money from farming. He was not angry that Ackleo Banda stopped giving him money. He did not refuse the money that Ackleo Banda gave him because he worked for it. He has no evidence that Ackleo Banda gave him K200 daily for lodging. He did not know who appoints the D.C. He saw the D.C for Vubwi, Eneless Banda, working with Ackleo Banda. Ackleo Banda does not issue NRCs. He does not know who brought the mealie meal found at the D.C's house but it was written 2.5kg DMMU.

7.2.2 Cross Examination of PW2 by the 2nd Respondent

When cross examined by counsel for the 2nd respondent, PW2 responded as follows: he registered as voter from Matemba ward, Vubwi Constituency. He was registered as a voter upon presentation of his NRC. ECZ registers voters who present an NRC. Page 1 of the petitioner's bundle of documents shows an extract of the voter register for Chisiya-1 polling district. All the people appearing on that page have Zambian NRCs. The documents exhibited from pages 8 to 32 of the 2nd respondent's bundle of documents are part of the voter register for Chisiya-1 polling district. The register is from page 1 to 25. The people on pages 8 to 32 of the 2nd respondent's bundle of documents all have NRCs. There was no foreign NRC on the said pages.

7.2.3 Re-examination of PW2

In re-examination, PW2 clarified as follows: he just knew how to take photographs and did not know how to fabricate pictures. He was a villager with no technological knowledge. He just knew how to open his phone and go to the camera.

7.3.0 The Testimony of PW3

PW3, was Steven Banda, a 29 year old farmer of Chisaka Village, in Vubwi District. He testified as follows: on 1st August, 2021, he received a phone call from Eneless Banda and Ackleo Banda. They asked him not to go anywhere far from home. He was told a vehicle would take mealie meal, cooking oil, sugar, salt, chitenge materials and T-shirts. He waited up to 15:00 hours. The Scania vehicle arrived with 79 bags of 25 kg mealie meal, 7 buckets of cooking oil, 28 packets of sugar and 28 packets of salt. He did not know the vehicle number plate.

On 11th August, 2021, at around 23:00 hours, Ackleo, the ward chairman, Mr Kalonga, and Jonathan, the councillor went to Kabungu in a white land cruiser. The vehicle had dots, and a picture of Ackleo Banda and Vincent Mwale but no number plate. They went to give the people money.

On 12th August, 2021, he watched from the roadside as people were ferried from Kabangu, Chibonoye and Mukanga in Malawi. The people were ferried in a white canter. The canter belonged to Ackleo Banda. The canter had no number plate. Ackleo Banda told the people to vote for him and the councillor. Ackleo Banda gave them money. Some people came from Tembwe in Malawi to vote. They did not have transport money although they came by a vehicle from Malawi. He informed the ward Chairman, Mr Kalonga, and Ackleo Banda. Ackleo Banda gave him a K500.00 to give the people as transport. He gave the people the money after they voted.

7.3.1 Cross examination of PW3 by the 1st Respondent

When cross examined by counsel for the 1st respondent, PW3 replied as follows: he does not know Charles Nyoka (PW2). He cannot recall what day the 1st August, 2021 fell on. It was only Eneless Banda who called him on the 1st August, 2021. He deleted Eneless Banda's phone number. He did not see whether the Scania vehicle was a Volvo or a Tata Truck, he just read the word Scania. The vehicle had a trailer. The vehicle carried 79 bags of mealie meal, 7 buckets of cooking oil, 28 packets of salt, 28 packets of sugar, T-shirts and chitenge materials. He did not pay attention to the number plate as he was offloading the goods. He remembered the land cruiser well, it was branded with an image of Ackleo Banda and Vincent Mwale. He saw the land cruiser on 11th August, 2021 at 23:00 hours. There was no paper at the back of the vehicle so he was able to see the dots on the vehicle.

On the 12th August, 2021, Ackleo Banda was using a land cruiser. At the meeting, he had a white canter. The canter had no number plate. He does not know whether the canter with the number plate BAT 2941 was white or yellow. He was with Ackleo Banda and Jonathan on 11th August, 2021. Jonathan told him he is a councillor. He knows Ackleo Banda very well as they went to the same school. They are friends. He was in grade 12 in the year 2015. Ackleo went to Vubwi Secondary school for his tuitions in 2015. Wilson Banda taught him and Ackleo Banda. He shared notes with Ackleo. He was in grade 12 while Ackleo Banda was doing his tuitions. He and Ackleo Banda sat next to each other at the Assemblies Church. He just knows the 1st respondent as Ackleo. He did not have Ackleo's phone number. Ackleo had never contacted him, they just met. He was at one point an election agent for Ackleo but could not produce the appointment letter as he had used it as toilet paper. He was not the registered official agent for Ackleo Banda, and did not know who was. He did not have proof that Ackleo Banda gave him a K500 for transport. He did not have any proof

of the payments that Ackleo Banda made to him. The court should believe both statements made by himself and PW2 as regards people being ferried from Malawi in a canter. He was never a member of the P.F but was merely being used. He did not belong to any party.

7.3.2 Cross examination of PW3 by the 2nd Respondent

When cross examined by counsel for the 2nd respondent, PW3 replied as follows: he did not search the people that he saw coming from Malawi. The people from Malawi look like him. The Malawian people did not show him any identification as there is no border. Even though he did not see any identification and there being no border, he was able to tell that the people were Malawians as they play soccer together and intermarry. It was not difficult to identify the Malawians. He was not fabricating evidence. He could identify Malawians by just looking at their faces. He did not count the people in the canter. His wife is Malawian, from Chief Lumunegwa's village but lives in Chisaka village in Vubwi District. His wife does not have any immigration documents as she has been in Zambia. She was registered as a Zambian, and registered as a voter at Chimpande ward. She is a Zambian. He did not initially tell the court that his wife is from Malawi but that her grandparents are Malawians. She was born in Zambia. He is a reliable witness.

7.3.3 Re-examination of PW3

There was no re-examination of PW3.

7.4.0 The Testimony of PW4

PW4 was Ackim Phiri, 33 years of age, a farmer who lives in Kabangu Village in Malawi whose testimony was as follows: On the 25th August, 2021, Ackleo Banda and Nyoka (PW2), came to see him. They told him that since he was from Zambia, they wanted him to help them with the campaign for the people from Malawi. After their discussion Ackleo Banda and Nyoka returned to where they had come from. On the 5th August, 2021 they came back and told him that he should gather some

people for them to hold a meeting at Kafulama. They had the first meeting at Kafulama, and Ackleo Banda produced campaign materials for the P.F, which he gave PW4 so that PW4 could share them amongst his people. After sharing the materials, the meeting started. Ackleo Banda asked for votes from the people of Malawi and explained that in Zambia where he came from, he could not manage to get enough votes from the people as only a few people would vote for him. As Ackleo Banda was asking for their votes, he also said that he would do anything for them like giving free medical facilities and free fertilizer. He also said that he could manage to do all these things for them because they were one people. He was kneeling down for the people of Kafulama when asking for the votes.

The next place they went to was Chibonoye. At that place, Ackleo did not give out any campaign material as it was not enough so they did not have a meeting at Chibonoye. From there, they went to Kabangu where a meeting was held. Again, Ackleo asked for votes from the people. He knelt down for the people of Kabangu and told them they should vote for him. Ackleo said he was going to do good things for the people of Kabangu and that on the 12th August, 2021 they should vote for him, that is Ackleo. After that, Ackleo took 3 sacks of P.F campaign materials for wearing and gave them to the people of Malawi. Ackleo called the Chiefs to talk to them but PW4 did not know what they went to discuss or what they were given. Ackleo knelt down and asked the people to help him as there was a big battle in Zambia. Ackleo told the people that the battle was too much and that when the people of Chibonyole would go to vote, they should vote where they would see a boat. Ackleo went on to tell the people of Malawi that they were his friends and whatever they did for him, he would in turn do good for them by returning the favour. Ackleo then told the people that he was now going back to where he had come from.

After Ackleo left they started sharing the materials that had been left amongst the people. The people fought because of the campaign materials that were brought.

7.4.1 Cross examination of PW4 by the 1st Respondent

In cross examination by counsel for the 1st respondent, PW4 responded as follows: There was a meeting at Kabangu where Ackleo asked for votes and gave out materials. Ackleo started the meeting at Kafulama. They did not have the meeting at Chibonyole but went on to Kabangu. Ackleo failed to hold the meeting at Chibonyole because Ackleo said that the campaign materials were not enough. He did not know what Ackleo was thinking by not having the meeting in Chibonyole. Ackleo did not have the meeting at Chibonyole because the campaign materials were not enough. They then went to Kabangu where Ackleo started distributing the materials. Ackleo got the campaign materials from his car. Ackleo's car was a Land cruiser that was branded with campaign materials. This was around 15:00 hours on the 5th August, 2021. He was not aware that on the 25th August, 2021, Ackleo Banda was at Parliament doing inductions. Ackleo Banda, the M.P was the one that went to his home even though he was at Parliament on the 25th August, 2021.

He was not related to Alfonso Kaziche Phiri and he had just seen the petitioner in Zambia. He had never spoken to the petitioner. He did not receive any materials for the Kabangu clinic from the petitioner. He did not know that there was a clinic at Kabangu village even though Alfonso Kaziche Phiri testified that he helped to build a clinic in Kabangu village and handed it over in July, 2021. He has never seen the clinic. He would not know if the petitioner is a liar or if he was telling the truth, but he was telling the truth, as he had never met with the petitioner. He came to Zambia two days before the day he testified in court. He had his visitors permit. He was from Zambia as he had a Zambian NRC.

He did not know how many times the petitioner held meetings at Kabangu village in Malawi as he did not see him. He did not have any papers to show that he had authority to stay in Malawi with his wife.

He knew that there was a petition in Chipata through the petitioner who told him about this case, and when to come.

Ackleo Banda and Charles Nyoka went to his house. He did not know whether Charles Nyoka was the UPND Chairperson for Vubwi District. He lives in Kabangu though he came from Chisaka in Vubwi. He knew Charles Nyoka when Charles went to Kabangu but he could not remember on what date that was. He remembered that it was before the elections. Even though he could not remember the date, it was at the beginning of August.

Charles Nyoka has never stood as M.P for Vubwi constituency in the past. He did not know that Charles stood as M.P for Vubwi. He did not know that Joseph Malanji came to Vubwi District with a helicopter. He did not defect from the UPND to the P.F with Charles Nyoka when Joseph Malanji went to Vubwi. He was not aware that Ackleo Banda got more votes inland than from the border. He did have evidence by way of a photo that Ackleo Banda went to his house but the said photo was now lost. All the photos, of Ackleo Banda, that were in his memory card are lost.

7.4.2 Cross examination of PW4 by the 2nd Respondent

In cross examination by the 2nd respondent's counsel, PW4 replied as follows: He did vote on the 12th August, 2021. A number of Zambians marry Malawians along the border area. It was possible for Zambians who stay in Malawi to cross into Zambia during an election and vote if they had an NRC.

7.4.3 Re-examination of PW4

In re-examination, PW4 replied as follows: he voted on the 12th August, 2021, and he met Nyoko and Ackleo Banda in December, 2020.

7.5.0 The Testimony of PW5

PW5 was Blackwell Banda, 44 years of age, and a farmer who lives in Vubwi under Chief Pembamoyo in Zambia at Menyani Village. His

testimony was as follows: on the 10th August, 2021, between 15:00-16:00 hours, a chopper red in colour arrived, and landed at a bush near the D.C's office. People from different parties went to see the chopper that had landed at a bush. They wanted to see what the chopper had brought and in the process of looking, some people started getting photos. He did not get any photo. A 50kg sack was removed from the chopper as well as a wooden box that was carried in the hands. These items were taken into the office of the D.C, Eneless Banda. As the people were getting photos, he moved his group to the side to discuss what could have been in the sack. To his surprise, the P.F members started beating him. This group belonged to Ackleo. He was surprised that he was being beaten as he had not taken any photos. While being beaten, he thought he was going to die until someone came from the chopper and asked, "I have seen you beating someone, what has he done?" The person from the chopper was particularly asking Alfonso, nicknamed Kamuna. Alfonso answered that they were beating him (PW5) because he had come with people who were getting photos of the chopper and he was the group leader.

Because of the violence, the elections in Vubwi were not free and fair. The people were voting in fear as they feared that they would be killed by the Vice Constituency Chairman. After being beaten, PW5 went to the Police so that he could be assisted to go to the hospital as he had been beaten on his back, particularly on his spine. He got a medical report. He wanted to see how this case would end as looking at the situation, he did not know where this country would end up with campaigns of violence.

When the Police apprehended Alfonso Kamuna, a member of the P.F, the one that assaulted him, Ackleo said that they should have the matter discussed. He agreed that they should sit down and discuss. He advised Alfonso that they were not supposed to do politics of violence.

7.5.1 Cross examination of PW5 by the 1st Respondent

In cross examination by the 1st respondent, PW5 responded as follows: He was assaulted. The police report indicated that he was allegedly assaulted because he was not bleeding when he went to the police but had some internal pains, and he had pains on his back. Alfonso Kaziche Phiri was there when he was being assaulted. Ackleo Banda, who belongs to the P.F, was also there when he was being assaulted. Ackleo's group was there when he was being assaulted. He did not see Ackleo Banda's face at the place where he was being assaulted. He did not know who the agent for Ackleo Banda was. He was not concerned with whether Alfonso Kamuna Phiri was a registered agent for Ackleo Banda or not.

He was the number 2 man for the UPND for Vubwi constituency, where Alfonso Kaziche Phiri and Ackleo Banda were standing for M.P. He did lodge a complaint of his attack at the ECZ Conflict Management Committee. He did not have the letter with him as he did not know that the issue would come to this. He did not report to the police that Ackleo Banda had assaulted him because it was not Ackleo Banda that assaulted him.

Ackleo Banda sent people to apologise to him but he was not present at the place where Ackleo gave this message. He was just told that Ackleo was asking for forgiveness by the people that Ackleo sent to him. He did tell Alfonso that they should not do politics of fighting. He had forgiven Alfonso but he had not forgiven the Party, and he was angry with the Party as they had not followed the law. It was as a result of that anger that he had come to testify as a witness.

A lot of people were getting pictures of the chopper. Alfonso Phiri did not get any pictures. He saw Nakaleti taking pictures and other people from different parties which he could not mention. The same people that were taking the pictures were there when he was being beaten. They did not use his phone to take the pictures, they used their phones. He did not have any photo of his beatings as he was the one being beaten and did not have a chance to get any photos. He did not tell a

lie when he went to the Police to tell them what had happened. Even in the absence of a video showing the chopper and the beating, the beating was there. He did not get any video because he was the one being beaten.

He was able to tell that the sack was 50 kg by looking at it. He did not know the number of the chopper. The group that beat him up did not show him their cards that they belonged to P.F, but they were able to know each other from the meetings that they would have where one would know that this person belongs to the P.F by what they were saying about the party. His conclusion on this was based on the fact that they used to attend P.F meetings and that they knew each other. He was beaten in Vubwi ward and it was true that people were scared to vote because they voted in fear. He was aware that Alfonso Kaziche Phiri won in Vubwi ward. He came from Mulabe ward. There was violence in Mulabe ward. Alfonso Kaziche Phiri did not win in Mulabe ward and he did not win at Mulabe polling station.

7.5.2 Cross examination of PW5 by the 2nd Respondent

In cross examination by the 2nd respondent's counsel, PW5 responded as follows: The chopper only came once to Vubwi. He did vote on the 12th August, 2021. Despite the alleged violence, he went to vote.

7.5.3 Re-examination of PW5

In re-examination, PW5 clarified that an independent candidate, Margaret Miti, won in the Mulabe ward, and not Alfonso Kaziche Phiri. There was a chopper, and the beating happened. He had not forgiven the party. Even though Alfonso Kamuna and him fought, it was Alfonso who beat him.

7.6.0 The Testimony of PW6

PW6 was Tangu Phiri, 41 years of age, a business lady who lives in Muchinji in Malawi: Her testimony was as follows: On the 25th July, 2021, Ackleo Banda, found them at Muchinji in Malawi. He went to

make a committee to help with the voting in Zambia. They met him again on the 11th August, 2021, and she was the Chair lady in the Committee that was formed. At that meeting, Ackleo gave them K2,000 so that they could buy relish to cook for the people of Malawi in preparation for the 12th August, 2021. Ackleo promised them that there would be a vehicle that would come in the morning to ferry people. This promise was made on the 11th August, 2021.

They got a two tonne vehicle belonging to the head master of Matemba School in Zambia. The vehicle came early in the morning around 05:00 hours and took the people to Matemba. The people were taken from Malawi to Matemba in Zambia. They went to vote and after voting they went to cook for the people so that they could eat. After they finished eating, they all parted company and were promised that they would be given bicycles. She received a bicycle on the 13th August, 2021 after the day of voting. When Ackleo gave them bicycles, he promised that he would give them land in Vubwi. Up to now, he has not given them the land.

7.6.1 Cross examination of PW6 by the 1st Respondent

In cross examination by counsel for the 1st respondent, PW6 responded as follows: she was from Malawi. She had a Zambian NRC but this did not make her a Zambian as she was from Malawi. She was not a Malawian criminal who had obtained a Zambian NRC fraudulently. She had the Malawian documents as well as the Zambian NRC with her. Ackleo, the M.P issued her with the Malawian documents. She got the Malawian documents from the Malawian D.C in 1999. She did not have any documents before 1999 as she had not yet reached the age of getting the documents at that time. She was about 16 or 17 years in 1991. She was 17 years in 1991 as she was doing Standard 7. She was now 41 years old. She was born on the 27th August, 1980. She was not educated and was just told that she was born in 1980. She was not able to understand English as she was uneducated.

She was not lying when she said that she did not have any papers in 1991. The papers she had were not fabricated. There was a D.C in Malawi in 1991 and his name was Mr Kamba. Ackleo Banda gave her the NRC in Zambia at Chikoka near Matemba. It was the Government of the Republic of Zambia that took a picture of her and gave her an NRC. Ackleo Banda did not cause her to lie, and this Court was going to believe her because it was the M.P who came to get them from Malawi and he knelt in front of them to ask for their votes.

She had the paper before the court to show that she was the Chairperson of the committee. Ackleo Banda did not write a letter appointing her as Chairperson of the committee but they wrote it on their own. The committee concerned Ackleo Banda though there was no document appointing her as Chairperson of the said committee. She did not have a receipt for the K2,000 that she received from Ackleo Banda. The vehicle that Ackleo Banda came with to Malawi did not have a number plate, and she did not have any picture or video of the said vehicle.

She did not have any evidence that Ackleo Banda was with her in Malawi on the 25th July, 2021 or on the 11th August, 2021. Ackleo Banda was the one that gave her the bicycle. She did not have any document to show that Ackleo Banda gave her the bicycle. She did not have any evidence that she crossed into Zambia and was cleared by Immigration to go to Zambia from Malawi on the 11th August, 2021. There was nowhere where it was written on the bicycle that it was given by Ackleo Banda.

On the 11th August, 2021 Ackleo Banda went to Muchinji around 16:00 hours. She was not aware that Ackim Phiri (PW4) said that Ackleo Banda was at Kafulama at that time. It was not possible for one person to be in different places at the same time. She was not going out with Charles Nyoka (PW2). She knew Charles Nyoka because of the campaign. Alfonso Phiri was the one who told her to come to be a witness in the Petition in Zambia. Alfonso Phiri knew about her house in Malawi because he had investigated. Alfonso Phiri in investigating

told them that the elections in Zambia had not gone well and when he asked them if they, as Malawians, had voted in Zambia they agreed. She would not know how out of 8 million Malawians, Alfonso Phiri knew that she voted in Zambia. Alfonso Phiri came to where they lived as there was a group of them. She was not paid to come and fabricate any evidence before the court and neither was, she having an affair with Charles Nyoka.

7.6.2 Cross examination of PW6 by the 2nd Respondent

There was no cross examination of PW6 by counsel for the 2nd respondent.

7.6.3 Re-examination of PW6

In re-examination, PW6 clarified that it was possible for one person to be found in two places depending on the time a person would spend in moving, the only difference would be in time, that is a few minutes.

7.7.0 The Testimony of PW7

PW7 was Lucy Christopher, 38 years of age, a farmer who lives in Kabangu in Malawi who testified as follows: on the 11th August, 2021 in the evening when it was dark around 8:00pm or 20:00 hours, she heard a knock at her door. When she went to the door she found that it was Ackleo and his friends. They told her that she should go and vote the following day in the morning and that she should not vote for anyone else. She was told to vote for the P.F. She was given K50, a chitenge and a T-shirt by Ackleo. Ackleo told her that when going to vote, he would send a vehicle.

The following day in the morning, the vehicle which was white in colour came to pick them up. Ackleo told them that if he won, he would, give them letters so that they would receive fertilizer. That is how they got into the vehicle and went to vote at Chankhandwe Polling Station. Ackleo told them after voting they should go to Steven's house to go and eat and she went to Steven's house after voting.

7.7.1 Cross examination of PW7 by the 1st Respondent

In cross examination by counsel for the 1st respondent, PW7 responded as follows: she did not come from any village in Zambia as she does not stay in Zambia neither does her husband come from any village in Zambia as he was from Malawi. Ackleo Banda was in Kabangu at 8:00pm that is 20:00 hours. She did not know that Ackim Phiri told this court that Ackleo Banda was in Kabangu at around 23:00 hours. Between her and Ackim, this court should believe her.

She had never seen Charles Nyoka. She knew Charles Nyoka in Chisaka when he went for a meeting with Ackleo. She was telling the truth when she said that Ackleo was at Kabangu, even though Charles Nyoka had testified that Ackleo went to Vubwi. She did not know Alfonso Kaziche Phiri and she did not know the person that she came to testify for. Ackim Phiri was the one that told her that there was a case and that she should come and testify. Ackim Phiri was her brother in law because he had married someone from the same village where she came from. She did not have a duty to support Ackim Phiri.

There was no clinic at Kabungu village neither was there any mother's shelter. Between her and Alfonso Kaziche Phiri who told this court that he had supported the building of a clinic at Kabangu, she was the one telling the truth. She did not have any receipt to show that she received any K50 from Ackleo Banda. She got to know Ackleo Banda when he came to their place on the 11th August, 2021. She did not know him prior to that.

She did have a voter's card. She also had an NRC for Zambia. She did vote on the 12th August, 2021. She obtained the NRC when a vehicle came to get them to go and obtain NRCs. Ackleo Banda was not in that vehicle and he was not the one that gave her the NRC. Ackleo Banda was responsible for her obtaining an NRC because the vehicle that went to pick them up to go and get NRC's was sent so that they could vote for the P.F. She did not come to testify in court because Alfonso Kaziche

Phiri had lost the elections. Alfonso Kaziche Phiri and her brother in law, Ackim Phiri, did not arrange for her to get an NRC. She did not know in which year she got the NRC, even though her NRC showed that she got it in the year 2008. Ackleo Banda did not help her to get the NRC in 2008 and she did not know who helped her to get the NRC in 2008.

7.7.2 Cross examination of PW7 by the 2nd Respondent

In cross examination by counsel for the 2nd respondent, PW7 responded as follows: she still wanted to keep the NRC from Zambia. She went to the Catholic Church and she knew the importance of telling the truth. She presented her NRC when she went to get the voter's card but she did not have to tell the person issuing the voter's card that she was a Zambian national. The Chief on the NRC was indicating Chief Pembamoyo but she could not read what was indicated under the District. Even though her NRC indicated that she was from Vubwi District under Chief Pembamoyo, when she went to get her voter's card she indicated that her village was Chikusi and the Chief as Chief Pembamoyo, who is the Chief in Zambia. She was given a voter's card on the basis of the details on her NRC. When going to get registered to vote, she was just told what to say. She knew that she was lying to the ECZ agent who was registering the voters. It was not her tendency to be ready to lie if she was given money. She was not aware that it was an offence in Zambia for one to register as a voter when one was not entitled to vote and was hence asking for forgiveness.

She was aware that there were a number of Zambians who stayed around the area in her village who came to vote. However, she did not agree that she only told people that she was not a Zambian after the elections. Even though she was not entitled to have a Zambian NRC, she was not willing to give it to the court for it to be destroyed. The reason why she wanted to keep the NRC was because it had already been given to her and not because she was a Zambian lying that she came from Malawi. She was not Lucia Phiri, a Zambian trying to pretend

to be Lucy Christopher from Malawi, and that was not the reason why she did not want the NRC to be taken from her. She was Lucy Christopher. She agreed that Lucy Christopher did not have a Zambian NRC. She also agreed that Lucy Christopher did not have a voter's card in Zambia.

7.7.3 Re-examination of PW7

In re-examination, PW7 replied as follows: although her NRC showed that she was Lucia Phiri, she was Lucy Christopher. When getting the NRCs, they were told to change their names by Ackim (PW4) who was sent by Ackleo.

7.8.0 The Testimony of PW8

PW8 was John Yolonimo, 27 years of age, and a farmer who lives in Kabangu, Malawi. His testimony was as follows: On the 6th August, 2021, Ackleo Banda came to Kabangu to hold a meeting. At that meeting Ackleo Banda told them that he had come to ask for their votes as Zambia was holding elections. Ackleo told them that if they voted for him and he won, he would write their names down and they would receive fertilizer within a week. After that Ackleo left and came back on the 11th August, 2021 at 9:00pm that is 21:00 hours. He heard a knock at his door and when he went outside, he found Ackleo Banda and Jonathan Phiri a Councillor for the P.F. Ackleo repeated what he had said that if they voted for him, they would get fertilizer. Ackleo then gave him a K50, a chitenge material and a T-shirt. Ackleo proceeded to tell him that a vehicle would come and pick them up and that after voting they should go to Steven's house. The day came and they organized themselves and they were told to go and vote for Ackleo.

7.8.1 Cross examination of PW8 by the 1st Respondent

In cross examination by the 1st respondent's counsel, PW8 responded as follows: He could not remember when he obtained his NRC. He obtained his NRC on the 25th September, 2018. He was 27 years old and he was born in 1992. His NRC indicated that he was John Banda,

born in 1975 because the person who told him to and go register told him to change the details. The one that told him to get an NRC was the D.C in Zambia but he did not know his name. The D.C and Ackim (PW4) from Zambia took him to get an NRC.

Ackleo Banda was not a candidate in 2018. Ackleo did not stand in 2018. He was John Banda. He came from Chibanga village which was in Zambia. He was not a Zambian. Although he came from Chibanga village, he stays in Malawi. Alfonso Kaziche was not his relative. He knew Ackleo Banda when Ackleo went to Chisaka village in 2021. He did get the NRC in 2018 although he only knew Ackleo Banda in 2021.

Kabangu village was very big. He did not know Steven Banda (PW3) and Steven was not his relative. Chisaka village was in Zambia. He met Ackleo Banda in Kabangu village. He did not say that he had met Ackleo Banda in Chisaka village.

He did not have any proof of payment that he received K50 from Ackleo Banda but Ackleo Banda just gave him the money and he put it in his pocket. Although the petition of Alfonso stated that the food was prepared at Headman Mchima's place, he had stated that the food was prepared at Steven's place. Steven came from Chisaka village. Headman Mchima was not Steven.

7.8.2 Cross examination of PW8 by the 2nd Respondent

In cross examination by the 2nd respondent PW8, responded as follows: He agreed that his full name was John Yolomino and that the NRC he had presented had fake names. He was not telling lies at the time of presenting his NRC to the ECZ official to get a voter's card. At the time of presenting his NRC to get the voter's card, he knew that Banda was not his real name. He did not know that it was fraud for him to register a fake name when he knew that his correct name was John Yolomino. He was merely playing tricks on the person who was registering him for a voter's card.

Presently, he was not deceiving the court. He did agree that there was no voter's card that was issued to John Yolomino. There was no Zambian NRC in the name of John Yolomino. It was not strange for a person to have two different names. Even though he was not John Banda, he did not want the court to retain the NRC and have it destroyed. He wanted to keep the Zambian documents so that he could be remembering the NRC of Zambia. He was not a Zambian trying to lie to this court that he was a Malawian. He wanted to keep the NRC so that he remembers the Republic of Zambia. He was from Malawi.

7.8.3 Re-examination of PW8

There was no re-examination of PW8.

7.9.0 The Testimony of PW9

PW9 was Thomas Banda, 23 years of age and a farmer who lives in Kabangu. He testified as follows: On the 11th August, 2021, Ackleo Banda came with Jonathan, a Councillor for P.F, to Kabangu at night, at 20:00 hours. They found that they were sleeping. He heard a knock at his door and when he went outside, he met Ackleo Banda and Jonathan. Ackleo told the people not to be scared as he was their child. Ackleo told them that he had come to inform them how they were going to move the following morning because they were going to vote and he did not want them to go to vote on foot.

Ackleo told them that they were going to use a vehicle and that they would not be hungry when going to vote. They were told that in the morning they should go to Steven's house and have some tea and that after voting they should go back to Steven's house to have some food. After that Ackleo gave him and the people he was with K50's and the people started fighting for the money. Ackleo told them not to worry as the money was enough for everyone and everyone received the money. Ackleo told them that he was not staying long and that he was leaving but that in the morning he was going to send a vehicle to carry them to go and vote.

On the 12th August, 2021, a vehicle came and they boarded it. Along the way, Ackleo told them that he would drop them off somewhere as he was not to be seen with them. Ackleo dropped them off and told them to go and vote for him, the M.P Ackleo. They voted and went to Steven's house and they ate. After eating, they all went back to their houses.

7.9.1 Cross examination of PW9 by the 1st Respondent

In cross examination by counsel for the 1st respondent, PW9 responded as follows: On the 12th August, 2021, he did not get a border pass or stamp in his passport to show that he had crossed into Zambia. He did come to Zambia although he did not have any evidence other than his word that he had come to Zambia. The evidence he had that he voted on the 12th August, 2021 was his voter's card. He did not know whether everyone who had a voter's card had voted. After voting, they returned to their houses by way of a vehicle, that is a white canter. He did not know who was driving the canter. He could not remember the number plate as he had not been to school. Although Alfonso Kaziche in his petition said that the canter was yellow with a white ribbon, he was saying what he saw. The canter he boarded was white.

He did not know who was driving the car that they boarded on the way to the polling station. Ackleo Banda was not in this car. He came from Kabangu but he did not know anything about a mother's shelter there as there was no mother's shelter in Kabangu. There was no clinic in Kabangu as they would go to the clinic in Chisaka village in Munchichi. Alfonso Kaziche Phiri was lying when he said that he helped to build a clinic in Kabangu.

Ackleo Banda came with Jonathan to Kabangu on the 11th August, 2021, at 20:00 hours when he was sleeping. The people that were fighting for K50's came from their houses. When Ackleo knocked on his door, he woke up to go outside. He found that there were other people outside. Steven was not Headman Mchima. It was Alfonso who was lying that the feeding was done by Headman Mchirna as he was telling

the truth. In Malawi, they did not give them food when voting. They did not eat on the Malawian side on voting day. Ackleo Banda did not come to his house at night at 20:00 hours on the 11th August, 2021.

He got his NRC in 2020 but he did not know the month. It was true that according to the NRC, he got it on the 30th August, 2020. Ackleo Banda was not a candidate in August, 2020. He could not give an answer as to whether he was aware or not that in August, 2020, Vubwi had an M.P. He was aware that Ackleo Banda only became a candidate after the P.F adopted him in June, 2021. Ackleo Banda was the one that took him to obtain his NRC in August, 2020. Ackleo Banda sent Ackim (PW4). He did not know when he was born. He said that he was 23 years old and not 27 years. He knew that he was 23 years old because he was told so by his parents. He has never been to school. His father was from Sankhale village, under Chief Nonyeni in the M'chinji District. His father has never been to school. His father was a farmer. He knew that he was 23 years old because his mother had been to school.

7.9.2 Cross examination of PW9 by the 2nd Respondent

In cross examination by counsel for the 2nd respondent, PW9 responded as follows: according to his NRC, he was from Vubwi. His NRC showed that his Chief was Chief Pembamoyo. The NRC showed that he was a Zambian. The NRC was the document that he went to show the person who was registering voters.

7.9.3 Re-examination of PW9

There was no re-examination of PW9.

7.10.0 The Testimony of PW10

PW10 was Loveness Phiri, 25 years of age a farmer who lives in Musipu village in Mozambique. She testified as follows: her name is Loveness Lucious though here in Zambia she was registered as Loveness Phiri. She was born in 1996. Ackleo and his members went to Jairos village in Mozambique to hold a meeting. Ackleo called 7 villages for the meeting and he knelt down before them saying that he was asking for

their votes. Ackleo promised them that when they voted for him on the 12th August, 2021, he was going to give them fertilizer, build them a clinic and build roads. Ackleo said that he had seen that they did not have good roads and clinics, and that if they helped him by voting for him, he was going to help them too. At the end of the meeting Ackleo gave them chitenge materials and T-shirts.

7.10.1 Cross examination of PW10 by the 1st Respondent

In cross examination by counsel for the 1st respondent, PW10 responded as follows: Ackleo Banda went to Jairos village on the 9th August, 2021 at 10:00 hours. Ackleo was with Nyoka, Lengi and Vincent Mwale. The one who was leading the group, is the one who introduced them. She did not know the leader's name. She knew about the petition because word was sent to those who attended the meeting. No one came to her house to tell her that she was required to testify on Wednesday in Chipata. Alfonso Kaziche Phiri called her on the phone to tell her to come to court to testify. There were approximately 450 people that were at the meeting. Alfonso managed to get her number out of the 450 people because she lives in the village where the meeting was held. There were many people in that village but she was the one that was chosen to come and testify in court. They sat as a village and deliberated on what she was going to say in court. The meeting was chaired by Charles Nyoka (PW2). The meeting was held at Jairos. Musipu was not a village but the Chief. Musipu and Jairos are the same as they were in the same area.

A Zambian could build roads and hospitals in Mozambique. She had never seen a Zambian build a road, a school, a clinic or give out fertilizer in Mozambique. She did not have any documentary evidence to show that Ackleo Banda was in Jairos on the 9th August, 2021. Vincent Mwale was old and fat. She knew Vincent Mwale when he went to their place. She also knew Ackleo Banda when he went to their place on the 9th August, 2021. Before then, she had never met either Vincent Mwale or Ackleo Banda. She got her NRC in 2020. She could not remember

the month. According to the NRC that she had, she got it on the 27th August, 2020 which showed the name as Loveness Phiri. She got it before she met Ackleo Banda. She could not remember when she got her voter's card. According to the voter's card, she got it on the 24th November, 2020, and this was before she knew Ackleo Banda. She did not have written evidence from the Ministry of Home Affairs or ECZ to prove that these were original documents. The documents that she had come with to court were not forged. She did vote and she had voted only once. She voted from Chimpanje, which was in Vubwi. She did not have evidence that on the 12th August, 2021 she had entered Zambia and went to vote. She did not have any documents to show that she had entered Zambia on the day she appeared in court to testify in this matter.

At this juncture counsel for the petitioner indicated that the documents had been handed over to him. Counsel for the respondent asked the court to take note that the owner of this document was Lavunesi Lusdiano of Chifunde village who was not the witness on the stand and that the exit permit from Mozambique was dated 27th September, 2021. PW10 stated that she was the one mentioned in the documents and counsel for the 1st respondent continued with cross examination of PW10. Her continued responses in cross examination were as follows;

She was the original owner of the documents. The information on the documents was from her voter's card which was the card that she used in 2019 where she came from. Her date of birth was 8th August, 1996. Although the document showed that her date of birth was 6th May, 1996, the information was gotten from the voter's card and maybe they made a mistake but what she was saying was the truth. The document was from the Government of Mozambique and it was issued to her. Her voter's card was from Mozambique.

At this point counsel for the 1st respondent indicated that all these documents had not been produced to which the court indicated that it was aware.

Counsel continued with his cross examination of PW10. She responded as follows;

Even though all the information that was on the document was different from the information on the Zambian documents, she came from Mozambique. PW10 explained that she had obtained Zambian documents because they were told they would be turned back from the clinics in Zambia without them. The only document that she had, to show that she was from Mozambique, was the document that she had come with to court.

7.10.2 Cross examination of PW10 by the 2nd Respondent

In cross examination by the 2nd respondent, PW10 responded as follows: She used a Zambian NRC to vote. She answered to the name Lovness Phiri when she went to get the voter's card. She was not told what to say before this court. She was a normal person who did things according to the way she wanted. She did not present her NRC on registration because she was being told to do so. When presenting the NRC to the person who registered her as a voter, she did not tell that person that she was from Mozambique. There were some people that were sent to take them to Zambia to get NRCs. She would not know whether they were from the ECZ as it was her first time. She did not know that by registering as a voter in Zambia, she was doing something illegal as they wanted a way to be going to the hospital. The NRC and voter's card could remain with the court in Zambia and be destroyed as she was not a Zambian.

7.10.3 Re-examination of PW10

In re-examination, PW10 replied as follows: The meeting that Charles Nyoka chaired was a campaign meeting for the P.F. The leaders in P.F had told her to lie by not disclosing that she was from Mozambique to

the officials in Zambia that were issuing voter's cards. She could not remember the name of the leader.

7.11.0 The Testimony of PW11

PW11 was Eclini Musipu, 35 years of age, a farmer who lives in Jairos village in Mozambique. Her testimony was as follows: Ackleo went to where they live to have a meeting with his members. Ackleo asked for their votes by saying that they should vote for him. Ackleo was with Vincent Mwale, Aleseni Phiri and Nyoka. Ackleo knelt down before them as he was asking for their vote. This meeting was held a week before the voting date. Ackleo said that when they voted for him, he was going to build roads, and that they would be put in groups and given fertilizer.

Ackleo told them that he was also going to form some groups that were going to help the women so that there would be no problem with them going to the hospital. Ackleo also said that the men should also form some groups in order to receive help as well. The women were given chitenge materials and the men were given T-shirts. When the date of voting came, they went to vote. After voting they went to eat at Abebe and Aserve's house.

7.11.1 Cross examination of PW11 by the 1st Respondent

In cross examination by counsel for the 1st respondent, PW11 responded as follows: The chitenge material that she received from Ackleo was at home. She did not have it at court. She had the chitenge and she had the evidence that she voted in Zambia. She did not have any written evidence that she voted on the 12th August, 2021, but she did have a voter's card and an NRC. She did not have any written proof from the Ministry of Home Affairs that these were original documents issued in Zambia. She did not have any document from the Ministry of Home Affairs in Mozambique to prove that she was a Mozambican.

She last saw Charles Nyoka when he went to where they live and had a meeting. She did not see Charles Nyoka after the elections. Alfonso was the one that told her to be a witness in the case in court today. She just

knew him as Alfonso. He is the one that was in court. Alfonso went to her house at her village in Mozambique. She did not know how many they were at the village. They could have been about a hundred. Alfonso left the ninety-nine to pick her as a witness because she and Alfonso used to know each other.

She knew Alfonso when he held a meeting in Zambia at Zaniche village. Although she lived in Mozambique, she knew about the meeting in Zambia at Zaniche village because she was told by her Zambian counterparts that there was a meeting in Zambia. These Zambian counterparts were the children of Zamiche, Akadili and Lufina who went to her house to tell her that there was a meeting. She could not remember the campaign messages that Alfonso made at that meeting. It was not true that she could not remember as all she could remember was what she was told to say before this court. She had a lot to do and that was why she could not remember, what was promised. There was a lot that she could not remember. It was not true that she could not remember that Alfonso came to her house to tell her to come and lie before this court that she was from Mozambique.

There was no other name for her village as it was just called Jairos. She did know where Musipu was as the village was just shared into two. Ackleo Banda and Vincent Mwale went to their village a week before elections. Even though Loveness said that Ackleo Banda went to their village on the 9th August, 2021, Ackleo Banda and Vincent Mwale used to go there on different dates. She and Loveness were both telling the truth. She could have forgotten the date as she forgets a lot of things. She got her NRC in 2020. She only knew Ackleo Banda when he went to their village. She got her voter's card in 2020. She knew Ackleo Banda when he was giving out NRCs. She was not lying but maybe some of the things she had forgotten. She knew that if she held the Bible and then told lies, God would be angry with her. She did not know that she would go to Namuseche Prison for lying. She knew Ackleo Banda at the time that they were getting their NRCs but could not remember the month.

It was at the time the rains were beginning. That was the time when she went to get her NRC and voter's card. She did not know the role that Ackleo Banda played in getting her the NRC. Maybe she had forgotten. She did not know that Ackleo Banda was only adopted as a candidate in June 2021.

7.11.2 Cross examination of PW11 by the 2nd Respondent

In cross examination by counsel for the 2nd respondent, PW11 responded as follows: She was a Christian and went to the African Church. She did not tell lies as when one lied, God would punish them. The names on her NRC were Madelena Pantino although the NRC indicated Mandelina Banda. The name Banda was the surname for her husband. The name Banda was for her father. She did not use the name Eclina Musipu. All of these were her names. When she went to obtain the voter's card, she presented her NRC. She agreed that Eclina Musipu did not have a Zambian NRC as that name was not on any Zambian NRC. She was not a Zambian as she came from Mozambique. Although she did not have any travel documents to show that on the 12th August, 2021 she travelled from Mozambique into Zambia, she came with her NRC to vote in Zambia. She did not want this court to remain with the documents and she would not come to vote again in 2026.

7.11.3 Re-examination of PW11

There was no re-examination of PW11.

This marked the close of the petitioner's case

8.0 The 1st Respondent's Case

The 1st respondent called four witnesses.

8.1.0 The Testimony of 1RW1

1RW1 was Ackleo Banda, the 1st respondent herein who is 35 years old, lives at Vubwi Primary School under Chief Pembamoyo and is a farmer as well as a business man. He is the current M.P for Vubwi constituency. His testimony was as follows: He did not know anything

about the allegation on page 2 of the bundle of pleadings that the P.F, a party to which he belongs to, had registered foreign nationals from Mozambique. He never registered any foreign national either from Malawi or Mozambique as that was not his job. He knew Eneless Banda as the D.C in Vubwi District who was chosen in 2011 and apart from politics, she was a Government worker. He did not know Seliano Sakala.

In response to the allegation that he was preparing food at Headman Mchima's shop to give voters, he did not buy any food to give Headman Mchima to give to the people, and he did not know Headman Mchima in any way. He also did not know Alfonso Kamuna Phiri and neither did he know James Mwanza. He also did not know Patrick Chisi, Yotamu Sakala, Daliso Mwale or Austin Mbewe. He did not know anything about the allegation that on the 9th August, 2021, he had travelled to Jairos village in Mozambique. He also did not know anything about the allegation that he had travelled to Chikabangu on the 5th August, 2021 and the 9th August, 2021, as he did not have a passport and did not remember going to Chikabangu in Malawi. Pertaining to all the other allegations in the petition and supporting affidavit, he had chosen to rely on his affidavit in support of his answer filed on the 7th September, 2021.

8.1.1 Cross examination of 1RW1 by the 2nd Respondent

In cross examination by counsel for the 2nd respondent, 1RW1 replied as follows: Page 4 of the 2nd respondent's bundle of documents was the declaration form of the results of the Members of Parliament. He was able to see his name and he got 7,255 votes. He was able to see Alfonso Kaziche Phiri's name who got 4,309 votes. He could confirm that he was the one that got the highest valid votes cast in Vubwi District. He also could confirm that a representative from the UPND did sign on this form. He could remember that the Returning Officer for Vubwi constituency was Martin Sakala, and he agreed that it was correct for Martin Sakala to declare him duly elected for Vubwi constituency.

He could confirm that from pages 8 to 125 of the 2nd respondent's bundle of documents, all the names of the voters appearing there had NRC numbers that were for Zambian nationals.

8.1.2 Cross examination of 1RW1 by the Petitioner

In cross examination by counsel for the petitioner, 1RW1 responded as follows: He did not know about any foreigners from Malawi and Mozambique who had come to vote in Zambia and it was up to the ECZ to know about this as this was their job. If the people from ECZ came to say that foreigners from Malawi and Mozambique had voted then he could agree. He did not go to any village in Malawi. He did not go to any village in Mozambique. He denied the evidence of the witnesses from Malawi and Mozambique that he had gone to their villages.

The official period for campaigns started on the 11th June, 2021 and ended on the 11th August, 2021, at 18:00 hours. He did not know anything about being in Mozambique on the 11th August, 2021 at 20:00 hours as he did not go there. He knew that 20:00 hours was outside the campaign period. A passport was needed to enter a foreign country like Malawi even when one was in Kabangu. He did not know whether all those who came to Zambia from Malawi and Mozambique had passports. It was not allowed for a foreigner, particularly from Malawi and Mozambique to vote. He did not know anything about going to pick up people using his vehicles from Malawi and Mozambique for them to come and vote in Zambia.

He was the M.P for Vubwi. He did not know that the people of Vubwi were very unfortunate to have him as their M.P. He did not tell any people from Malawi or Mozambique to come and fight his battle in Zambia. He did not know anything about what Thomas Banda and Charles Nyoka spoke of. He equally did not know anything about what the other witnesses spoke of in court. He heard the witnesses saying those things. What they said were lies, which he disputed.

He did not have a vehicle but he did the campaigns covering the entire Vubwi constituency. In terms of education, he completed his Grade 12 at Vubwi Day. He was able to speak English. He did not know that Blackwell Banda was beaten during the campaign. He did not know that Patrick Banda was beaten, and he did not know where he was at the time that Patrick Banda was being beaten.

He also did not know in which month hunger was declared in Vubwi. He was aware that the DMMU distributed mealie meal although he could not remember the month. He did not participate in the distribution of the mealie meal. He did not know that the mealie meal was taken to Vubwi in the month of March 2021. He did not know that the meal was distributed from June to August, 2021 in Vubwi as he did not remember the months. He was a Councillor in Vubwi from 2016 up to the time of elections in 2021. He was also the Deputy Council Chairperson. He was also the Constituency Development Fund (CDF) committee member. He was also the chairman for the Cashew Nut Growers Association. He was in the local leadership in Vubwi in 2021 by virtue of all the positions he had held as mentioned but he did not participate in the distribution of mealie meal by the DMMU.

He did have campaign materials which he kept at his home. He did not know that the campaign materials were kept at the D.C's home. He did not know that Charles Banda, in his position as Vice Chairperson for the presidential campaign group, told him to remove the campaign materials from the D.C's house to take them elsewhere. He did not know anything about refusing to do this even after being told. He had forgotten the number of agents that he had appointed for his campaign. He could not remember their names right at that moment and could do so if given five minutes so that he could bring the list of their names. At that moment, he could only remember one whose name was Bonnex Mushanga. He did not remember Steven Banda and he did not remember appointing Steven Banda through a letter that he later threw away and used. He knew what his agents did on his behalf.

He did use a vehicle during his campaign. The vehicle was a Hilux that was branded. There was also a land cruiser that was branded and two Prado's that were also branded. He had forgotten the registration number on the vehicle that he was using. He was not using a vehicle similar to that of Eneless Banda, the D.C, as she had a GRZ Hilux which was not branded. He was using a Hilux. Hilux's can resemble but they can differ. Some were the same but they differ. He could only remember the GRZ on the number plate for the Hilux belonging to the D.C but he could not remember the numbers. Four vehicles were branded in Vubwi, including the land cruiser, which was branded with the P.F colours. All the four vehicles were branded in P.F colours. The four to five witnesses that said that they were with him either in Malawi or Mozambique were all lying.

8.1.3 Re-examination of 1RW1

In re-examination 1RW1 replied as follows: The Hilux's were alike but different in that the make of the Hilux that he was using was an open van while for the D.C, it had a canopy. His positions were not connected to the distribution of mealie meal in Vubwi. He did not know whether Patrick Banda was beaten as it was not him that beat him.

8.2.0 The testimony of 1RW2

1RW2 was Bonnex Mushanga, 41 years of age, who lives in Chikoka village, Vubwi under Chief Pembamoyo and is a farmer. His testimony was follows: It was true that he was the campaign manager for Ackleo Banda. His duties included making sure that people would be enticed to vote for them. He was making sure that during their meetings, the people would be told what they would do for them. He was managing all the campaign teams for Ackleo Banda.

He knew Charles Nyoka, firstly when he defected from UPND to join the P.F in June, 2021. He also knew about Charles Nyoka in 2016 when he beat up a journalist and urinated in his mouth. The matter was in court and he was convicted. He also knew that Charles Nyoka went to Malawi

to get some voters to vote for UPND, and he was convicted for that. In addition, during the 2021 elections, Charles Nyoka made noise and caused a fracas and the matter was in court. This was how he knew Charles Nyoka. At the time that Charles Nyoka defected from the UPND to the P.F in 2021, he was the District Chairman for the UPND. He did not know the details for the roles and responsibilities that Charles Nyoka was given in Ackleo Banda's campaign team as Charles Nyoka did not stay for a long time in the party so he was not given any position.

The witness that testified that their campaign team had gone to Malawi and Mozambique was a liar as he just campaigned in nine wards and his team did not go into Malawi or Mozambique. As a campaign manager, he did not know anything about his campaign team being involved in violence that had to do with Patrick Banda and Blackwell Banda being beaten up by members of his campaign team. He did not know Alfonso Kamuna Phiri.

8.2.1 Cross examination of 1RW2 by the 2nd Respondent

There was no cross examination of 1RW2 by counsel for the 2nd respondent.

8.2.2 Cross examination of 1RW2 by the Petitioner

In cross examination by counsel for the petitioner, 1RW2 responded as follows: He did not know anything about Malawians getting NRCs and voter's cards from Charles Nyoka. He did not say that Charles Nyoka went to Malawi to organize the people in Malawi. He knew that Charles Nyoka went to Malawi to get people to come and vote for the UPND and was convicted for that. He did not recall the year. The elections in Zambia were held on the 12th August, 2021. His campaign team did not go to Malawi, and he did not know that Ackleo went to Malawi and to Mozambique to campaign. They did have a vehicle. It was a land cruiser, V8 that was branded. They also had a Toyota Hilux that was branded and two land cruisers. He did not know the number plates for the vehicles and he did not know whether the number plates had been

removed. The number plates were kept at Ackleo Banda's place. He did not know that the D.C was keeping any materials. The four vehicles that his campaign team was using came from the Secretariat for the P.F party in Lusaka. The District Chairman in Vubwi, Charles Phiri was the one that received these vehicles.

He did not remember seeing the DMMU distributing mealie meal in Vubwi. They were 12 of them in the campaign team these being Ackleo Banda, the M.P, Bonnex Mushanga, Severian Phiri, Prisiro Phiri, Chenjabani Banda, Jatel Phiri, Austin, Mijchu Banda, and Mercy Banda, the Chair lady. There was no Alfonso Kaumna Phiri but there was Logato Mwale. Those were the names that he could remember and they were together all the time. He would not know what time each of them slept as they slept at different places. He would not know if one of the members of his campaign team beat someone on the way before going to sleep. He was not with Ackleo Banda in Kabangu on the 11th August, 2021.

He did know Charles Nyoka when he caused a fracas during elections in Vubwi and that this matter was now in court. He had no document before the court to show that Charles Nyoka was in court in Vubwi. He was not with Charles Nyoka in Mbande for the first meeting. He did not recall that after the meeting they went to the D.C's office. He did not go there. The name of the D.C was Eneless Banda. He was not in touch with the D.C during the campaigns. He did not know that the D.C was using one of their branded vehicles.

8.2.3 Re-examination of IRW2

There was no re-examination of 1RW2.

8.3.0 The testimony of 1RW3

The 1st respondent's third witness was Vincent Mwale, 1RW3, 69 years of age, a farmer who resides at D95 Farm Care of Musole Primary School, Vubwi Schemes in the Vubwi District. His testimony was as follows: He was serving as the Council Chairperson for Vubwi District.

He knew Charles Nyoka as Charles was once the District Chairperson for UPND, Vubwi District. Charles Nyoka was campaigning for UPND party, and in 2015 Charles was involved in a fracas at Chikoka Primary School where he was in a group of people that beat up a journalist and urinated in his mouth. Last year in 2020, Charles Nyoka was involved in issues that led him to be arrested by the Police here in Chipata although the issues happened in Malawi. Charles quarrelled with someone else in Malawi and presently he was appearing before court in Vubwi on issues of fighting. Charles Nyoka joined the P.F party in June this year when the former Minister Malanje had come to Vubwi. Charles joined the P.F party and he brought 300 UPND defectors and 40 MMD defectors.

The allegation that 1RW3 was in Jairos village in Mozambique was false as he did not go to Mozambique and he did not go to any outside country. He was within his constituency. He also never went to Kabangu village in Malawi to campaign with Ackleo Banda as he campaigned in his own constituency in Zambia.

8.3.1 Cross examination of 1RW3 by the 2nd Respondent

There was no cross examination of 1RW3 by counsel for the 2nd respondent.

8.3.2 Cross examination of 1RW3 by the Petitioner

In response to cross examination by counsel for the petitioner, 1RW3 responded as follows: He knew Charles Nyoka but he did not know that Charles Nyoka at some time went to transport people from Malawi to come and vote in Zambia in August, 2021. He knew that for a person to vote, he or she needed to provide an NRC or a voter's card. He was with Charles Nyoka in some meetings but not all. He was with Charles Nyoka at the meeting at Musibiza, which is located both in Zambia and Malawi. The people from Musibiza did not come to vote in Zambia. He knew this because Zambians voted in Zambia. Musibiza is on the boundary of Zambia and Malawi, and they were on the Zambian side scouting for votes from the people of Zambia. He did not know whether

people from Musibiza on the Malawi side came to vote in Zambia for so long as they had an NRC and voter's card.

He was not aware that some Malawians voted in Zambia during the 12th August, 2021 elections. The extract of the voter's register at page 1 of the petitioner's bundle of documents in the last column showed that 'Mbewe Galasiana' voted while page 2 of the petitioner's bundle showed a copy of an Identity card (I.D) for Mbewe Graciana from the Republic of Malawi. These documents showed that this person voted in Zambia and that this person also holds an I.D from Malawi. From the two documents he was shown, it was not true that some Malawians voted in Zambia. He was still maintaining that some Malawians did not vote in Zambia. The bigger part of Musibiza was in Malawi.

He was a Christian. He knew that Christians should not lie. Musipu village was in Mozambique. It was also a border town between Zambia and Mozambique. There is no village known as Musipu but a Chief. He did not know the villages in the area for Chief Musipu. He did not know whether there was a Jairos village in Chief Musipu's area. He did remember that he had told the court that he had gone to solicit for votes in the Musibiza village. The road was the demarcation that ensured that they solicited the votes only from the Zambian people in Musibiza and not those in Musibiza village on the Malawian side, that was bigger. If one was on the Zambian side of this road and called the name of another person who was on the Malawian side of the road, that person could hear and respond. It was normal for the people on the Malawian side to hear the campaign message on the Zambian side as there was no wall fence but just a road demarcating the two countries. He had not crossed over into Malawi and Mozambique for campaigns as he did not have a passport with him. He knew that it was wrong for a foreigner to vote in Zambia and that if it was happening it should stop now and forever and the system should stop it.

As a Council Chairperson, he knew that there was a declaration of hunger in the Vubwi District in 2021. He knew that the DMMU took

mealie meal for distribution in Vubwi and that the same mealie was delivered to Vubwi in March. The distribution of mealie meal as relief food was continuous up to August, 2021. He did not have the schedule with him but he saw the mealie meal being distributed from March up to August by officers from DMMU. He did not talk to the officers from DMMU. It was not incorrect to assume that the distribution went on up to August, 2021.

There was no D.C for Vubwi currently. Previously it was Eneless Banda. She was not involved in distributing mealie meal to the hunger-stricken people in Vubwi because there was a committee doing the work. He did not ask Eneless Banda whether she was involved or not in the distribution of the mealie meal though he knew she was not involved. He knew some of the committee members and he saw some of them doing the work. Eneless Banda was no longer D.C for Vubwi. She was at her house. He did not know whether she had been fired. Eneless Banda had not been dismissed.

8.3.3 Re-examination of 1RW4

In re-examination 1RW3 replied as follows: He could not see any foreigners in the extract of the voter's register on page 1 of the petitioner's bundle of documents. He did not go to Malawi to campaign but they campaigned in Zambia in the Vubwi constituency and not outside the Vubwi constituency. He did not know whether Nyoka went to collect foreigners in Malawi to come and vote. Mutzilidza was a common name for a group of villages and they went to campaign at a group of villages on the Zambian side.

8.4.0 The testimony of 1RW4

The 1st respondent's fourth witness was Jonathan Steven Phiri, 1RW4, 33 years of age, a farmer and businessman who lives in Kalizangulu village in Chimpanje ward in Vubwi under Chief Pembamoyo. His testimony was as follows: He was a Councillor for Chimpanje ward. He was a candidate in the Local Government elections on the 12th August,

2021 and stood as a Councillor on the P.F ticket. He knew Ackleo Banda, the 1st respondent in this matter as he stood as M.P on the P.F ticket while he stood as a Councillor on the P.F ticket. He did not work with Ackleo Banda in the campaign as he was campaigning in his ward at Chimpanje. The testimony that he was giving money together with Ackleo Banda at Kabangu village in Malawi was a lie. The testimony of him giving campaign materials in Malawi was also a lie.

8.4.1 Cross examination of 1RW4 by the 2nd Respondent

There was no cross examination of 1RW4 by the 2nd respondent.

8.4.2 Cross examination of 1RW4 by the Petitioner

In response to cross examination by counsel for the petitioner, 1RW4 responded as follows: He did not campaign with Ackleo Banda and neither did he give money to anyone in Kabangu in Malawi. He would not know whether Ackleo gave money in Malawi as he was not with him. He was campaigning in Chimpanje ward which ward borders Malawi and Zambia. He did not know whether people in Malawi also voted in Chimpanje as for them to have voted, they would have needed NRCs from Zambia. He did not know whether the Malawians with NRCs from Zambia could vote in Zambia.

The extract of the voter's register at page 1 of the petitioner's bundle of documents in the last column showed that 'Mbewe Galasiana' voted. Page 2 of the petitioner's bundle showed a copy of an Identity card (I.D) for Mbewe Graciana from the Republic of Malawi. The person named Mbewe Graciana looked to be the same one named Mbewe Galasiana appearing on page 1 of the petitioner's bundle of documents. From page 1 of the petitioner's bundle of documents, he could see that this person voted. From what he was seeing on the two pages, he could not answer the question as to whether Mbewe Galasiana was from Malawi, and that the person who could answer this question was the one who compiled the documents. In looking at the documents, he agreed with counsel for

the petitioner's position, as the person who compiled the documents, that the person was from Malawi and voted in Zambia.

He did not use any campaign materials during his campaigns. The campaign materials that Ackleo Banda was using were kept with Ackleo the M.P. He was not always present when Ackleo was holding campaign meetings. Ackleo went to his ward twice but he was not there. Ackleo Banda was using vehicles during the campaigns. He would not know whose vehicles they were. He was not in touch with the P.F Secretariat in Lusaka for the P.F as he did not talk to them. Members of the party adopted him to stand on the P.F ticket but he did not know them. He was lucky as he was just pushed to stand on the P.F ticket. He would not be proud to have been voted into office by Malawians and Mozambicans. He stood in Zambia because he wanted be voted for by Zambians and feel proud that Zambians voted for him. He did not know that foreigners could easily cause war in his country, that is Zambia. He did not know whether it was wrong for Malawians and Mozambicans to vote in Zambia. The kind of leader he was, was a Councillor in Chimpanje ward. A councillor was a leader. He did not know whether he would want Malawians and Mozambicans to vote again in Zambia if it did happen in 2021.

When campaigning he was using the Chewa language. He had been to school up to grade 12, and a grade 12 could speak English. He had a grade 12 certificate and he could not only speak but also understand English. There were 4 campaign vehicles but these vehicles did not include the one that the D.C was using. He did not know the registration number of the vehicle that Ackleo was using. All the four vehicles had no number plates. He knew the D.C for Vubwi and her name was Eneless Banda. He did not see Eneless Banda distributing mealie meal for DMMU. He did not know if it was so because he was in Chimpanje ward and not in Vubwi at the time. He did not know whether anyone received mealie meal from DMMU in Chimpanje ward. He did not receive mealie meal. He did not know whether there was any hunger in Vubwi

District in 2021. There was no hunger and he would not know whether the Government was wrong to declare Vubwi a hunger-stricken district as he had never worked in the office. He did not know that the Government had declared that there was hunger in Vubwi District in 2021. There was enough food in his house and in all the houses in Vubwi and in particular in Chimpanje ward.

8.4.3 Re-examination of 1RW4

In re-examination 1RW4 replied as follows: He could see the face that was shaded on the extract of the voter's register on page 1 of the petitioner's bundle of documents. He did go to school up to grade 12 and therefore he could spell the first name of the said face on page 1 which was 'G a l a s i a n a'. He could also spell the name on page 2 of the petitioner's bundle appearing on the I.D from Malawi where there was a dark face and it spelled 'G r a c i a n a'. These two names were not the same though the name on the voter's card on page 2 of the petitioner's bundle of documents and the name on the extract of the voter's register at page 1 of the petitioner's bundle was the same as it was spelled as 'G a l a s i a n a'. He could not see any Malawian on the extract of the voter's register on page 1 of the petitioner's bundle of documents. He did not know whether Malawians or Mozambicans voted in Zambia.

This marked the close of the 1st respondent's case.

8.5.0 The testimony of the 2nd respondent's witness, 2RW1.

The 2nd respondent called only one witness Martin Sakala, 2RW1, 32 years of age, who resides in Vubwi. His testimony was as follows: In relation to the matter before court his occupation was that of a Returning Officer for Vubwi constituency. He started his work as a Returning Officer when they received nominations and his work ended on the Poll day after he made the declarations, that is after he had announced the winner. He remembered having filed an affidavit before court on the 8th September, 2021 and he wanted to rely on the said

affidavit. He also wanted to add more information on three things, these being: the registration, the voting and what transpired at the totalling center.

In terms of the voter's registration, once someone produced an NRC before a registration officer, that person was registered as long as they were above 18 years of age, being the eligible age to vote. The date of birth would be confirmed on the NRC so as to check that one was above 18 years old. After a person was registered and a voter's card given, a provisional register would be prepared which would be vetted by all the stakeholders for them to go through and check the details. The stakeholders included the voter's that came to register, and organisations like political parties. After the corrections were done, the final register was printed. He could confirm that the final register was compiled and printed.

In relation to the voting, it was done on the 12th August, 2021, in Vubwi constituency and his duty as a Returning Officer was to go round to some of the Polling Stations to check how the voting was taking place. As he was going round, he was checking whether the voting was taking place smoothly and that there was not any sort of violence. He was able to remember some of the Polling stations he visited and these were Songeya Primary School 01, Chipanje Primary School 1 and 2, Mbozi Primary School 1 and 2, Vubwi Primary School, 1, 2 and 3, Mwiza Catholic Church 01 and Mbande Primary School 01.

On the day of voting, as Returning Officer he was also expected to deal with appeals if any, that would arise from the polling stations. Normally these appeals would come in when there was an objection and decision concerning voting. To his knowledge he did not receive any appeals. The objections would arise either when a voter was not appearing on the register at that particular polling station, or if a voter was not in possession of a voter's card or NRC and if a voter was not a Zambian citizen. To his knowledge he did not deal with any such objection and neither did the officers report of such an objection.

With regard to the Totalling Center, the gazetted Totalling Center for Vubwi constituency was the Education Resource Center. They did receive all the results from the 39 polling stations and they recorded them on a form called a record of proceedings at the Totalling Center. After recording the provisional record of proceedings that was given to the stakeholders to verify, the stakeholders would go through and counter sign. That was when the final record of proceedings would be produced. Then the declaration of the winner followed. As the Returning Officer he declared the winner and a declaration form was used. The candidate with the highest casted votes was declared the winner who happened to be Mr Ackleo Banda.

Pages 1 to 3 of the 2nd respondent's bundle of documents shows the record of proceedings of the totalling of the votes for the National Assembly. At page 4 of the 2nd respondent's bundle of documents, there was the Declaration of the result of the Poll for the Member of Parliament. According to this declaration, the name of the candidate with the highest votes was Banda Ackleo IA of P.F with 7, 255 votes and the one who came second was Phiri Alfonso K of UPND with 4,309 votes. He also could confirm that the document on pages 5 to 28 of the 2nd respondent's bundle was an extract of the voter's register for Vubwi constituency and that he would like the court to uphold the election of the 1st respondent as the duly elected Member of Parliament for Vubwi constituency.

8.5.1 Cross examination of 2RW1 by the 1st Respondent

In cross examination by counsel for the 1st respondent, 2RW1 responded as follows: In reference to page 2 of the petitioner's bundle of pleadings and specifically paragraph 5 (i) which read that:

"5(i) Prior to the elections, the Patriotic Front (PF) registered a lot of foreign Nationals from Mozambique and Malawi to register as voters in Zambia at various polling stations."

He knew that the P.F was a political party and it was not the job of the P.F to register voters. The P.F did not participate in the registration of voters. He did not work for ECZ but was engaged by the ECZ. He was not aware of the ECZ registering any national from Malawi or Mozambique.

In reference to paragraph 5 (ii) at page 2 of the petitioner's bundle of pleadings which read:

"5(ii) The District Commission for Vubwi, Miss Eneless Banda being a Public Officer was seen campaigning for the Patriotic Front in the P.F branded vehicle without a number plate which she had deliberately removed to disguise the voters."

He knew that there was a District Conflict Management Committee in Vubwi but he was not a member of the Committee as the Returning Officer. Conflicts were reported to the Conflict Management Committee through the office of the District Electoral Officer. He was not privy to any conflicts during the campaign period. Ackleo Banda did not participate in the registration of voters in Vubwi. This was because this was the mandate of the ECZ, of which the Assistant Registration Officer, Supervisor and Assistant Registration Officers field were appointed to undertake the registration. Ackleo Banda did not occupy any of these positions.

A provisional register was a register that was produced after the completion of the voter registration period. It was called a provisional register because the details were not verified in that register and it was not final but it could not be removed or replaced as the process would be that the people would want to come and verify their details from the register. Therefore, it could not be completely wiped out and have fresh names. Even if 1000 names were incorrectly put on the register, those 1000 names would not be removed. If the register wrongly reflected the name of Martin Sakala 9 times this would be considered as a case of repetition, which could not be removed at the District level.

Vetting in layman's language referred to the putting up of a public notice so that the stakeholders could comment on the document that one was working on. So even Alfonso Kaziche Phiri had a chance to go and see the register and vet and if he was not satisfied, he had an opportunity to complain and have his issues addressed. To the best of his knowledge Alfonso Kaziche Phiri did not complain during the vetting period to say that there was something sinister about the register. He would not know whether Alfonso Kaziche Phiri would have complained about the register if he was sitting here as M.P. He was not aware that after being 'wired' by losing almost half of the vote, Alfonso Kaziche Phiri went to complain as the complaints were not handed to the District Electoral Officer. He was aware that Alfonso Kaziche Phiri was 'wired'.

In relation to page 4 of the 2nd respondent's bundle of documents, he could identify the Declaration of the Result of the Poll for the Member of Parliament and the document confirmed that Alfonso Phiri was 'walloped' in the elections. The said document also shows that the agent of Alfonso Phiri confirmed that Alfonso was 'walloped' as the agent was one of the witnesses.

In reference to pages 1 to 46 of the petitioner's bundle of documents, he could confirm that this was an extract of the voter's register. He could not see any foreigner on page 1 or page 3 of the said voter's register extract. The voting day was on the 12th August, 2021. His duty was to sample a few of the polling stations to see how the elections were going and the voting took place smoothly without any incidence of violence. He only handled appeals in relation to the grounds that he had indicated earlier, on which an appeal could be given to the Returning Officer. If there was a concern that a foreigner had voted, the appeal would start with the Presiding Officer, who was supposed to issue a form in relation to the objection and decision concerning voting.

The objection would be based on any of the following grounds; firstly that a voter was not appearing on the register in that particular polling

station; secondly that a voter was not in possession of a voter's card or NRC or both; and thirdly that the voter was not a Zambian citizen. If any of these grounds were present then a Polling Agent, or an Election Agent or a voter was free to object by filling out the form that he had referred to earlier on. If a foreigner was caught voting on the 12th August, 2021, then a form would have been filled out. To his knowledge, no such form was presented in any of the 9 wards of Vubwi and the name of the form was an Objection and decision concerning voting. He was not aware of any such form having been filled out by Alfonso Kaziche Phiri or any of Alfonso's agents concerning Malawian's voting. He was also not aware of any such form being filled out by Alfonso Kaziche Phiri or Alfonso's agents concerning Mozambican's voting. He did not receive any report of foreigners voting in Vubwi on the 12th August, 2021.

In reference to page 1 of the petitioner's bundle of documents, the name under Mbewe Galasiana was spelled as 'G a l a s i a n a' and on page 2 of the petitioner's bundle of documents, the name was also spelled as 'G a l a s i a n a' and the names on the voter's card and on the register were similar. He had also seen the name on the NRC on the other side where the number was 228761/55/1 and on page 1 of the petitioner's bundle, the NRC number that was appearing was 228761/55/1 and these numbers on page 1 and page 2 were the same. In relation to page 2 of the petitioner's bundle of documents, the voter's card number was 33960272, while the voter's number on page 1 of the petitioner's bundle of documents was 33960272. He could confirm that the details on the voter's register were the same as the one on the voter's card. Ordinarily if a person like Mbewe Galasiana went to the Polling station with the NRC and the details in the register, she would be allowed to vote because for one to be eligible to vote one required an NRC and a voter's card and the details should appear in the voter's register. As such there was no cause for the Polling Agents to stop this person from voting. There was also no cause for Alfonso Kaziche Phiri and his agents to complain about allowing this person to vote. He did not receive any

complaint from Alfonso Kaziche Phiri or any of his agents about Mbewe Galasiana voting. It could be correct that there was no complaint received because Mbewe Galasiana was eligible to vote because she had the correct papers.

In reference to page 2 of the petitioner's bundle of documents in the top left-hand corner, he could see the document written the Republic of Malawi and the name appearing there was spelt as 'G r a c i a n a' while the name on the voter's card on the same page was spelt as 'G a l a s i a n a'. These names were not the same though on page one of the petitioner's bundle of documents on the extract of the voter's register, the name was spelled as 'G a l a s i a n a' which tallied with the name on page 2 of the petitioner's bundle of documents on the voter's card. When putting the three names together, the one which was different was the one appearing on the ID from Malawi in the top left corner on page 2 of the petitioner's bundle of documents. He was not able to identify the picture on the portrait as it was not visible and therefore he could not say that the person on the ID on the Republic of Malawi was not the same one on the NRC although looking at the spelling of the names one could say it was not the same person.

8.5.2 Cross examination of 2RW1 by the Petitioner

In cross examination by counsel for the petitioner, 2RW1 responded as follows: He knew that names could be written in the English language, in Portuguese as well as Chewa but he did not know the language that was used to write the name 'Graciana' that he was referred to on page 2 of the petitioner's bundle of documents. He agreed that it could have been written in either English, Portuguese or Chewa. He agreed that for this person to have a Malawian document as shown on page 2 of the petitioner's bundle of documents then it was possible that this person could be from Malawi.

One of the grounds on which an objection could be raised was if someone was not a Zambian citizen. How one could raise this kind of an objection in relation to identifying whether someone was a Zambian

or not on the voter's register was to look at the eligibility for one to vote as that was the only criteria. It was easy for him to identify that a person was from Zambia or one was from Malawi from the documents as there was an extract of the approved register which contained Zambian voters. He was able to identify from the extract of the voter's register that these were Zambian voters. He would not know how to identify the foreigner if there was a foreigner on the register. He was not aware that the voter's register in Vubwi constituency contained a lot of Malawians and Mozambicans. He was aware that there were 9 wards in Vubwi District. He was aware that Matemba ward, Chisiya ward, Chimpanje ward, Mulabe ward, Zozwe ward and Sindemisale ward were on the border of Malawi and Zambia and that in total there were 6 wards. He was also aware that Vubwi and Mbozi wards border Mozambique and Zambia and that Mbozi ward also bordered Chadiza District. It was also correct that Mulabe ward borders partly Mozambique and partly Malawi. It was also correct that Zozwe ward borders Mozambique and Malawi and that only Mbande ward was inside Vubwi. Mbande ward borders Chipata and he agreed that it did not border either Malawi or Mozambique. He agreed that out of 9 wards, 8 wards border other countries that is, Malawi and Mozambique. It was not possible that either Malawians or Mozambicans registered as voters in these border places. He was not at any point a registration officer and as such it was correct to say that he would not know that registration officers could have registered Malawians or Mozambicans.

He never sat on the conflict resolution committee because he was not a member. If a form was filled out by Alfonso Kaziche Phiri he would not know. He had heard that there were more voters in Vubwi in 2021 as Vubwi had surpassed the target. In relation to page 100 of the petitioner's bundle of documents paragraph 6 reads as follows:

"Something went wrong, that's for sure! If (the way the elections were conducted) is found to have been corrupt, then there is something wrong with the ECZ. They didn't scrutinize or they

didn't monitor how the elections are supposed to be done," he said, "For example, Vubwi, a lot Malawians and Mozambicans came to vote. Literally we saw vehicles with Malawian number plates coming to vote in Vubwi Constituency. I saw vehicles with my own eyes bringing in Malawians to vote at my polling station."

He was recruited by ECZ and he was professional in the discharging of his duties. Despite his being professional he did not fail to scrutinize the voter's register. During the elections it was easy to identify from the voter's register that one was a foreigner. He did not know at what stage the petitioner could have discovered the irregularities in the register. The petitioner was not wrong to discover that there were foreigners on the voter's register after the election and votes declared.

He could not remember who got the highest results or votes at Chigwe polling station which was in Mulabe ward unless he looked at the record of proceedings. He was not aware that the 1st respondent beat all the other contestants at this ward. He agreed that Mulabe was partly bordering Mozambique and partly bordering Malawi. He did not know that the Mulabe ward was bigger on the side of Malawi than of Zambia.

He was only responding to the words 'wired' and 'walloped' as put to him in the questions. In reference to the question that was posed where the word 'wired' was used, 'wired' meant that the person who was 'wired' lost. The word 'walloped' also referred to the same that is someone who lost.

8.5.3 Re-examination of 2RW1

In re-examination, 2RW1 replied as follows: In reference to the 2nd respondent's bundle of documents at page 2 and in relation to the wards along the border and in particular Vubwi, the person who got the highest votes reveals that for Vubwi 1 Alfonso K Phiri got 156 votes, for Vubwi 2, Alfonso K Phiri got 145 votes, for Vubwi 3, Alfonso K Phiri

for 154 votes. To his knowledge Vubwi was one of the wards in the borders of Mozambique.

The criteria for identifying a voter was that one was to be in a possession of an NRC, a voter's card and they were supposed to appear in the voter's register. He was not able to tell if any complaints were filed before the Conflict Management Committee by looking at the current documents that had been produced in court. The target for Vubwi constituency in relation to registration of voters was given by the ECZ and it was roughly around 23,000 and what he meant when he said that this target was surpassed was that the total number of registered voters came to about 27,000.

In reference to page 100 of the petitioner's bundle of documents at paragraph 6 from the bottom it reads as follows:

"You remember I complained at a certain time that there are too many voters in Vubwi who were registered. Obviously, some numbers might have come in Vubwi who were registered. Obviously, some numbers might have come from across the borders," he said. "Going forward, I think that ECZ must tighten their rules on elections and monitoring of elections properly because if this was done, there wouldn't be so many people wanting to go to court."

from his understanding of this document, the author was merely making assumptions.

That was the close of the 2nd respondent's case.

The parties indicated that they would file submissions. The petitioner was given up to the 7th October, 2021 to file his submissions and the 1st and 2nd respondents were given up to the 14th October, 2021 to file their submissions and the petitioner was given leave to file submissions in reply on the 20th October, 2021.

9.0 THE PETITIONER'S SUBMISSIONS

The petitioner filed submissions wherein counsel argued that *Article 73 Clause 1 of the Constitution of Zambia (Amendment) Act No. 2 of 2016* provides that;

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

He submitted that *Section 97 Sub-section 1 of the Electoral Process Act, No. 35 of 2016* provides that;

"An election of a candidate as a member of Parliament, Mayor, Council Chairperson or Councillor shall not be questioned except by an election petition presented under this part."

Further, that *Section 98 (c) of the same Act* provides that;

"An election petition may be presented to the High Court or tribunal by one or more of the following persons;
(c) a person claiming to have been a candidate at the election to which the election petition relate;....."

Counsel submitted further that *Section 99 of the same Act* provides that;

"Any of the following reliefs may be claimed in an election petition;
(a) A declaration that the election was void or;
(b) A declaration that any candidate was duly elected."

Counsel argued that it is upon the cited law that the petitioner took out this petition, for the reliefs outlined in his petition. Counsel submitted that there was massive registration of Malawians and Mozambicans in Vubwi constituency as shown by the extracts of the voter register, starting from page 1 to page 95 of the petitioner's bundle of documents. He argued further that the 2nd respondent conceded that foreigners from Malawi and Mozambique obtained Zambian National Registration Cards (NRC's), but argued that the same were issued by the Ministry of Home Affairs and not the 2nd respondent. The record clearly shows that a lot of Malawians and Mozambicans came to vote in Zambia following the issuance of voter's cards. Counsel referred this court to the case of

Abuid Kawangu vs Elijah Muchima¹ in arguing that the standard of proof in election petitions is a fairly high degree of convincing clarity.

Counsel argued further that the 1st respondent's action of going to campaign in Malawi and Mozambique clearly shows that he was fully aware that some Malawians and Mozambicans had obtained the Zambian NRCs and voter's cards, otherwise he would not have gone to the said countries to campaign. Counsel argued that the foregoing shows that the 1st respondent assisted the Malawians and Mozambicans in acquiring the NRCs and voter's cards. He submitted that rigging an election is a long process which may require two or more years of planning. It is therefore possible that the 1st respondent could have embarked on the process of recruiting voters in the foreign countries by assisting them to acquire the Zambian NRCs and voter's cards.

He submitted further that all the witnesses who testified agreed that Vubwi constituency comprises of 9 wards, with 8 wards bordering Malawi and Mozambique, and with only 1 ward inside Zambia. That being border wards, it is correct to conclude that foreign nationals registered as voters in Zambia, and indeed voted in the August, 2021 elections. Counsel argued further that the record shows that 2RW1, Martin Sakala, admitted that it was possible that foreign nationals could have registered and voted in Zambia. This was also echoed by one senior citizen, Panji Kaunda, who wondered as to why the total registered voters for Vubwi Constituency surpassed the threshold of about 23, 000 to 27, 000 voters. The evidence tendered by the witnesses reveals that the 2nd respondent had no proper mechanism of dealing with foreigners who came to be registered as voters in Zambia. There was no scrutiny or security measures put in place to prevent such incidences from happening. Counsel submitted that the system is so easy that one merely needs to produce an NRC for such a person to be registered as a voter. Further, that the extract of the voter's register contained from pages 1 to 95 of the petitioner's bundle of documents

show that there is a suspected foreigner on each page who voted in the elections. There is evidence that the 1st respondent went to both Malawi and Mozambique around 20:00 hours, on 11th August, 2021, after the official campaign time had already closed. This was an illegal act and contrary to *Regulation 15 (2) (a)* of the *Code of Conduct*.

Counsel argued that in addition, there was a lot of violence that took place during the elections. Counsel relied on the case of **Richwell Siamunene vs Sisalunalo Gift**² to argue that violence should be done by the respondent or if not by the candidate, by his appointed election agent with his knowledge, consent or approval. Counsel argued that the violence that took place against the UPND leaders was done with the knowledge, consent or approval of the 1st respondent. It was either the 1st respondent was in the group of his appointed agents, or participated directly. He submitted that the 1st respondent's violent conduct prevented the majority of voters from electing the candidate whom they preferred as they stayed away from voting for fear of being beaten.

Further, that the 1st respondent was involved in the distribution of DMMU mealie meal during the campaign period, with the help of the D.C for Vubwi Constituency, Eneless Banda. That the said D.C was seen distributing the mealie meal bags using a government vehicle, whose number plate was purposely removed. Counsel argued that the said conduct is contrary to *Regulation 15 (1)* of the *Code of Conduct*, and that it disadvantaged the petitioner as the playing ground was not levelled. He argued further that there is evidence on record that the 1st respondent promised the people of Malawi and Mozambique free fertilizer, and construction of a clinic and roads should they vote for him. The 1st respondent also gave out chitenge materials, food and T-shirts to the Malawians and Mozambicans. The 1st respondent went as far as promising to give Malawians and Mozambicans land in Vubwi District. Counsel submitted that the record will further show that the 1st respondent was involved in the transportation of voters from Malawi and Mozambique to Zambia to vote, using vehicles he organised. The

1st respondent's testimony to the court was that he did not have a vehicle, but he managed to effectively campaign in Vubwi constituency. This clearly shows that he was abusing Government vehicles to conduct campaigns. Further to the above, the 1st respondent was involved in the purchasing of various foodstuffs to feed to the voters from Malawi and Mozambique.

Counsel submitted that all these illegal activities were committed by the 1st respondent himself, with help from his election agents. Counsel argued that the threshold laid down in the case of **Jonathan Kapaipi vs Newtown Samakayi**³ has been met. He prayed that the election of the petitioner as M.P for Vubwi constituency be declared null and void ab initio, with costs.

10.0 THE 1ST RESPONDENT'S SUBMISSIONS

The 1st respondent filed submissions on 12th October, 2021 wherein counsel argued that it is trite law that a petitioner to an action must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. Counsel referred this court to the cases of **Khalid Mohammed vs The Attorney General**⁴ and **Wilson Masauso Zulu vs Avondale Housing Project Limited**⁵ to buttress his argument. He argued further that the threshold of proof in election petitions is higher than that in ordinary proceedings as was decided in the **Wilson Masauso** case. That the above position has been consistently applied in our jurisdiction as illustrated by the holdings in the cases of **Anderson Kambela Mazoka and Others vs Levy Patrick Mwanawasa and Others**⁶, **Austin Chisangu Liato vs Sitwala Sitwala**⁷, and **Alex Cadman Luhila v Batuke Imenda**⁸. Counsel argued that it is clear that the petitioner herein must adduce evidence which must establish all the issues raised to a fairly high degree of convincing clarity. He submitted that it will be shown in this case that not only has the petitioner failed to adduce evidence to support his case but has also lamentably failed to prove his case to a higher degree of that above a balance of probability and close to that of beyond reasonable doubt.

As regards the allegations of violence, counsel argued that the petitioner contends that the election was characterized with violence. That in aid of the allegation, the petitioner cited the beatings of Patrick Banda, the UPND Youth Chairman and Blackwell Banda, PW5 herein. Counsel implored this court to note that Patrick Banda was not called to testify. Counsel submitted that while PW5 stated in his testimony that he was beaten by one Alfonso Kamuna Phiri, an alleged PF cadre, it was his testimony that the 1st respondent was not present during the alleged attack. He argued further that PW5 conceded, in cross examination, that he did not know whether or not the said Alfonso Kamuna Phiri was an agent of the 1st respondent. That PW5 further conceded that despite being allegedly beaten, he and Patrick Banda voted and without any apprehension or fear. Counsel argued further that PW5 did not adduce any evidence of the alleged attack. Counsel besought this court to take note of 1RW1's testimony as to his unawareness of the alleged attack, and that he does not know Alfonso Kamuna Phiri. Further that 1RW1 also stated that he had never been summoned by either the ECZ Conflict Management Committee, or the Zambia Police on allegations of violence either by himself or his registered agents. Counsel submitted that it was 2RW1's evidence that he, as Returning Officer, had not received any reports of violence either during the campaign period or on the voting day.

Counsel argued that it is trite law that the petitioner must show firstly, that the violence complained of was committed by the 1st respondent and, secondly, that the electoral offence was widespread and prevented or may have prevented the majority of the voters from electing a candidate of their choice. Counsel referred this court to the **Austin Chisangu Liato** case to buttress his argument. That the same was also the position of the Supreme Court in the case of **Mubika Mubika vs Poniso Njeulu**⁹.

This court was further referred to the **Richwell Siamunene** case wherein the Constitutional Court held that violence should be done by the respondent or if not by the candidate, by his appointed election agent with his knowledge, consent or approval.

Counsel submitted that no act of violence was proved to have been committed and/ or orchestrated either by the 1st respondent or his agents. That the acts of violence were isolated and counting two in number involving two people and no evidence was adduced to show that they really occurred. Counsel submitted that the failure to report to the ECZ Conflict Management Committee and failure to provide written complaints raises doubt as to the occurrence of the acts, and confirms that no single witness placed the 1st respondent and or his agents at the scenes of the alleged violence.

As regards the allegations of corrupt practices, counsel submitted that there was no corruption and/or corrupt practices that characterized the election in question. He argued that the petitioner's main witness was Charles Nyoka (PW2), a former UPND District Chairman for Vubwi who defected during the run up to the elections to join the P.F. Counsel argued that PW2 lied under oath when he testified that he did not belong to any political party prior to joining the PF. That PW2 was shifty and had a questionable demeanour because he has an interest to serve. Counsel argued that it was PW2's testimony that he was angry with the P.F, and as such his evidence should be treated as suspect evidence in accordance with the guidelines provided in the cases of **George Musupi vs The People**¹⁰ and **Kambarage Mpundu Kaunda vs The People**¹¹.

Counsel argued further that no single evidence placed the 1st respondent nor his registered agent at the centre of bribing would be voters. That the evidence adduced by the petitioner and his witnesses is contradictory and lacks cogence and clarity to be relied on. Counsel referred this court to the case of **Simasiku Kalumiana v Lungwangwa Geoffrey Lungwangwa and The Electoral Commission of Zambia**¹²

as authority on the need for credible witnesses in the prosecution of election petitions, and the need for cautiousness in the treatment of the evidence of witnesses who harbour an interest. In connection to this case, counsel argued that the evidence of witnesses such as PW2, PW6, PW8 and PW10 cannot be relied on as they have an interest to serve. He argued that most of these witnesses stated that it was PW1 and PW2 who arranged for them to testify and that meetings were held at which they were chosen to come to court to testify. PW10 confirmed the meeting and her appointment as a witness. Counsel submitted that in order to declare an election void by reason of corrupt practices 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. He relied on the case of **Mubita Mwangala v Inonge Mutukwa Wina**¹³ to buttress his argument.

He submitted further that incidences of the allegations that the 1st respondent gave out money are isolated and do not in any way place the 1st respondent or his registered agents on the scene. That it was proven from pictorial evidence in the petitioner's bundle of documents at Pages 98 and 99 that the mealie meal in question was being distributed under a government program by the DMMU, on an unconfirmed date of distribution as the picture does not state the date nor the author of the document. As regards giving out money in Malawi and Mozambique, counsel argued that both 1RW1 and 1RW4 refuted the claims as they stated that they have never been to those countries. That 1RW4 also denied ever campaigning with the 1st respondent as he was not in his campaign team.

As regards the allegation of foreigners voting in the election, counsel submitted that it is a notorious fact that the issuance of NRCs is the preserve of the Department of National Registration, Passport and Citizenship Office under the Ministry of Home Affairs as mandated by *Section 8 of the National Registration Act, Chapter 126 of the Laws of*

Zambia. Counsel argued that the 1st respondent and/or his agents have no say whatsoever in the issuance of NRCs. In the same vein, the issuance of Voter's Cards is done by an autonomous body in the name of the ECZ in line with *Part II* of the *Electoral Process Act No. 35 of 2016*. That the evidence is unimpeachable that the 1st respondent did not participate in both exercises and no credible evidence was adduced from the either the Ministry of Home Affairs or any Zambian authorities to prove that the NRCs exhibited before the court were original or otherwise.

He argued further that no evidence was equally adduced to show that the purported foreigners were indeed foreigners and not Zambians. That there was no evidence from either the Malawian High Commission or the Mozambican Embassy to corroborate the assertions of the petitioner's witnesses, neither was there any evidence from the Foreign Relations Liaison Office at the Ministry of Foreign Affairs nor the International Cooperation to support the assertions of the witnesses. Counsel implored this court to find that the alleged Malawians and Mozambicans are indeed Zambians masquerading as foreigners. He argued further that 2RW1 expertly narrated the process of registration of voters which involved vetting by stakeholders such as the petitioner and the UPND, and that no one, the petitioner included, raised issues with the voter register.

Counsel pointed out that no single foreigner was singled out to have registered as a voter. Counsel went on to argue that a careful perusal of the petitioner's documents revealed that the names and date of birth on the alleged Malawian and Mozambican identity cards did not tally with those on the Zambian identity cards. To buttress his argument, counsel gave an example of the document of Mbewe Galasiana contained at page 1 of the petitioner's bundle of documents and that of Mbewe Graciana, on page 2 of the same bundle of documents. He argued that the date of birth on the purported Malawian identity card

is 10th November, 1952 and on the Zambian identity card it is 10th February, 1960.

It was counsel's considered submission that the said evidence was fabricated and falls short of the requisite threshold to prove the authenticity of the documents. Counsel contended that like many purported foreign identity cards exhibited, the persons are different as details do not match.

Counsel argued further that there is no evidence on record that foreigners voted except for conspiracy theories and unsubstantiated allegations. Counsel pointed out that 2RW2, the Returning Officer for Vubwi Constituency, testified that he received no complaint of foreigners voting as. Counsel argued that no single foreigner, with proven credentials, was brought by the petitioner to prove that they were foreigners and that they voted. That there were equally no immigration formalities to prove that those foreigners entered into Zambia and that they voted. That PW6 stated that she is Malawian but lied that she is Zambian in order to obtain her NRC and failed to prove under cross examination that indeed she was Malawian and not Zambian. That PW7 produced her NRC that showed that she is not Lucy Christopher but rather Lucia Phiri, and that her NRC was obtained on 24th September, 2008, a date which was way before the disputed election.

He submitted further that PW8 produced an NRC that showed that he obtained it on 25th September, 2018, and lied about his age on the stand as he stated that he was 27 but his official age shows that he was born on 18th March, 1975. That PW9 obtained his NRC on 30th August, 2020, before the 1st respondent was a candidate, and had no proof that he is Malawian. Similarly, PW10 obtained her NRC on 27th August, 2020 and her Voter's Card on 24th November, 2020, and had no proof that both her NRC and Voter's Card were genuine. That PW11 had mismatched details on her alleged Zambian and Mozambican

documents which showed different persons and dates of birthdays. The unauthenticated Mozambican documents show that she was born on 6th May, 1996, while the purported Zambian identity shows that she was born on 8th August, 1996. Counsel argued further that PW11 stated that she lied on her own and no one forced her to lie and register as a Zambian. She had no proof that she was Mozambican and not Zambian. That PW10's documents also had different details, and that she could not remember and confessed that she was forgetful and inattentive.

Counsel submitted that there is no proof to hold that foreigners voted on the 12th August, 2021 elections. The identity cards had conflicting details and carried different names that could not prove that the witnesses were in fact its holders.

On whether it could be alleged that the foreigners had dual citizenship, counsel argued that since the amendment to the *Constitution of Zambia, Chapter 1 of the Laws of Zambia, Act No. 2 of 2016*, dual citizenship is allowed in Zambia. He argued that *Article 39 of the Constitution* provides for dual citizenship in Zambia. That the said provisions provide that:

"(1) A citizen shall not lose citizenship by acquiring the citizenship of another country.

(2) A citizen who ceased to be a citizen, before the commencement of this Constitution as a result of acquiring the citizenship of another country, shall be entitled to apply, as prescribed, to the Citizenship Board of Zambia, for citizenship and the Citizenship Board of Zambia shall bestow citizenship on that person.

This has to be read together with *section 8 of the Electoral Process Act* which provides for criteria for registration as a voter. It provides that:

8. (1) A person qualifies for registration as a voter if that person—
(a) is a citizen of Zambia;

(b) has attained the age of eighteen years; and

(c) is in possession of a national registration card.

(2) The Commission shall register a person as a voter as prescribed.

(3) A person who has been registered in the Register of Voters shall be issued with a voter's card.

(4) A person shall not register as a voter in more than one constituency."

Counsel argued that in the unlikely event that foreigners voted and at a magnitude that meets the threshold in the **Inonge Mutukwa Wina** and **Poniso Njeulu** cases, the petitioner has failed to show that the alleged foreigners do not hold Zambian citizenship as per *Article 39* of the *Constitution*. That in the absence of such proof, it would be difficult to come to a conclusion that "foreigners" or indeed the proper description that non-Zambian citizens voted in the elections since no evidence as to their true nationality and allegiance was adduced.

Counsel argued further that it is important to address the issue as to when a candidate should be responsible for the actions of others. He submitted that the **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke and the Attorney-General**¹⁴ and **Abiud Kawangu** cases are instructive in this discourse.

Counsel argued that *Section 2* of the *Electoral Process Act* defines the words "election agent" and "polling agent" as follows;

"election agent" means a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper;

"polling agent" means an agent appointed by a candidate in respect of a polling station";

Counsel referred this court to the **Richwell Siamunene** case wherein it was held that mere proof that the UPND supporters were indeed

involved in the said acts does not warrant an inference being drawn that the respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election.

Counsel submitted that the petitioner herein has failed to prove that the alleged corrupt or illegal practices or misconduct occurred. He argued that should the court however find that the alleged acts occurred, it should find that the petitioner has failed to prove that either the 1st respondent or his agents, election and polling agents, participated in the said acts. That this petition is incompetent and has failed to prove the allegations made and has failed to discharge the requisite burden and standard of proof in election petitions. The evidence as a whole is rehearsed and fabricated, and calculated to deceive this Honourable Court and to enable the petitioner to enter the National Assembly through the backdoor and to inconvenience a widely popular candidate.

Counsel argued that the evidence adduced lacks clarity, is not coherent and is contradictory as witnesses even refuted each other's testimony which further weakened the petitioner's case. That there was no evidence adduced at trial to warrant nullification of the election of the 1st respondent. Counsel concluded his submissions by praying that the election of the 1st respondent be upheld, and the petition be dismissed with costs.

11.0 THE 2ND RESPONDENT'S SUBMISSIONS

The 2nd respondent filed its submissions, wherein counsel argued that the law is well settled, as it was held in the case of **Khalid Mohammed vs The Attorney General** that he who alleges must prove. The Supreme Court in the said **Khalid Mohammed** case went on to further hold that a plaintiff cannot automatically succeed even if a defence fails as the plaintiff must not only prove his case, but also prove it whatever may

be said of the opponent's case. Counsel submitted that the petitioner herein must prove his case to the appropriate standard as set out for election petitions by the Constitutional Court and the Supreme Court of Zambia. Counsel argued that the Supreme Court has held in a plethora of cases that election petitions are required to be proven to a standard higher than on a mere balance of probabilities, and that the issues raised are required to be established to a fairly high degree of convincing clarity. To buttress his submission, counsel referred this court to the cases of **Anderson Kambela Mazoka and Others vs Mwanawasa and Others**, and **Akashambatwa Mbikusita Lewanika and Others vs Chiluba**¹⁵. Counsel further relied on the cases of **Micheal Mabenga vs Sikota Wina**¹⁶ and **Priscilla Mwenya Kamanga vs The Attorney General and Another**¹⁷.

Counsel submitted further that *Section 97 of the Electoral Process Act, No. 35 of 2016* is instructive on what circumstances may lead to nullification of an election. He argued that the Constitutional Court in the case of **Mbololwa Subulwa vs Kalieye Mandandi**¹⁸ stated that;

"Although the first aspect of section 97(2) (a) of the Act was satisfied, as regards the finding that each one of the three litigants did character assassinate each other, the second requirement or aspect of that section, that it must be proved that the act complained of was widespread as to have affected the election result, was not proved....."

He submitted that the law requires that the alleged acts of malpractice or misconduct must have been committed by the candidate or with his knowledge and consent or approval, or of his election agent or polling agent. The agents being those persons appointed by a candidate pursuant to *Regulation 50 and 51 of the Electoral (General) Regulations, 2006* as Election Agent or polling Agent.

Counsel went on to argue that the petitioner is only seeking reliefs grounded on illegal practices. That it is settled law that a petitioner can only be granted the reliefs sought in his pleadings, that is the

nullification of the election of the 1st respondent based on the alleged illegal practices.

Counsel argued further that in order for the petitioner to succeed with the petition, the petitioner must prove to the requisite standard that the allegation outlined under claim number 2 of his petition as a breach of Sections 86 and 87 of the *Electoral Process Act* were committed in connection with the parliamentary election held on 12th August, 2021 for Vubwi Constituency, and that the said offence was committed by the 1st respondent or with his knowledge or consent or approval. Counsel contended further that the petitioner must also prove that the 1st respondent's illegal acts prevented the majority of the voters in Vubwi Constituency from electing a candidate whom they preferred. Counsel pointed out they would proceed to address the evidence raised which seemed to attempt to prove corrupt practices although the second relief outlined in the petition shows that the petitioner is not seeking to nullify the election of the 1st respondent on the ground of corrupt practices or other misconduct but has confined himself to illegal practices.

Counsel then proposed to submit on relief number two as sought by the petitioner which relief is framed as follows:

"A declaration that the illegal practice committed by the 1st respondent and/or his agents affected the election result and that the same ought to be nullified."

Counsel submitted that Section 87 of the *Electoral Process Act* defines what amounts to illegal practices. He argued that the 2nd respondent's understanding of the petitioner's evidence in relation to the reliefs sought is contained in Section 87, Subsection 1 (b) and (c) of the *Electoral Process Act*. Counsel argued that, the petitioner's evidence is that the 1st respondent and indeed the 2nd respondent registered foreign nationals as voters in Zambia. Counsel argued further that from the petitioner's evidence it appears that the petitioner had no problem with the alleged possession of voters cards by Malawian and Mozambican

nationals, but that his issue was that the said persons allegedly voted for the 1st respondent which according to him, resulted in him being disadvantaged.

Counsel submitted that the evidence of PW1, PW2, 1RW1 and 2RW1 demonstrates that the 1st respondent did not take part in the registration of any foreign national as a voter for the reason that most of the petitioner's witnesses only met the 1st respondent long after they had already registered as voters. Counsel went on to argue that the 2nd respondent confirmed that the 1st respondent was not among the persons engaged to register voters in Vubwi. Counsel submitted that the evidence on record demonstrates that the 1st respondent did not take part or influence persons to register as voters. Counsel went on to submit that there is also no evidence on record, which even faintly demonstrates that the 2nd respondent registered voters in Vubwi Constituency or outside Vubwi Constituency. It was counsel's considered view that it was not enough for the petitioner to merely, by word of mouth, make such wild allegations that the 1st respondent was involved in registering voters when the duty to register voters lies within the confines of the 2nd respondent. Counsel went on to point out that most of the Petitioner's witnesses testified that the 1st respondent was requesting them to vote for him so that he could construct roads, for them. Counsel opined that this particular evidence had to do with corrupt practices and not illegal activities.

Counsel submitted further that, the petitioner has failed to provide evidence that shows that the 1st respondent supplied ballot paper or voter's cards to any person. Counsel argued that although PW4, PW6, PW7, PW8, PW9, PW10 and PW11 testified that they are foreign nationals from Malawi and Mozambique, their evidence was unreliable as none of the said witnesses voted using Zambian documents. Counsel pointed out that further to the foregoing, the said witnesses were answering to different names to the registered ones. Counsel argued

further that the said witnesses failed to present documentary evidence from their alleged countries of origin to prove that the foreign documents they were presenting before the court were genuine. Counsel invited this court to reject the evidence of PW4, PW6, PW7, PW8, PW9, PW10 and PW11.

Counsel went on to argue that there is no evidence on record which proves, with the requisite high clarity, that the 2nd respondent registered foreign nationals or allowed persons who are not permitted at law to possess voter's cards. Counsel highlighted that they had noticed that the petitioner had not discussed the totality of the evidence on record namely, what the respondent's witnesses testified and what the petitioner's witnesses testified, but that instead the petitioner seemed to have proceeded on the wrong notion that what his witnesses said was the truth. It was counsel's considered view that contrary to the petitioner's position, the record will show that the evidence of the petitioner's witnesses was countered and the same was shown to be untrue and unreliable. Counsel submitted that the petitioner has completely failed to establish that there were illegal activities perpetuated by the 2nd respondent or indeed the 1st respondent. Counsel was of the considered view, that given that this was the lone ground upon which the reliefs were being sought, the petition should be dismissed with costs as was done in the **Khalid** case. Counsel pointed out that while the petitioner went to great lengths to call various witnesses to testify on the alleged corrupt practices and other misconduct, the record shows that the petitioner had not moved this court to nullify the 1st respondent's election on the ground of corrupt practices or other misconduct but on illegal activities. Counsel argued that no benefit should accrue to a petitioner who has not requested for reliefs grounded in the evidence on corrupt practices. Counsel opined that the law on the importance of pleadings is well established in our jurisdiction to which the parties are bound, and that even in assuming the petitioner had pleaded corrupt practices, the

evidence on the record lacks the required high clarity to enable this court to rely on it to nullify the election of the 1st respondent.

In answering the question as to whether the alleged electoral offences were wide spread in relation to the alleged meetings that were held, counsel argued that the Constitutional Court has guided that the number of people who attend the meetings must always be provided. Counsel went on to explain that failure to provide the number is fatal to the petitioner's case or to the party wanting to rely on such numbers, because such a party would have failed to help the court determine how widespread the breach affected the electorate, and consequently whether or not it led to the majority of voters in that constituency failing to elect a candidate of their choice. Counsel cited the **Mbololwa Subulwa** case to support his submission.

Counsel argued further that the petitioner did not provide any evidence that almost 17, 000 foreigners were registered as voters in Zambia, and neither did he provide any evidence to ascertain the source of the figures given. Counsel submitted further that no evidence was exhibited before this court to support PW2's testimony that only 1000 foreigners crossed into Zambia while others were blocked. Counsel pointed out that the witnesses who testified to attending meetings stated that the meetings had 100 to 450 people, while other witnesses did not state the number of people who were attending the meetings. On this premise, counsel argued that the number mentioned is not sufficient to persuade this court that the alleged electoral offences were widespread to prevent the majority of the voters in Vubwi Constituency from electing a candidate of their choice. It was counsel's considered view that the alleged number of foreigners who registered as voters, as testified by PW1 and PW2 lacked the high clarity required in election petitions.

Counsel submitted that even if, in the unlikely event that this court found that the illegal activities were committed in Vubwi

Constituency by the 1st respondent, this court would still have to come to the conclusion that the same was not widespread. Counsel argued that on this basis, this court could still not nullify an election based on the illegal activities which were not widespread. Counsel opined that in the premises, the petitioner is not entitled to any reliefs sought and prayed for the petition to be dismissed with costs to the 2nd respondent.

Those were the submissions from the parties and I am indebted to counsel for the same.

12.0 THE FINDINGS OF FACTS

12.1 Facts not in dispute

The following facts are not in dispute: The petitioner, the 1st respondent and three other candidates contested the Parliamentary seat for the Vubwi Constituency in the last elections that were held on the 12th August, 2021. The results declared by the Returning Officer showed that the 1st respondent was declared the winner with a total number of 7,255 votes while the petitioner was the runner up with a total of 3,487 votes.

I find those as facts.

12.2 Facts in dispute

The facts that are in dispute and that need to be resolved are as follows:

1. Foreign nationals from Malawi and Mozambique being registered at various polling stations in Zambia and subsequently voting on the 12th August, 2021.
2. The D.C for Vubwi, Miss Eneless Banda being a public officer, was seen campaigning for the P.F candidate in a P.F branded vehicle without number plates as the number plates were deliberately removed to disguise the voters.

3. Abuse of government resources by way of the use of Government of the Republic of Zambia (GRZ) vehicle being seen transporting mealie meal in the district which was intercepted by alert UPND cadres before distribution and which mealie meal is currently stored at Vubwi Police station as evidence.
4. Preparation of food by a P.F cadre known as Seliano Sakala at Headman Mchima's shop that was used as a camp and the food was distributed to voters at the Mchima polling station.
5. Transportation of people from Tsumba, Kamwendo and Sankhani Villages in Malawi to Muzigawa Polling station in Zambia by three P.F cadres, namely James Mwanza, Patson, Chisi and Yotamu Sakala in a 3 tonne truck belonging to Elisha of Guma Viillage in Mbozi Area.
6. James Mwanza, Patson Chisi and Yotamu Sakala told the voters that they should eat food at Alick's home at Chidambo Village in Malawi after voting.
7. Daliso Mwale, a P.F cadre and son to the P.F Chairman for Vubwi District Council was seen transporting voters from Lifuledi Village in Malawi to Chigwe Polling Station in Zambia, in a 3 tonne yellow canter with a white ribbon on the trailer bearing registration number BAT 2941.
8. The voters that were transported by Daliso Mwale were seen being fed at the home of Faustina Banda and Henry Zulu who are P.F cadres, at Chigwe Village before and after voting.
9. The UPND Youth Chairman, Patrick Banda was attacked by P.F cadres while using a P.F branded vehicle and the notable people who were in the said vehicle were Ackleo Banda, the 1st respondent and Austin Mbewe, Franco and other unknown persons.
10. The attack of Patrick Banda arose after the P.F cadres in the vehicle flashed their P.F symbol and Patrick Banda flashed the UPND symbol which made the P.F cadres reverse their vehicle

and attack him. The matter was reported to the Vubwi Police and a medical report was obtained from Vubwi Hospital.

11. The UPND constituency Vice Chairman, Blackwell Banda was attacked and beaten by Alfonso Kamuna Phiri, a P.F cadre, after a chooper landed in the bush 2 days before the election day and when Blackwell Banda wanted to find out what the said chopper had brought he was attacked. The matter was reported to Vubwi Police station and a medical report was obtained from Vubwi Hospital.

The said facts put forth as grounds in the petition can be summarised into the following categories:

- (a) Illegal practices
- (b) Corruption and Bribery
- (c) Violence and intimidation

Before dealing with the grounds, I will address the standard of proof that is required in Election Petitions.

13.0 STANDARD OF PROOF IN ELECTION PETITIONS

It must be stated from the onset that the standard of proof in an Election Petition is not the same as that which obtains in an ordinary civil suit. In an ordinary civil suit, a claimant has to prove his case on a preponderance of probabilities. The learned author of **Cross & Wilkins Outline of the Law of Evidence, Collin Tapper, at page 35** of his book explains that:

"Speaking of the degree of cogency which evidence must reach in order to discharge the burden of proof in a civil case Denning J said:

"That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in criminal cases. If the evidence is such that the tribunal can say; "we think it more probable than not",

the burden is discharged, but if the probabilities are equal it is not'."

With regard to the standard of proof that is required in an Election Petition in our jurisdiction, the Supreme Court of Zambia held in the case of **Michael Mabenga Vs Sikota Wina & Others** that:

"An Election Petition like any other civil claim depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a mere balance of probability."

In the **Anderson Kambela Mazoka and Others Vs Levy Patrick Mwanawasa and Others** case, the Supreme Court held:

"The standard of proof must depend on the allegations pleaded.....As regards the burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity."

Similarly in the case of **Akashambatwa Mbikusita Lewanika and Others Vs Frederick Jacob Titus Chiluba** the Supreme Court guided:

"Parliamentary election petitions were required to be proved to a standard higher than on a mere balance of probability and therefore in this, where the petition had been brought under constitutional provisions and would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Furthermore the issues raised were required to be established to a fairly high degree of convincing clarity."

In the more recent case of **Sydney Chisanga Vs David Chisopa, Electoral Commission of Zambia, Attorney General**¹⁹, at page 30 the Constitutional Court echoed the position of the Supreme Court when it stated as follows:

"The issue is whether or not, on the evidence adduced in this matter, the Appellant did prove to the applicable standard that the

Respondent used government property as claimed. We reiterate that the burden of proof was on the Appellant to prove his allegations against the 1st respondent, which were grounded on section 97 (2) (a) of the Act, to the required standard of convincing clarity.⁹

It is evident from the foregoing authorities that the standard of proof in Election Petitions need not be beyond reasonable doubt as required in criminal cases but it must be beyond probability and that is the standard to which the petitioner in this case has to prove his allegations. Additionally the Constitutional Court in the case of **Richard Sikwbele Mwapela Vs Miyutu Chinga**²⁰ has guided that the basis for nullification of an election is as per the parameters provided under Section 97 (2) (a) of the Electoral Process Act No. 35 of 2016 which provides:

“(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;

The Constitutional Court has guided further in the said **Richard Sikwbele Mwapela** case that:

“In terms of the provisions of Section 97 (2) (a) of the Act, 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. A petitioner must further 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 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."

With the foregoing in mind I will now turn to the law on which the petitioner's claims are predicated.

14.0 THE LAW RELIED UPON BY THE PETITIONER

The petitioner has brought this petition pursuant to *Articles 47(2), 51, 54, 68, 72 (2) (c) and 73 (1) of the Constitution of Zambia*. The petitioner has also brought this petition pursuant to *Sections 81, 89, 97 (1), 98 (c), 99, 100 (2) (a) of the Electoral Process Act No. 35 of 2016 as read together with Rules 12, 15 (a), (h) and (k) of the Code of Conduct Rules, in the Schedule to the Electoral Process Act, 2016*.

Section 81 of the Electoral Process Act refers to acts of bribery and corruption, while *Section 89* refers to various election offences. *Section 97* generally refers to instances where elections may be declared void while *Section 97 (1)* provides that an election of a candidate as a Member of Parliament shall not be questioned except by an election petition presented under this Part. *Sections 98(c), 99 and 100(2) (a)* all outline the procedure to be followed in the presentation of an Election Petition.

Upon a careful perusal of *Section 89* of the *Electoral Process Act* this Court has noticed that the said *section* does not assist either the parties or the court in terms of the evidence that was adduced by the petitioner and his witnesses. I find it therefore irrelevant for purposes of this petition as there are no facts either pleaded or led in evidence that pertain to events that occurred at the Polling stations or within the radius specified under *Section 89* that would justify reliance upon the said *Section*.

15.0 THE PLEADINGS

In relation to the pleadings however, it must be stated that the 2nd respondent has argued that the petitioner has not pleaded corrupt practices. Counsel for the 2nd respondent argued that this court should limit its consideration to the alleged illegal practices by the 1st respondent as that is what was pleaded by the petitioner under paragraph 2 of his claims. The said claim by the petitioner is reproduced hereunder as follows:

"A declaration that the illegal practice committed by the 1st respondent affected the election result, and that the same ought to be nullified."

It is trite that the functions of pleadings are to put a party on notice as to what claims are being made against it as pleadings are meant to assist the parties and the court in understanding the nature of issues to be raised in a case so as parties will not be *"ambushed"*. The Supreme Court in the case of **Anderson Kambela Mazoka and 2 Others Vs Levy Patrick Mwanawasa and 2 Others** held that:

"The functions of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties."

It is also trite law that once closed the parties to an action are bound by their pleadings. That being said however, there are exceptions to this

general rule. Although the 2nd respondent has argued that the evidence of the prosecution witnesses alleging corrupt practices should not be considered by this court, the Supreme Court in the case of **Afrope Zambia Limited Vs Anthony Chate and Another**²¹ reaffirmed its holding in the case of **Augustine Kapembwa Vs Danny Maimbolwa and Another**²² wherein it held that:

“Where a party refers to evidence not pleaded, the proper course is for the other party to object immediately to this reference, thereupon it would be the duty of the court to decide whether or not it is necessary to grant an adjournment to the other party and whether to allow an amendment of the pleadings, subject to an order for costs.”

Similarly, the Supreme Court in the case of **Muvi TV Limited Vs Killian Phiri and Another**²³ guided that the trial court is not precluded from considering a matter that is not pleaded but let into evidence without any objection. It follows then that the 2nd respondent ought to have objected to the production of the evidence by the petitioner’s witnesses, which he asserts to be allegations of corrupt practices and other misconduct, the moment it was introduced at the trial of the action. Having not objected, this court is at liberty to consider the allegations pleaded and evidence adduced in support of those allegations. In any event both the 1st and 2nd respondents pleadings and conduct of the trial responded to the evidence of the corrupt practices as if the petitioner had expressly pleaded that the nullification of the 1st respondent be done on the basis of corrupt practices which action resonates with the guidance in the **Afrope Zambia Limited** case where it was further held that a radical departure from the case pleaded, amounting to a separate and distinct new case, cannot entitle a party to succeed. In so holding the Supreme Court in the said **Afrope Zambia Limited** case gave the litmus test for ascertaining a radical departure when it adopted the views expressed in the **Augustine Kapembwa** case that:

"One must test the plaintiff's submissions in this way: if these allegations had been made upon the pleading in the first place, namely allegations based upon the facts as they have now emerged, would the defendant's preparation of the case and conduct of the trial have been any different?"

Consequently, this court is at liberty to consider the petitioner's evidence which does not radically depart from the case pleaded.

16.0 ANALYSIS OF THE ALLEGATIONS AS THEY APPEAR IN THE PETITION

I will now deal with the allegations as they appear in the petition. The first one is 5 (i) which states that "Prior to the elections, the Patriotic Front (P.F) Registered a lot of foreign Nationals from Mozambique and Malawi to register as voters in Zambia at various polling stations." In support of this allegation the petitioner led the following evidence:

PW1 testified that prior to the elections Ackleo Banda participated in the supervision and registration of voters from Malawi and Mozambique. PW1 testified that this supervision was widespread as it covered 8 out of 9 wards in Vubwi constituency namely; Matemba, Chisiya, Chimpanje, M'lawe, Zozwe and Sindemisale which are on the Malawian border and along the Mozambican border, the supervision and registration covered Zozwe, M'lawe, Vubwi and Mbozi. It was PW1's testimony that in all the polling stations along the borders, people of foreign nationals were included in the voter's register and given specific instructions to vote for P.F candidates, thereby giving the P.F candidates an upper hand. On the other hand, 1RW1, the 1st respondent, testified in cross examination that he did not know about any foreigners from Malawi and Mozambique who had come to vote in Zambia and it was up to the ECZ to know about this as this was their job. 2RW1 testified that he knew that P.F was a political party and it was not the job of the P.F to register voters. He testified further that he

was not aware of the ECZ registering any national from Malawi or Mozambique.

In assessing these testimonies, the Court has noted firstly that PW1 did not testify that he saw the 1st respondent participating in the supervision and registration of voters from Malawi and Mozambique. As such, this testimony was hearsay and was not substantiated with any evidence to show that PW1 actually witnessed the 1st respondent supervising the registration of voters which exercise as rightly testified to by 1RW1 and 2RW1 is the preserve of the ECZ. As PW1's testimony was hearsay evidence it is inadmissible.

Secondly, in cross examination by the 2nd respondent's counsel, PW1 testified that he only came to know about the registration of foreign voters on the 12th August, 2021. When questioned about whether he saw all the foreigners coming to vote from Malawi and Mozambique, PW1 in cross examination by the 1st respondent's counsel stated that he only saw one foreigner on the queue at Muzigawa, following which he and his driver, Gabriel Miti and another person called Chola commenced investigations. In relation to this testimony, this court has noted that the same was not corroborated by any other evidence as PW1 did not call either Gabriel Miti or Chola to give evidence of this incident and the alleged investigations that they undertook. Similarly there was no evidence of a complaint having been made by PW1 over the said alleged discovery of a foreigner on the queue which evidence would have added credence to his testimony that he at least identified one foreigner. I as such reject this testimony.

With regard to the 1st respondent's involvement in the registration of voters, while PW1 testified that the 1st respondent supervised the widespread registration of foreigners as voters, in 8 out of 9 wards in Vubwi constituency, along the Malawian border being Matemba, Chisiya, Chimpanje, M'lawe, Zozwe and Sindemisale, and Zozwe, M'lawe, Vubwi and Mbozi which are on the Mozambican border, in cross examination by the 2nd respondent's counsel, PW1 conceded that out of

the 9 wards he had only shown 3 wards in his bundle of documents that had foreign registered voters. Additionally, PW1 did not present any eye witnesses who saw the 1st respondent or his election or polling agent's participation in the registration process neither did he testify that he actually saw the 1st respondent supervise and register the foreign voters. This in my view does not show that the alleged voter registration of foreigners was widespread as numbers are a critical factor in determining whether a particular allegation was widespread. As this testimony was largely hearsay and is uncorroborated, the same is accordingly rejected.

PW1 also referred the court to the documents exhibited from pages 1 to 95 of his bundle of documents as being from the Zambian voter's register which contains information of foreign nationals from Malawi and Mozambique who voted. PW1 went on to point out that some individuals on the said pages are Zambians and others are not and that the non-Zambians outnumbered the indigenous Zambians which posed a security risk in Zambia as they took part in the election of a leader. PW1 referred to page 1 of the petitioner's bundle of documents, number 5 from the left under the last row to show the name of Mbewe Galaisana who is a Malawian as per the identification card that is exhibited on page 2 of the petitioner's bundle of documents. PW1 testified further that the same person has a Zambian voter's card bearing number 33960272 and that she voted from Muzigawa Primary School a polling station in Chisiya ward, Zambia. PW1 testified that this kind of scenario was widespread in Zambia.

PW1's testimony that the non-Zambians in the voter's register outnumbered the Zambians was discredited in cross examination by the 2nd respondent's counsel when he admitted that on pages 1, 3, 8, 10, 25, 27, 29, 32 and 34 of his bundle, out of a total number of 35 voter's on each of these pages only one person was marked a foreigner. PW1 also admitted that on pages, 6, 12, 16, and 21 out of the total number of 35 voters on each of these pages only two were marked as

foreigners and lastly that on page 19 only three people were marked as foreigners out of 35 people. I find that PW1's testimony was as such shaken in this regard as it is evident that the alleged foreigners in the voter's register did not by any stretch of imagination outnumber the Zambian voters. I accordingly reject this testimony in that regard.

Additionally in countering the evidence of the aforementioned exhibits, counsel for both the 1st respondent and 2nd respondent belaboured in cross examination of PW7, PW8, PW10, PW11 and 2RW1 to show that the names on the identity cards and voters cards were at variance with those on the identity cards either from Malawi or Mozambique. In an attempt to explain these anomalies, PW7, Lucy Christopher testified that when they were taken to obtain NRCs and subsequently voter's cards, they were told to change their names by PW4 who was sent by Ackleo, the 1st respondent. Although the explanation was plausible, I found PW7 to be an untruthful witness as while she testified that Ackleo helped her obtain the NRC, she testified that she only got to know him on the 11th August, 2021 which was a day before the elections. This therefore reduces the weight I can attach to her evidence and I accordingly reject it in that regard.

Moreover, even though the petitioner went to great lengths to exhibit a number of identity cards together with Zambian NRCs and voter's cards for alleged nationals of Malawian and Mozambican origin, which exhibits are found at pages 2, 4, 5, 7, 9, 11, 13, 14, 15, 17, 18, 20, 22, 28, 30, 31, 33, 35, 37, 39, 41, 43, 46, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, and 95, none of these individuals were called to speak to their documents. Consequently in spite of these documents having been formally produced, this court is unable to attach the necessary weight to these documents which it would have attached had the actual owners of the same appeared to testify.

The petitioner however did, call a number of witnesses to testify in support of this particular allegation. PW6 Tangu Phiri, who claimed to be from Malawi testified while being cross examined by the 1st respondent's counsel that, Ackelo Banda gave her a NRC in Zambia at Chikoka near Matemba; PW7 Lucy Christopher who claimed to be from Malawi also testified that she was given a voter's card on the basis of the details on her NRC and when going to get registered to vote, she was just told what to say as when getting the NRC's they were told to change their names by PW4, Ackim Phiri, who was sent by Ackleo; PW8 John Yolonimo who claimed to be from Malawi testified that he obtained an NRC on the 25th September, 2018, that the D.C in Zambia and Ackim PW4 from Zambia took him to get an NRC; PW10 Loveness Phiri who claimed to be from Mozambique testified that there were some people that were sent to take them to Zambia to get NRC's and PW11 Eclini Musipu who claimed to be from Mozambique testified that she knew Ackleo Banda when he was giving out NRC's.

In cross examination PW7 testified that she obtained her Zambian NRC in 2008 before she knew the 1st respondent, PW10 also testified that she obtained her Zambian NRC in 2020 before she met the 1st respondent. PW11 in cross examination testified that she knew the 1st respondent in 2020 at the time she was going to obtain her NRC but later in her testimony PW11 indicated that she was a very forgetful witness. PW8 mentioned that he got his Zambian NRC with help from PW4 and a D.C whose district PW8 did not mention. PW9 testified that PW4 acting on the 1st respondent's instructions helped him to go and obtain a Zambian NRC.

In assessing the testimonies of these particular witnesses, I find that they were marred with contradictions which went to the root of the case. For instance PW7 and PW10 testified that they obtained their NRCs with the help of the respondent and yet their testimonies reveal that they obtained the NRCs before they knew the 1st respondent. Other contradictions pertain to the details of the documents which due to the

reasons outlined below I will not go into as these documents were not admitted before court. On the whole, the credibility of each of these witnesses was brought to the fore as PW11 admitted she was a very forgetful witness, while PW8 could not testify with convincing clarity who helped him to obtain his NRC. Additionally, though both PW8 and PW9 referred to PW4 as having helped them on the instruction of the 1st respondent, PW4 himself did not testify to having been engaged by the 1st respondent to conduct this exercise.

As already alluded to, although these witnesses, that is PW6, PW7, PW8, PW9, PW10 and PW11, all had physical copies of two sets of identity cards for Zambia and the country which they claimed to be from, none of these documents were formally admitted into evidence and therefore could not be relied upon. That being said, what is evident in this case, is that people along the border, particularly Zambia and Malawi and Zambia and Mozambique have a tendency of obtaining identification cards for the two countries along whose border they reside. This is what evidently led the 1st respondent to campaign in the villages of Malawi and Mozambique and what also motivated the petitioner to contribute towards the construction of a clinic in Malawi which I will address below.

It must be stated that for such a serious allegation, the Court and the parties would have greatly benefitted from an unimpeachable presentation of evidence to be able to substantiate the said allegation to the required standard of a fairly high degree of convincing clarity. Instead, the petitioner chose to call witnesses who were allegedly from Malawi and Mozambique whose documents had not been formally produced before Court. This in my view was tantamount to the petitioner shooting himself in the foot.

PW1 testified further that the Mozambicans alone were estimated at 10,000 while the Malawians were estimated at 7,500 and that although the figures may have not been verified there were a number of trucks that ferried voters from Malawi and Mozambique to various polling

stations in Zambia on the 12th August, 2021. PW2, Charles Nyoka testified that Ackelo Banda told him that they would be going to Mozambique to organise people to vote. The votes were banked votes for P.F members and he, Ackelo Banda and other P.F members travelled to Mozambique. PW2 testified further that banked votes were votes that were kept in Mozambique and there were 10,000 banked votes in Mozambique. Ackleo Banda won by 7,255 votes as not all banked voters came as over 9,000 were blocked by the UNPD cadres.

In relation to this evidence, PW2's testimony must be treated with caution as he is a partisan witness with a possible interest to serve and as such his evidence cannot be used to corroborate that of PW1. That being said however, it is also critical to note that neither PW1 nor PW2 explained the source of the figures that they were referring to in relation to the alleged number of foreigners that came to vote from Malawi and Mozambique in order to substantiate this piece of evidence, and I therefore cannot attach any weight to it.

PW1 went on to testify that the said foreign voters were ferried from Kabangu village in Malawi to Chankhandwe polling station under the supervision of the 1st respondent and that the 1st respondent used government personnel during his campaign, specifically, the Vubwi D.C, Eneless Banda, who was availed a P.F branded vehicle to use for campaigns in Mozambique. PW3 also testified that on the 12th August, 2021, he watched from the roadside as people were ferried from Kabangu, Chibonyole and Mukanga in Malawi in a white canter that belonged to Ackelo Banda.

PW1's testimony of seeing foreigners enter Zambia was shaken in cross examination by the 1st respondent as although he testified that foreigners used the border between Zambia and Malawi which has no registered border to enter Zambia on 12th August, 2021, he admitted that he did not see all the foreigners as he only saw one on the queue at Muzigawa. I find once again that PW1's testimony was hearsay evidence with regard to the foreigners from Malawi and Mozambique

entering Zambia to vote and as such the same is unreliable and inadmissible.

In relation to PW3's evidence however, he testified that he actually watched from the roadside as people were ferried from Kabangu, Chibonyole and Mukanga in Malawi. No other evidence was proffered to explain how PW3 knew that the people that were being ferried, were from these particular places in Malawi nor did PW3 explain where he was with convincing clarity that he saw these people from Malawi being ferried to go and vote. This is so because, in cross examination PW3 testified that the alleged Malawians did not show him any identification but that even though he did not see their identification and as there is no border, he was able to tell that these people were from Malawi. It is clear that PW3's evidence needed to be corroborated with sufficient detail. Aside from this, PW3's credibility was also brought in to question in cross examination as he initially testified that his wife was from Malawi and later said she was Zambian. Due to PW3 not being a truthful witness his evidence is unreliable and I reject PW3's testimony in this regard.

An independent source of evidence which may have corroborated the evidence of PW1 was produced by him in the form of an audio recording in a USB flash disc, exhibit and marked "AKP2". This particular recording is of an alleged conversation between the D.C Eneless Banda and a gentleman from Nyakoma concerning the people from Mozambique that received food stuff and money for voting for the P.F although a number of them were blocked from voting by the UPND. In that audio recording the gentleman confirms that a number of people from Mozambique were willing to vote for the P.F but were blocked by the UPND.

Although this evidence was not objected to by counsel for the respondents, this audio was not referred to at all either by the petitioner or any of his witnesses at trial. More importantly however, no foundation was laid for the production of this evidence into court in

order that it be satisfied with a fairly high degree of convincing clarity that the parties recorded in that said audio recording are actually who they are implied to be as well as when it was recorded. This evidence lacks the sufficient clarity and I accordingly reject it.

Further, it must be noted that this said flash disc under exhibit "AKP2" also contains three video recordings which the court was referred to by the petitioner as revealing the activities of the D.C Eneless Banda. The first video allegedly reveals the D.C Eneless Banda arriving in a village in a Toyota Hilux branded with P.F insignia. In the second video, a woman is seen addressing a crowd and asking for votes for the P.F allegedly in Mchinji, in Malawi, while the third video shows a gentleman asking for votes from some people in a village allegedly in Mozambique in exchange for the building of roads, and a clinic. Although these videos were played in court, no examination or cross examination was done over the same that would have helped the court to firstly identify the individuals in the said videos and understand what was happening in each video with sufficient clarity. Once again neither, the parties or the Court was given an opportunity to dissect this evidence in detail to attain the high degree of convincing clarity that is required in an election petition. The said video recordings and audio recording at best would lead this court in to a realm of speculation which it is not the function of this court to do. Accordingly I reject this evidence.

In closing on this allegation, the court noted that PW1 admitted in cross examination by the 1st respondent's counsel that he helped fund the construction of a clinic in Malawi, but that the same was not intended to persuade Malawians to come to Zambia to vote for him. PW1 went on to testify that the construction of this clinic commenced in 2020 and was handed over in July, 2021, during the campaign period. Interestingly however, PW7 and PW9 testified that there was no clinic in Kabangu in Malawi and that Alfonso Kaziche Phiri was lying when he said that he helped to build a clinic. I find that these contradictions bring the credibility of each of these witnesses to the fore. I keenly

observed PW1 when he was asked this question and noticed his demeanour which was that of one having been caught off guard in relation to this question. It is my firm view that he spoke the truth when he admitted and even explained that he actually did not build the clinic but contributed to its construction. I, as such, find that PW7 and PW9 were not truthful in their testimonies when they blatantly denied or expressed no knowledge of PW1 having contributed to building the clinic or its existence at all, this is more so that their responses were flippant. I accordingly reject PW7 and PW9's testimonies in this regard. That was the evidence submitted in support of and against this allegation.

15.1 Analysis of the legal arguments and submissions of counsel

I will now consider the law and the submissions that were submitted by counsel for the petitioner and the respondents in support of and against this allegation where upon I will also present my analysis of the same.

15.2 Alleged registration of Malawians and Mozambicans

15.2.1 A recap of the submissions by counsel for the petitioner

It has been submitted by learned counsel that there was massive registration of Malawians and Mozambicans in Vubwi constituency as shown by the extracts of the voter register starting from page 1 to page 95 of the petitioner's bundle of documents. Counsel argued further that the 2nd respondent conceded that foreigners from Malawi and Mozambique obtained National Registration Cards (NRC's) but that the same were issued by the Ministry of Home Affairs and not the 2nd respondent. Counsel for the petitioner went on to point out that the record clearly shows that a lot of Malawians and Mozambicans came to vote in Zambia following the issuance of voter's cards.

Counsel for the petitioner argued further that the 1st respondent's action of going to campaign in Malawi and Mozambique clearly shows

that he was fully aware that some Malawians and Mozambicans had obtained the Zambian NRCs as otherwise he would not have gone to the said countries to campaign. Counsel contended that the foregoing shows that the 1st respondent assisted the Malawians and Mozambicans in acquiring the NRCs and voter's cards.

Counsel submitted that all the witnesses who testified agreed that Vubwi constituency comprises of 9 wards, with 8 wards bordering Malawi and Mozambique, and with only 1 ward in Zambia. Counsel argued further that 2RW1, Martin Sakala admitted that it was possible that foreign nationals could have registered and voted in Zambia. Counsel pointed out that by the 2nd respondent's evidence, the 2nd respondent had no proper mechanism of dealing with foreigners who came to be registered as voters in Zambia.

Counsel in finalising this point submitted that there was evidence that the 1st respondent went to both Malawi and Mozambique around 20:00 hours on 11th August, 2021, after the official campaign time had already closed. Counsel contended that this was an illegal act contrary to *Regulation 15 (2) (a) of the Code of Conduct*.

15.2.2 A recap of the submissions by counsel for the 1st respondent

Conversely, counsel for the 1st respondent submitted that the issuance of NRCs is in the preserve of the Department of National Registration, Passport and Citizenship Office (DNRPCO) under the Ministry of Home Affairs as provided under *Section 8 of the National Registration Act, Chapter 126 of the Laws of Zambia*. Counsel for the 1st respondent contended that the 1st respondent and his agents have no say whatsoever in the issuance of NRCs. Counsel contended further that in the same vein, the issuance of voter's cards is done by an autonomous body in the name of the Electoral Commission of Zambia in line with *Part II of the Electoral Process Act No. 35 of 2016*. Counsel argued with force that it is unimpeachable that the 1st respondent did not participate in both exercises and no credible evidence was led to prove

that the NRCs were original or otherwise as there was no evidence from the Ministry of Home Affairs, DNRPCO or any Zambian authorities.

15.2.3 A recap of the submissions by counsel for the 2nd respondent

Counsel for the 2nd respondent contended that the petitioner seemed not to have a problem with foreign nationals allegedly from Malawi and Mozambique having in their possession voter's cards but that he had an issue with these foreigners voting for the 1st respondent which disadvantaged him. Counsel contended further that PW1, PW2, 1RW1 and 2RW1's evidence demonstrates that the 1st respondent did not take part in registering any foreign national as a voter due to most of the petitioner's witnesses having only met the 1st respondent long after they were already registered as voters.

Counsel submitted that the 2nd respondent confirmed that the 1st respondent was not part of the persons engaged to register voters in the Vubwi constituency. Counsel submitted further that the evidence on record demonstrates that the 1st respondent did not take part or influence any person to register as voters. Counsel contended that most of the petitioner's witnesses testified that the 1st respondent was requesting them to vote for him so that he could construct roads for them and that this evidence has to do with corrupt practices and not illegal activities.

Counsel contended that the evidence of PW4, PW6, PW7, PW8, PW9, PW10 and PW11 was unreliable as even though they testified that they were foreign nationals from Malawi and Mozambique, the witnesses were answering to different names to the ones registered where they were registered as voters. Counsel on this point added that none of these witnesses had any documentary proof from their alleged country of origin to demonstrate that the alleged foreign documents they were presenting before court were genuine. Counsel was of the considered view that there is no evidence on record with the required high clarity which shows that the 2nd respondent registered foreign nationals or

allowed persons who are not permitted at law to possess voter's cards. Counsel submitted that the petitioner has totally failed to establish that there were illegal activities perpetuated by the 2nd respondent or indeed the 1st respondent.

15.2.4 The court's analysis of the submissions and application of law to the facts

In countering the submissions of counsel for the petitioner, I have already found that the evidence adduced by the petitioner's witnesses does not reveal that there was massive registration of Malawians and Mozambicans in Vubwi constituency and do not accept this argument. While I accept that the evidence adduced particularly in the petitioner's bundle reveals that there are foreign nationals from Malawi and Mozambique who hold Zambian NRCs and voter's cards, the petitioner dismally failed to present this evidence before court to the standard required in an election petition. I say so because, in a paradoxical fashion, the petitioner did not call witnesses to speak to their formally produced documents before court but instead the petitioner called witnesses who were unable to speak to their documents as they had not formally produced the same before court.

Regardless, of this, the issue in this allegation before court in my view is not whether the said documents are authentic or not as argued by counsel for the 2nd respondent rather, the issue is, whether the possession of the Zambian NRCs and voter's cards arose out of an illegal process.

From the onset it must be noted that the issuance of voter's cards is done to persons who are in possession of Zambian NRCs. Counsel for the 1st respondent has rightly explained that the issuance of NRCs is in the preserve of the Ministry of Home Affairs.

One of the ways in which citizenship may be attained in Zambia is through registration which registration is provided for under the *National Registration Act, Chapter 126 of the Laws of Zambia* and the

attendant *Statutory Instruments No. 34 and 83 of 2019* that amend the said *Act* as well as the *Citizenship of Zambia Act No. 33 of 2016* as read together with the *Constitution of Zambia Act No. 1 as amended by Act No. 2 of 2016* of the *Laws of Zambia*.

Article 266 of the *Constitution of Zambia* simply defines a citizen as:

'a citizen of Zambia'

Section 2 of the *Citizenship Act* provides that:

"citizen has the meaning assigned to it in the Constitution"

Article 37 of the *Constitution* provides that a person is entitled to citizenship in Zambia in the following terms:

" 37 (1) Subject to clause (2), a person is entitled to apply to the Citizenship Board of Zambia to be registered as a citizen if that person has attained the age of eighteen years and—

(a) was born in Zambia and has been ordinarily resident in Zambia for a period of at least five years;

(b) was born outside Zambia, has or had an ancestor who is, or was, a citizen and has been ordinarily resident in Zambia for a period of at least five years; or

(c) has been ordinarily resident in Zambia for a continuous period of at least ten years; immediately preceding that person's application for registration, as prescribed.

(2) Notwithstanding clause (1), a person who is, or was married to a citizen, for a period of at least five years, is entitled to apply to the Citizenship Board of Zambia, to be registered as a citizen, as prescribed."

The Citizenship Board of Zambia is established under *Part II* of the *Citizenship Act of Zambia*. *Section 17* of the *Citizenship Act of Zambia* provides that:

"17. A person who qualifies to be registered as a citizen by registration in accordance with Article 37 of the Constitution may apply to the Board under this Part."

The foregoing provision clearly spells out the criteria for issuance of an NRC, and in my view provides for foreigners to be registered as citizens of Zambia within the parameters prescribed.

Counsel for the 1st respondent argued that it was possible that the alleged Malawian and Mozambican voters had dual citizenship. In so arguing counsel referred this Court to *Article 39 of the Constitution of Zambia* which provides that:

"39 (1) A citizen shall not lose citizenship by acquiring the citizenship of another country.

(2) A citizen who ceased to be a citizen, before the commencement of this Constitution as a result of acquiring the citizenship of another country, shall be entitled to apply, as prescribed, to the Citizenship Board of Zambia, for citizenship and the Citizenship Board of Zambia shall bestow citizenship on that person."

Similarly, *section 26 of the Citizenship Act* provides that:

"26. A person who ceased to be a citizen before the commencement of the Constitution, as a result of acquiring the citizenship of another country, may make an application to the Board for the restoration of the citizenship of Zambia, in the prescribed form."

Section 2 of the Citizenship Act defines a dual citizen as:

" a citizen who has acquired the citizenship of another country."

While dual citizenship is defined under *section 2 of the Citizenship Act* as:

"the acquisition of the citizenship of one other country in addition to Zambian citizenship."

To understand what dual citizenship actually means, reference to the position in the law prior to 2016 will be of aid. *Article 9 of the Constitution of Zambia (Amendment) Act No. 18 of 1996* which *Article* has since been repealed provided as follows:

"9 (1) A person shall cease to be a citizen of Zambia if that person-

(a) acquires the citizenship of a country other than Zambia by a voluntary act, other than marriage; or

(b) does any act indicating that persons intention to adopt or make use of any other citizenship.

(2) A person who -

(a) becomes a citizen of Zambia by registration; and

(b) immediately after becoming a citizen of Zambia is also a citizen of some other country;

Shall subject to clause (4), cease to be a citizen of Zambia at the expiration of three months after such a person becomes a citizen of Zambia unless such person has renounced the citizenship of that other country, taken the oath of allegiance and made and registered such declaration of their intention concerning residence as may be prescribed by or under an Act of Parliament."

The learned author of **A Concise Manual of Immigration, Refugee and Citizenship Law in Zambia, Joseph Chirwa**, in analysing the repealed *Article 9* in the *Constitution* explains at **page 103** of his book that:

"The above provision meant that one could not attain dual citizenship while remaining a citizen of Zambia and that,

once citizenship of a country other than Zambia was attained, Zambian citizenship ceased."

The salient feature of this provision is that if a Zambian citizen acquired citizenship of another country, that person would have to renounce that newly acquired citizenship failure to which they would lose their Zambian citizenship. In other words Zambians were not allowed to have the status of dual citizenship. With the repeal of this *Article*, however, the law in Zambia now recognizes that a Zambian citizen can attain dual citizenship, that is become the citizen of another country other than Zambia. The learned author of **A Concise Manual of Immigration, Refugee and Citizenship Law in Zambia** explains at **page 104** that:

"After the coming into force of the Constitution of Zambia (Amendment) Act 2 of 2016, dual citizenship was permitted in Zambia. Dual citizenship means the 'acquisition of the citizenship of one other country in addition to Zambian citizenship', while a dual citizen means 'a citizen who has acquired the citizenship of another country.'

Similarly, the salient feature of the current *Constitution of Zambia* is that dual citizenship pertains to Zambian Citizens acquiring citizenship of other countries. Consequently, the argument canvassed by counsel for the 1st respondent is flawed to the extent that none of the witnesses testified that they were Zambian citizens holding citizenship in either Malawi or Mozambique rather, it was the other way round in that they testified to either being from Malawi or Mozambique with Zambian NRCs and voters cards. I find therefore that the argument of dual citizenship is misconceived as it does not tie in with the law providing for the same.

With that perspective in mind, can it be said that the acquisition of the NRCs and voter's cards by these alleged foreign nationals was illegal? A perusal of the testimonies of PW5, PW7, PW8, PW9, PW10 and PW11

reveals that none of them testified to having obtained Zambian National Registration Cards in accordance with the criteria set out in *Article 37 of the Constitution of Zambia*. PW7 testified in cross examination that the reason why they got NRCs was so that they could vote for the P.F. PW10 testified that the reason why she obtained an NRC from Zambia was to enable her to go the hospital in Zambia. It follows then that if this evidence were to be accepted, the registration of these alleged foreign nationals was not done in conformity with the law as prescribed. That being said however, I have already rejected the evidence of the aforementioned witnesses as none of them formally produced their documents before court and their credibility was found wanting. In any event the Ministry of Home Affairs, through the Attorney General whose preserve it is to issue NRCs, and the correct party to answer to such an allegation was not joined to this action.

Turning now to the registration of these 'citizens' as voters, the *Electoral Process Act No. 35 of 2016* provides that:

- "8. (1) A person qualifies for registration as a voter if that person-
- (a) is a citizen of Zambia;
 - (b) has attained the age of eighteen years; and
 - (c) is in possession of a national registration card.
- (2) The Commission shall register a person as a voter as prescribed.
- (3) A person who has been registered in the Register of Voters shall be issued with a voter's card."

From the above process, it can be gleaned that the 2nd respondent registers a person as a voter in Zambia based on the criteria that one is a citizen of Zambia, has attained the age of 18 years and is in possession of a national registration card. *Section 9 of the Electoral Process Act* outlines the factors that disqualify one from being registered as a voter as it provides that:

"9. (1) The Commission shall not register a person as a voter if that person

- (a) is not a citizen of Zambia;*
- (b) is not in possession of a national registration card;*
- (c) suffers from a mental disability which makes the person unable to exercise their right to vote;*
- (d) is detained under the Criminal Procedure Code during the pleasure of the President;*
- (e) is disqualified from voting under section forty-seven;*
- (f) is under a sentence of death imposed by a competent court, or a sentence of imprisonment imposed by a court or substituted by a competent authority for some other sentence imposed by that court; or*
- (g) does not qualify to be registered as a voter as may be prescribed.*

(2) In this section, the reference to a sentence of imprisonment shall not be construed as including a sentence of imprisonment the execution of which is suspended or a sentence of imprisonment imposed in default of payment of a fine."

From the foregoing provisions of the law and the evidence on record, however, it is evident that once a person is registered as a citizen of Zambia, and meets the criteria set out in Sections 8 and 9 of the *Electoral Process Act*, the 2nd respondent would not have any way of knowing that that person is not entitled to be registered as a voter on the basis of being a foreigner. In my view, the buck stops with the Ministry of Home Affairs through the Citizenship Board of Zambia as this is the entity that screens applications in order to attain whether an individual is entitled to be a citizen of Zambia and if so then the right to be registered as a voter automatically kicks in subject to the exceptions mentioned in Section 9 of the *Electoral Process Act* above.

It is my considered view therefore that had it been proved with a fairly convincing level of clarity that the petitioners' witnesses that testified were indeed foreigners who had in their possession Zambian NRCs and voter's cards, the reasons advanced would have proved that there was indeed an illegality in as far as their having being issued NRCs. However, as already shown above, the petitioner's presentation of this evidence was fundamentally flawed as none of these witnesses formally produced their documents before this Court and the same could not be admitted.

Additionally, evidence that was admitted in the form of identity cards from Malawi and Mozambique, NRCs and voter's cards from Zambia as well as the USB containing an audio and video recording were not adequately introduced before the court in terms of a foundation being laid and authenticity being shown. To buttress this view the persuasive case of **OTK Limited Vs Amanita Zambian Limited, Diego Gan-Maria Casilli, Amanita Permium Oils Limited and Amanita Limited**²⁴ which was cited with approval by the Supreme Court in the case of **Charles Kajimanga (Hon Judge) Vs Marmetus Chilemya**²⁵, Justice **N Mutuna** as he was then in citing the learned author **Edward J. Imkwinkelreid**, in his book on **Evidentiary Foundations** at page 2, states in the **OTK Limited** case that:

"For our purpose, the most important procedural rule is that the proponent of an item of evidence must ordinarily lay the foundation before formally offering the item into evidence. For example, the proponent of a letter must present proof of its authenticity before offering the letter into evidence. Proof of the letter's authenticity is part of the letter's 'foundation' or 'predicate'. Substantive Evidence Law makes proof of authenticity a condition precedent to the letters admission into evidence."

Justice N Mutuna in the said **OTK Limited** case goes on to state that:

"On the question of authenticity the same author at page 41 has this to say:

'The common law generally requires that the proponent of evidence prove the evidence's authenticity as a condition to the admission of the evidence. To authenticate an item of evidence the proponent must present proof that the article is what the proponent claims that it is.'

The foregoing clearly demonstrates the need for laying a foundation before offering a document into evidence. It also emphasizes the fact that it is a condition precedent to offering the document for production."

In concluding the analysis of this allegation, I will now address the petitioner's phraseology of the said allegation to ascertain whether the same can be substantiated.

In analysing this particular allegation, a number of difficulties emerge. Firstly, this court has noted that this allegation is specifically targeting the P.F which entity is not a party to this suit through its Secretary General as was guided in the persuasive case of **Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe Vs United National Independence Party**²⁶.

Secondly, although the allegation is targeting the P.F, the evidence that was led as shown above is clearly targeting the 1st respondent and the D.C, one Eneless Banda. The difficulty that is apparent in the phraseology of this allegation is that this allegation does not specifically target either of these two individuals but the party and there can be no nexus between these two individuals and the P.F in terms of culpability. To amplify this point the Constitutional Court has held in the case of **Nkandu Luo and the Electoral Commission of Zambia Vs Doreen Sefuke and the Attorney General** as follows:

*"Recently in **Crispin Silingwa v Stanley Kakubo**²⁷ cited with approval, as we have done in our earlier decisions, the*

holding of the Supreme Court in the **Lewanika v Chiluba** case wherein it stated:

'a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since an election agent has to be specifically so appointed.'

Section 2 of the Act defines 'election agent' as:

'a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidates nomination paper.'

Also, regulation 55 (1) of the Electoral Process (General) Regulations 2016 reads as follows:

'A candidate shall name an election agent in the nomination paper and subject to the person named shall be the election agent of the candidate for the purpose of that election.' "

The Constitutional Court went on further to guide in the said **Nkandu Luo** case that:

"A careful perusal of the record reveals that the 1st respondent did not adduce a shred of evidence to support the involvement of the 1st appellant's duly appointed election agents in the violent act. Neither was it shown in the evidence that the 1st appellant or her election agents knew of the attack on the UPND campaign bus. According to the record, the 1st appellant only became aware of what had transpired when she was informed by telephone. That cadres or supporters of the PF were implicated in the attack is not enough to attach responsibility to the 1st appellant or her duly appointed election agents and to annul the election

on the basis of section 97 (2) (a) (ii) of the Act. In **Richwell Siamunene v Sialubalo Gift** we said the following:

'Mere proof that the UPND supporters were indeed involved in the said acts does not warrant an inference being drawn that the respondent had directly or indirectly incited the UPND supports to act as they did. To so hold would amount to speculation and it is not the duty of this court to make assumptions based on nothing more than party membership and candidacy in an election.'

It is clear from the aforementioned authorities that a candidate is only answerable for his actions and that of his election agent or a person who commits an electoral offence with the candidate's knowledge, approval or consent. What is also clear is that an individual cannot be held responsible for the actions of a group and vice versa. Accordingly, this court cannot make assumptions that the P.F through the acts of the 1st respondent and the D.C, Eneless Banda, in the case before this Court participated in having foreigners from Malawi and Mozambique registered as voters for the 12th August, 2021 elections.

Thirdly, another difficulty that emerges is though it is trite that the issuance of voter's cards as already discussed above is the preserve of the 2nd respondent, this allegation does not in any way address the 2nd respondent in this regard.

The fourth difficulty that emerges as already explained in detail above is that the issuance of voter's cards only arises after the issuance of NRCs and the issuance of NRCs is the preserve of the Ministry of Home Affairs which institution through the Attorney General was not joined to this action.

With all these difficulties having arisen, it is my considered view that the petitioner should have phrased this allegation to firstly specifically

target the 1st respondent and any other individual such as the D.C, one Eneless Banda to rightly appropriate blame; and or included other parties who are inevitably tied to this process such as the Attorney General to represent the Ministry of Home Affairs, as well as the 2nd respondent in addition to the P.F through its Secretary General.

Consequently, due to the way the first allegation is phrased, this court cannot attach responsibility to either the 1st respondent or the 2nd respondent as neither of them were addressed in the said allegation. Even if the 1st respondent is a member of the P.F, by the holding of the **Nkandu Luo** case an individual cannot be held responsible for the actions of a group. On the totality of the evidence presented before court and the manner in which this particular allegation was phrased, I find that it cannot be substantiated and dismiss it accordingly.

15.3 Allegations of corrupt practices

15.3.1 Abuse of position and use of government transport for campaign purposes contrary to Regulation 15 (i) and (k) of the Code of Conduct during the campaign period

On the second allegation in 5 (ii) concerning the District Commissioner for Vubwi, Miss Eneless Banda a Public Officer having been seen campaigning for the P.F in a branded vehicle without a number plate which she had deliberately removed to disguise the voters, the testimonies are as follows:

PW1 testified that the 1st respondent used government personnel during his campaign, specifically the Vubwi D.C, Eneless Banda who was availed a P.F branded vehicle to use for campaigns in Mozambique. PW1 also testified that the Government Vehicle was used to ferry mealie meal to voters. PW1 testified further that the D.C is not, by virtue of being a government employee allowed to participate in active politics.

PW2 testified that after a meeting on the 15th June, 2021 where Nkandu Luo was being introduced as the running mate for Edgar Chagwa Lungu, he, Ackleo Banda, Bonex Mushanga and Kamuna went to the

government house for the D.C for Vubwi, Eneless Banda. At her house they found campaign materials that comprised of 18 bales of chitenge materials, 9 bales of T-shirts and bicycles. PW2 went on to testify that the T-shirts had the images of Edgar Lungu and Nkhandu Luo. PW2 testified that he and the others informed the D.C, Eneless Banda, that the meeting did not go well as they did not have campaign materials to give the people to which the D.C told them that the materials which had been brought were for the 9 wards of Vubwi constituency and that they were in the hands of Ackleo Banda.

PW2 testified further that he was surprised to see Ackleo Banda was using a white land cruiser with tinted windows on the sides and some dots spelling NRPC to take food to areas with bad roads between Malawi and Zambia and Mozambique and Zambia. He used to see the same vehicle at the office of the Permanent Secretary and they were in the company of the D.C, Eneless Banda in her GRZ vehicle when they went to collect the land cruiser from the Golf Club where it was being washed. The vehicle had no registration number. PW2 also testified that the D.C helped Ackleo Banda in his campaigns by keeping mealie meal at her house, usage of the GRZ vehicle and influencing Malawian and Mozambican people to vote for Ackleo Banda.

PW3 testified that on the 1st August, 2021 he received a phone call from Eneless Banda and Ackleo Banda who asked him not to go anywhere far from home as a vehicle was being sent with mealie meal, cooking oil, sugar, salt, chitenge materials and T-shirts. PW3 testified that he waited up to 15:00 hours and a Scania vehicle arrived with 79 bags of 25 kg mealie meal, 7 buckets of cooking oil, 28 packets of sugar and 28 packets of salt but that he did not know the number plate of the vehicle. In cross examination PW3 testified that it was Eneless Banda who called him but that he had since deleted her number from his phone. PW3 also testified that he did not see whether the Scania was a Volvo or a Tata truck as he just read the word Scania.

In assessing these testimonies, PW1 did not testify that he personally saw the D.C Eneless Banda campaigning for the PF but testified that the D.C, Eneless Banda was seen campaigning for the PF. PW1 was therefore not an eye witness and his evidence is hearsay. In so testifying however, PW1 placed reliance on a video the contents of which shall be discussed below.

In relation to PW2, he has a possible interest to serve as he is a partisan witness and as such his evidence has to be treated with caution and cannot be used to corroborate the evidence of PW1. Additionally in cross examination PW2 floundered in his testimony as to the number of people that were present at the meeting at the D.C's house when asked why he had mentioned only three people were present in cross examination when in his examination in chief PW2 explained that there were five people including himself.

PW3 testified that he did not belong to P.F or any particular party but was just being used by the PF. I note that PW3's testimony was on the whole not shaken in cross examination, however as PW3's status is that of a sympathiser of any party at any given time I find that his evidence needs to be treated with caution as he has a possible interest to serve.

An attempt to corroborate the evidence of PW1 and PW2 would have been attained in the independent evidence in the form of a USB flash disc containing an audio recording and three video recordings that was produced by PW1 and marked exhibit "AK P2". PW1 as indicated earlier produced this evidence and the same was played in court. The first video recording reveals a Toyota Hilux vehicle branded with P.F insignia, without a number plate, being driven with a number of women running behind it chanting "Edgar has come!" The vehicle stops and a woman disembarks' from the vehicle and a voice is heard of a man telling this woman "welcome!" PW1 referred to this exhibit as showing the activities of the D.C. PW2 in cross examination by the 1st respondent's counsel also explained that he took a picture of a vehicle

being a Toyota Hilux that the D.C was using which Toyota Hilux was branded with P.F colours.

In relation to PW3's testimony, the same would have been corroborated by the audio recording in exhibit "AKP2" where the following conversation is held allegedly between Eneless Banda the D.C and an unnamed man.

"Hello

Good morning

How is Nyakhoma

Nyakhoma is fine, how about that side?

Have you known me?

I think I have known you, you are the DC (District Commissioner)

Yes

What is there is that they are saying the party lost, because we didn't do well.

Ok.

That the food that was taken for distribution, did you take that food to the camps?

Yes

Let's do this, those areas or places you took those things to and the people that received, get a piece of paper and write down all those that received. They are saying that you sold the food in Mozambique.

They are saying we sold?

Because the people who came from Mozambique.

Yes.

The ones we were voting with.

Where were you taking that food, the people you were voting with, those who received the food, take a paper and go round, if it is mealie meal, I don't know how much you gave? And if it is cooking oil, if it was money, I will pass through and come to collect those papers.....

.....I wanted to ask how I am going to write, should I write those that were at the camps receiving that food?

Those that were at the camps, those that received food should sign.

Ok

Thank you".

As already alluded to above, no identification was done by PW1, PW2 or PW3 of the first video recording to explain who the woman that disembarked from the vehicle was and confirm that she was in fact Eneless Banda the D.C, where she was and what she was doing. It must be born in mind that this court has not seen the D.C before and was not availed with any evidence to identify Eneless Banda as the D.C save for this video which identification was not properly laid. The court as such was left at sea to assume that this woman is Eneless Banda which is contrary to the laid down rules of identification. As such this court was not armed with sufficient information or detail to confidently place reliance on this particular video recording to identify Eneless Banda as the video and its contents were not authenticated.

Similarly, with the audio recording, no foundation was laid by the Petitioner to introduce this vital piece of evidence before the court and even though the court was not precluded from listening to this evidence, the court was again left at sea to assume that the woman on the recording is actually Eneless Banda. To make things worse, this audio recording was not played in court to give the parties an opportunity to examine and cross examine this evidence, as such no authentication was done.

Due to the lack of finesse in the presentation of this material particular, I reject the evidence of PW1, PW2 and PW3 for having been insufficiently corroborated.

On the third allegation in 5(iii) it states that the GRZ vehicle was seen transporting bags of mealie meal in the District which was intercepted by the UPND cadres before the distribution was done and that the said bags of mealie meal are currently kept at Vubwi Police Station as part of the evidence.

PW1 testified that P.F used a government vehicle to ferry mealie meal to voters in the district and that this vehicle had its number plate removed. PW1 testified further that the said vehicle was intercepted by alert UPND cadres and part of the mealie meal is currently at Vubwi Police Station. PW1 exhibited pictures on pages 96 to 99 which show a white land cruiser with bags of mealie meal in it.

In cross examination PW1 testified that the mealie meal exhibited in his bundle at pages 96 to 99 is for the Disaster Management and Mitigation Unit and that Vubwi District was declared as a place of disaster. PW1 testified further that the said vehicle that was used to distribute the mealie meal had a GRZ number plate that was removed but that he did not know whether Ackleo Banda works for DMMU. Further in cross examination, PW1 testified that there was no date shown on the pictures of the vehicle carrying the mealie meal as the camera had no provision for the dates. In re-examination PW1 testified that the 1st respondent distributed the mealie meal during the campaign period. PW1 testified further that he did not have the actual date or time frame when hunger was declared in Vubwi district so he was not so sure when Vubwi was declared hunger stricken as he did not have the official document to show that Vubwi was declared hunger stricken.

Conversely, 1RW1, the 1st respondent testified in cross examination that although he held various local leadership positions in Vubwi from 2016 up to 2021, he did not participate in the distribution of mealie

meal by DMMU. 1RW1 also testified that he did not know in which month hunger was declared in Vubwi but that he was aware that the DMMU distributed mealie meal. 1RW2 testified that he did not remember seeing the DMMU distributing mealie meal in Vubwi. 1RW3 testified that as Council Chairperson he knew that there was a declaration of hunger in the Vubwi District in 2021 and he knew that the DMMU took mealie meal for distribution in Vubwi in March 2021 which distribution continued up to August 2021.

I find that 1RW1 was rather evasive in his answers as it is clear that he was not being truthful with his answers concerning the declaration of hunger in Vubwi. This is so because 1RW1 testified that he held various local leadership positions in Vubwi from 2016 up until 2021 and yet he was unaware of when the declaration of hunger was made. Accordingly I reject his testimony in that regard. 1RW2 is a witness with an interest to serve being a partisan witness and so his evidence must be dealt with caution. I find that his evidence was not very useful with respect to this allegation as he testified that he did not recall the DMMU distributing maize at all in Vubwi and yet it is clear from the evidence that there was the distribution of mealie meal branded with the DMMU signs. 1RW3 testified in cross examination that as a Council Chairperson, he knew that the DMMU took mealie meal for distribution in Vubwi and that the same mealie meal was delivered to Vubwi in March, 2021. 1RW3 also testified that the said distribution of mealie meal as relief food was continuous up to August, 2021 even though he did not have the schedule with him, he saw the mealie meal being distributed from March up to August by officers from DMMU. 1RW3 testified that Eneless Banda was not involved in distributing mealie meal to the hunger stricken people in Vubwi because there was a committee doing the work.

To corroborate the evidence of PW1, in relation to the use of the GRZ vehicle, PW1 produced before this court, photos of a vehicle being a

land cruiser white in colour at pages 96 to 99 of the petitioner's bundle of documents.

In assessing this evidence, there is no date to show when these photos were taken as proof that this is the GRZ vehicle that was transporting mealie meal bags in the District and was subsequently intercepted by UPND cadres. Additionally, PW1 testified that he was aware that there was hunger declared in Vubwi District and as such the DMMU was actively distributing mealie meal during the first half of the year and even leading up to the campaign period. This evidence casts doubt as to a GRZ vehicle having been used to ferry mealie meal to the voters during the campaign period. I say so because it appears that the DMMU were distributing the mealie meal during this period meanwhile it is PW1's testimony that it was the 1st respondent with the assistance of the D.C Eneless Banda that were distributing the mealie meal.

Due to the apparent contradictions in the aforementioned testimonies, the credibility of PW1 testimony is brought to the fore and in assessing the same I find that PW1's testimony was largely based on hearsay evidence and needed to be corroborated.

However, no evidence was brought before court to prove that this mealie meal that was allegedly intercepted by alert UPND cadres is currently being kept at Vubwi Police Station as no Police report or Occurrence book was furnished to this effect. As such, the independent evidence used to corroborate PW1's testimony is clearly lacking in cogency and I find the evidence insufficient to prove the allegation that a GRZ vehicle was being used to transport bags of mealie meal in the District and was subsequently intercepted by the UPND cadres. This ground is accordingly dismissed.

15.3.2 Offering any inducement, reward or bribe contrary to Section 81 of the Electoral Process Act and Regulation 15 (h) of the Code of Conduct during the campaign period

On the fourth allegation in 5 (iv) that Mr Seliano Sakala, a P.F cadre was seen preparing food at Headman Mchima's shop which was used as a camp and he was distributing the said food to the voters covering almost all the people around Mchima Polling Station, only PW1 testified that Seliano Sakala co-ordinated the preparation of food at Mchima polling station which was used to feed the people of the areas surrounding Mchima. PW7, PW8, PW9, testified that Ackleo told them that after voting at Chankhandwe Polling Station they should go to Steven's house to eat. The inconsistencies in the testimonies of PW1 and those of PW7, PW8 and PW9 cast doubt on the veracity of the petitioner's claim. The reference by PW1 to a different man and polling station altogether brings to the fore the disparities in detail of a material particular. This ground is therefore unsubstantiated as no other witness corroborated PW1's allegation and testimony. I as such dismiss this ground.

On the fifth, sixth, and seventh allegations that is 5 (v)-(vii), PW1 testified that the PF cadres transported people from Malawi to Mzigawa polling station while other voters were transported from Lifuledi village in Malawi to Chigwe polling station in M'lawe ward, in Zambia. PW1 also testified that these voters were transported in a canter which belonged to the 1st respondent, was yellow in colour with a white ribbon and driven by Daliso Mwale. PW2 testified that on the 11th August, 2021 the 1st respondent got 6 canters which they used to ferry people from Malawi to Zambia with instructions to vote for Ackleo Banda. PW3 testified that on the 12th August, 2021 he watched from the roadside as people were ferried from Kabangu, Chibonyole and Mukanga in Malawi. PW3 testified that the people were ferried in a white canter that had no number plate and it belonged to Ackleo Banda. PW3 testified that Ackleo Banda told the people to vote for him and the Councillor. PW3 testified further that some people came from Tembwe in Malawi to vote and that they did not have transport money although they came by a vehicle from Malawi. PW3 also testified that he informed the chairman,

Mr Kalonga and Ackleo Banda whereupon Ackleo Banda gave him K500 to give the people as transport which he did after they voted.

PW6 testified that a two-tonne truck belonging to the headmaster of Matemba school in Zambia came to collect them from Malawi and took them to Matemba. That they went to vote and after voting they went to cook for the people so that they could eat. PW7 testified that on the 12th August, 2021, a vehicle that was white in colour came to pick them up from Kabangu in Malawi. PW7 testified further that Ackelo told them that after voting they should go to Steven's house to go eat and she went to Steven's house after voting.

PW8 testified that on the 11th August, 2021 at around 21:00 hours Ackelo Banda together with Jonathan Phiri, a Councillor went to his house in Kabangu and told him that a vehicle would come to pick them up and after voting they should go to Steven's house. PW8 testified further that when the day came, they organized themselves and they were told to go and vote for Ackleo. PW9 testified that on the 11th August, 2021, Ackleo Banda together with Jonathan a Councillor for PF went to Kabangu around 20:00 hours and when he went outside Ackelo told the people that in the morning they should go to Steven's house and have some tea. PW9 testified further that Ackelo told the people that after voting they should go back to Steven's house and have some food. That after that Ackleo gave him and the people he was with K50's which they started fighting over.

In cross examination PW2 testified that he saw the canters that Ackleo Banda used to ferry voters with his own eyes and they had no registration number because they were going into Malawi and Mozambique. PW2 explained that the canter mentioned in the petition by PW1 could be one of the canters that was used to ferry voter. PW2 also testified that he could not remember all the drivers for the canters and could only remember Elias whose canter he followed to Kabangu in Malawi where there was Alick. He did not follow the other five canters

but he followed this particular canter so that he could have proof and protect the country and his children from what was happening.

In cross examination PW3 testified that at the meeting, Ackleo Banda had a white canter which had no number plate. Ackleo testified further that he did not know whether the canter with the number plate BAT 2941 was white or yellow. PW3 testified further that he was at one point an election agent for Ackleo but could not produce the appointment letter as he had used it as toilet paper. PW3 however admitted that he was not the registered official for Ackleo and that he did not have proof that Ackleo Banda gave him K500 for transport. PW3 also stated that the court should believe both statements made by himself and PW2 as regards people being ferried from Malawi in a canter.

In assessing the evidence of these aforementioned witnesses with regard to this allegation, it is curious that none of these witnesses mentioned the persons, places in Malawi, polling stations in Zambia, the home and owners of the homes where the food was being prepared, vehicles including, the descriptions thereof and drivers of the same, that PW1 mentioned in his petition. That being said however, it should be noted that the mere transportation of voters using a private vehicle is not prohibited by the law. What is expressly prohibited in the *Electoral Process Act* is the transportation of voters using a government vehicle. In relation to this particular allegations therefore, what the petitioner should have proved against the 1st respondent is that Daliso Mwale, whom he alone testified of, did not just ferry any ordinary voters, but Malawian voters with the intention of giving the 1st respondent an advantage in the election. PW1 should also have proved that the vehicle used to ferry the Malawians is indeed the property of the 1st respondent or was procured by him, and that Daliso Mwale was the 1st respondent's registered election or polling agent. It should also have been proved that Daliso Mwale's act of ferrying Malawians to Chigwe Polling Station prejudiced the petitioner to the extent that the majority of voters were

or may have been prevented from electing a candidate of their preference.

The petitioner did not adduce any evidence that proved any of the foregoing elements. His evidence is essentially hearsay as he did not testify to having personally seen the said Daliso Mwale ferry Malawians to Chigwe Polling Station, nor did he bring any witnesses who specifically attested to having been ferried by Daliso Mwale. He further failed to bring any witness to attest to his allegation that the said Daliso Mwale was involved in ferrying Malawians to a polling station in Zambia so as to give the 1st respondent an advantage.

As such I find that the testimonies of PW1 were at variance with those of PW2, PW3, PW6, PW7, PW8 and PW9. While it is evident that the testimonies of these witnesses was to show the alleged corrupt acts of the 1st respondent by way of inducing and bribing them and other would be voters, I find that as the details were in fact different to those pleaded, they went to the root of these particular allegations and cannot in my view be admissible. I as such find these grounds not to have been substantiated due to the inconsistencies in the testimonies of PW1, PW2, PW3, PW6, PW7, PW8 and PW9 in relation to the names of the persons involved, the description of the vehicles, and in particular the colour of the canter and accordingly all three grounds are dismissed.

On the eighth allegation that is 5 (viii) no evidence was led either by the petitioner or his witnesses as proof that the voters that were seen being fed at the home of Faustina Banda and Henry Zulu who are P.F cadres at Chigwe Village before and after voting. This ground was seemingly abandoned and is dismissed.

15.3.3 A recap of the submissions by counsel for the petitioner

Counsel for the petitioner submitted that the 1st respondent was involved in the distribution of DMMU mealie meal during the campaign period with the help of the District Commissioner, Eneless Banda, in Vubwi Constituency. Counsel submitted that the said District

Commissioner was seen distributing the said bags of mealie meal using a Government vehicle whose number plate was removed on purpose. Counsel contended that this was contrary to *Regulation 15 (1)* of the *Code of Conduct* which conduct disadvantaged the petitioner as the playing ground was not levelled.

Counsel contended further that there is evidence on record that the 1st respondent promised the people of Malawi and Mozambique that he was going to give them free fertilizer, build a clinic and construct good roads in Mozambique. Counsel also contended that the 1st respondent personally gave out chitenge materials, food and t-shirts to the Malawians and Mozambicans. Counsel pointed out that all the aforesaid activities were committed by the 1st respondent in person with the help of his people as election agents. Counsel pointed out further that the 1st respondent even promised to give Malawians and Mozambicans some pieces of land in Vubwi District which promise he has failed to honour despite winning the elections.

Counsel submitted further that the 1st respondent was involved in the transportation of the voters from Malawi and Mozambique into Zambia to vote using vehicles which he, the 1st respondent had organized. Counsel contended that the 1st respondent told the court that he did not have a vehicle but managed to campaign effectively in Vubwi Constituency. Counsel was of the considered view that this showed that the 1st respondent was abusing Government vehicles to conduct his campaigns and hence the removal of the number plates to disguise them.

Counsel argued that the 1st respondent was involved in the purchase of various food stuffs which he used to feed the voters from Malawi and Mozambique. Counsel argued further that all these were illegal activities which are not permitted during the elections. Counsel opined that the conduct of the 1st respondent satisfies the threshold laid down in the case of **Jonathan Kapaipi Vs Newton Samakayi** and the **Poniso Njeulu** case.

15.3.4 A recap of the submissions by counsel for the 1st respondent

Counsel for the 1st respondent argued that the petitioner contended that there was corruption and or corrupt practices that characterized the election and in so doing the petitioner's main witness was Charles Nyoka, PW2. Counsel for the 1st respondent explained that PW2 is a former UPND District Chairman for Vubwi who defected during the run up to the elections to join the Patriotic Front, PF. Counsel contended that PW2 lied under oath that he did not belong to any political party prior to joining the P.F. Counsel was of the considered view that PW2 was shifty and had a questionable demeanour because he has an interest to serve. Counsel went on to point out that it was PW2's testimony that he was angry with the PF. Counsel referred the court to the cases of **George Musupi Vs The People at page 271** and **Kambarage Mpundu Kaunda Vs The People** for guidance in as far as treating of suspect evidence from witnesses with an interest to serve. Counsel argued that there was no single evidence that placed the 1st respondent or his registered agent at the centre of bribing would be voters.

Counsel argued further that the evidence adduced by the petitioner and his witnesses is contradictory and lacks cogency and clarity to be relied on. The court was referred to the case of **Simasiku Kalumiana Vs Lungwangwa Geoffrey Lungwangwa and The Electoral Commission of Zambia** as authority on the need for credible witnesses in the prosecution of election petitions. The court was also referred to the case of **Simasiku Namakando Vs Eileen Imbwa** for guidance on the need for courts to be cautious in the treatment of evidence of witnesses who may harbour an interest. It was counsel's considered view that witnesses such as PW2, PW6, PW8 and PW10 among others could not be relied on as they had an interest to serve. Counsel contended that most of these witnesses among others stated that it was PW1 and PW2 who arranged for them to testify and that meetings were held at which they were chosen to come to court and testify. Counsel contended

further that PW10 confirmed the meeting and her appointment as a witness. Counsel submitted that these are not credible witnesses and their testimony is suspect and cannot be relied on.

Counsel then referred the court to the case of **Mubita Mwangala Vs Inonge Mutukwa Wina** where it was held that:

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

Counsel submitted that incidences of the allegations that the 1st respondent gave out money are isolated and do not in any way place him or his registered agents on the scene. Counsel submitted further that it was proved from pictorial evidence in the petitioner's bundle of documents at pages 98 and 99 that the mealie meal in question was a government program under the Disaster Management and Mitigation Unit (DMMU). Counsel argued that the date of distribution of the mealie is unconfirmed as the picture does not state the date nor the author of the document. Counsel argued further that with regard to the giving out of the money in Malawi and Mozambique, both 1RW1 and 1RW4 refuted the claims as they stated that they have never been to those countries ever. Counsel pointed out that 1RW4 also denied ever campaigning with the 1st respondent as he was not in the 1st respondent's campaign team.

15.3.5 A recap of the submissions by counsel for the 2nd respondent

Counsel for the 2nd respondent submitted that the petitioner went to great lengths to call various witnesses who testified on corrupt practices and other misconduct. Counsel submitted that the record will show that the petitioner has not moved this court to nullify the 1st respondent's election on the ground of corrupt practices or other misconduct but on illegal activities. Counsel submitted further that no

benefit will accrue to the petitioner who has not requested for relief grounded in the evidence on corrupt practices. Counsel argued that the law on the importance of pleadings is well settled in this jurisdiction and counsel was of the firm view that each party is bound by the pleadings placed on record. Counsel contended that even if the petitioner pleaded corrupt practices, the evidence on record lacks the required high clarity to enable this court rely on it and nullify the election of the 1st respondent.

In answering the question whether the alleged electoral offences were widespread, counsel pointed out that in relation to proving the number of people who attended meetings in breach of the electoral law, the Constitutional Court has provided useful guidance to the effect that the number of people who attended the meetings must always be provided. Counsel pointed out that failure to provide such numbers is fatal to the petitioner's case or the party wanting to rely on such numbers because such a party would have failed to help the court determine how widespread the breach affected the electorate and consequently whether or not it led to the majority of voters in that constituency failing to elect a candidate of their choice. The court was referred to the case of **Mbololwa Subulwa Vs Kaliye Mandandi** where it was held that:

"As regards the appellant, none of her witnesses testified as to the number(s) of people who attended the campaign meetings at which the respondent or the 2nd petitioner in the Court below uttered the inflammatory words against her. All that 1RW8 stated in his evidence is that there were a lot of people from different villages who attended the meeting that the respondent held at Mwanzi village in Sinjembela Ward. He did not give any figure. The term "there were a lot of people from different villages at the meeting" is relative and could mean different things to different people. Therefore the finding by the trial Judge that the character assassination against the appellant by both the respondent and the 2nd

petitioner in the Court below was widespread cannot be said to have been supported by the evidence on record and was thus not proved to the required standard. As such the finding by the trial Judge that the character assassination by the respondent and the 2nd petitioner in the Court below against the appellant was widespread was not supported by the evidence on record. We reverse it."

Counsel submitted that they had combed through the evidence of all the petitioner's witnesses and that although PW1 and PW2 testified that almost 10,000 and 7000 foreigners were registered as voters in Zambia they did not produce any evidence to ascertain the sources of the figures they were giving. Counsel pointed out that even though PW2 testified that only 1000 people crossed into Zambia as others were blocked from entering Zambia, there was no evidence led on where these figures were being gotten from.

Counsel argued that the only witnesses who discussed attending these meetings testified that the said meetings that they attended had 100 to 450 people. Counsel argued further that the other witnesses did not mention the numbers of people who were attending the meetings. It was counsel's considered view that the figures mentioned are not sufficient to persuade this Court to agree that the electoral offences were so widespread to prevent the majority of the voters in Vubwi Constituency from electing a candidate of their choice. Counsel contended that the evidence on record is sufficient to demonstrate that there were no wide spread electoral offences that would have prevented the people in Vubwi to elect the candidate of their choice. Counsel was of the considered view that the alleged number of foreigners who registered as voters as testified by PW1 and PW2 lacked the high clarity required in an election petition. Counsel submitted that in the unlikely event that this Court found that illegal activities were committed in Vubwi Constituency, by the 1st respondent, this Court would still have to come to the conclusion that the same were not widespread and as such this Court could still

not nullify an election based on the illegal activities which were not widespread.

15.3.6 The court's analysis of the submissions and application of law to the facts

Counsel for the 2nd respondent has submitted that the petitioner has not moved this court to nullify the 1st respondent's election on the ground of corrupt practices or other misconduct but on illegal activities. As indicated earlier in this judgment, although the petitioner did not plead corrupt practices as a basis for the nullification of the 1st respondent's election, the court noted that the 2nd respondent not having objected to the same during the trial, this court would go ahead to consider the evidence adduced in support of the allegations pleaded pertaining to the same. That being said however, I agree with counsel for the 2nd respondent that each party is bound by the pleadings placed on record.

As alluded to earlier, an evaluation of the petitioner's evidence reveals that the petitioner's witnesses gave testimonies that were at variance with regard to the details that the petitioner had stated in his petition. To exemplify, at the trial of this matter, only PW1 testified to the allegation that one Daliso Mwale was seen transporting voters from Lifuledi Village in Malawi to Chigwe polling station in M'lawe Ward, Zambia. PW1 testified further that Daliso Mwale transported the voters in a yellow canter with a white ribbon, which is the property of the 1st respondent. PW2, PW3, PW6, PW7, PW8 and PW9 all testified about the 1st respondent having had vehicles used to transport voters from either Malawi or Mozambique into Zambia at various polling stations but none of these testified about Daliso Mwale and the supporting details in the allegation as narrated by PW1.

In the case of **Micheal Mabenga Vs Sikota Wina and 2 others** the Supreme Court held that:

"An election petition is like any other civil claim governed by the pleadings, in this case by the petition and answer and the parties are bound by their pleadings."

The Supreme Court also guided in the case of **Brelsford James Gondwe Vs Catherine Namugala**²⁸ that:

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

Similarly, the Constitutional Court in the case of **Abiud Kawangu Vs Elijah Muchima** held that:

"We agree with the respondent's submissions that the burden lay on the court below to prove the allegations made in his petition against the respondent. This is because the one alleging, that is the appellant in this case (petitioner in the court below) carries the burden of proving all the allegations. He must prove the allegation to the required standard with cogent evidence otherwise no judgment will be entered in his favour."

PW1 was bound by his pleadings and ought to have brought witnesses who would testify to the specific details that he gave in each and every one of his allegations and not bring details of names, places and vehicles that were different from those contained in the petition and not mentioned at all by PW1.

Additionally, from the evaluation of the evidence as a number of witnesses belonged to a category of witnesses that are considered to be suspect this court had to treat this evidence adduced with caution. I as such agree with the submissions by counsel for the 1st respondent that

witnesses such as PW2, PW6, PW8 and PW10 among others were witnesses with a possible interest to serve as either they were partisan or had testified that it was PW1 and PW2 who had arranged for them to testify. That being said however, I note that the 1st respondents own witnesses being 1RW2 and 1RW3 were similarly circumstanced as they were clearly partisan witnesses. In the case of **Poniso Njeulu Vs Mubika Mubika** the Constitutional Court had this to say about partisan witnesses:

"The respondent submitted that PW11 was a partisan witness requiring corroboration, citing the Uganda case of Nabukeera Hussein Hanifa vs Kibule Ronald and another (2011) UGHC 64 where the court observed, 'just like in the election itself, each party is set out to win and the court must cautiously and carefully evaluate all the evidence adduced by either party; that evidence of partisans must be viewed with great care and caution, scrutiny and circumspection.' PW11 identified himself as polling agent for the PF. We have carefully perused the record and agree with the respondent that there was need for PW11's testimony to be supported by other independent evidence. We have not seen any such evidence on the record."

In adopting this guidance, this court assessed the independent evidence called into aid and as explained in detail above found the same wanting in terms of production and or unsupportive in terms of corroborating the testimonies of the witnesses in question. Additionally the credibility of the witnesses for the petitioner and the 1st respondent's case was also called into question as a result of the number of contradictions that were gleaned in their testimonies. The Constitutional Court held in the **Steven Masumba Vs Kamondo** case that:

"once a witness or complainant has been shown to be untruthful in material respects, his or her evidence can carry very little weight."

From the foregoing authorities I am ably guided and fortified in my findings that the petitioner has not proved all the allegations in his petition to the required standard with cogent evidence. As such in agreeing with the 2nd respondent's counsel, the petitioner has not established his grounds in the petition to the required standard in election petitions that is to a fairly high degree of convincing clarity, in relation to corrupt practices.

16.0 Allegations of violence and intimidation contrary to Regulation 15 (1) (a)

On the ninth, tenth and eleventh allegations that is 5 (ix), (x) and (xi), it is alleged that the UPND Chairman, Patrick Banda was attacked by the P.F cadres while using a P.F branded vehicle in which vehicle the 1st respondent was together with Austin Mbeve, Franco and other persons unknown and that this matter was reported to Vubwi Police and a medical report obtained from Vubwi Hospital. In relation to the said attack which is said to have occurred at Chigwe polling station, it is curious that neither Patrick Banda nor any other person who was at the alleged scene was called to testify over this allegation. The only witness that testified to this allegation was PW1 who did not testify that he was present at the scene. Although, the petitioner exhibited the medical report that was issued to Patrick Banda on the 5th July, 2021, this medical report fails to corroborate PW1's evidence of the attack having been occasioned by the 1st respondent and or his election or polling agents as it only refers to Patrick Banda having been assaulted and outlines the injuries sustained. On this basis I find these grounds not to have been substantiated to a convincingly high level of clarity and accordingly dismiss them.

On the twelfth and thirteenth allegations that is 5 (xii) and (xiii) Blackwell Banda, PW5, testified that he was assaulted by Alfonso Kamuna a member of the P.F on the 10th August, 2021 between 15:00 to 16:00 hours at a bush near the D.C's office where a chopper had landed. PW5 testified that when he went with some other people to see

what the chopper had brought and while some of his people were taking photos, the P.F members that belonged to the 1st respondent started to attack him although he was not taking any photos. In cross examination PW5 testified that the medical report issued by the police showed that he was allegedly assaulted because he was not bleeding when he went to the police but he had some internal pains on his back. PW5 in cross examination initially testified that Ackleo Banda was also present at the place that he was being assaulted but when asked further in cross examination PW5 conceded that he did not see Ackelo Banda's face where he was being assaulted. Additionally PW5 testified that he did not have any photo of his beatings as he was the one being beaten and did not have a chance to get any photos.

PW5 testified that he is the Vice Constituency Chairman for the UPND and in the hierarchy he was the number 2 man for Vubwi District. Therefore PW5 is a witness with an interest to serve as he is a partisan witness whose evidence needs to be treated with caution. In so saying, I find PW5 not to have been a credible witness firstly because, he did not tell the truth with regard to the presence of the 1st respondent at the alleged scene of his attack and secondly because he was unable to prove that he had lodged a complaint of this alleged attack with the ECZ Conflict Management Committee (CMC).

I also found PW5's testimony to have been to be unconvincing as PW5 testified that people in his group were taking photos of the chopper and if the events occurred as PW5 testified that he was subsequently attacked, it goes without saying that the people in his group would have had at least a photo of the chopper. To fortify this view PW5 in cross examination testified that a lot of people were taking pictures and that although Alfonso Kaziche Phiri did not take any photos, a person called Nakaleti did and so did other people from other parties whom he could not name. It is therefore surprising that PW5 did not even have one picture or photo depicting this incident or that of the chopper. As such, the testimony of PW5 needed to have been corroborated by an

independent witnesses or independent evidence to add credence to his version of events such as an actual police report or the Occurrence Book.

Even though PW1 testified about this particular incidence of violence and PW5 in cross examination testified that PW1 was present at the alleged scene of the attack, PW1 himself did not attest to this fact. Therefore PW5's evidence of PW1 having been present at the alleged scene as an eye witness was not corroborated by PW1 himself which again casts a shadow on the credibility of PW5's testimony. Additionally PW1 testified that PW5 was assaulted by Alfonso Kamuna Phiri while PW5 testified that a group of P.F members which included Alfonso Kamuna beat him up. The disparity in the details of what happened in this alleged attack again brings into question the credibility of both PW1's and PW5's evidence. I equally find PW1 not to have been a truthful witness as it is apparent that he was not at the scene of the alleged attack and was just repeating what he was told and hence his not being able to give a correct presentation of the alleged attack.

PW5's testimony is weakened further by the medical report which categorically indicates that PW5 had 'backache' due to an 'alleged assault' as it states further that PW5 was 'not swollen', that there was 'no bruise' and 'note not bleeding but tender to touch'. There appears to be no correlation between PW5's testimony that a group of people beat him up and the findings in this medical report as truly if he had been beaten by a group of people the wounds and or injuries would have been visible for all to see. As such I find that the said report does not aid PW5's claims in terms of his actually having been assaulted as the medical report casts doubt on the same. Additionally there is no evidence independent to corroborate PW5's testimony that he was assaulted by Alfonso Kamuna Phiri, the 1st respondent or any P.F cadre for that matter. I find that this ground is therefore unsubstantiated and dismiss it.

16.1 Allegations of violence and intimidation

16.1.1 A recap of the submissions by Counsel for the petitioner

Counsel for the petitioner submitted that there was a lot of violence that took place during the election. Counsel referred this Court to the case of **Richwell Siamunene Vs Sisalubalo Gift** where it was held that violence should be done by the respondent or if not by the candidate, by his appointed election agent with his knowledge, consent or approval. Counsel contended that the violence that took place against the UPND leaders was done with the knowledge, consent or approval of the 1st respondent in this matter as it was either the 1st respondent who was in that group of his appointed agents or he participated directly. Counsel contended further that these people that were being beaten were not ordinary people but leaders who had a large following. It was counsel's considered view that the conduct of the 1st respondent led to the majority of voters being prevented from electing the candidate whom they preferred as the said voters stayed away from fear of being beaten after seeing the beating.

16.1.2 A recap of the submissions by Counsel for the 1st respondent

Counsel for the 1st respondent submitted that in aid of this allegation of violence the petitioner cited the beatings of Patrick Banda, UPND Youth Chairman and Blackwell Banda, PW5. Counsel pointed out that Patrick Banda was not called to testify and that PW5 testified that he was beaten by Alfonso Kamuna Phiri, an alleged P.F cadre but that the 1st respondent was not present during the alleged attack. Counsel also pointed out that PW5 conceded that despite being allegedly beaten, he and Patrick Banda voted without any apprehension or fear. Counsel argued that PW5 adduced no evidence showing the alleged attack, save for his word of mouth. Counsel pointed out further that 1RW1 refused any knowledge of Alfonso Kamuna Phiri or of the two attacks. In addition counsel argued that 1RW1 stated that he had never been summoned by either the Electoral Commission of Zambia Conflict

Management Committee or the Zambia Police on allegations of violence either by himself or his election agents. Counsel argued further that it was the evidence of 2RW1 that he had not received any reports of violence either during the campaign period or on the voting day as Returning Officer. Counsel emphasized that 2RW1 insisted that the elections were free and fair as no adverse report was received by him from the Petitioner, his party or his agents.

Counsel for the 1st respondent contended that it is trite law that the petitioner must show firstly, that the complained of violence was committed by the 1st respondent and secondly, that the electoral offence was widespread and prevented or may have prevented the majority of the voters from electing a candidate of their choice. To buttress this argument the Court was referred to the cases of **Austin Chisangu Liato Vs Sitwala Sitwala, Mubika Mubika Vs Poniso Njeulu, and Richwell Siamunene Vs Sialubalo Gift**. Counsel submitted that no act of violence was proved to have been committed either by the 1st respondent or his agents; that the acts of violence were isolated as they were two in number involving two people and that no evidence was adduced to show that these acts of violence really occurred. Counsel was of the considered view that the failure to report the acts of violence to the ECZ CMC raises a doubt of their occurrence and failure to provide written complaints confirms that they were a mere afterthought and fabricated. Counsel concluded his argument on this allegation by arguing that no evidence was adduced to prove that it was the 1st respondent or his agents that orchestrated the alleged beatings as no single witness placed the 1st respondent or his agents at the scenes of the alleged violence.

16.1.3 A recap of the submissions by Counsel for the 2nd respondent

Counsel for the 2nd respondent did not make any submissions on the law with regard to this particular allegation.

16.1.4 The court's analysis of the submissions and application of law to the facts

The petitioner alleges in his petition that there was prevalent use of violence by the 1st respondent during the campaign period, which was aimed at intimidating members and supporters of opposing political parties, particularly the UPND. The offence of violence is covered under *Section 83 Subsection 1* of the *Electoral Process Act*, which provides that;

"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;*
- b) inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means, or pretended supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any 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) to attend and participate in, or not to attend and participate in, any political meeting, march, demonstration or other political event;"*

I should highlight that while the above provision seems to indicate that it is any person who may perpetuate an act of violence or threat of

violence, the Constitutional Court guided in the **Richman** case that Section 83 of the *Electoral Process Act* must be read together with Section 97 of the same Act in order to identify who may perpetuate the prohibited acts outlined under Section 83 subsection 1 of the *Electoral Process Act*. The court guided as follows;

“While we accept that in construing section 83 (1) of the EPA, 2016, we ought to follow the principle in Mwalimu Simfukwe vs Evaristo David Kasunga which considered the provision of section 82 of the repealed Electoral Act of 2006 which is similar to the current section 83 of the EPA 2016, wherein it was stated that a person can directly and indirectly commit the corrupt or illegal practices. In our considered view, section 83 is similar to other provisions under Part VIII setting out the election offences. Therefore, the meaning of “indirect” is found in section 97(2) (a) of the EPA, 2016. A corrupt practice, an illegal practice or other misconduct is imputed to a candidate, and is therefore indirectly committed by the candidate, only where the candidate is proved to have had knowledge of and approved or consented to the alleged corrupt or illegal practice or misconduct. It will also be imputed to a candidate where the corrupt or illegal practice or misconduct is committed with the knowledge and consent or approval of the candidate's election or polling agent. The phrase “any other person” in Part VIII of the EPA, 2016 is defined and delimited by section 97, which is the only provision under which an election may be nullified. It identifies a group of persons connected to the person who is accountable, either through agency and/or through knowledge of activity combined with consent or approval. When section 83 is read with section 97, it is clear that the violence or threat of violence must be perpetuated by the candidate or with the candidate's knowledge and approval or consent or that of his election or polling agent.”

In addition to the above, it must also be shown, as stated earlier, that the violence or threat of violence prevented the majority of voters in the constituency from electing a candidate they preferred.

In *casu*, the petitioner outlined two specific incidences of the alleged violence in his petition. I will firstly look at the alleged attack on the UPND Constituency Vice Chairman, Blackwell Banda, by one Alfonso Kamuna Phiri, a P.F cadre. The attack on Blackwell Banda allegedly occurred when he went to check what a chopper had brought and dropped in the bush for P.F cadres. Only two witnesses testified to the said attack that is the petitioner himself, PW1, and Blackwell Banda, PW5.

At this juncture, it is necessary to address the potential interest that PW5 may have to ascertain if there is need for corroboration of his evidence. The court has guided in the case of **Steven Masumba vs Elliot Kamondo**²⁹ that 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.

Corroboration is defined by **Black's Law Dictionary, 9th Edition**, at **page 397** as;

"Confirmation or support by additional evidence or authority."

PW5 is not only a partisan witness, but he testified that in the UPND hierarchy, he was the number 2 man for Vubwi District. Therefore he is a witness with a possible interest to serve and there is need for proper corroboration of his evidence. This is as per the guidance of the Constitutional Court in the case of **Mwenya Musenge Vs Mwila Mutale**³⁰ where it held at **page J58**:

"our consideration of the evidence on record is that all the witnesses mentioned above, except PW12, were partisan with a possible interest to serve; therefore we treat their

*testimony with caution. However, the testimony of PW12, who was non-partisan and whose testimony was not hearsay, corroborated the evidence on character assassination.**

A perusal of the record reveals that the only evidence that attempts to corroborate PW5's evidence as to the allegations of violence is that of PW1 and the medical report issued to him, and produced on the record. The question then is, can these pieces of evidence offer sufficient corroboration to PW5's evidence?

In answering this question, the medical report as already indicated above does not sufficiently corroborate a violent attack on PW5. Additionally the medical report does not corroborate PW5's evidence as to who the assailant was. It was in fact PW5's evidence, when cross examined by counsel for the 1st respondent, that he did not see the 1st respondent's face during the attack, and hence did not report the 1st respondent as his assailant to the police. PW5 however testified that out of a group that beat him he only managed to name Alfonso Kamuna Phiri as an assailant. PW5 further stated in cross examination by counsel for the 1st respondent that;

"To my surprise, the P.F members started beating me. This group belonged to Ackleo."

PW5 also testified that Alfonso Kamuna Phiri was arrested by the police and that Ackleo Banda called for discussions thereafter to resolve the issue. Not only is there a discrepancy in this piece of evidence as earlier on PW5 testified that he had not reported the matter to the police but there is also no independent evidence adduced to corroborate PW5's evidence to indicate who was responsible for the alleged attack inflicted on him.

As regards whether PW5's evidence can be corroborated by that of PW1, I have already found that although PW5 testified to PW1's presence at the scene of the alleged attack on PW5, PW1 himself did not attest to

this. Further as there were disparities in the details of how many people attacked PW5 in that PW1 only mentioned one person whereas PW5 referred to a group, PW1's testimony cannot corroborate that of PW5.

It must be stated that the onus is on the petitioner to adduce additional independent evidence from persons who must have witnessed the violent altercations. The petitioner herein has failed to do so.

The second incident of violence outlined in the petition relates to the attack on Patrick Banda, the UPND Youth Chairman. The allegation in the petition is that Patrick Banda was attacked, by alleged P.F cadres, in a P.F branded vehicle, in which the 1st respondent was a passenger and participant of the attack. The attack on Patrick Banda allegedly occurred at Chigwe polling station. It is curious that neither the alleged victim, nor any person present at the alleged scene was called to testify to this allegation. The only evidence adduced at trial in support of this allegation is that of PW1, who did not testify to being an eye witness. Another piece of evidence is the medical report issued to Patrick Banda, which does not corroborate PW1's evidence that the attack was occasioned by the 1st respondent and/or his election or polling agents.

While, PW1, the petitioner herein, testified that there were many incidences of violent attacks on his supporters, evidence adduced at trial related only to the two incidents specifically outlined in the petition. These incidents were not widespread so as to prevent the majority of voters in Vubwi Constituency from electing a candidate they preferred. PW5 testified that there was violence in Vubwi and Mulabe wards, yet in cross examination PW5 testified that he was aware that the petitioner won in Vubwi ward, while in re-examination PW5 testified that Margaret Miti, an independent candidate, won in Mulabe ward. This evidently shows that the people of the two wards were not in any fear so as to fail to elect candidates whom they preferred.

I find that the allegation of violence and intimidation fails to meet the three tiered threshold as provided under *Section 97 Subsection 2* of the *Electoral Process Act*.

As this court has found that the alleged illegal practices, corrupt practices and allegations of violence and intimidation were not proved by the petitioner then the aspect of the alleged misconduct being so widespread does not even arise. In conclusion, it is clear from the foregoing that the petitioner has failed to prove the allegations in this petition against the 1st and 2nd respondents to the required standard. In view of this and my earlier findings, I find that the petitioner's action fails and I accordingly dismiss it with costs to the respondents. These costs are to be taxed in default of agreement between the parties.

In accordance with the provisions of *Section 108* of the *Electoral Process Act*, I HOLD that the 1st respondent was duly elected as Member of Parliament for Vubwi constituency.

Delivered at Chipata this 23rd day of November, 2021
REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
23 NOV 2021
R. CHIBBABBUKA
P.O. BOX 50087, LUSAKA

R. Chibbabbuka
HIGH COURT JUDGE