

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT MANSA
(Constitutional Jurisdiction)**

2021/HP/EP/0001

IN THE MATTER OF: A PARLIAMENTARY ELECTION PETITION FOR
CHIMBAMILONGA CONSTITUENCY IN NSAMA
DISTRICT, NORTHERN PROVINCE HELD ON THE
19TH AUGUST, 2021.

IN THE MATTER OF: ARTICLES 73 OF THE CONSTITUTION OF
ZAMBIA, (AMENDMENT) ACT NO. 2 OF 2016,
CHAPTER 1, OF THE LAWS OF ZAMBIA

IN THE MATTER OF: SECTIONS 81, 83, (1) (C) & (6) 84,96, 97 and 99
OF THE ELECTORAL PROCESS ACT

IN THE MATTER OF: REGULATION 15 (1) (C) & (H) OF THE
33ELECTORAL PROCESS (CODE OF CONDUCT)
REGULATIONS, STATUTORY INSTRUMENT NO.
35 OF 2016

IN THE MATTER OF: ELECTORAL PETITION RULES NO. 426 OF

BETWEEN:

EVANS KABAMBA (MALE)

PETITIONER

AND

ELIAS MUSONDA (MALE)
ELECTORAL COMMISSION OF ZAMBIA

1ST RESPONDENT
2ND RESPONDENT

**BEFORE THE HONOURABLE MR. JUSTICE KENNETH MULIFE IN OPEN
COURT**

For the Petitioner: Mr. Elijah Siatwambo - Messrs F.B Nanguzyambo &
Associates

For the 1st Respondent: Mr. Edgar Khosa - Messrs BCM Legal Practitioners

For the 2nd Respondent: Mr. Zokani Simposya - Messrs MSK Advocates

J U D G M E N T

Cases referred to:

1. Khalid Mohammed v Attorney General (1982) ZR49
2. Brelsford James Gondwe v Catherine Namugala, SCZ Appeal No. 129 of 2012
3. Austin C. Liato v Sitwala Sitwala Selected Judgment No. 23 of 2018
4. Mbololwa Subulwa v Kaliye Mandandi Selected Judgment No.25 of 2018, 2016-CCZ-A025,
5. Herbert Shabula and Greyford Monde (Appeal No. 13 of 2016 – 2019/CC/A032
6. Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General, Selected Judgment No. 51 of 2018.
7. Christabel Ng'imbu v Prisca Chisengo Kucheka Appeal No.16-2017
8. Giles Chomba Yambayamba v Kapembwa Simbao, Selected Judgment No. 6 of 2018.
9. Simasiku Kalumiana v Lungwangwa Geoffrey and the Electoral Commission of Zambia, 2006/HP/ EP007
10. Simasiku Namakando and Eileen Imbwae 2006/HP/EP/002
11. Nabukeera Hussein Hanifa v Kibule Ronald and Another (2011) UGCH72
12. Christopher Kalenga v Annie Munshya and Two Others 2011/HK/EP/03,
13. Sunday Chitundu Maluba v Rodgers Mwewa and Attorney General, CCZ Appeal No. 4 of 2017
14. Austin C. Milambo v Machila Jamba, CCZ, Appeal No. 6 of 2016
15. Lewanika v Chiluba (1998) ZR 79,
16. Sibongile Mwamba v Kelvin M. Sampa and ECZ, Appeal No.

- 2/2017, Selected Judgment No. 57 of 2017 at page J34
17. Raila Odinga and Five Others v Independent Electoral and Boundaries Commission and Three Others, Kenyan Supreme Court Election Petition No. 5 of 2013
 18. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) ZR 138

Statutes referred to

1. Constitution of Zambia, Chapter 1 of the Laws of Zambia
2. Constitution of Zambia (Amendment) Act No. 2 of 2016
3. The Electoral Process Act, Act No.35 of 2016
4. The Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016
5. The Electoral Process (Code of Conduct) (Enforcement) Regulations, 2016
6. Electoral Process (Code of Conduct) (Amendment) Regulations, 2020

Works referred to:

1. Steven H. Gifis., Dictionary of Legal Terms: Definition and Explanations for Non-Lawyers, Third Edition,
2. Halsbury's Laws of England, Fourth Edition (Reissue), Volume 15
3. Halsbury's Laws of England, 5th Edition, Volume 38A
4. Registered Voters per Polling State, 2021, ECZ Register

1.0. INTRODUCTION

- 1.1. This is a judgement in an election petition resulting from a parliamentary election that was held in Chimbamilonga Constituency in the Nsama District of the Northern Province, of the Republic of Zambia, during the 12th August 2021 General Elections.
- 1.2. In the mentioned election, the Petitioner and the 1st Respondent were sponsored by the United Party for National Development (UPND) and the Patriotic Front (PF), respectively. There were other candidates sponsored by various political parties. However, they are not parties to this petition.
- 1.3. At the conclusion of the polls, the 1st Respondent was declared duly elected and therefore winner of the contest, by the Returning Officer.
- 1.4. Dissatisfied with the mentioned declaration, the Petitioner filed the present Petition into this Court on 23rd August, 2021. It is accompanied by an affidavit. Herein, the Petitioner is claiming as against the Respondents, the reliefs reproduced below thus:
 - i. That the said parliamentary election for the Chimbamilonga Constituency in the Nsama District of the Northern Province of the Republic of Zambia be declared null and void;
 - ii. That it may be determined that the said Elias Musonda was not validly elected as the member of parliament for the Chimbamilonga Constituency in the Northern Province of the Republic of Zambia;

- iii. That a fresh poll held for the election of the member of parliament for the Chimbamilonga Constituency in the Northern Province of the Republic of Zambia;
- iv. That the 1st Respondent be disqualified from contesting in the fresh poll. And;
- v. That the Respondent bears the costs of and incidental to this petition.

2.0. AVERMENTS

2.1.0 Averments by the Petitioner

2.1.1 In his petition, the Petitioner made the following averments: that he is a person who was a parliamentary candidate sponsored by the UPND at the general elections held on the 12th of August, 2021 and that he was a person with a right to be elected as Member of Parliament for the Chimbamilonga Parliamentary Constituency. That the following persons were candidates in the said election and sponsored by the respective named political parties:

- (i) Elias Musonda - PF;**
- (ii) Evans Kabamba - UPND**
- (iii) Banda Chelelani - Democratic Party (DPP);**
- (iv) Ng'onga Judith - Socialist Party (SP); And,**
- (v) Zimba Martin - National Democratic Congress Party (NDC).**

2.1.2 That out of the above stated candidates, the Returning Officer declared the 1st Respondent as the duly elected member of Parliament for the Chimbamilonga Constituency with the following as polling results for each Parliamentary candidate in descending order:

- (i) Elias Musonda - 11,728 votes;**

- (ii) Evans Kabamba – 7,745 votes;**
- (iii) Banda Chelelani – 945 votes;**
- (iv) Ng’onga Judith – 247 votes; and,**
- (v) Zimba Martin – 173 votes**

2.1.3 Suffice to add that I have verified the foregoing results from exhibit “EK3”, an ECZ 21 Form entitled “Declaration of the Result of the Poll” contained the Petitioner’s affidavit verifying the petition filed. The Form is signed by the Returning Officer for Chimbamilonga Constituency (one Meek Chibale), in the subject election.

2.1.4 The Petitioner averred that contrary to the declaration made by the Returning Officer that the 1st Respondent was duly elected, the 1st Respondent was not validly elected based on the following grounds and facts:

- (i) That during the campaign period but before the election date, the 1st Respondent and his campaign team were buying voter’s cards in the Petitioner’s stronghold areas. And that subsequently three people were apprehended by the police and that such people had in their possession, voter’s cards and National Registration Cards. That in consequence of this, the campaign manager of the 1st Respondent was heard saying that he had 4000 votes in his possession.

The Petitioner contends that this act violates sections 81 and 83 (1) (c) of the Electoral Process Act No. 35 of 2016 (hereinafter referred to as ‘Act No. 35 of 2016’)

- (ii) That the night before the election, the presiding officers at various polling stations were giving out money under the guise of social cash transfer and they were telling people that if they do not vote for the PF and its parliamentary candidate, the 1st Respondent herein, the people will not be given more money and that they would place cameras in the voting booths to monitor all who received the money and to ensure that they voted for the PF and the 1st Respondent.

The Petitioner contends that this conduct violates section 82 of Act No. 35 of 2016.

- (iii) That on 12th August 2021, the day of the election, the 1st Respondent with his campaign team distributed food items to the people as they were going to vote in contravention of the provisions of the law.
- (iv) That Senior Chief Nsama went to all the polling stations in the Constituency telling all the people that he was going to chase them from his chiefdom if they did not vote for the 1st Respondent, an act which the Petitioner posits, is contrary to the provisions of section 83(1) (a), (b) and (c) of Act No. 35 of 2016.
- (v) That on the said date of the election, the police fired some tear gas canisters and this disturbed the voters to an extent were some of them were terrified and opted to return home without casting their votes. That this

conduct was contrary to section 83(1) (a), (b) and (c) of Act No. 35 of 2016.

(vi) That during the campaign period, to the day of the elections, the 1st Respondent together with his campaign team and one Chishimba Kambwili issued tribal remarks against the Petitioner and his political party, the UPND. The 1st Respondent further alleged that the Petitioner was a tribalist and that his party was only for Tongas and that no Bemba speaking person should vote for the Petitioner and his party.

(vii) That on the polling day, the polling agents for the petitioner were not given the GEN 20 Forms and that their election agents were denied access to the polling stations.

And,

(viii) That the 1st Respondent and the members of his political party threatened the Petitioner's election monitors and chascd them from the polling stations.

2.1.5 The Petitioner averred that as result of the above mentioned alleged corrupt and illegal practices committed by the said 1st Respondent and his agents in the course of being elected, the majority of the voters in the affected areas and/or polling stations, were prevented from electing the candidate whom they preferred.

2.1.6 The Petitioner states that by reason of such corrupt and illegal practices perpetuated by the 1st Respondent and his agents, which practices were done in contravention of Act No. 35 of 2016, the said

election of the 1st Respondent as parliamentary candidate for the Chimbamilonga Constituency was null and void.

2.1.7 In his affidavit verifying the Petition, the Petitioner mostly resounded his averments from his petition and I will therefore not repeat them save for the fact that he exhibited exhibit marked “**EK1**” being a copy of his adoption certificate as parliamentary candidate for the Chimbamilonga Constituency under the UPND ticket; exhibit marked “**EK2**” showing proof of his acceptance by the Electoral Commission of Zambia (ECZ) that the Petitioner was nominated and thus a candidate for the Chimbamilonga Constituency parliamentary election under the UPND ticket. Lastly, the Petitioner exhibited an exhibit marked “**EK3**” mentioned above in paragraph 2.1.3 above.

2.1.8 On 21st September 2021, the Petitioner filed an amended petition upon leave of Court. The amended petition only introduced the following paragraph

Your Petitioner states that the campaigns and elections were characterised by political violence. In the months of July and August on dates unknown and on the 11th and 12th of August 2021, members of the UPND were attacked by the members of the Patriotic Front and party regalia belonging to the UPND were burnt. Homes were destroyed and members of the public were threatened that they would be beaten and their homes would be destroyed. This brought fear among the people and the majority of the people could not support and vote the party of their choice. The political violence was perpetrated by the 1st Respondent’s campaign team and agents.

- (vii) The PF Constituency Chairman, Stephen Musonda;
- (viii) The PF Constituency Secretary, Mr. Wedson Kampela;
- (ix) The PF Constituency Chairlady, Mrs. Faustina Chansa;
- (x) The PF Provincial Representative and Vice Provincial Youth Chairman, Mr. Moses Banda; and,
- (xi) One hundred and twelve (112) polling agents and three (03) election officials who were accredited with the ECZ, the accreditation being in the form of ECZ forms and identity cards issued by the ECZ and certified at the civic centre.

2.2.2 That the accredited agents, as part of the campaign team, were deployed in pairs in each of the 52 polling stations and 56 polling streams in Chimbamilonga Constituency. As part of the campaign team and strategy, command centres were created per polling station consisting of a number which is 10% of the registered voters at that particular polling station.

2.2.3 That 56 voter registers were purchased from the ECZ to assist in the targeted door-to-door campaigns to identify the registered voters in the 56 polling stations.

2.2.4 It was further averred that the appointment of presiding officers is a preserve of the ECZ and that the 1st Respondent is not privy to the activities of the ECZ.

2.2.5 That the 1st Respondent is not and was not at the material time in the employment of the Government of the Republic of Zambia in the

service of the Ministry of Social and Community Development which is mandated to administer the social cash transfer programme.

2.2.6 The 1st Respondent denied ever distributing food stuffs to the electorate but stated that the food supply was regularly done to his campaign team which consisted of 52 command centres in the polling stations from the time the campaign period opened. The food stuffs were bought at the beginning of the campaign period with the sole purpose of providing essential food stuffs for the campaign team.

2.2.7 The 1st Respondent denies that Senior Chief Nsama persuaded people to vote for the PF and threatened those who would not, that he would banish them from his chieftdom stating that the said Chief is not an agent of the 1st Respondent nor was he part of the campaign team. That due to the terrain and geographical size of the Chimbamilonga Constituency, it was impossible for the Senior Chief to have traversed all the polling stations from 06:00hrs to 18:00hrs on the same day.

2.2.8 The 1st Respondent denies that there were tear gas canisters that were fired which dispersed the voters and prevented them from voting. Instead, the 1st Respondent states that he was not aware of such an incident as he is not part of the Zambia Police Service.

2.2.9 The 1st Respondent denies ever having issued tribal remarks with one Hon. Chishimba Kambwili. He states that he only campaigned once with Hon. Chishimba Kambwili whereat Hon. Chishimba Kambwili only made comments when he compared the voting patterns between the Northern and Southern Provinces.

2.2.10 The 1st Respondent denied having threatened the Petitioner's polling agents and stated that it is not his mandate to supervise the operations of the ECZ. That contrary to the Petitioner's allegations, the 1st Respondent, his agents or his campaign team did not engage in corrupt and illegal practices in the course of being elected as Member of Parliament for the Chimbamilonga Constituency.

2.2.11 The 1st Respondent denies that his election is null and void as it was done in accordance with Act No. 35 of 2016.

2.2.12 The 1st Respondent prays that the Petitioner is not entitled to the reliefs he is seeking and that this Court should dismiss the petition with costs.

2.3.0 Averments by the 2nd Respondent

2.3.1 The 2nd Respondent is similarly opposed to the petition and in doing so, filed its answer on 17th September 2021 in which it made similar admissions to those by the 1st Respondent.

2.3.2 There were no averments in reply by the Petitioner.

2.3.3 These are the averments in toto.

3.0. ORAL EVIDENCE

3.1.0 Evidence on behalf of the Petitioner

3.1.1 In aid of his case, the Petitioner testified first and called 12 witnesses.

He told the Court that on 12th August 2021, he contested as a Member of Parliament for Chimbamilonga Constituency under the UPND ticket. He felt that the elections were not free and fair for the following reasons: that a lot of his members were beaten up by

members of the PF whom he called the agents of the 1st Respondent and the incidents were reported to the police.

3.1.2 The Petitioner further stated that on 11th August, 2021, the PF, in disguise of the social cash transfer were dishing out relief money and told the voters that if they voted for the UPND, they would be removed from the beneficiary's list.

3.1.3 That by reason of the aforesaid, the voters were filled with fear and ended up voting for the PF instead of the UPND.

3.1.4 That on the dates he cannot recall, a committee consisting of members of the PF which is responsible for distributing fertiliser to the vulnerable, told the voters that if they vote for the UPND, they would be removed from the list of beneficiaries and they set an example by removing Steward Katcbe (PW9) from the list. That this act scared the voters because they knew that the PF are capable of doing anything.

3.1.5 The Petitioner stated that when Hon. Chishimba Kambwili came to Nsumbu Ward to campaign with the 1st Respondent, he made tribal remarks in the following terms: ***“tongas vote for their people and we should also vote for our people”***. That the said Hon. Chishimba Kambwili further produced a document showing the voting patterns in the Southern and Northern Provinces whereupon he stated that ***“if they vote like this in the Southern Province why should we vote for their people?”***.

3.1.6 That while all this was being said, the 1st Respondent was present and did nothing to stop the said Hon. Chishimba Kambwili from his utterances.

3.1.7 That on the polling day, the police went and dispersed the voters by throwing tear gas canisters thereby causing fear and the people went back home without voting. On the same day, the PF team distributed food to the voters in all polling stations telling them that if they vote for the UPND, they would stop receiving such food.

3.1.8 That on the same day, his polling agents were denied GEN 20 Forms and access to enter into selected polling stations and that the Petitioner called the Police Officer-in-Charge for Nsama District and filed a verbal complaint.

3.1.9 Further, the Petitioner testified that Senior Chief Nsama went round threatening voters that he would banish them from his chiefdom if they voted for the UPND. This caused fear in the voters.

3.1.10 On the polling day, the said Senior Chief Nsama used his light truck to ferry voters to the polling stations.

3.1.11 Based on the foregoing, the Petitioner urged me to nullify the election of the 1st Respondent and order for a fresh election.

3.1.12 During cross-examination, by Mr. Khosa, Legal Advocate for the 1st Respondent, the Petitioner stated that his members were beaten by the 1st Respondent's political agents listed by the 1st Respondent in his answer though not registered by the ECZ.

- 3.1.13 That the social cash transfer is a government programme administered by officials in the Department of Social Welfare under the Ministry of Community Development.
- 3.1.14 The petitioner testified that he did not know the Government department responsible for the distribution of fertilisers but that it was agents of the PF who were responsible for the distribution.
- 3.1.15 The Petitioner further stated that he was not present when Hon. Chishimba Kambwili made the alleged tribal remarks. He also told the Court that the firing of teargas canisters to disperse the people was done at Nsumbu Polling Station. That he could not remember the total number of voters in Nsumbu but estimated the polling streams to be 4 with about 900 voters each. He finally estimated the figure to be between 4,000 and 4500.
- 3.1.16 The Petitioner testified that he won the election at Nsumbu Polling Station. That Chimbamilonga Constituency has 56 polling stations and the total number of voters was 28, 000 plus among which he obtained about 7000 votes while the 1st Respondent obtained about 11,000 votes.
- 3.1.17 It is the Petitioners testimony that the road to Nsama is gravel. Tarred roads only start at Mporokoso. That he does not know the average surface area of Nsama District. However, it can take one from 05:00hrs to 17:00hrs to traverse the entire Chimbamilonga Constituency.
- 3.1.18 When the witness was referred to pages 9-26 of the 1st Respondent's bundle of documents filed on 17th September, 2021, he

testified that the documents appearing at the following pages are GEN 20 Forms signed by members of his political party: 9, 10, 14, 18, 19, 20, 22, 23, 25 and 26. He stated that the rest of the documents are not clear on whether or not they were signed and this is on account of being faint.

3.1.19 The Petitioner continued to testify that the period from 17th May, 2021 to 11th August 2021 was a campaign period and was subject to the COVID-19 guidelines. Thereby necessitating the conduct of door-to-door and Facebook campaigns among other meetings. He stated that he had put up a campaign team and had the Councillors conduct the door-to-door campaigns without camping. That he did not know whether Senior Chief Nsama was the agent of the 1st Respondent and whether he too conducted the door-to-door campaigns.

3.1.20 He stated that one Chisunka was chased by Senior Chief Nsama from the chiefdom and does not know whether or not the said Chisunka was a member of his party.

3.1.21 When re- examined, the Petitioner stated that the Government in power forms organisations and that the social cash transfer program is one of the programs which was administered by the PF Government. The Committees were appointed by the said PF and received orders from the said party officials.

3.1.22 There was no cross-examination from Mr. Zokani.

3.1.23 **PW1** was Musonda Crispin. He testified that on a date he can't recall, he attended a political meeting in Nsumbu Ward that was

addressed by Hon. Chishimba Kambwili of the PF. According to PW1, the ECZ had prohibited the holding of political rallies. That during the occasion, the said Hon. Chishimba Kambwili uttered the following remarks

here you don't know how to vote. You give 4000 votes to the United Party for National Development while we give the Patriotic Front Party 7000 votes. Now at their place, these people in red can vote. (Referring to a paper he had in his hands, he mentioned Pemba and Mapatizya that in 2016 the PF had 289 votes while the UPND had 20,263 votes). Can you say these are people? waka nyelele (someone who defecated...)

3.1.24 PW1 said he took a video of the aforementioned event. Suffice to note that the video was not tendered in evidence.

3.1.25 During cross-examination by Mr. Khosa, PW1 stated that he stays in Nsumbu in Chimbamilonga Constituency where he registered as a voter.

3.1.26 There was no cross-examination from Mr. Zokani and no re-examination.

3.1.27 **PW2** was Emmanuel Chileshe, a UPND Youth Chairman for the Mwambeshi Ward. He attested that on 20th July 2021, he saw a vehicle branded 'PF' coming to his home and people disembarked from it. The people had sticks with which they wanted to whip him because he is a member of the UPND. So, he ran into the bush to hide. While hiding in the bush, he saw the said people enter his house and started breaking household goods, destroyed his clothes and those of his children. They burnt some of his items, took his solar panel and radio

cassette. They also got away with a sum of K1,000.00 which he had kept to buy fertilizer. He took all the broken items to the police station. They also broke the windows and the doors of his house.

3.1.28 From where he was hiding, he saw and identified stevan (RW3) and Gideon among the members of the PF who attacked his home. They were saying that the members of the community were not to vote for the UPND.

3.1.29 Further on the polling day, members of the PF in Mulenga Village in Mwambeshi Ward slaughtered a goat to give to everyone who voted for them.

3.1.30 When cross-examined by Mr. Khosa, PW2 stated that Mulenga Village is in Mwambeshi Ward in which he was a registered voter. He admitted that there are two police stations in Chimbamilonga Constituency. They are called Nsama and Nsumbu Police Stations. He reported his attack to Nsama Police Station. That RW3 and Gideon were not apprehended by the police officers but he was told to go to the police station after the election and follow-up the matter. To date, the police officers have not apprehended Stevan and Gideon whom he occasionally does see in his area.

3.1.31 PW2 stated that he knew Gideon and RW3 were election agents for the 1st Respondent. The witness testified that the number of registered voters in his village is 60 out of which 50 voted as others died and others did not participate. He does not know the total number of registered voters in Mwambeshi Ward. That the 1st Respondent won the election.

- 3.1.32 That on the date of the election, PW2 saw the members of the PF conducting door-to-door campaigns.
- 3.1.33 During re-examination, PW2 stated that he is angry because all the voters were supposed to vote for the UPND but did not do so because they were given goat meat to eat on the polling day. Further, the voters were scared because they saw him being attacked by the PF.
- 3.1.34 **PW3** was Elizabeth Chansa. Her testimony was that on 19th July, 2021, she went to her field and upon returning, she decided to take a siesta under a mango tree. She woke up to hear insults by the son and daughter to RW3 on allegations that she was supporting the UPND. They warned that if the candidate for the UPND wins, they would shave her pubic hair using a bottle because a razor blade would be too blunt.
- 3.1.35 On the same day in the evening while PW3 was sitting, she saw stones being thrown at her. She could not see the people who threw the stones because it was dark. However, she suspected that it was members of the PF because no one has ever thrown stones at her.
- 3.1.36 When she woke up on the 20th July, 2021, she found a heap of grass which she too suspected was put by members of the PF. Around 19:00 hrs, she heard noises and someone said they have burnt the pool table for her child and the grass thatched shelter belonging to the UPND was also burnt. She decided to go to the scene so that she could get her daughter. When she got there, she found that they had not burnt the properties as people managed to stop them. The people

who wanted to burn the pool table were kabanda, Nickson, RW3 and his son. As she wanted to sit, a mob arrived and dragged her by her clothes. Then RW3's son got a stone and hit her on the head. They continued to drag her from all sides and hitting her. The said assailants also grabbed her phone together with its memory card.

3.1.37 Then later, the Officer-in-Charge for Nsama Police Station came and upon seeing him the assailants fled. However, a person named Mpundu remained behind, took a stick and hit her. The Officer-in-Charge asked Mpundu why he was hitting her. She was hit on her shoulders, ribs and the back. She proceeded to Nsama Hospital after getting a medical report. At the Hospital, she was told that her arm was broken and was referred to Mporokoso General Hospital where she received treatment and her left arm was put in a Plaster of Paris (P.O.P.). She said that she has scars all over her body resulting from the attack. The Court viewed the scar on her healed but broken left hand.

3.1.38 PW3 stated that all these acts of violence were done to instill fear in the voters so that they could not vote for the UPND.

3.1.39 When cross-examined by Mr. Khosa, PW3 stated that she does not have any post in the UPND but his son is a Constituency Chairman of the political party. That she reported her attack to the police but her assailants were never arrested. When referred to documents in the Petitioner's Bundle of Documents, she indicated that she does not know how to read and that her assailants were

never arrested and that Rw3 and two members of the PF said that they cannot be arrested because they belong to the ruling party.

3.1.40 There was no cross-examination from the 2nd Respondent and nothing in re-examination.

3.1.41 **PW4** was Chief Inspector Sylvester Nkuwa, a Police Officer-in-Charge for Nsama Police Station. His testimony was that Nsama Police Station had a tough time to police the area during the period towards the General Elections in issue because of the violence that characterized them. That the violence was perpetrated by members of the PF and the UPND. Assaults and malicious damage to property were the most reported cases.

3.1.42 PW4 stated that a document was brought to his office by Mr. Yona Chishimba and Davies Siame both members of the PF. That the document was an undertaking by members of the UPND and the PF after a meeting between themselves, that they will not cause any more violence. Notwithstanding the above said undertaking, cases of malicious damage to property and assault increased, inter alia by PW3 and Agnes Kabwe, who were assaulted by members of the PF and the UPND, respectively. Further, Clement Mutale reported a case of malicious damage to property by members of the PF.

3.1.43 PW4 stated that three suspects (two from PF and one from the UPND) are serving prison sentences at Mporokoso Correctional Facility on charges of political violence. That one member of the PF and the UPND were released from police custody after being severely warned in a meeting which was attended by Davis Siame and Yona

Chishimba of the PF, the Pctitioner herein and Mr. Shikapundwe of the UPND.

3.1.44 It was PW4's testimony that he had to escort the 1st Respondent, to sign a parliamentary book after he was declared winner of the contest and this was for fear that he would be attacked on the way.

3.1.45 The witness testified that on the polling day, PW4 received a report from Nsumbu that there was a fracas at Nsumbu Primary School Polling Station. Upon hearing this, he drove to Nsumbu and when he got there, he found a lot of people who had already casted their votes but were waiting for votes to be counted. He personally addressed the people he found and further went to see the Commander for the Zambia Army Battalion based in Nsumbu because the Police were instructed to work with the Zambia Army in policing the elections.

3.1.46 After a meeting with the Zambia Army Battalion Commander, PW4 drove back to Nsama but around 19:00 hrs, he received another phone call from his officer that the Zambia Army Officers had to disperse everyone from the polling station for the reason that it was 19:00 hrs. As a result of this, the people on the queue going into the polling station to cast their votes, ran away. He conveyed this information to his immediate supervisor, the Officer Commanding, who advised that if the situation is quiet, then its fine.

3.1.47 When the President-Elect was declared, senior members of the UPND stormed his office asking him to arrest the members of the PF

Party who had assaulted people. He could not act on this as all Commissioners of the Police were dismissed from employment and as at now all dockets are still on his table awaiting further instructions from the Divisional Criminal Investigations officer.

3.1.48 During cross-examination by Mr. Khosa, PW4 stated the tear gas canisters and shot buttons used to disperse people at Nsumbu Polling Station were by the Zambia Army since police officers were not given any of those weapons. All the 17 wards in the Constituency are under his jurisdiction for purposes of policing. That he has one Police Station and one police post in Nsama District.

3.1.49 PW4 told the Court that two members of the PF attacked one young lady from UPND after the 1st Respondent was declared winner. That on the assault of PW3, although the suspects are there, they have not been apprehended nor the one for Agnes Kabwe including the case of malicious damage to property reported by Clement Mutale.

3.1.50 PW4 stated that from 26th June 2021, to the election date he received 12 complaints of violence from three wards in the Constituency as follows: 8 from the PF and 4 from the UPND.

3.1.51 There was no cross-examination from Mr. Zokani and no re-examination.

3.1.52 PW5 was Steven Ngandwe. He testified that in September 2017, he was visited by the village headman who told him that he was being sought after by Nsumbu High School to form a group that would be distributing money to the vulnerable. When he got there, an election was held and he was elected representative to give out the money to

the vulnerable. The money came from the Department of Social Welfare. After a month they sent some money and he started giving out the money to the vulnerable which exercise, he continued carrying out for the last 4 years. To his surprise this year (2021), he received a call by a group popularly known as "PF" meaning "Patriotic Front". When he went to meet them, they instructed him to tell the beneficiaries of the social cash transfer program, to vote for the PF and that in the polling booth there will be a machine placed which will be capturing all those who would not vote for the PF.

3.1.53 When he left, he went and addressed the beneficiaries of the social cash what he was told. The others said it was a lie while others believed it was true that the PF will stop giving them that money. Then he advised them that they should just know what to do and the said beneficiaries responded that they would vote for the PF. He had with him a document which indicates the beneficiaries' details and the amount received. It appears at page 4 of the Petitioner's Bundle of Documents. He stated that an estimated total number of 230 people received social cash.

3.1.54 During cross-examination by Mr. Khosa, the witness stated that Shikapampa village is in Nsumbu ward and that the monies he gave out were strictly for the beneficiaries in Nsumbu ward. That when he attended a meeting in 2018, Mr. Mulenga the Head Teacher, was appointed the pay point Manager mandated to pay out the social cash money. He added that the term of office for the managers was three years. That his term of office did not end in 2020. He clarified that

from 2017 when he became a member of the Committee, it has not been the same beneficiaries who had been receiving the money but rather the number of beneficiaries increases according to the number of people they identify as being vulnerable in the ward. He reiterated that Nsumbu Ward had about 230 beneficiaries and that the PF candidate emerged as the winner of the election in Nsumbu Ward.

3.1.55 There was no cross-examination from Mr. Zokani and no re-examination.

3.1.56 **PW6** was Maggy Musonda who testified that she is a beneficiary of social cash transfer program which she receives around the 15th or 20th of every month. That on 11th August 2021, she got the money after being informed by a Mr. Simukopa that the money had been brought. When she got there with her National Registration card, her name was called-out and she entered inside. Before being given the money, there was a condition which was given. She was told that she should never vote for the UPND and that if she did, her name would be removed from the list of beneficiaries. That the people who will be at the polling station would be photographing them.

3.1.57 She went back home and on 12th of August, 2021, she went and voted for the PF as she was told.

3.1.58 Under cross-examination by Mr. Khosa, PW6 testified that she has been receiving the said money from 2017 to date. PW6 further testified that she did not know whether it was social welfare officers who give out the money. She stated that Mr. Mulenga is part of the

Committee that distributes the money and that Mr. Mukopa was present on 11th of August 2021 when she received the money.

3.1.59 There was no cross-examination from Mr. Zokani. She was not re-examined.

3.1.60 **PW7** was Brian Kombe a Ward Councillor for Nsumbu on the UPND ticket. His testimony was that, when they started campaigning, there were rumours that members of the PF were getting voter's cards from people. He informed all members of the said ward that if they heard of someone who was getting voter's cards, they should report that person to him so that he could confirm the rumours. On 12th June 2021, he received a tip-off that a certain woman had voter's cards. He went to the woman's house and indeed found her with a purse that contained voter's cards. When quizzed as to what she was doing with the cards, she stated that she was collecting them from people. At that point, PW7 decided to report the matter at Nsumbu Police Station and surrendered the voter's cards that were found with the said woman.

3.1.61 While at the Police Station, the said woman came with her children in the company of Maunda Shadreck the PF Counsellor and other members. The said woman was only cautioned and released.

3.1.62 On 13th June, 2021, PW7 received another call that there was a woman who had other people's voter's cards. When he went there, he found the said woman with two National Registration cards and other people's voter's cards. Yet again the matter was reported at the Police

Station and recorded in the Occurrence Book and the suspect detained but released the following day.

3.1.63 During cross-examination by Mr. Khosa, PW7 testified that he won as Councillor for Nsumbu ward on the UPND ticket against Shadreck Manda of the PF but did not know who won the Parliamentary elections. He did not know the names of the two women in the incidences of 12th and 13th June 2021.

3.1.64 There was no re-examination.

3.1.65 **PW8** was Musa Abdallah Mazombola. He testified that it was on 11th August, 2021 when the 1st Respondent came in the company of his friends donated a mat at his Mosque in Nsumbu whereupon he solicited for their votes. As head of the Muslims Committee, he called the Nsumbu Mosque asking them why they accepted the mat knowing fully well that the next day was a polling day and that these people were not their congregants and had never donated anything to the Muslims. The following day, he got back on his motorbike. Upon arrival, on the 12th of August, 2021, he found Chief Nsama at Lunsangwe area addressing and shouting to a gathering of people that

whoever will vote for anyone else other than for the 1st Respondent he should know where to go because I will chase that person from my chiefdom.

3.1.66 PW8 testified that these sentiments by the Chief got him concerned more so that the day he uttered such remarks was not a day for campaigns. He could not say anything as he was equally just a subject of the same Senior Chief Nsama.

3.1.67 PW8 proceeded to go to Nsumbu to cast his vote. While on the queue, he was approached by a woman who said she could not read her names. When he tried to help, a police officer by the name of Zulu, told him that he was not responsible for helping voters and ordered him to leave the polling station. This altercation went on and PW8 refused to leave until he voted around 18:00hrs. When he came out, he found that a lot of people were running away from tear gas and he saw soldiers, police officers and other people. At that time, people were all scattered and only the military and the police remained there.

3.1.68 During cross-examination by Mr. Khosa, PW8 testified that he was born in Nsumbu and assumed the position of Head-Islam Propagator for Luapula, Northern and Muchinga Provinces, in the year 2011. That the place where he found Senior Chief Nsama was Lunsangwe located in Lunsangwe Ward in Nsama District and that he did not attempt to speak to the Chief when he heard him tell people whom they should vote for. He however does not know who, as a result of Senior Chief Nsama's threats, has been chased from his chieftdom.

3.1.69 PW8 stated that he stood on the queue until the time the lady requested for his help to vote. He does not know the number of registered voters at the four streams at Nsumbu. He added that it was not his continued presence that caused the Police to disperse people by the use of teargas canisters. That there were a lot other people present after they had voted.

- 3.1.70 PW8 stated that he was not present at the mosque when the 1st Respondent brought the mat to the Mosque.
- 3.1.71 PW8 further testified that he is not angry because the 1st Respondent won the election. He left Nsumbu for Mpulungu, his place of residence, by ship. That he and Senior Chief Nsama have a cordial relationship of Chief and subject although he did not call the Chief to ask him why he was advising his subjects on which candidate they should vote for because he was scared of how he was going to react.
- 3.1.72 There was no cross-examination from Mr. Zokani and no re-examination.
- 3.1.73 PW9 was Steward Katebe, a District Chairperson for the UPND. He testified that they have a farmers' Co-operative society known as Chibusa Co-operative Society where he is the Chairman. Towards the campaign period, some members of the PF told him that he was not supposed to be the Chairman of the said Co-operative because he was a member of the UPND. They insisted that he be removed and they took the matter to the District Commissioner. The District Commissioner and members of the PF who had complained to him sought the advice of the agricultural officer whereupon, they were advised to conduct an election for the position.
- 3.1.74 It would appear that an attempt by Taineke Chansa (RW5), a Chairman for the PF, to block PW9 from contesting in the election, failed. PW9 contested and won the election after polling 27 votes. RW5 complained to the District Commissioner that people won't benefit because they voted for the UPND meaning PW9.

3.1.75 Later, there was a programme called Presidential Empowerment where people were required to fill-in forms and they were told that they had to pay some money in order to get the said forms. Chibusa Co-operative was to receive cement and iron sheets under the mentioned empowerment program. But when the said cement and iron sheets were brought, RW5 and others directed that Chibusa Co-operative should not be given the items because it refused to remove the UPND from the position of chairperson. PW9 and others were thus not given the goods.

3.1.76 PW9 further testified that at a later stage, Chibusa Co-operative alongside other co-operatives, was supposed to deposit some money towards the FISP program in order for the members to access farming inputs under the program. It would appear that PW9 had gone elsewhere to visit. When he returned, he found that RW5 had imposed himself as Chairman of Chibusa Co-operative.

3.1.77 PW9 and others' attempt to make the deposit towards the mentioned FISP program, was rejected by RW5, Steven Musonda (RW3), Kampala, Pervious. PW9 was given back his money. They further directed for the removal of PW9 and his wife from the list of beneficiaries of the FISP program because they will buy when Hakainde Hichilema wins the election.

3.1.78 Further, it became difficult for PW9 to conduct door-to-door campaigns as a party mobiliser because people were afraid that they would not receive fertiliser if they were seen interacting with him. People started running away from PW9 and his team in fear of being

denied fertiliser if they were seen with members of the UPND. Even though it was known that FISP was a government program, it was later discovered that the program was being managed by the PF.

3.1.79 PW9 stated that he was forcefully removed from his position and this compelled him and others to start supporting the PF who had everything. As a result, his group was abandoned and they lost the subject election.

3.1.80 During cross-examination by Mr. Khosa, the witness stated that he joined Chibusa Co-operative in 2008 and that the Co-operative had 35 members. That he served as Chairman for one term and was re-elected for the second term at an election that was held in Nsama area at one Techaumo's building in February 2021. He thus served from 2012 to 2020 for two terms of 4 years each.

3.1.81 PW9 stated that Chibusa Co-operative is in Lunsangwe and Mwambeshi Wards and that the 1st Respondent is not a member of the Co-operative but that he is a member of the PF. That currently, the Chairperson of the Co-operative is RW5, who imposed himself. He added that in the just ended general elections, RW5 played the part of campaigner for the 1st Respondent.

3.1.82 It was PW9's testimony that the FISP programme is ordinarily administered by civil servants under the Ministry of Agriculture.

3.1.83 He stated that he was fully involved in the campaigns of the said just ended elections by way of a door-to-door campaigns.

3.1.84 There was no cross-examination from the 2nd Respondent and no re-examination.

3.1.85 **PW10** was Chishinka Mulenga, a Youth Chairman in the UPND. He testified that on 6th June, 2021 he was by his shop which is situated behind the market in Nsama District, selling airtime. While there, Senior Chief Nsama came while holding 2 bottles of black label beers in his hands. He was in the company of the 1st Respondent, Kelvin, a Councillor and one Davy Siame. They entered the market and told the people in the market, that they do not want anyone to vote for another person but the people he was with and that whoever will vote for the UPND, would be banished from his chiefdom.

3.1.86 On 6th August, 2021 around 24:00 hrs, PW10 heard police officers kick his door open. They entered, apprehended him and took him to Mporokoso District. While he was in detention, he did not know what happened behind in Nsama. He was supposed to be released on 8th August but was only released on 12th August 2021 at 12:00 hrs. He later received a call from the Officer-in-Charge of Nsama Police that he should report to his office. When he got there, the Officer-in-Charge told him he should be careful in the village that he lives in because Senior Chief Nsama, RW3 and the 1st Respondent instructed him not to release him from police cells. PW9 stated that he did not understand the reason why he was being harassed. He added that a lot of the members of the UPND in Nsama District were often harassed and threatened that they will be banished from the chiefdom. That this instilled a lot of fear in most people as they saw how their leaders were treated by the authorities.

3.1.87 In further cross-examination, the witness stated that the Petitioner is known to him as an area Member of Parliament for the UPND and that he did not know the denomination he belonged to. He only knew that the Petitioner is Muslim, when Counsel for the 1st respondent mentioned that he is a Muslim and not a Christian. He did not know how many people were chased from Senior Chief Nsama's chiefdom. And that he still stays in Zacharia village in Senior Chief Nsama's chiefdom. He knows the police officers who arrested him facially but does not know their names. Zacharia village is in a ward he does not know.

3.1.88 There was no cross-examination from the 2nd Respondent and no re-examination.

3.1.89 PW11 was James Fumapo. He testified that on 7th August, 2021, while he sat at the station of the market in Nsama, Senior Chief Nsama came where he was seated and grabbed him by his shirt. Senior Chief Nsama told PW11 that he is one of those he has heard are strong supporters and members of the UPND. He continued to pull and drag him by his shirt until some of the buttons fell off. Senior Chief Nsama then slapped PW11 but he managed to duck the slap and slipped off his grip.

3.1.90 It was the testimony of PW11 that on the polling day, Senior Chief Nsama got his car and started going round picking people and ferrying them to the polling station. The vehicle stopped near his home and he got onto the car. He asked the passengers what they were

being told upon getting on that vehicle. They told him that the vehicle is not for the UPND but the PF.

3.1.91 When he was dropped at the polling station, he asked the driver whether the passengers were members of the UPND or the PF or that they were just one community. When PW11 continued to inquire about which party owned the vehicle, the driver stood and went to one of the police officers at the polling station who came where he stood and told PW11 that they did not want to see him there anymore. PW11 then asked why he was being chased away from the polling station before he could cast a vote. He had to leave the polling station and came back later to cast his vote.

3.1.92 During cross-examination by Mr Khosa, PW11 stated that on the date of voting, he was on the said motor vehicle and that he is not a member of the UPND. The polling station he was taken to is Kabobole polling station. He only knew the driver of the vehicle that took him to the polling station as Lottie. He did not report the hostile encounter he had with the Chief to the police.

3.1.93 There was no cross-examination from the 2nd Respondent and no re-examination.

3.1.94 PW12 was Kafwanka Ahmad Alex whose testimony was that he was one of the local monitors of the UPND in Chimbamilonga Constituency. He was given an identity card by the ECZ, in this respect. The card gave him access to any polling and totalling centre.

3.1.95 On 12th August, 2021 as the elections were going on, he was going through the polling stations. He went to most of Zone B polling

stations from Lupele junction at Kapinda to Kapisha ward. When he got to Mwewe Polling Station, he was denied access into the polling station by Inspector Mbewe who said they were busy. He requested to see the presiding officer because he needed to find out if there were any challenges the polling agents were facing but they all refused to talk to him. The presiding officer could not allow him to enter nor talk to him and did not allow the agent for the UPND to come and speak to him. The said Inspector Mbewe then closed the door. The police officer was adamant on allowing PW12 to go into the polling station and seeing that he had a lot of polling stations to pass through, he rushed to the totalling centre, where he reported the incident to the Returning Officer by the name of Chibale who promised that he would look into the matter but to no avail. PW12 proceeded to call the Petitioner and explained what he had encountered.

3.1.96 PW12 also told the Court that he discovered that some of the polling agents were not given GEN 20 Forms by the ECZ. The forms, contain the names of the candidates, the political party each belongs to and the number of votes cast for each of the candidates and were needed for purposes of comparing the results from the agents and the polling stations. He went back and asked the returning officer why some polling agents were not given the GEN 20 Forms. His efforts proved futile.

3.1.97 The polling stations that were not given GEN 20 forms were Mwewe, Kakoma, Shimusanse and the Civic Centre (despite him being

at the civic centre totalling centre). He was promised that they would be given but this never happened thereby raising suspicions.

3.1.98 When cross-examined by Mr. Khosa, PW12 stated that he was not sure if he shared the same Islamic faith with the 1st Respondent.

3.1.99 When cross-examined by Mr. Zokani, Legal Advocate for the 2nd Respondent, the witness said that he did not actually speak with the presiding officer in person. The presiding officer was told by Inspector Mbewe that somebody wanted to speak to her. He heard the Inspector ask her because he was standing by the door.

3.1.100 There was no re-examination.

3.2.0 Evidence on behalf of the 1st Respondent

3.2.1 The foregoing marked the close of the Petitioner's evidence. Turning to the 1st Respondent, he testified in his own right and called eight witnesses. He denied having committed the illegalities alleged by the Petitioner whereupon he asked the Court to admit his answer herein, in evidence, which was done.

3.2.2 The 1st Respondent told the Court that he filed his nomination successfully on 17th May, 2021. Later he was guided by the ECZ, in consultation with the Ministry of Health that the campaigns will be under strict COVID guidelines in that no public campaign rallies would be allowed.

3.2.3 He stated that with his Campaign Manager, they constituted a campaign team which comprising the 1st Respondent, the Council Chairperson, Mr. David Siame, the Campaign Manager, RW1, Vice

Campaign Manager, Mr. Yona Chishimba, the PF District Chairman, Mr. Benjamin Chanda, District Chairlady, Mrs. Janet Musonda, the Vice District Secretary Mr. Joel Shikapundwa, RW4 who is the Constituency Chairman for Chimbamilonga, the Constituency Vice Secretary Mr. Wedson Kampela, Chairlady Mrs. Faustina Chansa , 2 Election Agents and RW6 plus 112 polling agents. The polling Agents were to be deployed in pairs per voting stream.

3.2.4 Having constituted the above listed team, they agreed that their mode of campaign would be door-to-door campaigns. Consequently, they established 52 Command Centres because of the vastness of Chimbamilonga Constituency. He said that the Constituency is made-up of 17 wards being Chubo, Mwambeshi, Lunsangwe, Pungwa, Chishi, Kapoma, Mukubwe , Mululu , Kampinda, Kapusu, Kashikishi , Mikose, Munwa, Chishela, Katwa, Nsumbu and Kapisha. The length of the Constituency is 264 km and the width is about 130 kilometres. The terrain of Chimbamilonga is hilly and rocky. Apart from the gravel road from Mporokoso to Nsumbu, the rest of the roads are virtually impassable. It was on the basis of the foregoing that the 1st Respondent established the 52 command centres in the range of 3-5 kilometers from respective polling stations.

3.2.5 The 1st Respondent stated that to the contrary, it was the members of the UPND who were attacking the general public and his team. Here, he referred to the incident of 28th June, 2021 when his team went to see its agents and foot soldiers at Ndole Polling Station. That when he and his team were going back to their Command Centre in Nsumbu,

they found the entrance to the Command Centre barricaded. When they stopped the vehicle to remove the barricade, they were ambushed and a young girl from a neighbouring house was badly injured, including their Constituency Chairman. Evidence of the assaults is on pages 5-8 of his Bundle of Documents filed into Court on 17th September 2021. The said medical reports show that Reuben Chishimba aged 20 sustained a bleeding cut on the head, while the other belonging to RW3 shows that he sustained cuts in the head. The other medical report was for Mary Mwimanzi aged 13 who sustained a cut on the head.

3.2.6 The 1st Respondent stated that this incident was reported to Nsumbu Police Station. Later in the evening of the same day, officials from the UPND and PF including himself and his Campaign Manager, were summoned to appear before the Conflict Resolution Committee which was being chaired by a Captain from the Zambia Army. The agenda was violence whereupon they agreed to counsel their members to stop the violence. They signed an agreement to that effect.

3.2.7 The 1st Respondent expressed ignorance of the incident where PW3 was alleged to have been assaulted by Kabamba, Mpundu, Nickson and RW3 and his son. Further, out of the mentioned alleged assailants, the 1st Respondent only knew RW3 adding that the mentioned RW3 was never arrested.

3.2.8 He denied the allegation that on 11th August 2021, the day before the election, he, with the members of the PF were distributing social cash transfer to the beneficiaries. He further denied telling voters to vote for

the PF and not the UPND lest they be removed from the list of beneficiaries of the social cash transfer money. He stated that this function is for the Ministry of Community Development and Social Services and that the officers who do that are civil servants.

3.2.9 The 1st Respondent testified that neither he nor the members of his Campaign team are civil servants. He denied using the FISP fertilizer distribution programme for his campaigns stating that FISP is a function of the government through the Ministry of Agriculture.

3.2.10 Further, the 1st Respondent stated as follows: that he has no idea of the Chibusa Co-operative as he has no relationship with the said entity; that he does not know its regulations; that RW5 (his Election Agent) imposed himself as Chairman of the Co-operative and that he is not privy as to the reasons why PW9 was removed as Chairman of the Co-operative.

3.2.11 He stated that during his campaign period, he never campaigned with Hon. Chishimba Kambwili. That he received a call from the said Hon. Chishimba Kambwili on 8th August, 2021 that he wanted to come and meet his ward officials and foot soldiers. This was because Hon. Chishimba Kambwili wanted to convey some messages from the Presidential Campaign Team. That indeed Hon. Chishimba Kambwili came to Nsumbu ward and passed on the message he had but never uttered any tribal remarks. Rather, the message he gave to the foot soldiers was about voting patterns between the Southern Province and Northern Province. He had a piece of paper which bore 2016 election Presidential results. The said Hon. Chishimba Kambwili

went on to read out the votes which the UPND and PF respectively got from the elections from selected constituencies in the two provinces. That Hon. Chishimba Kambwili urged PF officials and the foot soldiers to go out and sensitise voters to vote in large numbers like their friends were doing in the Southern Province. That this was a one-way communication meeting to the effect that the 1st Respondent and his Campaign Manager never uttered any word.

3.2.12 The 1st Respondent stated that in 2016 the voter turnout for Chimbamilonga Constituency was 57%. That he was not aware of the tear-gassing incident at Nsumbu Basic School and his polling agents never reported that there was tear gas canisters that were discharged. He added that he was not in charge of the Zambia Army, the entity that allegedly discharged the tear gas cannisters. He stated that Nsumbu ward has 6,534 registered voters and that the Petitioner won in this particular ward.

3.2.13 The 1st Respondent further stated that he had no comments on the allegation that he and the PF were distributing food to the voters in all polling stations and that they were threatening people that if they voted for the UPND, they would not partake of this food.

3.2.14 It was the 1st Respondent's testimony that Chimbamilonga Constituency has a total of 28,602 registered voters out of which 21,188 voted adding that he had no financial capacity to distribute food to 21,188 voters. The alleged distribution of food is not possible in view of the vastness of the Constituency. That he and his Campaign Manager only bought food to feed their foot soldiers in command

centres as shown by a document at page 3 of his Bundle of Documents.

3.2.15 The 1st Respondent denied being privy to the allegation by the Petitioner that on 12th August 2021, polling agents of the UPND were denied GEN 20 forms and that some of their monitors who visited selected polling stations were denied access to these polling stations nor that the petitioner filed a verbal complaint to the Officer-in-Charge for Nsama Police Station. That some legible GEN 20 Forms in his Bundle of Documents show that they were signed by agents of the PF and UPND. These are on the following pages of the Bundle of Documents: 9, 10, 12, 14, 18, 19 ,20 ,22 ,23, 25, and 26 Suffice to note that the 1st Respondent admitted that the GEN 20 Forms he exhibited are not for all the polling stations and this is so because his polling agents were not given some of the Forms.

3.2.16 He denied being privy to the allegation that Senior Chief Nsama threatened to banish from the chieftdom, his subjects who would vote for the UPND or that the Chief used his light truck canter to ferry voters on the voting day. He denied having been in the company of the Chief adding that on the alleged date, he was in Luanshya to visit his family and to mobilise campaign resources. That he had left the Constituency on 17th May 2021 after filing his nomination and only returned to the Constituency from Luanshya on 9th June 2021 and resumed campaigns on 12th June 2021. Further, he stated that the Chief was not part of his campaign team.

3.2.17 The 1st Respondent stated that he had no knowledge about the allegation that he told the Officer-in-Charge for Nsama Police not to release PW10 whom they had detained. He also stated that he was not in Mulenga area on 20th July, 2021 when PW2 was attacked and his property, that of his children, destroyed or stolen. In support of this version, the 1st Respondent referred the Court to a campaign calendar issued by the ECZ. It appears at pages 1 and 2 of his Bundle of Documents. In the main, the document shows the dates on which each political party was scheduled to visit a named ward.

3.2.18 The 1st Respondent denied the allegations in paragraph 5 of the Petition. The allegations in the mentioned paragraph 5 of the petition, have been outlined above. At the risk of repetition, they relate to the grounds and facts upon which the Petitioner is challenging the 1st Respondent's subject election as Member of Parliament. These include the following: voter's card buying, undue influence, forceful dispersal of voters from Nsumbu Basic School Polling Station by state security and defence agencies and non-compliance with the principles governing the conduct of elections. He denied these allegations on grounds that he was either not privy to them or they were not communicated to him by his agents, or at all.

3.2.19 Concerning the allegation about violence, the 1st Respondent told the Court that the violence took place only in two wards namely, Nsumbu and Mwambeshi. Further, that the tear-gassing of people at Nsumbu Basic School Polling Station, was an isolated incidence that did not cause people to have fear and fail to vote as evident from the

21,118 people who voted out of the total number of 28,602 registered voters. He stated that the voter turnout during the 2021 General Elections is unprecedented and outclassed that for the 2016 where, out of over 26,000 registered voters only around 15,000 voted.

3.2.20 The 1st Respondent urged me to declare the election free and fair and thereby to dismiss the Petition.

3.2.21 When cross-examined by Mr. Siatwambo, Legal Advocate for the Petitioner, the 1st Respondent agreed that the Chimbamilonga Constituency is vast. As a result, he had to engage the campaign team and foot soldiers. That it was not possible for him to be visiting the 52 wards in the Constituency at once and see how his foot soldiers were carrying out their campaigns. That he would therefore, not know the actual people who also eat food from his foot soldiers.

3.2.22 The 1st Respondent stated that he was not the one who personally recruited his foot soldiers but he campaigned through them. He conceded to the fact that the just ended elections were not free of political violence. That RW3 was in his campaign team and the said RW3 was attacked by members of the UPND at Nsumbu whilst in the 1st Respondent's company but the attack did not disrupt the peace and campaigns though witnessed by many people. That there were incidences when he was not found with RW3. As a result, he is not aware that RW3 had beaten PW3 and destroyed the house belonging to PW3's son. He could not confirm about other incidences and as such would not confirm that these two (the Nsumbu and Nsama

incidences) were the only incidences which occurred. He could not attest to the polling day Nsumbu incident because he was not there.

3.2.23 When asked further, the 1st Respondent reneged on his earlier denial of having campaigned with Hon. Chishimba Kambwili. Rather, he stated that he campaigned with him once.

3.2.24 He stated that RW5 was part of his campaign team and not the civil service who are in charge of the FISP programme. It was his further testimony that he did not strictly adhere to his campaign schedule which he exhibited in his Bundle of Documents.

3.2.25 The 1st Respondent denied PW10's allegation that he was in the company of Senior Chief Nsama at a market in Nsama District and during which occasion the Senior Chief directed his subjects to vote for the 1st respondent on the polling day. The 1st Respondent denied this allegation on grounds that on the material day, he was in Luanshya District on the Copperbelt Province visiting his family and mobilising campaign resources.

3.2.26 The 1st Respondent stated that just like with his polling agents, polling agents for the UPND equally had the right to access the GEN 20 Forms.

3.2.27 The 1st Respondent denied being aware that the people who were collecting the social cash transfer money were being threatened that they would be removed from the list of beneficiaries if they did not vote for the PF.

3.2.28 The 1st Respondent admitted that giving food to the electorate; directing them on how to vote and threatening to remove them from

the list of beneficiaries of incentives, amounts to electoral malpractice. The 1st Respondent stated that he was informed that the person who was recruiting his foot soldiers was also asking for their voter's cards. When referred to the Petitioners bundle of documents bearing the PF symbol, headed 'foot soldiers' bearing names and National Registration card numbers, and names of people at pages 1-3, the 1st Respondent denied that those were the forms they used to recruit the foot soldiers. He stated that they were recruiting foot soldiers equal to 10% of the number of registered voters at a polling station.

3.2.29 During re-examination, the 1st Respondent stated that before commencing his campaigns, he bought 56 voter's registers for each of the 56 streams of Chimbamilonga Constituency, from the ECZ. When they recruited foot soldiers, each had a register for a respective polling station so that each foot soldier should identify 9 voters in that catchment area and take down details of the voter, and this was by way of ensuring that they were not engaging voters who are dead. These were the reasons why they were looking at voter's cards and National Registration card numbers. Further, the Polling agents are the ones who were reporting to him and not foot soldiers.

3.2.30 Referring to the alleged tribal remarks by Hon. Chishimba Kambwili, the 1st Respondent clarified that they were made during the campaign period. As such, they can be regarded as being a campaign gimmick.

3.2.31 The 1st Respondent denied the Petitioner's allegation that the 1st Respondent and /or his agents bribed voters with food on the voting

day or at all on grounds that the allegation is bare because the requisite Petitioner's witness did not supply the names of the alleged voters who were bribed.

3.2.32 **RW1** was Chansa Hastings who testified that from 17th May 2021 to 11th August 2021, he was the Campaign Manager for the 1st Respondent and the PF, in the Chimbamilonga Constituency for the subject general elections. He stated that the Constituency has 17 wards and 56 polling stations. That Nsumbu and Kasaba Bay Polling Stations have 4 and 2 streams, respectively. He recounted the geographical arrangement of the Constituency in the manner narrated by the 1st Respondent.

3.2.33 **RW1** stated that in adherence to ECZ and Ministry of Health regulations regarding the COVID-19, he established command centres in all the 56 polling stations and deployed foot soldiers therein to conduct door-to-door campaigns. The Command Centres would also be feeding centres for the foot soldiers.

3.2.34 He used the documents appearing at pages 1-3 of the Petitioner's Bundle of Documents to recruit the foot soldiers.

3.2.35 **RW1** denied the allegation that Hon. Chishimba Kambwili uttered tribal remarks. His testimony here is the same as that for the 1st Respondent and for obvious reasons, I shall not recite it.

3.2.36 **RW1** stated that the social cash transfer programme is a government program under the Department of Social Welfare and Community Development and has been in existence long before the subject general elections. He denied the assertion that himself and the

members of his team administered the program. Similarly, he denied (on behalf of the 1st Respondent, himself and his team) of having distributed relief food or farming inputs and this is because the program is administered by the government and not the PF. He further denied the assertion that RW9 influenced FISP programmes under the Chibusa Co-operative.

3.2.37 RW1 confirmed that RW5 lives in Mwambeshi ward, is a member of the PF and was an agent during the general election. He denied the assertion that the members of PF perpetrated violence. Rather, the violence was instigated by members of the UPND against the PF. Here, RW1 cited the incidence of 21st June 2021, in the manner narrated by the 1st Respondent adding that the ringleaders of the violence were Petro Sikapundwa, Wezi Sikazwe and Kauseni.

3.2.38 He denied the allegation that Senior Chief Nsama was part of their campaign team. Further, the Senior Chief did not threaten people with banishment from his chieftdom if they did not vote for the PF.

3.2.39 He denied the allegation that the 1st Respondent donated a mat to a mosque during the campaign period and did not allow his candidate to leave Mwambeshi and Lunsangwe wards on 11th August, 2021 because he wanted him to prepare for the next day's election as he was voting from Kabobole ward. RW1 was in Nsumbu ward on the material day and if there was to be a donation of a mat, he could have done it personally as he was in Nsumbu ward and was to vote from there.

3.2.40 He stated that the elections in issue were free and fair considering that there were only two incidents of violence.

3.2.41 During cross-examination, by Mr. Siatwambo, RW1 re-stated his evidence-in-chief save to add as follows: that he was not aware that RW3 had gone to beat up PW3 and demolished a house belonging to one of the members of the UPND; that he was not aware that a police officer testified that there were 12 cases of political violence that had been reported at Nsama Police Station; that the Petitioner was on the run that's why he was not part of the meeting held on 28th August 2021; that the Petitioner is the one who beat RW1 and the others on their way back from Ndole Polling Station; that the evidence to show that the Petitioner is the one who attacked him is with the Conflict Management Committee; that the foot soldiers he recruited were members of the PF. And that he did not recruit voters in the disguise of foot soldiers.

3.2.42 RW1 further stated that he was not with the 1st Respondent at all times and in times he was not with him, he would not know what he was doing.

3.2.43 **RW2** was Chishimba Moses who is Senior Chief Nsama. He denied having campaigned for the 1st Respondent or at all; having ferried voters to the polling station on the polling day or at all or having denied none-PF members from boarding his motor vehicle as there is no need to transport voters by a motor vehicle since the polling station is only 450 meters away; that he went to admonish his subjects at the market to vote for the 1st Respondent or threatened to

banish from his chiefdom, those who voted otherwise, in the company of the 1st Respondent, Siame and kelvin or at all adding that he has no authority to direct his subjects on who to vote for; that he never attempted to beat James on 7th August 2021 or at all otherwise he could have been reported to the police; that he did not banish one Mr. Chishinka from the village because he was a member of the UPND or at all adding that the said Mr. Chishinka is in fact still residing in the chiefdom.

3.2.44 There was no cross examination from Mr. Zokani.

3.2.45 During cross-examination by Mr. Siatwambo, RW2 stated that he was not aware of any incidences of violence as he was always at his palace. He never received any reports to that effect except those of witchcraft. He is very well versed with the law that as a chief he is not supposed to be partisan and that's the reason he was never found in such incidences. That each candidates used to pay curtesy calls on him individually seeking for his blessing to contest in his chiefdom. He would bless and advise them to work in harmony.

3.2.46 RW2 stated that PW11 is his subject and that he knows him very well. That no one has ever accused him of stealing and this is because he does not steal. He is not aware that it is alleged he threatened banishment from his chiefdom and denied ever uttering such remarks.

3.2.47 There was no re-examination.

3.2.48 **RW3** was Stevan Musonda, the Constituency Chairman for Chimbamilonga under the PF. He testified that they started their

campaigns on 12th June, 2021. The Campaigning Manager put up command centres where they met with their people. On 27th June 2021, he and others went to meet foot soldiers in Nsumbu. On the 28th June 2021, when they were about to reach their command centre, they found the road blocked with stones. RW3 disembarked from the vehicle with the Campaign Manager with two other men. Little did they know that it was a trap. Suddenly the Campaign Manager was stoned, he saw Wezi Sikazwe get a stick and hit him on his head whereupon he fainted and he was taken to the Hospital. Thereafter, he was discharged and taken to the Command Centre where he was informed that they had a meeting with officials from the UPND at the police station. The incident left a scar on his head. The Court saw the scar. It was stretching across the victim's head from the back to the front. He produced a document at page 6 of the 1st Respondents bundle and said it was his medical report indicating the wounds he sustained during the incident.

3.2.49 On the 20th day of July 2021, while at his shop in Nsama, RW3 heard people screaming. When he got to the road, he found Jasper Chimbala had been hit with a chain by a member of the UPND. The UPND had come with a light truck canter full of stones intended to be used to throw at people. He was able to recognise Wezi, the Petitioner, Joshua Shikapundwa and Mr. Yumba. They said that RW3 is the one they were looking for and yet again he was hit with a stone on his head. He sustained a cut and was later taken to the police station by members of the PF. He showed the Court another medical report

which appeared at page 8 of the 1st Respondent's bundle of documents. RW3 further testified that despite all these attacks on him, he participated in the District Conflict Management Committee meeting as a member. The meeting was chaired by Father Musukuma and the Clerk was a planning officer from the Council by the names of Kasanda. From the UPND was PW9 as well as Gospel Kafuna representing ten churches, Kasombolo, RW5 for the Movement for Multi -Party Democracy (MMD) and Chris for the FDD.

3.2.50 RW3 stated that there were only two incidents involving political violence: one at Nsumbu on 20th June, 2021 and the other one at Nsama on 20th July, 2021. The other incidences of violence considered by the Conflict Management Committee were perpetrated by the UPND namely that the UPND had burnt canoes belonging to the PF.

3.2.51 The witness denied the allegation he (RW3) and his son, beat-up PW3. Rather, he was the one who was beaten by members of the UPND but there was nothing that happened and they voted peacefully. That indeed that he has 3 sons but that his son by the name of Gershom Chola, who is alleged to have participated in beating Pw3 was in fact in Katwatwa on the material date. His other son, Alex Chansa, is a minor (aged 8 years) who is not able to stone such an elderly woman.

3.2.52 He denied having attacked PW2 and stealing his solar panel on 20th July 2021, or at all since he stays about 25 Kilometres away from Pw2's home, the scene of the alleged incidents. He added that he does not own a motor bike that could have facilitated for his movement to

the scene of the alleged crime. Further, his home is situated about 100 metres away from the police station and if he did participate in the alleged attack, he could have been easily arrested.

3.2.53 Rw3 stated that there were no other incidences that were reported to the Conflict Management Committee. Further, the post-election meeting that was held did not disclose that there were reports of violence in the elections.

3.2.54 Under cross-examination by Mr. Siatwambo, RW3_restated his evidence-in-chief save to add as follows: that he was not an agent for the 1st Respondent but that he was part of his campaign team. He stated that when he took a break from campaigns for two weeks from 15th July 2021, he remained within the Constituency during which he observed only two incidences of violence. That his daughter Dyna was never at Katwatwa but his son, Gershom. He added that he is not aware that he is on the police wanted list for political violence and beating PW3 plus destroying PW2's house.

3.2.55 RW3 maintained that he is not aware that there are still other cases of political violence the police are investigating. He is only aware of the incidents of 28th June and 20th July 2021.

3.2.56 There was no cross-examination from Mr. Zokani and no re-examination.

3.2.57 RW4 was Kampela Wedson. He testified that in the beginning of the subject general elections, him, alongside RW5, escorted the 1st Respondent to file his nominations. On 11th August, 2021, the 1st

Respondent met polling agents for Mwambeshi Ward. On the 12th August 2021 he was not a polling agent.

3.2.58 There was no cross-examination from Mr. Zokani.

3.2.59 When cross-examined by Mr. Siatwambo, RW4 stated that the only role he played was to escort the 1st Respondent to file his nominations at the ECZ. He also escorted him when he went to meet the polling agents on 11th August 2021. That apart from these roles, he does not know anything else in this matter.

3.2.60 **RW5** was Taineke Chansa. He testified that he is a member of the PF under Chimbamilonga Constituency. Further, he was an Election Agent, alongside RW4, for the 1st Respondent. That on 17th May 2021, he escorted the 1st Respondent to file his nominations.

3.2.61 He stated that PW9 joined Chibusu Co-operative Society in 2008. In 2012, he became Chairperson of the Co-operative. And, according to the Constitution of the Co-operative, a chairperson's tenure is only one term which is a period of three years. Be that as it may, PW9 held on to the chairmanship until February 2021 when he lost elections to RW5 after re-contesting the position. He stated that he has no powers to remove anyone from the Co-operative adding that PW9 is still a member of the co-operative. Therefore, the allegation that PW9 was removed by RW5 from the position of Chairman of the Co-operative because he was a member of the UPND, is false.

3.2.62 There was no cross-examination from Mr. Zokani.

3.2.63 During cross-examination by Mr. Siatwambo, RW5 re-stated his evidence-in-chief save to add that he does not have a copy of the

Constitution of the Co-operative to prove that a chairperson of the Co-operative is prevented from contesting for a second term of office. He denied Counsel's suggestion that in the February 2021 election for the position of Chairperson of Chibusa Co-operative, PW9 got 27 votes and won the elections.

3.2.64 There was no re-examination.

3.2.65 **RW6** was Chansa Evans who gave his testimony as follows: that he was an agent for the 1st Respondent and a party agent for purposes of the subject general elections. On 12th August 2021, he attended Nsemiwe Polling Station situated in Fungwa Ward for purposes of executing his roles outlined above. Voting went well and the 1st Respondent was declared winner. He did not meet the 1st Respondent on 12th August 2021. Rather, he met him on 11th August 2021 at Lunsangwe.

3.2.66 There was no cross-examination from Mr. Zokani.

3.2.67 Under cross-examination by Mr. Siatwambo, RW6 said he was at the polling station the whole day and as such did not see what happened at other polling stations. He has no knowledge of political violence incidences that could have happened and the allegations thereof.

3.2.68 **RW7** was Mpundu Isaac. He testified that on 11th August, 2021, the 1st Respondent met him as a polling agent, indeed alongside other polling agents, for the PF, at his house in Lunsangwe at 10:00hrs. The 1st Respondent ran them through guidelines from ECZ.

3.2.69 The witness told the Court that his polling station was Lunsangwe situated in Lunsangwe Ward and that the polls were violent-free.

3.2.70 There was no cross-examination from Mr. Zokani.

3.2.71 During cross-examination, by Mr. Siatwambo, RW7 said that he was not invited to attend the meeting with Hon. Chishimba Kambwili. That he was at Lunsangwe the whole day and as such did not have sight of the activities of other polling stations. He therefore has no testimony to offer on the allegations brought by the Petitioner.

3.2.72 **RW8** was Jameson Chansa who testified that on 11th August 2021, the 1st Respondent had a meeting with polling agents in Mwambeshi Ward at 14: 30 hrs. He was a polling agent for Kabobole Polling Station in Mwambeshi Ward, for the PF.

3.2.73 There was no cross-examination from Mr. Zokani.

3.2.74 During cross-examination by Mr. Siatwambo, RW8 stated that he did not attend the meeting where Hon. Chishimba Kambwili was in attendance. Further, he has no testimony to offer on the allegations by the 1st respondent.

3.2.75 There was no re-examination. This marked the 1st Respondent's defence.

3.2.76 Counsel for the 2nd Respondent informed the Court that the 2nd Respondent would not call a witness. The 2nd Respondent is thereby not prejudiced because according to the case of **Khalid Mohammed v Attorney General (1)** the Supreme Court of Zambia guided that a Plaintiff cannot succeed automatically if a defence fails and that he

must prove his case whatever may be said of the opponent's case. Applied to the present petition, this principle of law demands that the Petitioner must prove to the required standard, his allegations against the 2nd Respondent despite the 2nd Respondent's decision not to offer evidence in defence.

4.0 SUBMISSIONS

4.1. In terms of submissions, the record discloses that Mr. Siatwambo undertook to file the Petitioner's written submissions into Court on or before 8th October 2021. Mr. Khosa and Mr. Zokani undertook to file written submissions on behalf of their respective clients on or before 15th October 2021. I am dismayed that none of them filed their submissions in compliance with their foregoing undertakings. Mr. Siatwaambo and Mr. Khosa filed their submissions into Court out of time and without leave of Court allowing them to do so. For this reason, I have not considered both Counsel's submissions. Mr. Zokani did not file any submissions at all.

4.2. Given the foregoing, this judgment is without the parties' submissions. However, they are not prejudiced because I have considered the evidence and the relevant law. In any event, submissions are merely persuasive so that even without them, a litigant is not disadvantaged.

5.0 DETERMINATION

5.1. The above are the issues in toto. I have considered them. I shall henceforth state my findings and apply the law thereto. But first, I shall highlight the law governing the electoral process in Zambia. This

comprise domestic legislation and, relevant international and regional human rights instruments to which Zambia is a State Party such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Commonwealth Charter, the African Charter on Human and Peoples' Rights, the African Union Declaration on the Principles Governing Democratic Elections and the SADC Principles and Guidelines Governing Democratic Elections in Africa.

5.2. Relevant to the present petition, domestic electoral legislation is as follows:

- (i) The Constitution of Zambia, Chapter 1 of the Laws of Zambia (hereinafter referred to as 'Cap. 1') as read with the Constitution of Zambia (Amendment) Act No. 2 of 2016 (hereinafter referred to as Act. No.2 of 2016);
- (ii) The Electoral Process Act, Act No.35 of 2016 (hereinafter referred to as the 'EPA');
- (iii) The Electoral Petition Rules, Statutory Instrument No. 426 of 1968 as amended by the Electoral Petition (Amendment) Rules, Statutory Instrument No. 443 of 1968;
- (iv) The Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016;
- (v) The Electoral Process (Code of Conduct) (Enforcement) Regulations, 2016 (herein after referred to as the '2016 Electoral Code of Conduct') as amended by the Electoral

Process (Code of Conduct) (Amendment) Regulations, 2020 (hereinafter referred to as the '2020 Electoral Code of Conduct') Statutory Instrument No. 35 of 2020. And;

(vi) The Electoral Process (Registration of Voters) Regulations, 2020, Statutory Instrument No. 80 of 2020

5.3. The principles established to govern the conduct of elections in Zambia, originate from the supreme law of the Republic, particularly Article 45 of Act No. 2 of 2016. Of relevance to the present petition, they include the following: that citizens are free to exercise their political rights...(a) that elections are free and fair; that elections are free from violence, intimidation and corruption; independence, accountability, efficiency and transparency of the electoral process...and timely resolution of electoral disputes.

5.4. Suffice from the onset to state that on the authority of section 100(3) of the EPA read with section 97 (1), section 98 (c) and section 102 of the same Act, the present petition is properly before me firstly for having been filed into Court within the prescribed time frame of fourteen days after the date on which the result of the subject election was duly declared. This is in accordance with section 100(3) of the EPA. Secondly, for having been commenced in the prescribed manner, namely by way of a petition. This is in accordance with section 97(1) of the EPA. Thirdly, for having been commenced by a person who was a candidate in the election in issue, the Petitioner. This is on the authority of section 98(c) of the EPA. And fourthly, the Petitioner having complied with the requirements of section 102 of the EPA,

namely by making a deposit of the security for costs before any further steps could be taken in prosecuting the petition.

5.5. Further, the 2nd Respondent has been properly sued in this petition and this is on account of it being the body that was solely and legally charged with the responsibility of implementing the electoral process as envisaged under the Constitution of Zambia; conducting the subject election and to regulate the conduct of candidates. This position is supported by Article 229 (2) (a), (b), (e), and (h) of the Constitution (Amendment) Act No.2 of 2016 (hereinafter referred to as 'Act No. 2. of 2016') as read with Article 291(1) of the same Act, and, the preamble to the EPA which in part reads as follows

An Act to provide...for the conduct of elections by the Electoral Commission of Zambia and empower the Commission to make regulations in matters relating to elections...

5.6. Article 229(1) of Act No. 2 of 2016 provides for the establishment of the ECZ. Article 229 (2) of the same Act mandates the ECZ in the following terms (quoting only relevant portions):

The Electoral Commission shall—

- (a) implement the electoral process;
- (b) conduct elections and referenda;
- (d) settle minor electoral disputes, as prescribed;
- (e) regulate the conduct of voters and candidates;
- (f) accredit observers and election agents, as prescribed...

5.7. I shall now state the law regarding the burden and standard of proof in this petition. Next, I shall outline the issues not in dispute and thereafter, the issues in dispute and for determination by this Court.

A discussion of the issues in dispute shall result into my findings and decision as to whether or not the present petition has merit.

5.8 An election petition is a species of a civil action. In terms of burden of proof, the well settled principle that **“he who alleges must prove”**, applies. In this petition therefore, the burden is upon the Petitioner, to prove his allegations against both Respondents.

5.9 The standard of proof in an election petition, is higher than that which is applicable in ordinary civil cases namely “proof on the balance of probabilities”, but lower than “proof beyond reasonable doubt” applicable in criminal matters. In an election petition, the Petitioner must prove his or her allegations to a **“fairly high degree of convincing clarity”**. The foregoing positions are supported by the following holding of the Supreme Court of Zambia, in the petition of **Brelsford James Gondwe v Catherine Namugala (2)**

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

5.10 Relevant to the present petition, the grounds which must be proved by the Petitioner and upon which the election of the 1st Respondent as a Member of Parliament, shall be declared void by this Court, are prescribed by sections 97(2) (a) and 97(2)(b) of the EPA. They fall into two categories. The first category is contained in section 97(2) (a) of

the Act. They relate to the conduct of the petitioned candidate and his election or polling agents. The second category is contained in section 97(2)(b) of the Act. They relate to the ECZ in the manner it conducted the election in issue.

- 5.11 Concerning the grounds under the first category, the proscribed conduct according to section 97(2)(a) of the EPA are the following: a corrupt practice, illegal practice or other misconduct. The provision contemplates that the mentioned proscribed conduct must have been committed by the candidate, his election or polling agent or by any other person but with the knowledge and consent or approval of that candidate or his or her election agent or polling agent. Further, the Petitioner must prove that as a result of the proscribed conduct, the majority of the voters in the constituency in issue, were prevented from voting for a candidate they preferred.
- 5.12 A 'corrupt practice' has been defined under section 2 of the EPA to mean ***“any conduct which is declared to be a corrupt practice in accordance with section eighty-one”***. I shall discuss the provisions of section 81 of the EPA in the due course.
- 5.13 Relevant to this petition, ***“illegal practices”*** within the meaning of section 97(2)(a) of the EPA, have been outlined in sections 81, 83, 84, 86 and 87 of the same Act. These are bribery, undue influence, illegal practice of publishing false statements in respect of candidates, illegal practices in respect of public meetings and illegal practices relating to the poll, respectively.

5.14 The term “**other misconduct**” in section 97(2) (a) of the EPA has not been defined by the Act. However, the **Electoral Code of Conduct, 2016** which prescribe the manner in which a person or other stakeholders in the electoral process including candidates, must conduct themselves in connection with an election, is part of the Act (by way of a schedule). This position is premised on section 9 of the **Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**. The provision states as follows

Every Schedule to or table in any written law, together with notes thereto, shall be construed and have effect as part of such written law.

5.15 Therefore, electoral offences contained in the said Electoral Code can be a basis or ground, within the meaning of section 97(2)(a) of the EPA, for challenging and nullifying the election of a Member of Parliament if proved to the required standard.

5.16 The holdings of the Constitutional Court of Zambia in the cases of **Austin C. Liato v Sitwala Sitwala (3)** and **Mbololwa Subulwa v Kaliye Mandandi (4)** support this position.

5.17 Further, the following holding by the Constitutional Court of Zambia in the case of **Herbert Shabula and Greyford Monde (5)** at page J34, is insightful and on point about this position

In so far as corrupt and illegal practices are concerned, the Act in section 81 and 95 provide what amounts to corrupt and illegal practices for election avoidance purposes. However, the Act does not define what amounts to ‘other misconduct’. That notwithstanding, paragraph

15(1) of the Code of Conduct, 2016 does prescribe conduct considered to be misconduct that can result in an election being declared void within the contemplation of section 97(2)(a) of the Act.

5.18 Quoting only relevant parts, Paragraph or Regulation 15 of the mentioned Code of Conduct prescribes as follows

A person shall not: (a) cause violence or use any language or engage in any conduct which leads or is likely to lead to violence or intimidation during an election campaign or election...

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

(e) prevent the reasonable access to voters of any candidate or political party in any manner for the purpose of conducting voter education, fund raising, canvassing membership or soliciting support...

(h) offer any inducement, reward or bribe to any person in consideration of such person – (i) joining or not joining any political part...(v) surrendering that person's voter's card, or national registration card, or both; or (vi) offering or surrender a voter's card or national registration card or both;

(i) abuse or attempt to abuse a position of power, privilege or influence, including...traditional authority for political purposes including any offer of reward or for the issuance of a threat...

(k) use Government or parastatal transportation or facilities for campaign purposes...

(m) discriminate against any person on grounds of ...ethnicity...or in any other manner in connection with an election or political activity...

(o) be in possession of a voter's card or national registration card belonging to another person during the campaign period...

(2) A person who contravenes subparagraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

5.19 An election agent and a polling agent have been defined under section 2 of the EPA. Here, an '**election agent**' is defined as "***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***". A '**polling agent**' is defined as "***an agent appointed by a candidate in respect of a polling station***".

5.20 Section 97(2)(a) of Act No. 35 of 2016 has been interpreted by Zambian superior Courts in a plethora of election petitions such as **Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General (6)**. Here, the Constitutional Court of Zambia stated that

In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a) there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent...in addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of

adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

5.21 Turning to grounds in the second category, the requisite provision, section 97(2)(b) of the EPA empowers the High Court to nullify the election of a petitioned Member of Parliament if the ECZ, in conducting the election in issue, did not comply with the principles contained in the provisions of the EPA relating to the conduct of elections and that such non-compliance, affected the results of the election.

5.22 Section 97(2)(4) of the EPA has a caveat protecting the validity of a parliamentary election in spite of the manner it was conducted by the ECZ. The caveat is such that even though an officer of the ECZ had breached his official duty in the manner he conducted the election in issue, the High Court shall not nullify the election of the winner if nonetheless, the election was conducted in substantial conformity with the provisions of the EPA and that the officer's breach of his official duty, did not affect the result of that election. This position was further emphasised by the Constitutional Court of Zambia in the petitions of **Christabel Ng'imbu v Prisca Chisengo Kucheka (7)** and **Giles Chomba Yambayamba v Kapembwa Simbao (8)**.

5.23 The foregoing principles shall be adopted in determining the present petition. With that said, I shall outline the issues not in dispute. These are as follows:

- (i) That the ECZ conducted the subject parliamentary election in Chimbamilonga Constituency on 12th of August 2021. In the mentioned election, the Petitioner was sponsored by the UPND whereas the 1st Respondent was sponsored by the PF;
- (ii) That at the material time, Chimbamilonga Constituency was made up of 17 wards listed in paragraph 3.2.4 above and 56 polling stations;
- (iii) That the total number of Registered voters in the Constituency was 28,602 out of which a total number of 21,188 voted. This is according to the Registered Voters per Polling Station, 2021, ECZ Register.
- (iv) That at the close of the election, the ECZ, through its Returning Officer, declared the 1st Respondent as the duly elected candidate for Chimbamilonga Constituency. The results are outlined in paragraph 2.1.2, above.

5.24 These are the issues not in dispute. I shall now outline the issues in dispute and for determination by this Court. Essentially, these are the issues that have been raised by the Petitioner in his petition. They are outlined in paragraph 2.3 of this judgement as follows:

- (i) Whether or not during the campaign period but before the election date, the 1st Respondent and his campaign team were buying voter's cards in the Petitioner's stronghold areas. And that subsequently, three people were apprehended by the police and that

such people had in their possession, voter's cards and National Registration Cards. And that in consequence of this, the Campaign Manager of the 1st Respondent was heard saying that he had 4000 votes.

(ii) Whether or not during the campaign period, to the day of the elections, the 1st Respondent together with his campaign team and Hon. Chishimba Kambwili, uttered tribal remarks against the Petitioner and his political party, the UPND whereupon they urged electorates (on account of their Bemba tribe) not to vote for the Petitioner for contesting on a Tonga-driven political party, the UPND.

(iii) Whether or not on the polling day, the police discharged tear gas canisters at Nsumbu Primary School Polling Station thereby frightening and dispersing voters on queues and preventing them from voting.

(iv) Whether or not the night before the election day, presiding officers at various polling stations were giving out money under the guise of social cash transfer and they were telling people that if they do not vote for the PF and its parliamentary candidate (the 1st Respondent), the people will not be given more money and that they would place cameras in the voting booths to monitor all who received the money and to ensure that they voted for the PF and the 1st Respondent.

(v) Whether or not on 12th August 2021, the day of the election, the 1st Respondent with his campaign team distributed food items to the people as they were going to vote.

(vi) Whether or not Senior Chief Nsama went to all the polling stations in Chimbamilonga Constituency telling all the people that he was going to chase them from his chieftdom if they did not vote for the 1st Respondent.

(vii) Whether or not the 1st Respondent and the members of his political party threatened the Petitioner's election monitors and chased them from the polling stations. And,

(viii) Whether or not on the polling day, the polling agents for the Petitioner were not given the GEN 20 Forms and that they were denied access to the polling stations.

5.25 These are the issues in dispute. The first, second, fourth, fifth, sixth and seventh issues in dispute, relate solely to the 1st Respondent. The eighth issue in dispute solely relate to the 2nd Respondent. And, the third issue in dispute relate to State agencies involved in policing the General Elections. I shall deal with them in the order they have been listed.

5.26 About the first issue, parties have advanced conflicting versions in that, whereas the Petitioner has alleged that the 1st Respondent and/or his campaign team had engaged themselves in the act of buying voter's cards from electorates, the 1st Respondent and his witnesses have denied the allegation.

5.27 I shall firstly ascertain if buying of voter's cards is a species of the conduct contemplated by section 97 (2) (a) of the EPA for purposes of nullifying the election of a Member of Parliament. Secondly, and only

if the conduct has been found to fall within the ambit of section 97 (2) (a) of the EPA, whether the alleged incident occurred. Thirdly and only if the incident had occurred, whether or not it was committed, consented to or approved by the 1st Respondent and/or his election or polling agents. Lastly, and if the previous question is answered in the affirmative, whether or not the conduct prevented the majority of the voters in the Constituency, from voting for a candidate of their preferred choice.

5.28 The foregoing considerations applies to all the allegations relating to the 1st Respondent and only after they have all been proven, shall any of the allegation constitute a ground for nullifying the 1st Respondent's subject election. The converse entails failure of the allegation.

5.29 Turning to the first issue, the act of buying a voter's card from a voter, is defined as an 'illegal practice' under section 97 (2)(a) as read with sections 2 and 87(1)(d) and (e) of the EPA. The requisite portions of section 2 of the Act states as follows: ***"illegal practice" means an offence which is declared under this Act to be an illegal practice"***

5.30 Part VII of the EPA under which section 87 cited above falls, is entitled: ***"corrupt and illegal practices and other election offences"***. Section 87 is itself entitled: ***"Illegal practices relating to the poll"***. The provision provides as follows

Section 87(1) A person shall not...(d) sell or offer to sell any ballot paper or voter's card to any person or purchase or offer to purchase any ballot paper or voter's card from any person;

(e) not being a person entitled under this Act to be in possession of a ballot paper or voter's card, have any such ballot

5.31 In view of the foregoing, I reiterate that the act of buying voter's cards alleged above by the Petitioner, is an illegal practice within the meaning of section 97(2)(a) of the EPA, for purposes of nullifying the election of a petitioned Member of Parliament.

5.32 With that said, I turn to the next question, namely if the act occurred. The Petitioner did not perceive the incident. Rather, he relied on Pw7 who told the Court that he was the elected Councillor for Nsumbu Ward on the UPND ticket in the subject General Elections. The Witness also informed the Court that he caught two women with other people's voter's cards, on 12th and 13th June 2021, respectively and he reported the two incidents to the police. The witness did not specify the number of voter's cards he had found on the two women. However, he caught the women in Nsumbu Ward. Suffice it to add that the Petitioner did not lead evidence to substantiate his assertion that the 1st Respondent's Campaign Manager was heard boasting that he had in his possession, 4000 votes. In the result, I consider this particular assertion, abandoned. I shall therefore only direct my mind to PW7's testimony.

5.33 In evaluating PW7's testimony, I have found helpful, the following

holding by Musonda, J (as he then was) in the election petition of **Kalumiana v Lungwangwa Geoffrey and the Electoral Commission of Zambia (9)**

The whole petition turns out of the credibility of witnesses as you have most petitioners' witnesses giving evidence to support allegations contained in the petition, while witnesses for the Respondent dispute those allegations. As I said in the petition of Simasiku Namakando and Eileen Imbwae, the witnesses have to be subjected to strict scrutiny of their integrities.

5.34 In the petition of **Simasiku Namakando v. Eileen Imbwae (10)** referred to above, Musonda, J, held thus

This case therefore hinges on the credibility of the witnesses and it is imperative to put under strict scrutiny their credibility. To aid such analysis, I will categorise the witnesses into four groups in this petition. The attachment of weight to evidence follows the order. More weight is attached to the fourth, then third, then second and lastly, the first category of witnesses.

- (i) Witnesses who belong to the Petitioner and Respondents' political parties;
- (ii) Witnesses who were electoral officials engaged by the Electoral Commission to conduct the election;
- (iii) Witnesses who belong to the Petitioner or Respondent's party who gave evidence against their own party candidate;
- (iv) Monitors or police officers who are not party to these proceedings nor were they party members.

5.35 The foregoing is supported by the following persuasive but equally apt holding in the Ugandan election petition of **Nabukeera Hussein Hanifa v Kibule Ronald and Another (11)** cited with approval by Justice Kaoma in the petition of **Christopher Kalenga v Annie Munshya and Two Others (12)**

in an election petition just like in an election itself each party is set out to win. Therefore, the Court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny, circumspection. It would be difficult indeed for a court to believe that supporters of one candidate behave in a saintly manner, while of the other candidate were all servants of the devil. In an election contest of this nature, witnesses most of them are motivated by the desire to score victory against their opponents will deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain.

5.36 In the petition of **Mbololwa Subulwa v Kaliye Mandandi (supra)**, the Constitutional Court of Zambia guided that the evidence of partisan witnesses require corroboration. The Court stated as follows

as a starting point, we wish to echo here the position we took in *Steven Masumba*, where we made it clear that in terms of the requirement for corroborating evidence in election petitions, witnesses who belong to a candidate's own political party or who are members of the candidate's campaign team, must be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood by such witnesses in an

effort to tilt the balance of proof in favour of the candidate that they support.

5.37 According to **Steven H. Gifis., Dictionary of Legal Terms: Definition and Explanations for Non-Lawyers, Third Edition,** corroborative evidence means

evidence complementary to evidence already given and tending to strengthen or confirm it; additional evidence of a different character on the same point.

5.38 I have adopted the foregoing principles. As such, I have approached PW7's testimony cautiously and this is in view of his affiliation to the UPND, the political party that sponsored the Petitioner in the subject election. I am of this view because by virtue of his affiliation to the UPND, PW7 may harbour partisan interests in this petition. Therefore, his evidence must be corroborated.

5.39 Bearing the foregoing in mind, I have combed through the evidence but did not find corroborative evidence supporting Pw7's testimony yet in my view, such evidence could have been easily supplied by the police to whom Pw7 allegedly reported the two incidents. Further, it is not clear why the Petitioner opted not to call the said corroborative evidence. The absence of corroborative evidence renders the allegation short of the threshold prescribed by the foregoing authorities, for purposes of admitting the evidence of a partisan witness. As highlighted already, independent evidence is required to exclude the possibility of exaggeration or falsehood by a witness with a partisan interest. With this said, I am not satisfied that the Petitioner has proved to the required standard, the allegation that the 1st

Respondent and/or his campaign team, were engaged in buying voter's cards as a way of propelling the 1st Respondent's subject election.

5.40 In any event, even assuming that the incident indeed occurred, Pw7 has not demonstrated that the 1st Respondent and/or his election or polling agents, are complicity to the alleged conduct as prescribed by section 97 (2)(b) of the EPA. Further, and assuming that the allegation was proved and that the 1st Respondent and/ or his agents had acquiesced to the impugned conduct, the allegation would not sustain the Petitioner's prayer for a nullification of the 1st Respondent's election and this is in view of the fact that both Pw7 and the 1st Respondent won the elections as against other contenders in Nsumbu Ward, the site of the alleged voter's card buying. This position implies that the impugned conduct if at all it occurred, did not sway the minds of the majority of the voters as to prevent them from voting for the Petitioner in Nsumbu ward. If it did, the 1st Respondent and the Councillor who was sponsored by the PF, would have won their respective elections.

5.41 Based on the foregoing, I dismiss the allegation.

5.42 I now consider the second issue in dispute. Herein, the Petitioner has alleged that during the campaign period, to the day of the elections, the 1st Respondent together with his campaign team and Hon. Chishimba Kambwili uttered tribal remarks against the Petitioner and his political party (the UPND) whereupon they urged electorates (on

account of their Bemba tribe) not to vote for the Petitioner for having been sponsored by a Tonga-driven political party.

5.43 In seeking to prove this allegation, the Petitioner called one witness, Pw1. Pw1 told the Court that he attended the meeting at which Hon. Chishimba Kambwili uttered the alleged tribal remarks. Pw1 did not produce documentary evidence depicting the remarks. Therefore, reliance is placed on his oral testimony.

5.44 I must highlight that it was not stated whether or not Pw1 is an independent witness so as to guide me in evaluating his testimony. That as it may, I am of the view that the impugned meeting indeed took place and that during the meeting, Hon. Chishimba Kambwili uttered remarks relating to the voting patterns in the Northern and Southern Provinces. I am of this view because this aspect has been confirmed by the 1st Respondent and some of his witnesses except that they have denied that Hon. Chishimba Kambwili uttered tribal remarks against the Petitioner and his political party. Rather, they maintained that Hon. Chishimba Kambwili only made comparisons in terms of the voting patterns between the two provinces, by way of urging the electorates in Chimbamilonga Constituency to vote in large numbers on 12th August 2021. In view of the foregoing, the dispute is whether or not Hon. Chishimba Kambwili's remarks in issue were tribal.

5.45 I have carefully examined the context of the impugned remarks as suggested by PW1, the 1st Respondent and some of the 1st Respondent's witnesses. As stated already, I did not have the benefit

of documentary evidence depicting the alleged remarks. That notwithstanding, I am of the firm view that the remarks are tribal and were intended to influence the voters in Chimbamilonga Constituency to vote on tribal lines in the subject general elections. I am of this view because if the remarks were merely intended to persuade voters in Chimbamilonga to vote in large numbers, Hon. Chishimba Kambwili could have highlighted the voting patterns in all the provinces of the Republic of Zambia because they had also voted in that material year. For Hon. Chishimba Kambwili to have singled out the voting patterns only in the two political rivals' respective strongholds and with special emphasis on how the two political parties polled in the respective strongholds, he intended to influence voters in Chimbamilonga to vote on tribal lines especially considering that according to the records at ECZ, electorates in the Southern Province have been overwhelmingly voting for the UPND and not the PF.

5.46 Based on the foregoing, I reiterate that Hon. Chishimba Kambwili's remarks during the meeting in issue, were tribal. Additionally, I have found that the 1st Respondent approved the said remarks because apart from being present during the meeting, he did nothing to dissociate himself from the remarks.

5.47 Further, I reject the 1st Respondent's assertion that the occasion on which the remarks were uttered, was not a campaign platform but an in-house meeting between Hon. Chishimba Kambwili and the foot soldiers and other poll personnel for the PF in Chimbamilonga Constituency. I reject this suggestion because if the meeting was

inhouse, Pw1, who is not a member of the PF could not have been in attendance. Further, all foot soldiers and poll staff for the PF in Chimbamilonga Constituency could have attended the meeting. However, the fact that some of such personnel (for example RW7 and RW8) neither attended the meeting nor received its notice denotes that the PF election personnel were essentially not the only targeted audience. Rather, the meeting was open to any willing and available member of the public in Chimbamilonga Constituency.

5.48 That said, it remains for me to determine if the remarks fall within the ambit of section 97 of the EPA for purposes of nullifying the election of a Member of Parliament. Here, the provisions in mind are section 84 as read together with section 2 of the EPA. Section 84 of the Act proscribes the publication by one candidate in an election against another, of a false statement of the illness, death or withdrawal from the election in issue by the latter, for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not believing it to be true.

5.49 Although the provision prohibits only the publication of false statements relating to illness, death or withdrawal of another candidate from an election, when Regulation 15(1) of the Electoral Code of Conduct, 2016 which prohibits character assassination is read together with section 97(2) (a) of the EPA, it can be seen that the law in the EPA has not restricted nullification to only publication of false statements about the death or withdrawal of a candidate from the election. Further, and more importantly, section 97 (2) (a) of the EPA

empowers the High Court to nullify an election of a member of Parliament not only where an allegation of a corrupt or illegal practice is proved but also on ground of proof of "other misconduct" which is not at all defined in section 2 of the EPA.

5.50 In sum, I reiterate that section 97(2) (a) of the EPA read with Regulation 15(1)(c), of the 2016 Electoral Code of Conduct is wide enough to cover publication of false statements other than those specified in section 84 (1) of the EPA. The petitions of **Mbololwa Subulwa v Kaliye Mandandi** and **Austin C. Liato v Sitwala Sitwala**, cited above, support this position. In the latter petition, the Constitutional Court of Zambia guided that

Although section 84(1) of the EPA specifically prohibits the publication of a false statement relating to illness, death or withdrawal from an election of a candidate, that situation does not give licence to a candidate in an election to malign other candidates in relation to their personal character or conduct in order to secure his or her election

5.51 For the reasons stated above, an aggrieved candidate is empowered to petition the other, on grounds of false accusations, in this case, for having been accused of being a tribalist or for having aligned oneself with a tribal political party. I am of this view because it is clear that the falsehood is injurious to the reputation of the individual and has the potential to adversely affect how s/he is perceived by its recipients who in an election are the voters. The falsehood is evidence that the statement is calculated at influencing the voters in an election. The

following except according to The Learned Authors of **Halsbury's Laws of England, Fourth Edition (Reissue), Volume 15 at paragraph 705**, is helpful. It is discussing the making of statements relating to a candidate's character in the following terms

it is an illegal practice if before or during an election, any person, for the purpose of affecting the return of any candidate at the election, makes or publishes any false statement of fact in relation to the candidate's personal character of conduct, unless he can show that he had reasonable grounds for believing, and he did believe, the statement to be true...*The false statement of fact need not be defamatory at common law, so long as it is a statement which is calculated to influence the electors...*but it is essential that it should relate to the person rather than the political character or conduct of the candidate (the emphasis is mine).

5.52 The last pertinent question here is if the tribal remarks had swayed the voting pattern of the majority of the voters thereby preventing them from voting for their preferred candidate. Regarding this requirement, the Constitutional Court of Zambia had this to say, in the petition of **Sunday Chitundu Maluba v Rodgers Mwewa and Attorney General** (13) at paragraph 3

If a court finds a candidate liable under the said section 97 of the Electoral Process Act of 2016, it must also find that by virtue of the illegal act, the majority were prevented or were likely to have been prevented from electing a candidate of their choice. To appreciate what is meant by the 'majority', we resorted to its natural and ordinary meaning found in the Wit Smith Concise Oxford Dictionary wherein the majority is said to

be the greater number of a part...it is pertinent to note that the word is used only with countable nouns. The numerical sense of majority has been further elaborated through the use of the term widespread. In the Wit Smith Concise Oxford Dictionary, widespread means widely distributed or disseminated...in *Kambela Mazoka and Others v Levy Mwanawasa and others*, the Supreme Court shed light on what widespread means by stating that:

since a presidential election involves all the 150 constituencies, the Petitioner must prove electoral malpractices and violating of the electoral laws in at least a majority of the constituencies.

5.53 Reverting to the question I had asked myself, I have no hesitation in answering it in the negative namely that the remarks by Hon. Chishimba Kambwili though tribal, have failed to pass the majority or widespread principle. In other words, the remarks did not sway the majority of the voters. I am of this view because the incident was only reported in one ward (Nsumbu Ward) out of the seventeen wards. Therefore, the majority of the wards in the Constituency (sixteen wards) were unaffected by the remarks for there is no evidence suggesting that the remarks were communicated to voters in those other wards. In terms of figures obtained from the **Registered Voters per Polling Station, 2021, ECZ Register**, the unaffected sixteen wards have a total of 22, 068 whereas there are 6, 534 registered voters in Nsumbu Ward where the tribal remarks were uttered. Given the foregoing figures, it cannot be denied that the majority of the

voters in Chimbamilonga Constituency, were not affected by Hon. Chishimba Kambwili's tribal remarks.

5.54 That the voters were not swayed by the tribal remarks, is further confirmed by the fact that the Petitioner and his fellow political affiliate, PW7, won in Nsumbu Ward. If the voters were swayed, by the remarks, the opposite would have been the case, namely that the 1st Respondent would have been the victor in the subject election in the Ward.

5.55 Based on the foregoing, I dismiss the Petitioner's second allegation which is the second issue in dispute.

5.56 Turning to the third issue in dispute, the Petitioner has alleged that on the polling day, the police discharged tear gas canisters at Nsumbu Primary School Polling Station thereby frightening and dispersing voters on queues and preventing them from voting. The Petitioner called Pw8 and Pw4 to testify on this aspect.

5.57 Based on the principle laid down in the Simasiku Namangolwa petition (supra), I have believed the two witnesses' testimonies that the tear-gassing incident indeed occurred. I have believed them because they are credible on account of being non-partisan. Therefore, there is no motivation for them to concoct a non-existent incident.

5.58 Further, the two witnesses' version is confirmed by the fact that there is no evidence that they colluded and this is in view of the fact that the duo are strangers to each other. My firm view is that where witnesses who are strangers to each other give the same account of an incident, they are credible and their evidence must be believed.

5.59 Accordingly, I reiterate that voters at Nsumbu Primary School Polling Station, were indeed dispersed using tear-gas cannisters save to state that, on the basis of Pw4's testimony, they were dispersed by the Zambia Army and not the Zambia Police Service. However, regardless of the state actor, the conduct need consideration.

5.60 Relevant to the incident, Regulation 14 of the 2016 Electoral Code of Conduct forbids law enforcement officers, among other stakeholders connected to the electoral process, from coercing or intimidating people during campaigns or an election, by means of threats, sanction or violence. The provision states as follows

a person or a member of a law enforcement agency, civil society, a church, faith-based organisation, traditional leader, political party or media shall not, by means of threats, violence or sanction, coerce or intimidate another person during campaigns, public debate or elections.

5.61 It is not clear why the Zambia Army dispersed the voters and this is because none of their personnel came to testify about the incident. In the absence of justification, it can be concluded that they breached Regulation 14 of the 2016 Electoral Code of Conduct when they dispersed the voters. The nagging question under the circumstances is if the incident can be a basis for nullifying the subject election of the 1st Respondent.

5.62 In answering this question, I have first considered the question if the incident was widespread and thereby prevented the majority voters from voting. Having combed through the evidence, I have noted that the incident took place only at one Polling Station in the Constituency.

Therefore, the majority of the polling stations (55) were not affected by the incident. I have also considered the number of registered voters at Nsumbu Primary School Polling Station. According to the Registered Voters per Polling Station, ECZ Register, Nsumbu Primary School Polling Station has four streams but it is not clear from the evidence, whether it was all the four streams which were affected by the forceful dispersal of the voters. With this gap, I have proceeded on the assumption that the incident affected all the four streams. The total number of registered voters in the four streams is 3, 921. This figure signifies 13.7 % of the total figure of 28,602 of registered voters in Chimbamilonga Constituency. From this, it is obvious that the number of voters who were affected by the incident is far smaller than the number that was not affected.

5.63 Given the foregoing, I have found that unfortunate as the incident is in the sense of dispersing people who wanted to exercise their fundamental human right to vote in the subject election, the incident does not qualify to be a ground for nullifying the subject election of the 1st Respondent and this is because the incident was not widespread as prescribed by section 97(2)(b) of the EPA and the cases cited above, interpreting the provision.

5.64 Further, I note that the State Actors (the Army personnel) who dispersed the voters, were not under the 1st Respondent's control or supervision. Rather, they acted independently of the 1st Respondent and for their own reasons. In view of this, coupled with the localised nature of the incident, it would be a grave injustice for this Court to

apply the incident to the disadvantage of the 1st Respondent by way of nullifying his election. This view is supported by the following holding of the Constitutional Court of Zambia in the petition of **Austin C. Milambo v Machila Jamba (14)**, at page J55

...We agree with the trial Judge that where wrong doing not associated with the candidate or their election or polling agents is proved, the law as it stands now does not recognise such wrongs as grounds for nullifying an election.

5.65 Similarly, in the petition of **Lewanika v Chiluba (15)**, the Supreme Court of Zambia guided that

...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.

5.66 As highlighted already, section 2 of the EPA defines an "election agent" or "polling agent" of a candidate as a person who is specifically so appointed by such candidate. Regulation 55(1) of the Electoral Process (General) Regulations, 2016 affirms this position in the following terms

a candidate shall name an election agent in the nomination paper and, subject to the other provisions of this regulation, the person named shall be the election agent of the candidate for the purpose of that election.

5.67 Based on the foregoing, I dismiss this allegation.

5.68 I now turn to the fourth to seventh issues in dispute. In these, the Petitioner has alleged corruption or bribery and undue influence in the conduct of the subject election. The allegation involving corruption, appears in the fourth issue namely that the night before the election, presiding officers at various polling stations were allegedly giving out money to voters under the guise of social cash transfer. There is also an allegation that on 11th August 2021, the 1st Respondent donated a mat to a Mosque whereupon he solicited for votes in return.

5.69 I shall deal with the allegation involving corruption, first and those involving undue influence, later.

5.70 Concerning the bribery allegation, the relevant law has already been outlined above. This is section 2 as read with section 81 (a), (c), (d) and (e) and section 97(2)(a) of the EPA. Section 81 of the Act prescribes as follows

Section 81. (1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly - (a) give, lend, procure, offer, promise or agree to give... or offer, any money to a voter ...in order to induce that voter to vote... or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election... (c) make any gift... to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election... (d) upon or in consequence of any gift...promise...promise or endeavour to procure, the return of any candidate at any election or the vote of any voter at any election... (e) ... pay or cause to be ...paid any money to or for the use of any other person with the

intent that such money or any part thereof shall be expended in bribery at any election...

5.71 Turning to the evidence, it would appear that the Petitioner did not personally perceive the alleged corrupt practices. Rather, he is relying on witnesses who allegedly perceived the incident namely PW5 and PW6 with respect to the distribution of the social cash. And, PW8 with respect to the donation of a mat at the Mosque. Suffice to state, without hesitation, that I am satisfied that indeed the alleged social cash was distributed to the beneficiaries. Also, that there was a threat that beneficiaries who would not vote for the 1st Respondent, would be removed from the list of beneficiaries. I have found in this manner because on the authority of the petition of Simasiku Namakando (supra), Pw5 and PW6 who are the witnesses on this aspect, are credible on account of being non-partisan. Therefore, they have no interest of their own to serve and thereby to concoct a false story.

5.72 I must also state that I have taken judicial notice of the impact and effect of poverty on humanity. With this hindsight, there is no doubt that social cash is a treasured incentive by the poor who are entitled to it. Therefore, threats to exclude them from benefitting from the program would bear heavily and negatively on the targeted individual and this is likely to compel them to yield to the conditions carried by the threat. It is for this reason that PW6 gave-in to the threats by way of voting for the PF, according to her evidence. Such a threat would therefore amount to an illegal practice within the meaning of section

97(2) (a) and read with sections 2 and 83 (c) (iii) of the EPA for purposes of nullifying the election of a Member of Parliament.

5.73 Reverting to the evidence supporting the said alleged corrupt practice, PW5 was one of the distributors of the social cash in Nsumbu Ward. That as regards the social cash in issue, he was instructed by a group of people calling themselves "PF", to warn the beneficiaries to vote for the 1st Respondent lest they be removed from the list of beneficiaries. The witness said that he conveyed this warning to the beneficiaries and this aspect has been corroborated by PW6, a beneficiary of the said social cash.

5.74 As stated, I am satisfied that the social cash was indeed distributed. That notwithstanding, I am not satisfied either that it was distributed by members of the PF or that the threat to deregister beneficiaries who would not vote for the 1st Respondent, was made by presiding officers as alleged by the petitioner in his evidence, petition and affidavit in support of the petition. I am of this view because regarding the distribution of the social cash, PW5 and PW6 have told the Court that the money was being distributed by a team which was lawfully established, and not presiding officers. This therefore, defeats the Petitioner's allegation that the subject social cash was distributed by presiding officers. In the view that I have taken, the ECZ is exonerated from this allegation on account of its officers (the presiding officers), having been exonerated.

5.75 Further, I am not satisfied that the social cash was used as bribe and this is on grounds that it was a government program, which according to PW5 and PW6, had been distributed monthly as an ongoing program, to the beneficiaries even before the subject election was contemplated. This position implies that the money was scheduled to be distributed even during and even after the month of the subject General Elections. With this background, the distribution of the social cash to the beneficiaries on 11th August 2021, cannot be deemed to be a corrupt practice.

5.76 Further, I am not satisfied that PW5 and PW6 have linked the 1st Respondent to threats by the group that referred to itself as “PF” to deregister beneficiaries of the social cash who would not vote for the 1st respondent. It is not safe for this Court to hold the 1st Respondent liable for the team’s threats only because it referred to itself as “PF”, the political party which sponsored him in the disputed election. For the Court to hold the 1st Respondent liable, PW5 and PW6 needed to demonstrate that the mentioned ‘PF’ team either comprised the 1st Respondent’s election or polling agents or that its threats were directly or indirectly sponsored by the 1st Respondent. In the absence of such evidence, the allegation of undue influence of voters by the 1st Respondent, by way of threats to deregister beneficiaries who would not vote for the 1st Respondent, cannot be sustained.

5.77 My view here is supported by the holding of the Constitutional Court of Zambia in the Nkandu Luo petition (supra) that

That supporters of the PF were implicated in the attack, is not enough to attach responsibility to the 1st Respondent or her duly appointed election agents and to annul the election on the basis of section 97(2)(a)(ii) of the EPA.

5.78 In so holding, the Court affirmed its following holding in the petition of Richwell Siamunene v Sialubalo Gift (supra)

Mere proof that the UPND were 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...when section 83 is read with section 97, it is clear that violence or threat of violence must be perpetrated by the candidate or with the candidate's knowledge and approval or consent or that of his election or polling agent. In order for the candidate to be liable for the illegal practice or misconduct, it must be shown to be that of his official agent; there must be proof to the required standard that he had both knowledge of it and approved or consented to it; or that his election or polling agent had knowledge and consented to or approved of it.

5.79 Based on the foregoing, the allegation is dismissed.

5.80 That as it may, the threats by the group calling itself "PF", amounts to undue influence and on this basis, needs consideration. I shall accordingly consider it at an appropriate stage.

5.81 Turning to the allegation concerning the mat, even though the mat was not tendered in evidence, I am nonetheless satisfied that it was donated to the Mosque and I am of this view based on grounds that PW8, the witness who attested to the donation, as stated already, is similarly a credible witness and this is because he is a non-partisan. That as it may, I am not satisfied that the mat was donated for corrupt purposes. I am of this view because the allegation that the donation was accompanied with a solicitation for votes, is made by an individual (PW8) who did not perceive the alleged solicitation. Rather, PW8 was only told by other people about the solicitation of the votes that accompanied the donation of the mat. The individuals who perceived the solicitation for votes and who allegedly narrated this to PW8, have not been called to testify albeit for unknown reasons. Clearly, PW8's testimony concerning the solicitation of votes, is inadmissible hearsay in as far as the witness is eliciting to suggest that the solicitation indeed occurred, in the absence of the individual who reported this aspect to him. This position is supported by the following statement according to **Steven H. Gifis., Dictionary of Legal Terms: Definition and Explanations for Non-Lawyers, Third Edition,**

a rule that declares not admissible as evidence any statement other than that by a witness while testifying at

the hearing and offered into evidence to prove the truth of the matter stated...If, for example, a witness' statement as to what he or she heard another person say is elicited to prove the truth of what that other person said, it is hearsay. If, however, it is elicited to merely show that the words were spoken, it is not hearsay. The witness' answer will be admissible only to show that the other person spoke certain words and not to show the truth of what the other person said. The reason for the hearsay rule is that the credibility of the witness is the key ingredient in weighing the truth of his or her statement; so when that statement is made out of court, without benefit of cross-examination and without the witness' demeanor being subject to assessment by the trier of fact (judge or jury), there is generally no adequate basis for determining whether the out-of-court statement is true.

5.82 Based on the foregoing, much as I am satisfied that the mat was donated to the mosque, I dismiss the assertion that it was donated for corrupt purposes and this is on grounds that the assertion falls within the realm of inadmissible hearsay.

5.83 As regards intimidation, there is an allegation by PW9 that members of the UPND operating in the name and style of Chibusa Co-operative Society, were excluded from accessing fertilizer under the government FISP program and a Presidential Empowerment Scheme because they elected a member of the UPND (PW9) as Chairperson of the said Chibusa Co-operative Society. According to Pw9, the Co-operative Society operates in Lunsangwe and Mwambeshi Wards. That to instil more fear in members of the UPND, RW5, a member of the PF, deposed PW9 and imposed himself as Chairperson of the mentioned Chibusa Co-operative Society. That the foregoing actions prompted residents in the area to dissociate themselves from the UPND in

preference for the PF whose candidates they voted for in the subject General Elections. That the residents decided in this manner for fear that they would be denied fertilizer and other benefits from the government if they associated themselves with the UPND.

5.84 The Petitioner has not suggested that he perceived this incident. Rather, he sought to rely only on PW9, a witness who allegedly perceived the incident. PW9 is a Chairman for the UPND in Nsama District. Suffice it though from the onset to state that threatening to exclude a beneficiary from accessing FISP and other government incentives not only has the potential to bear heavily on the targeted individual but also capable of sending a strong message to the others who could be contemplating the conduct which has led to the exclusion of the beneficiary. Bearing this in mind, I have no hesitation in concluding that the subject conduct complained of by PW9 amounts to inducement within the meaning of section 83(c)(iii) of the EPA. Such a threat would therefore amount to an illegal practice within the meaning of the said provision read with sections 2 and 97(2) (a) of the EPA as a ground for purposes of nullifying the election of a Member of Parliament.

5.85 With this said, the next question is if the incident indeed occurred. Thereby, I shall forthwith, evaluate the veracity of PW9's allegation. As noted already, the witness is partisan and this is by virtue of his position of Chairman for the UPND in Nsama District. Therefore, in accordance with the principle laid down in the petition of *Mbololwa Subulwa v Kaliye Mandandi* (supra), his evidence must be

corroborated. With this hindsight, I have combed through the record but did not find any corroborative evidence. Even the assertion that he was deposed from his position as chairman by RW5 has not been corroborated yet in my view, he could have readily called an independent witness to confirm that he had won the election in the contest for the chairperson of Chibusa Co-operative. I am particularly cautious about PW9's claims that he was deposed from the position and this is in consideration that RW5 is claiming that he ascended to the position after defeating PW9 in the same election which PW9 is claiming to have won. What is therefore before me are mere words of accusation from PW9 and RW5 yet the burden is upon PW9 to prove to the Court his allegation that he had won the election but was just deposed from the position.

5.86 For lack of corroborative evidence, I dismiss PW9's allegation here. Further, even assuming that members of the Chibusa Co-operative Society were indeed intimidated as alleged by PW9, the incident would not suffice to render the subject election of the 1st Respondent null and void and this is because the number of the people who were affected is a small proportion of the total number of registered voters. To illustrate this, I recount PW9's requisite evidence. He stated that at the material time, the Co-operative society had a membership of 35. Further, it is not clear how many of these members were registered voters and actually voted in the subject election. Given this position, I reiterate that the incident, if at all it had occurred, would not have succeeded in having the subject election of the 1st Respondent

nullified and this is because it was not widespread as to prevent the majority of the voters in the Constituency, from voting for their preferred candidate.

5.87 Further, as regards intimidation, it has been alleged that on the polling day, 12th August 2021, Senior Chief Nsama, went to all the polling stations in Chimbamilonga Constituency, threatening to banish from his chieftom, people who would not vote for the 1st Respondent and the PF. The witnesses here are PW8 and PW10.

5.88 As highlighted already, PW8 is an independent witness. He told the Court that on 12th August 2021, he saw and heard the Senior Chief utter the threats to his audience in Lunsangwe Ward.

5.89 PW10 is a Youth Chairman for the UPND. He told the Court that on 6th June 2021, he heard the Senior Chief, who was in the company of the 1st Respondent, utter the mentioned threats. He also told the Court that the Senior Chief and the 1st Respondent and Councillor Kelvin of the PF, pressed the Officer-in-Charge for Nsama Police, to continue detaining PW10, in police cells, for unknown reasons.

5.90 The question is if the alleged incidents indeed occurred. My findings are that the incidents indeed occurred and this is because the two witnesses in issue have corroborated each other particularly in as far as the utterance of the banishment threats is concerned. Thus, the danger of falsehood on the part of PW10, a partisan witness, has been excluded because his evidence regarding the utterance of the threats by the Senior Chief, has been corroborated by PW8, a non-partisan witness.

5.91 However, I dismiss PW10's evidence that the Senior Chief and the 1st Respondent had pressed for his continued detention by the police and this is because it has not been corroborated. I further note that this aspect could easily have been corroborated by the police officer who allegedly alerted PW10 that the Senior Chief and the 1st Respondent, among others, had pressed for his continued detention. The reason why the Petitioner did not call the alleged police officer to testify is startling considering that he was able to call PW4 who is equally a police officer. Further, if PW4 is the police officer PW10, is referring to, then the silence of PW4 on this aspect defeats PW10's assertion.

5.92 Reverting to the banishment threats, the next question is if they are part of the grounds contemplated by section 97(2)(a) of the EPA for purposes of nullifying the 1st Respondent's subject election. The relevant law in answering this question is paragraph 14 of the 2016 Electoral Code of Conduct cited above. As highlighted already, the provision forbids traditional leaders, among others, from coercing or intimidating people during campaigns or an election, by means of threats, sanction or violence. As highlighted already, the Electoral Code of Conduct being a schedule to the EPA, is part of the Act. Therefore, read with section 97 (2)(a) of the EPA, the alleged banishment threats by Senior Chief Nsama is "misconduct" for purposes of nullifying the election of the 1st respondent's subject election provided that the other thresholds prescribed by the EPA are proved.

5.93 I must also state that I have taken judicial notice of the immense influence and power that chiefs in Zambia wield over their subjects. With this background, it can safely be concluded that Senior Chief Nsama's banishment threats had the potential to influence the voting pattern of those who heard them.

5.94 With that said, the next question is if the 1st Respondent and/ or his election or polling agents had approved or consented to the Senior Chief's subject threats. Here, I firstly note that it is not in dispute that at the material time, the Senior Chief was not an election or polling agent of the 1st Respondent, within the meaning of section 2 of the EPA. Further, Pw8 and PW11's evidence does not indicate that the 1st Respondent was present during the respective occasions on which the said Senior Chief Nsama made the remarks. The two witnesses have also not led evidence to demonstrate that the 1st Respondent and/or his agents consented to the Senior's Chief alleged threats directly or indirectly. It would appear that through the two witnesses, the Petitioner intends to persuade me to assume that the 1st Respondent consented to the threats only on grounds that the Senior Chief was campaigning on his behalf. I decline to adopt this view as it is anchored on speculation. A person can be motivated to campaign for the other, for various reasons such as natural affinity towards the candidate and not necessarily because the other person has consented to the campaign.

5.95 As stressed in section 97(2)(a) of the EPA and the petitions of Richard Siamunene and Nkandu Luo (*supra*), to hold a candidate responsible

for the wrongful conduct of another person, there must be proof, to a fairly high degree of convincing clarity, that the candidate consented to the impugned actions. The provision does not empower the Court to base its decision on speculation and neither is it the duty of the Judge to fill-out the gaps in the evidence of the petitioner in respect of his allegations in the petition as the Judge is a neutral umpire in the adversarial justice system which we practice in our courts.

5.96 I am cognisant of PW10's evidence that regarding his incident, the 1st Respondent was in the company of the Senior Chief when the Senior Chief uttered the banishment threats. If that was the position, failure by the 1st Respondent to dissociate himself from the Senior Chief's said utterances implies that he had approved the threats within the meaning of section 97(2)(a) of the EPA for purposes of nullifying his subject election provided it is also proved that the threats had swayed the majority of the voters and thereby prevented them from voting for their preferred candidate.

5.97 In evaluating PW10's evidence, I placed reliance on the principles laid down in the Simasiku Namakando petition (supra) whereupon I have formed the view that being a member of the UPND, he has partisan interests in this petition. Therefore, his evidence that the 1st Respondent was in the company of the Senior Chief when the Senior Chief made the banishment threats, must be corroborated, according to the petition of Mbololwa Subulwa cited above.

5.98 With this hindsight, my finding is that there is no corroborative evidence on this aspect and I am startled at the lack thereof

considering that PW10 has indicated that the occasion was attended by an audience implying that there were other listeners apart from himself. In view of the absence of corroborative evidence, I have not found force in the Petitioner's assertion that the 1st Respondent was in the company of the Senior Chief when the Senior Chief made banishment threats. The allegation is accordingly dismissed.

5.99 Even assuming that the 1st Respondent had consented to the Senior Chief's threats, the allegation would not sustain the Petitioner's prayer for the nullification of the 1st Respondent's subject election for the reason that the threat was not widespread as alleged by the Petitioner. Just to re-state, the Petitioner has alleged under paragraph 5 (d) of his petition that the Senior Chief uttered the threats in all polling stations in the Constituency. This assertion is not supported by evidence and is clearly an exaggeration. I am of this view because the evidence of the requisite witnesses (PW8 and PW10), disclose that the threats were only uttered in two wards and at isolated localities of the two wards. Therefore, voters in the fifteen wards and other parts of the two wards, were not affected by the threats.

5.100 This is not to suggest that I have undermined the power of social media in the dissemination of information in this era. However, the possibility that the threats were disseminated to other parts of the Constituency via social media, if at all, should have been expressly pleaded and proved by the Petitioner and not to be assumed by the Court. Overall therefore, the allegation would still have failed on account of not being widespread.

5.101 Other allegations involving undue influence are as follows: that on the polling day (12th August, 2021), Senior Chief Nsama offered his light truck to ferry only people who were going to vote for the PF, to Kabobole Polling Station. The witness here is Pw11 who stated that he boarded the mentioned motor vehicle on the material day whereupon he was told about this condition by the driver of the vehicle.

5.102 As stated already, PW11 is an independent witness. That as it may, I have not found force in this allegation and this is firstly on the grounds outlined above namely that PW11 has not demonstrated that the 1st Respondent and/or his election or polling agents, approved or consented to the impugned actions of the Senior Chief; that the absence of the alleged driver from Court to attest to the alleged directive by the Senior Chief, renders PW11's statement inadmissible hearsay; that if the alleged directive was indeed made to the alleged driver by the Senior Chief, it would fail on account of it not being widespread since the truck reportedly ferried voters for only one polling station. Therefore, fifty-five polling stations, which obviously are in the majority figure, were not affected by the gesture.

5.103 In any event, the alleged directive or condition is defeated by the fact that PW11, who is himself non-partisan, was allowed to board the vehicle. Common sense guides that if the driver was indeed directed to ferry only PF voters, PW11 being non-partisan, would not have been allowed to board the vehicle.

5.104 Based on the foregoing, I dismiss this allegation.

5.105 The other allegation involving undue influence is that the 1st Respondent and members of his campaign team distributed food to voters in all polling stations and further threatened that if the voters would vote for the UPND, the UPND would stop distributing the food. This aspect is contained in paragraph 5(c) of the petition and amplified by the Petitioner in his evidence-in-chief. The eye-witness here is only PW2, a Youth Chairman for the UPND who told the Court that on the polling day, members of the PF slaughtered a goat and distributed it to everyone who voted for PF candidates.

5.106 From the onset, I must state that the Petitioner has not led evidence to prove that food was indeed distributed to everyone who voted for PF candidates. To the contrary, Pw2, the only witness here, only spoke about a single goat that was slaughtered and distributed. If this is the food which is alleged to have been distributed to everyone who voted for the PF in the constituency (which I assume it is, in view of the fact that PW2 is the only witness here), then PW2's evidence is a classic example of exaggeration associated with partisan witnesses. I say this because it is inconceivable how one goat can feed voters in 56 polling stations. Further, the exaggeration casts doubt on the credibility of PW2's evidence.

5.107 In any event, PW2 has not demonstrated that the 1st Respondent and /or his election or polling agents acquiesced to the distribution of the alleged goat meat to the voters. As highlighted already, it is not tenable for the Court to assume that since the people who allegedly slaughtered and distributed the goat to voters are members of the PF,

the political party that sponsored the 1st Respondent, then they acted with the approval of the 1st Respondent and/or his election or polling agents. The threshold prescribed by section 97(2)(b) of the EPA, is such that for a petitioned candidate to be held responsible for the wrongful conduct of the other, it must be established that s/he directly or indirectly consented to such conduct.

5.108 Based on the foregoing, I have dismissed this allegation.

5.109 The other allegation concerning undue influence involves use of physical violence. The Petitioner did not personally perceive the violent incidents. Rather, he relied on the evidence of the witnesses who allegedly perceived the incidents. These are PW2-4 and PW11. PW2 is a Youth Chairman for the UPND. He told the Court that on 20th July 2021, he escaped an attack at his home from people in a PF branded motor vehicle. The said people (who included RW3 and one Gideon) were armed with sticks and they destroyed his property, that of his children and also stole his solar panel, radio cassette and a cash sum of K1, 000.00. Pw2 stated that this incident happened in Mwambeshi Ward and that he was attacked on account of being a member of the UPND.

5.110 PW3, is an independent witness. She is PW2's mother. She told the Court that on 19th July 2021, she was insulted and threatened with actual violence by RW3's son and daughter, on allegations that she was a supporter of the UPND. That on 20th July 2021, RW3's mentioned son and the members of his team, violently dragged her whereupon RW3's son stoned her. Further on the same day, one

Mpundu, hit her with a stick and thereby broke her left hand. As stated already, I had an opportunity to view the broken hand.

5.111 PW4, is a non-partisan witness and this is on account of his position of Officer-in-Charge for Nsama Police. He told the Court that twelve complaints involving electoral violence (4 from the UPND and 8 from the PF), were reported to his office. Further three individuals (one from the UPND and two from the PF) were convicted of offences involving electoral violence and are serving prison sentences. Further, two people (one from the UPND and one from the PF) had been cautioned by the police for the offence of electoral violence.

5.112 PW11, a non-partisan witness told the Court that Senior Chief Nsama manhandled him on allegations that he was supporting the UPND.

5.113 Having examined the evidence, I am satisfied that indeed, there were incidents of violence in the Constituency in the period leading to the subject general elections. I am of this view because the evidence of the four witnesses who have testified in this respect, is corroborative thereby excluding the possibility of concoction on the part of a partisan witness, namely PW2. I am also satisfied, based on PW4's testimony, that the violence was perpetrated by members of both the UPND and the PF against each other. The fact that members of the PF were equally victims of the violence, is evident from the injury sustained by RW3. Further, medical reports exhibited at pages 5-8 in the 1st Respondent's bundle of Documents are testimony that members of the PF were also victims of the violence.

5.114 With that said, the question is the status of electoral violence in an election petition. Here, section 83(1)(a) which proscribes electoral violence and enacts it in a criminal offence, as read with sections 2 and 97(2)(a) of the EPA, is insightful. Section 2 denotes electoral violence as an 'illegal practice' within the meaning of section 97(2) (a) of the EPA for purposes of nullifying the election of a Member of Parliament provided that it is attributed to the petitioned candidate and/or his or her election or polling agents and is widespread as to affect the overall result of the election.

5.115 In view of the foregoing, the pertinent question is if the violence in issue can be attributed to the 1st Respondent and/or his election or polling agents. There are three categories of the alleged violence. One category involves Senior Chief Nsama who is alleged to have manhandled PW11. The other category involves RW3's children and one Mpundu in which it is alleged that the said people either insulted or beat PW3. The last category involves RW3 in which it is claimed that he was part of the PF team that wanted to attack PW2 but destroyed and stole his property after he fled the attack.

5.116 Turning to the violence involving the Senior Chief, much as I am satisfied that he manhandled PW11, the allegation cannot sustain the Petitioner's prayer for a nullification of the 1st Respondent's subject election firstly because PW11 has not demonstrated that the Senior Chief acted with the consent of the 1st Respondent. As stated already, just because the Senior Chief acted in support of the 1st Respondent does not automatically entail that the 1st Respondent consented to the

Senior Chief's violent conduct in this matter. Further, evidence of violence by the Senior Chief is confined to only one ward and towards one individual - PW11. Under the circumstances, the allegation would fail for not being widespread within the meaning of section 97(2)(b) of the EPA.

5.117 I must however hasten to attach a caveat to my foregoing position by dispelling any view that political violence is acceptable. On the contrary, I condemn it in the strongest terms more so that it was perpetrated by a traditional leader who is expected to be a custodian of peace in his chieftdom and to be non-partisan. Accordingly, Chiefs are strongly admonished to refrain from being architects of political violence as this is contrary to the provisions of the law that governs them – the Chiefs Act, Chapter 287 of the Laws of Zambia, particularly section 11(1). They are further admonished from involving themselves in partisan politics as this has the potential to cause division in chieftdoms in view of the fact that chieftdoms are inhabited by people belonging to different political parties. Chiefs must be reminded that their subjects have a fundamental right to freedom of association and thereby to belong and support any legally constituted political party of their choice. It is therefore unconstitutional for a chief to dictate the political allegiance of his subjects.

5.118 With that said, I must add that the setback in the foregoing allegation only lies in its failure to pass the rigorous threshold prescribed by the EPA. The setback does not preclude PW11 from instituting criminal proceedings against the Senior Chief and I strongly urge him to do so

as this may serve as a deterrent measure against partisan and violent traditional leaders.

5.119 Turning to the other category of the allegation of violence involving RW3, I have no hesitation, on the authority of section 97(2)(a) of the EPA, in ascribing it to the 1st Respondent, by extension and this is because admittedly, RW3 was an election agent of the 1st Respondent in the subject election. That as it may, the allegation does not suffice for purposes of nullifying the 1st Respondent's subject election. This is because the stated violence was not widespread as to affect majority of the voters in the Constituency and thereby to influence their choice of the candidates. I am of this view because the evidence implicating RW3 disclose that the violence in issue affected only one individual – PW2. This implies that the vast majority of the voters were not affected by the violence even taking into account the violence which was instigated by members of the UPND.

5.120 Based on the foregoing, this allegation shall equally fail and the same reasons extend to the violence directed at PW3. However, I reiterate my concerns and comments in the preceding paragraphs and thereby urge the victims, PW2 and PW3 to seek redress through the criminal justice system.

5.121 The other allegation concerning violence is that the 1st Respondent and the members of his political party threatened the Petitioner's election monitors and chased them from polling stations. I must hasten to state that the Petitioner did not lead any evidence to

substantiate this allegation. For this reason, I consider this allegation abandoned and I will say nothing more about it.

5.122 The foregoing are my findings regarding issues in dispute that relate to the 1st Respondent. I now turn to allegations that relate to the 2nd Respondent. The first allegation is that presiding officers distributed social cash and, in the process, threatened beneficiaries that if they did not vote for the PF and its parliamentary candidate (the 1st Respondent), they would not be given more money. Further, that to monitor who the beneficiaries would vote for, cameras would be placed in voting booths. This allegation has already been resolved in favour of the 2nd Respondent under paragraph 5.1.74, above. I shall therefore say nothing more about it.

5.123 The other grievance by the Petitioner is that on the polling day, the polling agents for the Petitioner were not given GEN 20 Forms and that they were denied access to the polling stations. The grievance is anchored on section 97(2)(b) of the EPA which relates to the manner the ECZ discharges its electoral functions bestowed on it by Article 229(2) of Act No. 2 of 2016, cited above. For convenience, I shall reproduce section 97(2)(b) of the EPA. It states as follows

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

5.124 Section 97(4) of the EPA referred to by the foregoing subsection

provides as follows

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

5.125 It is thus certain that section 97(2)(b) addresses acts of non-compliance with the provisions of the EPA in the conduct of elections, which has an effect on the results of the elections. Its effect is made clear by section 97(4) of the same Act afore-cited, with which it must be read. As stated already section 97(4) of the EPA, introduces a caveat in the nullification of an election based on the conduct prescribed under section 97 (2) (a) of the EPA. This position is further supported by the holding of the Constitutional Court of Zambia in the petition of **Sibongile Mwamba v Kelvin M. Sampa and ECZ (16)** that

The provision (section 97(2)(b) and (4)) is not novel but is a re-enactment of section 93(2)(b) and 4 of the repealed Electoral Act No. 12 of 2016 which provision, was construed by the Supreme Court in the case of Webster Chipili v David Nyirenda, SCZ, Appeal No. 35 of 2003 as follows: the subsection of paragraph(b) means that once evidence of non-compliance with the Electoral Act of an election is established to the satisfaction of the High Court, which evidence is capable of affecting the results of an election, the lower court is obliged to invoke subsection (4) of section 93 as a matter of course. This is done to enable the lower court review the acts or

omissions of the election officers in the conduct of the election in order to determine whether the election was so conducted as to be substantially in accordance with the provisions of the Act and whether such acts or omissions did affect the result of the election.

5.126 I have also found persuasive and helpful, the Kenyan petition of **Raila Odinga and Five Others v Independent Electoral and Boundaries Commission and Three Others, Kenyan Supreme Court Election Petition (17)** helpful in addressing this grievance. Here it was held as follows

A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was so devoid of merits and so distorted as to reflect the expression of the people's electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process

5.127 The Learned Authors of Halsbury's Laws of England, 5th Edition, Volume 38A also state at paragraph 667 that

No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal having cognisance of the question that the election was so conducted substantially in accordance with the law as to elections, and that the act or omission did not affect its result. The function of the Court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard

to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the result was affected.

5.128 Turning to the present incident, the witness is PW12, a local monitor for the UPND in Chimbamilonga Constituency. He told the Court that he was unjustifiably denied access to Mwewe Polling Station and the UPND polling agent who was deployed at the same polling station. He also stated that polling agents at four polling stations were denied GEN 20 Forms.

5.129 I note that by virtue of his position in the UPND, PW12 is a partisan witness. That as it may, I have found that his foregoing evidence was not discredited. Mr. Khosa did not cross-examine the witness. Turning to Mr. Zokani, his cross-examination of PW12 does not dispute PW9's assertion that he was denied access to the voting room at Mwewe Polling Station and the polling agent there. Rather, the cross-examination is suggesting that the Presiding Officer at Mwewe Polling Station was not involved in denying PW9 the access. That as it may, the witness satisfactorily maintained that the Presiding Officer was one of the officers who denied him the access.

5.130 Mr. Zokani did not also challenge the witness' evidence that UPND polling agents for four polling stations in the Constituency, were not given the GEN 20 Forms. That Mr. Zokani concedes to PW12's allegation here, is confirmed by the failure on the part of the 2nd Respondent to call requisite witnesses. Given the foregoing, I believe

PW12's evidence and conclude that the incidents he has complained about indeed happened.

5.131 Further, I have no hesitation in finding that the requisite officers of the 2nd Respondent, breached their official duty when they denied PW12 access to Mwewe Polling Station and to the UPND polling agent there. They also breached their duty when they failed to avail GEN 20 Forms to UPND polling agents in the four wards. The question is if the incidents have satisfied the threshold prescribed by section 97 (4) for purposes of nullifying the 1st Respondent's subject election.

5.132 Having examined PW12's evidence, I have found that his complaint is only about having been denied access at Mwewe Polling Station and the UPND polling agent there. It is also about the failure by officers of the 2nd Respondent to provide UPND polling agents in the four polling stations with GEN 20 Forms. Apart from these breaches, PW12 has not led evidence suggesting that the breaches, affected the results of the subject election. Under the circumstances, I am entitled to conclude that the breaches did not affect the results of the election. Thereby, there is no basis for me to invoke these complaints for purposes of nullifying the subject election. Among others, the threshold according to section 97(4) of the EPA is that in order for a breach of official duty by officers of the 2nd Respondent to qualify as a ground for nullifying the election of a Member of Parliament, it should affect the result of that election. A breach of duty by an officer of the 2nd Respondent, which does not affect the results of the election does

not empower the Court to nullify the election of a petitioned candidate and this is the position with the subject complaint.

5.133 The foregoing position is supported by the following holding of the supreme Court of Zambia in the case of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (18)**

We accept that there were flaws, incompetency and dereliction of duty on the part of the Electoral Commission of Zambia. This is exemplified by the late delivery of the election materials and insufficient supply of presidential ballot papers in the complaining constituencies which led to the delays and extension of the gazetted voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st Respondent.

5.134 Based on the foregoing I dismiss the two subject allegations.

5.135 In conclusion, the 1st Respondent's criteria of recruiting his foot soldiers needs consideration because of its implications on the democratic principles of our electoral system. The subject 'foot soldier concept' was born out of the stringent restrictions brought about by the COVID 19 epidemic. Relevant to this petition, the restrictions included the banning of public campaign rallies during the subject General Elections. This resulted into initiatives such as door-to-door campaigns which obviously required huge manpower to reach out to the electorates. The same position applied in the case of Chimbamilonga Constituency considering its vastness and significant figure of 28, 602 registered voters. With this background, the

recruitment of foot soldiers was justifiable. However, it is the class of the foot soldiers whom the 1st Respondent employed which require analysis because it has the potential to undermine the democratic principle of voters' freedom of choice. I shall clarify my view by considering the dynamics behind the subject foot soldiers.

5.136 The requisite evidence concerning this aspect is that of the 1st Respondent and his Campaign Manager, RW1. According to the duo, pursuant to the mandate bestowed on him by the 1st Respondent, RW1 recruited foot soldiers on behalf of the 1st Respondent. They would be recruited in the ratio of ten percent of the total number of registered voters in each polling station in the Constituency. This figure in turn entails ten percent of the total number of registered voters in the Constituency, thus about 2, 860 foot-soldiers. The foot soldiers would be deployed in each of the 52 Command Centres to conduct door-to-door campaigns in each of the 17 wards.

5.137 Under cross-examination by Mr. Siatwambo, the 1st Respondent and RW1 were in agreement that the recruitment criteria deliberately targeted registered voters in their respective polling stations, for purposes of the subject General Elections. This aspect is confirmed by the recruitment forms exhibited at pages 1-3 of the Petitioner's bundle of documents. As highlighted already, the forms depict voter's card numbers for each foot soldier.

5.138 The 1st Respondent and RW1 are also in agreement that the foot soldiers were to be salaried with food for their door-to-door campaign services, by the 1st Respondent, which is what prevailed.

5.139 In dispute, is if the foot soldiers were members of the PF or they were non-partisan registered voters. It is this aspect which must be interrogated. Thus, if the foot soldiers were members of the PF, there would be no compromise on the democratic principles and thereby, there would be no need for concern. I am of this view because the assumption is that being party-affiliates, the foot soldiers share same political ideals with the 1st Respondent. Therefore, in recruiting them, the 1st Respondent is not gaining undue advantage over the other contenders because he is recruiting his own kind. Similarly, when the foot soldiers vote for him, it would not be as a result of inducement triggered by the incident of employment but because of the same political values which they share.

5.140 Concern arises if the foot soldiers comprise non-partisan registered voters and this is because the incident of their employment has the potential to compromise their independence to elect a candidate of their choice. I am of this view because it is common knowledge that employment ignites a sense of identity, belonging and loyalty in the employee, towards the employer. Further, acceptance by a foot soldier to disseminate the employer's ideals to the electorate, implies discipleship on the part of the foot soldier. It would be naïve to ignore this social magnet and symbiotic relationships which employment induces between parties to it.

5.141 Applied to the present subject, the foregoing elements logically imply that if the foot soldiers were non-partisan registered voters, their incident of employment had in effect converted them into electorates

for the 1st Respondent. Further, there is no dispute that recruiting voters in the guise of offering them employment is proscribed by the EPA for it amounts to bribery within the meaning of section 81 of the Act. Voters must be recruited on the basis of a candidate's ideals and manifesto and not by monetary or material rewards.

5.142 With that said, the question is if the subject foot soldiers were either members of the PF or non-partisan registered voters. The 1st Respondent and his witness (RW1) have fronted conflicting versions here. According to the 1st Respondent, the foot soldiers were non-partisan registered voters. On the contrary, RW1 stated that the foot soldiers were members of the PF. Having considered the two versions, I am persuaded by that advanced by the 1st Respondent for the following reasons: firstly, because the 1st Respondent's version is supported by his averments in paragraph 4 of his answer to this petition. And secondly, because as disclosed by RW1 during cross-examination by Mr. Siatwambo, there is nothing on the recruitment forms (appearing at pages 1-3 of the Petitioner's bundle of documents) suggesting that the foot soldiers were members of the PF.

5.143 Based on the foregoing, I have found that the 1st Respondent engaged himself in an illegal practice within the meaning of section 97 (2) (a) of the EPA and this is by way of recruiting voters in the guise of recruiting foot soldiers. The practice needs to be proscribed as it can be used by shrewd candidates to circumvent a fair political contest simply by employing a larger proportion of non-partisan registered voters as foot soldiers.

5.144 To avoid the foregoing situation, it is advisable that candidates who desire to recruit registered voters as their foot soldiers, target their political-party affiliates and the justification for this view-point has already been explained. In the event that they desire to recruit non-partisan registered voters, as foot soldiers, they should avoid any form of inducement such as in the present case lest the recruitment be viewed, and correctly so, to be a covert way of buying voters. The recruitment of non-partisan registered voters would be devoid of illegality, if it is voluntary.

5.145 Based on the foregoing, I reiterate that the 1st Respondent's subject recruitment of the foot soldiers was a covert way of buying voters hence a bribery within the meaning of section 81(c) of the EPA for purposes of nullifying his election under section 97(2)(a) of the EPA. So that by logical presumption, the 1st Respondent wittingly or unwittingly, illegally appropriated to himself, 2, 860 votes (in the guise of the subject foot soldiers) without having subjected them to a fair contest with the other contenders.

5.146 And, considering that the recruitment was conducted in all the polling stations in the constituency, I find the practice to have been wide spread within the meaning of section 97 (2) (b) of the EPA.

5.147 That notwithstanding, I am mindful of the provisions of Article 47(2) of Act No. 2 of 2016 in contemplating the net result of the subject conduct in the election in issue. The provision prescribes that elections to the National Assembly shall be conducted on the basis of a simple majority vote under the first-past-the-post system. With this

hindsight, I have conducted an arithmetic analysis of the impact of the said 2, 860 voters (recruited in the guise of foot soldiers) which the 1st Respondent illegally appropriated to himself. Arising from this, I have found the following: Firstly, that it is not certain if all the 2, 860 foot-soldiers had voted in the subject election. This is in view of the fact that 7, 414 registered voters did not vote. Therefore, the possibility that none, some or all of the subject foot soldiers, could be part of the 7, 414 registered voters who did not vote, cannot be ruled out in view of the fact that none of them was called to testify.

5.148 Secondly, being non-partisan registered voters, it cannot be said with certainty, which one of the candidates in the subject election, each foot soldier would have voted for in the event that they had not been induced by the 1st Respondent's subject employment. The possibility that each of the candidates could have gotten some votes from them is not farfetched as there is no evidence depicting their individual preferred candidate. In view of the foregoing possibilities, I have found it fair and reasonable to deduct the figure ascribed to the foot soldiers (2, 860) from the total votes which the 1st Respondent's polled. Further, I have found it fair and reasonable under the circumstances, not to ascribe the figure to any of the five candidates. Using this mathematical formula, the 1st Respondent would still be leading the other contenders. The Petitioner would be trailing in the second position and the gap between the duo would be 1,123 votes.

5.149 Even assuming that I was to distribute the figure ascribed to the foot soldiers to all the contenders, the 1st Respondent would still be

leading. Here therefore, one of the reasonable and fair formular would be to distribute the figure according to the ratio or proportion of the votes which each candidate got from the total number of people who voted. An analysis of this formular entails that the 1st Respondent would get the largest proportion of the foot soldiers' votes because overall, he polled higher than any other candidate even after subtracting the 2, 860 foot-soldiers' votes from his votes. The ultimate result is that the 1st Respondent would still be leading.

5.150 The other fair and reasonable mathematical formular, would be to distribute the foot soldiers' figure equally to all the candidates. This formular would be on the basis that none of the candidates has adduced evidence entitling him to a higher portion of the votes than the others. If this be the formular, it would still leave the 1st Respondent in the lead.

5.151 Based on the foregoing, much as the criteria used by the 1st Respondent in recruiting the subject foot soldiers has been found to be illegal for it gave him unduc advantage over the other candidates, the various mathematical formulae adopted above, have disclosed that the 1st Respondent would still have obtained more votes than the other candidates even in the absence of the foot soldiers. Thereby, he would have won the subject election on the basis of the simple majority threshold prescribed by Article 47(2) of Act No. 2 of 2016.

6.0. CONCLUSION

6.1. In conclusion and having considered the entire evidence in this petition, I am not satisfied that the Petitioner has proved his

allegations to a 'fairly high degree of convincing clarity' against both Respondents, as to merit the nullification of the subject election of the 1st Respondent. I have accordingly found and do declare that the 1st Respondent (Elias Musonda) was duly elected Member of Parliament for Chimbamilonga Constituency. I thereby dismiss the petition.

6.2. Considering that the petition raised serious questions for determination and which questions have helped develop our electoral jurisprudence, parties shall bear their respective costs.

6.3. Leave to appeal is granted.

DELIVERED AT MANSA ON THIS 17TH DAY OF NOVEMBER 2021



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KENNETH MULIFE
HIGH COURT JUDGE