

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

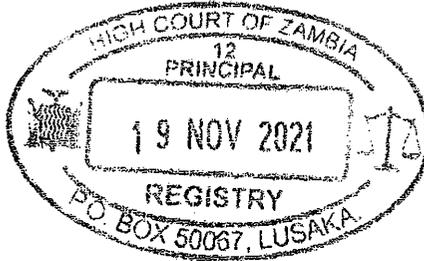
2021/HP/EP/0020

BETWEEN

POTIPHER TEMBO

AND

TASILA LUNGU
ELECTORAL COMMISSION OF ZAMBIA



PETITIONER

FIRST RESPONDENT
SECOND RESPONDENT

Before the Honourable Mr Justice K. Chenda on 19th November 2021

For the Petitioner : Mr G. Phiri and Ms M. Phiri of PNP Advocates
with Mr K. Mweemba and Mr G. Mataa of Keith Mweemba & Company

For the First Respondent : Mr M. Zulu, Mr J. Zimba, Mr N. Botha, Ms M. Phiri and Mr F. Daka of Makebi Zulu Advocates
with Mr E. Khosa of BCM Legal Practitioners

For the Second Respondent: Mr. A.S. Musonda and Ms. T. Mukuka of AMW & Co. Legal Practitioners

JUDGMENT

The Grand Norm:

- (i) The Constitution, Chapter 1 of the Laws of Zambia in articles 52(4), 73(1), 70(1) and 121;

Primary Legislation:

- (ii) The Electoral Process Act No. 35 of 2016 in sections 81, 82, 83, 84, 87, 89(1)(e), 96(1), 97, 98, 99, 100(3), 106(1) and 109;

Subsidiary Legislation:

- (iii) The Electoral Process (General) Regulations S. I. No. 63 of 2016 in regulation 49 (2);

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Case Law:

- (iv) *Nkandu Luo & ECZ v Doreen Sefuke Mwamba & AG* - Selected Judgment No. 51 of 2018 at p. J50-51
- (v) *In Re Clare, Eastern Division Case* (1892) 4 O'M & H 162 at 164;
- (vi) *Morgan & Ors. v Simpson & Anr.* (1974) 3 All ER 722 at 731 from line h;
- (vii) *Sibongile Mwamba v Kelvin M. Sampa & Anr.* Vol 3 (2007) ZR 284 at 316 -317;
- (viii) *Galaunia Farms Limited v National Milling Company Limited* (2004) ZR1 at pages 9-10;
- (ix) *Mwalimu Simfukwe v Evaristo David Kasunga* - Appeal No. 50 of 2013;
- (x) *Abiud Kawangu v Elijah Muchima* - Appeal No. 8 of 2017 (2016/CC/A039);
- (xi) *Richwell Siamunene v Sialubalo Gift* Vol. 3 (2017) ZR 335 at 354;
- (xii) *Steven Masumba v Elliot Kamondo* - Vol. 3 (2017) ZR 130 at p 172-173
- (xiii) *Match Corporation Limited v Development Bank of Zambia & Anr* (1999) ZR 18 at p.23 lines 23 to 30
- (xiv) *Afrobe Zambia Limited v Anthony Chate & Ors* - Appeal No. 160/2013 at p. J16;

Authoritative Texts:

- (xv) Halsbury's Laws of England 5th Edition (2013) Volume 38A (Elections and Referendums), Lexis Nexis: London at p. 176, footnote 4; and
- (xvi) Phipson on Evidence 17th Edition (2009) Sweet & Maxwell: London at p.152, para 6-07.

1. INTRODUCTION AND BACKGROUND

- 1.1 The governance system in Zambia is such that two out of the three primary organs derive their mandate directly from the citizenry through periodic elections.

- 1.2 The two said organs are: (i) the Executive for election of a Republican President as its head and also for election of local government office bearers; and (ii) the Legislature for election of members of Parliament (“MP”).
- 1.3 The matter before Court relates to an election held on 12th August 2021 for legislative office whereby the Petitioner and First Respondent were among contestants for the seat of MP for Chawama constituency in Lusaka district, Lusaka province.
- 1.4 The two were sponsored by the United Party for National Development (“UPND”) and the Patriotic Front party (“PF”), respectively.
- 1.5 The First Respondent emerged victorious in the election and aggrieved by that, the Petitioner escalated the contest to this third organ of the governance system seeking annulment of the election.
- 1.6 The Petitioner also sued the Second Respondent (or “ECZ”) as the statutory body that conducted the election as mandated.
- 1.7 In his petition filed on 27th August 2021, the Petitioner alleged in the main that the election was tainted with violence, malpractices and procedural flaws.

- 1.8 In her answer filed on 2nd September 2021, the First Respondent denied any wrongdoing and counter alleged that there was adherence to the law governing both the elections and the preceding campaigns.
- 1.9 The Second Respondent for its part reacted with an answer filed on 8th September 2021 insisting that due process was followed and the First Respondent validly elected.
- 1.10 The pleadings were completed with the filing of a reply by the Petitioner on 13th September 2021 in which he reiterated the grievances in the petition.
- 1.11 I heard the petition in Lusaka district from 15th October 2021 to 29th October 2021 and this is the reserved judgment, divided into 6 parts:
- (i) introduction and background (above);
 - (ii) summary of the material facts;
 - (iii) summary of the evidence;
 - (iv) outline of the relevant law;
 - (v) analysis and findings; and
 - (vi) conclusion and orders.

2. SUMMARY OF MATERIAL FACTS PLEADED

- 2.1 The Petitioner has alleged that his quest for elective office was hindered by the First Respondent and her agents.
- 2.2 The Petitioner has alleged that the said hindrances ranged from violent physical assaults on his supporters (and damage of their property) to prevention of display and also removal of the Petitioner's campaign materials.
- 2.3 The Petitioner has also complained that the violence continued even on voting day.
- 2.4 The Petitioner has alleged that the First Respondent employed a number of other malpractices during campaigns which included distribution of money, cooking oil and mealie meal to the constituents. It has been pleaded that the Petitioner even distributed money and regalia at a polling station on election day.
- 2.5 The Petitioner has alleged that the acts complained of were so widespread that they exerted undue influence and created fear in the public thereby preventing the majority of the electorate from voting for their preferred candidate.
- 2.6 The Petitioner has also alleged that after voting, the electoral process was mismanaged by the ECZ with various irregularities which included:

- i) absence of Gen 20a forms for some polling stations;
- ii) discrepancies between votes recorded in ECZ form 19 at the totalling centre and those declared /published in the Gen 20 forms.

2.7 The Petitioner has concluded that the First Respondent was not duly elected as MP and has prayed for nullification with costs.

2.8 The counter pleading by the First Respondent denies that there was any violence and vote buying tactics by her or her agents or that there was any hindrance of affixing and removal of the Petitioner's campaign materials.

2.9 The First Respondent has pleaded that the majority of voters in Chawama constituency voted and cast in her favour as their preferred candidate.

2.10 She has averred that according to her the election was conducted according to law but she cannot react to the allegations that ECZ mismanaged the process as she is not privy to the operations of ECZ.

2.11 The First Respondent has in her answer insisted that she was duly elected as MP and prayed for dismissal of the petition with costs.

2.12 In summary, the ECZ's side of the story as pleaded is that all Gen 20a forms for the polling stations were made available and no complaint was received to the contrary.

2.13 The ECZ has also averred that the Petitioner (or his agents) did not tender any objection to the results in the prescribed manner and any discrepancies in totalling could not affect the outcome of the election.

2.14 ECZ has concluded in its answer that the election was conducted in accordance with the law and that the First Respondent was validly elected as MP.

3. SUMMARY OF EVIDENCE

3.1 **PW1 was the Petitioner who testified in chief** that he was a 49 year old resident of Lusaka South and a businessman by profession. He testified that he was also the UPND candidate for the Chawama constituency parliamentary election on 12th August 2021.

3.2 It was his testimony that he stood against 3 other contestants from other parties who included the First Respondent on the PF ticket.

- 3.3 The Petitioner complained that the elections were not free and fair beginning from the point of nominations in May 2021 where throughout the campaign period that followed, he and his supporters were subjected to rampant violence and threats by the agents of the First Respondent.
- 3.4 The Petitioner testified that he and his team were not allowed to campaign and that their movements were restricted and they could not even display their campaign materials in public or otherwise sell the UPND manifesto in the constituency.
- 3.5 The Petitioner also lamented about not being featured on the ZNBC televised programme of race to Manda Hill unlike most of the other candidates.
- 3.6 It was the Petitioners testimony that on 27th May 2021 whilst he was campaigning in Chawama Ward, Chawama Constituency, they were attacked by PF supporters clad in PF regalia. Others with him at the time were Mr. Terry Chingo and a lady called Abigail.
- 3.7 The matter was reported to Chawama Police but was not acted on by the Police.

3.8 The Petitioner also spoke of the following incidents of violence which he received a report of and for which he said he has witnesses:

- (i) an attack at the UPND command centre in John Howard Ward in May 2021 by PF supporters who included Innocent Kalimanshi and Nathan Phiri who fired gunshots and robbed a disabled UPND supporter of his wheelchair, voters card and NRC as well as stealing of cooking implements. The incident was reported at Chawama Police whose officer in charge visited the scene but took no action after, despite Innocent Kalimanshi and Nathan Phiri being known PF persons with a PF branded office in Chawama that still exists to date;
- (ii) an attack in Nkoloma Ward on the UPND branch chairman Gilani Simfukwe who was also robbed of household goods by the perpetrators who were PF supporters;
- (iii) an attack in Nkoloma Ward on a blind lady who was a UPND supporter and an attempt to rape her in the presence of her children. The incident was reported to Misisi Police but no arrests were made;

- (iv) an attack in Chawama ward on the Petitioner's campaign manager and constituency chairman Andrew Zulu who was abducted by a PF cadre Saidi, taken to an unfinished building, assaulted with a screw driver and told that UPND would not campaign in Chawama and that the Petitioner's campaign would be restricted to the sitting room of the Petitioner's home;
- (v) an attack in John Howard Ward where the Petitioner's supporter Mambula Mashowe had his vehicle damaged by PF supporters, incident reported but no arrests followed;
- (vi) an attack in John Howard Ward where the Petitioner's supporter Mr. Habwato was beaten while putting up campaign posters for the Petitioner and the now Republican President, then UPND presidential candidate;
- (vii) an attack in Nkoloma Ward on 9th July 2021 on a UPND sympathizer Chanda Mulenga who was assaulted including indecently by 3 PF cadres in full view of her son Edwin Chomba as reported to the Petitioner by a witness he has; and

(viii) an attack in Nkoloma Ward on 9th July 2021 on a UPND sympathizer Moses Musumali who also had his shop ransacked and robbed of K15,000 by PF cadres.

3.9 The Petitioner also complained of an incident on 12th August 2021 at Lilayi Ward polling station called JICA/Mtendere E, as reported to him by his campaign manager.

3.10 It was the Petitioner's testimony that according to the report, the Polling Station was peaceful until at about 14:00 hours, the First Respondent arrived and began to distribute money and PF t-shirts including to a female police officer on duty there.

3.11 As the First Respondent was leaving the polling station, the UPND Lilayi ward youth chairman, Joseph Chomba Lwimba queried the police officer to which the PF Chawama Constituency CDF committee chairman and Lilayi Ward Chairman, Weluzani Banda shot him twice in the stomach. People around scampered for safety and many did not vote.

3.12 Mr Banda was arrested while Mr Lwimba survived after hospitalization.

3.13 The Petitioner testified that as a result of the said violence there was a lot of voter apathy as out of the ninety something thousand registered, only fifty something voted.

3.14 It was the Petitioner's evidence in chief that even the conduct of the electoral process by the Second Respondent was flawed;

3.15 According to him 15 polling stations had no Gen 20a form and he wondered where the Second Respondent got the results announced for these from and for that additional reason, he disagrees with the results announced by the Second Respondent at p.24 of his bundle.

3.16 The 15 polling stations were according to the Petitioner:

- | | | |
|---------------|------------------------------|-------------------|
| 1. Mazunzo A3 | 7. Mwazona 5 | 13. Andrew Mwenya |
| 2. Zambezi C1 | 8. Chawalila 1 | 14. Ufulu AZ |
| 3. Mazunzo A4 | 9. Chawalila 6 | 15. Kuomboka |
| 4. Lwipa B4 | 10. Chawalila 9 | |
| 5. Lwipa B5 | 11. Nyerere Community Centre | |
| 6. Mwazona 1 | 12. Eye Clinic 1 | |

3.17 The matter was raised with the returning officer Mr. Jonathan Nkhata but yielded no satisfactory answer.

3.18 The Petitioner also testified that there was an anomaly at Methodist polling station in Chawama Ward where the First Respondent was announced to have 301 votes and yet she only had 300 as complained of by the Petitioner before the

announcement which still went ahead without attending to the complaint.

3.19 It is for the foregoing that the Petitioner has challenged the election of the First Respondent as MP.

3.20 **The first round of cross examination of the Petitioner was by Mr Khosa** Counsel for the First Respondent during which the Petitioner testified-

- (i) he was familiar with the Electoral Code of Conduct;
- (ii) he reported the incidents of violence to the Second Respondent's conflict management committee and to the police but there is no documentary record of the reporting in his bundle;
- (iii) he does not know whether the perpetrators of the alleged violence were the First Respondent's registered election agents or polling agents;
- (iv) he assumed that the perpetrators of the alleged violence were agents of the First Respondent because they had her interests and they were well known PF supporters;
- (v) as for the incident of 27th May 2021 where he was attacked by people in PF regalia, he did not know the names of the attackers but he had a witness;

- (vi) he did not know whether the Mr. Saidi alleged to have attacked and abducted Mr. Andrew Zulu was a registered election or polling agent for the First Respondent;
- (vii) as for the incident of 12th August 2021 where the First Respondent was giving out money and t-shirts, there was a video and a photo taken but deleted by Mohammed Mutete, former Lilayi ward councillor;
- (viii) turning to the 15 polling stations alleged to have had no Gen 20 forms, the ECZ records from p.19 to 23 of his bundle showed that all the candidates had their votes tabulated.

3.21 The second round of cross examination of the Petitioner was by Ms Phiri, also Counsel for the First Respondent during which the Petitioner testified that-

- (i) he is not aware that Messrs Kalimanshi, Phiri and Saidi are not agents of the First Respondent;
- (ii) he was not present when Mr Zulu was abducted;
- (iii) the children of the blind woman who was allegedly attacked in their presence were not there when Mr Simfukwe was being attacked on the same night;
- (iv) he would not know if its the same people who attacked both the blind woman and Mr Simfukwe;

- (v) he did not know the PF cadres who attacked Mulenga Chanda on 9th July 2021; and
- (vi) the declaration of result of the poll appearing at p.24 of the Petitioner's bundle was signed by representatives of all contesting parties except UPND.

3.22 The next cross examination on behalf of the First Respondent was by Mr Makebi Zulu during which the Petitioner testified that-

- (i) he had been a politician for 21 years and contested unsuccessfully in parliamentary elections 3 times-
 - a) in 2001 as an independent in Nyimba;
 - b) in 2016 under UPND in Chawama; and
 - c) in 2021 under UPND in Chawama;
- (ii) he was not happy that the people of Chawama rejected him for a second time;
- (iii) in 2021 there were about 97,000 registered voters out of which more than 57,000 cast their votes thus showing that the majority of those registered voted;
- (iv) of all the allegations in paragraph 8 of his petition the only one where he was present and witnessed was the one of 27th May 2021;

- (v) as for the incident of 27 May 2021 the First Respondent was not there and she did not injure Terry Chingo nor did she undress Abigail;
- (vi) he did not name the attackers of 27 May 2021 and does not know if they were agents of the First Respondent;
- (vii) as for the incident in 8 (b) of his petition of an attack in June 2021 at UPND offices, the First Respondent was not on the scene and he did not know whether the perpetrators were agents of the First Respondent or not but he blames her for it because they were her supporters;
- (viii) by analogy he blames the First Respondent for the attack on and abduction of Andrew Zulu;
- (ix) the First Respondent was not present during the attacks pleaded in paragraph 8 e)-m) of the petition but the Petitioner blames her for them because the unnamed attackers were perceived or alleged to be PF supporters or cadres;
- (x) he did not see the First Respondent distributing the money and t-shirts alleged in paragraph 8 (n) of the petition;
- (xi) in one breath the Petitioner stated that Andrew Zulu was his informer of the incident as he knew who witnessed it while

in another breath the Petitioner stated that Andrew Zulu witnessed the event;

(xii) he does not remember UPND deploying youths at every polling station to protect the vote;

(xiii) turning to paragraph 8 (o) of the petition, Mr Joseph Lwimba was a UPND cadre but not an election or polling agent so not entitled to be within the precincts of the polling station;

(xiv) there was commotion at the polling station after the police officer was approached by the First Respondent as he (the Petitioner) was told;

(xv) according to p.20 of his bundle the total number of votes cast at Mtendere E1, E2, E3 and F1 was 2189 out of which 1142 voted for him versus 1110 who voted for the First Respondent;

(xvi) he agreed that he emerged victorious at the polling stations despite the commotion that he alleged but that he could have gotten more;

(xvii) he agreed that because of the gap of about 15,000 votes between the constituency total of the Petitioner and First Respondent even assuming that everyone at Mtendere voted for him he would not have gotten the 15,000 votes;

- (xviii) as for the polling stations where he said Gen 20 forms were missing, he had at least two polling agents at each station but did not know their names as the list was with his campaign manager;
- (xix) the Gen 20 forms that he has produced in Court were given to him by his polling agents;
- (xx) he was given the Electoral Code of Conduct and he is familiar with it;
- (xxi) the procedure was that any grievance of irregularity should be reported in writing to the ECZ Conflict Management Committee;
- (xxii) there is no documentary proof before Court that the Petitioner complained to the said committee as it was all verbal;
- (xxiii) he did not follow the complaint procedure because he had no faith in ECZ and for the same reason he has not to date asked them for Gen 20 forms for the 15 polling stations;
- (xxiv) he cannot prove anything over the 15 polling stations because he does not have the Gen 20 forms;
- (xxv) there was nowhere in the Electoral of Conduct where it says he could complain verbally;

- (xxvi) he has produced the ECZ record of proceedings in his bundle and it shows the results he got in all of the 15 polling stations complained of;
- (xxvii) he has not anywhere in his petition or affidavit disputed the results stated in the record of proceedings; and
- (xxviii) his reason for disputing the results of the 15 polling stations is because he does not have the Gen 20 forms for them.

3.23 When further cross examined, this time by Mr Daka, also Counsel for the First Respondent, the Petitioner testified that-

- (i) he disputes that the sum total of paragraphs 6 a), d), i) and m) of his petition was that he was campaigning;
- (ii) the First Respondent was responsible for the attacks but was not reported to the Police because she was not physically there;
- (iii) the people depicted as injured in the exhibits in the Petitioner's affidavit verifying facts were injured by the agents and supporters of the First Respondent who were about 100 or 200 in number;
- (iv) the names of them that he can remember were Saidi, Nathan Phiri and Innocent Kalimanshi;

(v) the 3 of them were agents of the First Respondent but he did not see any of them doing the acts complained of but was just told about them; and

(vi) he has not brought any evidence to show that the 3 were working under the knowledge, consent or approval of the First Respondent.

3.24 The Petitioner was also cross examined by Counsel for the Second Respondent beginning with Mr Musonda during which the Petitioner testified-

(i) he was familiar with the Second Respondent's Code of Conduct and the dispute resolution mechanism which required a formal complaint to be made of grievances before or during elections;

(ii) a complaint could be written or verbal;

(iii) he had polling agents in the 15 Stations where he alleges the Gen 20 forms were missing and he was not physically present there during voting;

(iv) he has no documentary evidence or audio evidence of him or his polling agents having lodged a formal complaint over the Gen 20 forms;

- (v) out of the 4 competing political parties only him/UPND complained about Gen 20 forms;
- (vi) the results for the 15 polling stations reflect in the record of proceedings;
- (vii) he does not in his petition allege that the Second Respondent's officers were relying on his polling agents for results;
- (viii) after 21 years as a politician, he is familiar of how results are transmitted from the polling station to totalling centre;
- (ix) him and his agents lodged a verbal complaint in the constituency about the transmission of results but there is no documentary or audio evidence of it in Court;
- (x) his allegations against the Second Respondent relate to 15 out of the 111 polling stations in Chawama which is not even half of them;
- (xi) he however, evasively answered that he could not confirm that the 15 did not represent the majority of the polling stations in Chawama; and
- (xii) he conceded that $111 - 15 = 96$ and that 96 is greater than 15.

3.25 The Petitioner was also cross examined by Ms Mukuka, Counsel for the Second Respondent during which he testified that-

- (i) his allegations in paragraph 17 of his affidavit verifying petition related to 2 out of the 111 polling stations in Chawama and that they relate to the Gen 20 forms exhibited as PT2 in his affidavit;
- (ii) the results tabulated in the two Gen 20 forms are for all candidates;
- (iii) according to him the results of the two Gen 20 forms could affect the outcome of the election in such a way that a different candidate could have won;
- (iv) the total votes for the two polling stations (Nyerere Community Centre and Chawama Primary School-6) exhibited as PT2 was 1110;
- (v) the record of ECZ proceedings at page 6 of 6 showed that the First Respondent polled a total of 35,492;
- (vi) if you subtract the 1110 from 35,492 it gives 34,380 but he does not know whether the First Respondent would still be leading if she had 34,380 votes.

- (vii) he made a verbal complaint to Second Respondent over the allegations in paragraph 17 of his affidavit verifying facts but has no documentary or audio evidence before court to prove so;
- (viii) as for paragraph 18 of his affidavit, what is in issue is one vote as the record of proceedings for the African Methodist Polling Station where the Second Respondent inputted 301 votes for First Respondent for polling stream Eye Clinic-2 in the record of proceedings exhibited as PT4 and yet the Gen 20 a form exhibited as PT3 showed she had 300 votes;
- (ix) there is no verbal or audio evidence before Court to show that he complained to the Second Respondent about it;
- (x) the record of proceedings exhibited as PT4 shows that his total votes were 20,244 at page 6 of 6; and
- (xi) if the one vote in issue in paragraph 18 of his affidavit were added to his votes, he would have got 20,245 and would not have won the election.

3.26 **The Petitioner was not re-examined by his Counsel.**

3.27 **PW2 was Benjamin Phiri**, a 51 year old resident of Lusaka.

3.28 He testified in chief that he voted at the JICA polling station at 10:00 hours on 12th August 2021 and thereafter went outside the

polling station and stayed 100 metres away from it. At about 14:00 hours he saw two vehicles arrive a Prado and Hilux, both without license plates and the First Respondent emerged from the former while her husband emerged from the latter.

3.29 They went into the polling station and stayed there for less than 2 minutes and when they came out, they found a lady officer and four men all of whom went to the First Respondent's vehicle.

3.30 The First Respondent then gave the police officer something wrapped and gave the 4 men money in their hands after which the First Respondent and her husband left.

3.31 PW2 testified that he was with 7 other men at the time, making them 8 inclusive of him.

3.32 It was PW2's evidence that the Police officer took the parcel and put it in a makeshift stand/nthemba and refused when asked to tell PW2 and his group what was in there.

3.33 PW2 and group retrieved the parcel, opened it and found 3 PF t-shirts branded with a portrait of the former president Lungu, which they confiscated and expressed disapproval alongside people around.

3.34 It was his testimony that less than 20 minutes after the First Respondent had left, a Landcruiser without a license plate and

laden with about 20 PF cadres arrived and they went to a man who PW2 knows as Weluzani Banda and a PF leader.

3.35 Thereafter the group came to PW2's group and inquired about who "Benja" is. PW2 did not answer and told his group to follow suit.

3.36 It was his testimony that the PF group then began to punch PW2 and his group and sprayed pepper on their faces.

3.37 PW2 testified that after recovering from the ordeal he and Joseph Lwimba (PW4) went to Weluzani Banda and inquired what sort of a leader he was who had brought people from Chawama to kill them.

3.38 According to PW2, Mr Banda reacted by removing a gun and saying he would shoot PW2. Mr. Banda then gave chase of PW2 and PW4 in his Noah bus while the latter two were on foot.

3.39 PW2 testified that MrBanda aimed to shoot him but he (PW2) dodged and instead PW4 is the one who got shot on the left abdomen area and shot a second time too in the abdomen.

3.40 It was PW2's evidence that PW4 got a pipe and threw it at Mr Banda's vehicle in self help, while people at the polling station scampered and left.

3.41 PW2 got PW4 and carried him before taking him to Game clinic and later to a medical facility in Kafue before eventual referral to UTH.

3.42 **The first round of cross examination of PW2 was by Ms Phiri** for First Respondent during which PW2 testified:

- (i) the First Respondent arrived at JICA polling station between 13-14 hours but was not present when the shooting occurred;
- (ii) the t-shirts he said were given by the First Respondent to an officer were not before Court and he did not report the issue to the Police or ECZ; and
- (iii) he does not know the names of the 20 people that came in the Landcruiser but they came from Chawama.

3.43 **When cross examined by Mr Khosa** also for the First Respondent PW2 testified:

- (i) he did not get the name of the female officer who he said got the t-shirts;
- (ii) there were about 3 other police officers at JICA polling station but he did not report the incident to them;

- (iii) he could not answer whether there were any polling agents for the political parties at the station as it was not his duty to see everyone;
- (iv) he did not see a ribbon demarcating the polling station and was not sure whether the t-shirt parcel was given within or outside the polling station;
- (v) his position in UPND was as part of the security wing;
- (vi) JICA polling station is in Lilayi ward and has more than 1 polling streams; and
- (vii) he (PW2) was aware that the Petitioner won the vote in all polling streams at JICA and in Lilayi ward as a whole.

3.44 **PW2 was also cross examined by Mr Zulu** for the First Respondent during which he testified:

- (i) he agreed that this was the second time that he was testifying on oath over the same incident and that the first time was in an election petition before the Local Government Elections tribunal in the case of Victor Nyasulu v Changala and ECZ;
- (ii) he agreed that he had told the tribunal that after he voted he led a group of UPND youths of between 30-50 in numbers to gather around JICA polling station to protect the vote and that he still stands by that evidence;

- (iii) he testified that this organisation of UPND youths took place at every polling station in his ward Lilayi, which according to him has about 4 polling stations and that he (PW2) was in charge of the mobilization;
- (iv) he agreed that after voting they never left the polling station as required but stayed behind;
- (v) PW2 testified that the First Respondent and her two vehicle entourage parked outside and away from the polling station;
- (vi) he testified that he remained vigilant and watchful to protect the vote and observed the First Respondent greet someone and go straight into the polling station without doing anything else;
- (vii) he agreed that after 2 minutes the First Respondent got out of the polling station and went straight to her vehicle outside the polling station;
- (viii) he agreed that from the time that the First Respondent moved from her vehicle to the polling station and back, she did nothing that could have compromised the votes;
- (ix) PW2 stated that the lady officer was given a parcel that he could not identify as it was concealed meaning that it was not intended to be seen by anyone;

- (x) he agreed that the officer did not give the parcel to anyone but put it away whilst outside the polling station after which she returned into the polling station and PW2 and at least 30 UPND youths followed her;
- (xi) PW2 agreed that he had told the tribunal that the UPND group of cadres followed the officer believing that she had been given ballot papers to go and stuff in boxes and that they were so angry that they wanted to beat the officer;
- (xii) PW2 agreed that he informed the tribunal that after they approached the officer there was commotion within the polling station;
- (xiii) he testified that there then ensued a fight between PF sympathizers and UPND sympathizers during which he went to get the parcel but not from the hands of the lady police officer;
- (xiv) PW2 agreed that because of the confusion, the lady officer never had the opportunity to explain what was in the parcel and she had no gun when swarmed by UPND cadres;
- (xv) he agreed that the officer had nothing to use to protect her when approached by the 30 UPND cadres and PW2 and she

only managed to escape when PF sympathizers came and began to fight with PW2 and the UPND cadres;

(xvi) he agreed that at the time of the confusion the First Respondent was not around;

(xvii) PW2 agreed that he had informed the tribunal that it was during the confusion and the fight that he heard the gunshots and that he still stands by that testimony;

(xviii) PW2 stated that after the shots people scampered and he took PW4 to the hospital and does not know what happened thereafter at JICA and cannot say whether people did not return to vote;

(xix) he however agrees that because of the vigilance of him (PW2) and his men the votes were protected and undisturbed at JICA and the Petitioner convincingly won at the polling station; and

(xx) he agreed that the only reason why he (PW2) was before Court was because he was not happy that the Petitioner lost in the other wards in Chawama constituency.

3.45 PW2 was also cross examined by Counsel for the Second Respondent, Mr Musonda, during which PW2 testified:

- (i) he knew that ECZ had a code of conduct but was not familiar with it and was not aware that he could complain to ECZ;
- (ii) it was correct to say that ECZ was not made aware of the incidents he complained of vehicles coming and going and a parcel being left with a Police officer;
- (iii) he was in charge of the UPND security wing and did inform the Petitioner and UPND of the incidents;
- (iv) there is nothing that he can say if told that neither UPND nor the Petitioner lodged any formal complaint with ECZ;
- (v) PW2 stated that he had failed to give a response to the proposition that he had nothing to say because he was not aware of any complaint;
- (vi) he had voted in 6 elections and was aware that the correct procedure is that when one votes they must leave the polling station;
- (vii) he voted at 10:00 hours at JICA but was still around the polling station at 14 hours; and
- (viii) he did not have any authority from ECZ to remain at the polling station and can confirm that he was neither a polling

agent for the Petitioner nor an accredited monitor or observer.

- 3.46 **When re-examined by Mr G. Phiri**, for the Petitioner, PW2 testified that after the people from Chawama came he and group were pepper sprayed after which they went to query Weluzani Banda over it and he fired in the air, chased them and shot at them.
- 3.47 **PW3 was Teddy Mulele**, a 40 year old driver of Freedom Compound in Chilanga.
- 3.48 **It was his evidence in chief**, that he was a polling agent at Mtendere E polling station at JICA on 12th August 2021.
- 3.49 PW3 testified that he reported at the station at 05:00 hours and all was peaceful until 14:00 hours when he heard some noise and went outside to see.
- 3.50 It was his testimony that he saw the First Respondent, her husband and Mr Mohammed (a former ward councillor) walk into the polling station after which a female monitor took a picture of the First Respondent on her mobile telephone.
- 3.51 PW3 testified that Mr Mohammed got the telephone and the monitor's accreditation card, only returning them after deletion of the picture.

- 3.52 It was his testimony that 20 minutes later he heard more noise and went out again only to see abandoned ballot boxes which officers brought inside.
- 3.53 PW3 stated that he also saw people moving out of the queues and running around.
- 3.54 It was his testimony that thereafter whilst about 2 metres away from him, he saw Weluzani Banda a PF official shoot PW4, a UPND youth twice.
- 3.55 PW3 told PW4 that he (PW4) was hurt, PW4 was vacated and the commotion grew after which Weluzani Banda fled in his car. Police officers and soldiers arrived on the scene and ordered people back on the queues to vote, by which time a lot of people had left.
- 3.56 **When cross examined by Ms Phiri for the First Respondent, PW3 testified:**
- (i) he was not outside when the commotion started at JICA polling station and for that reason did not know why it started;
 - (ii) PW4 was taken to the hospital by PW2; and
 - (iii) the First Respondent was not present during the commotion.

3.57 PW3 was also cross examined by Mr Khosa, for the First Respondent during which PW3 testified-

- (i) he was a polling agent for UPND at Mtendere E 2 stream at JICA centre and the Petitioner won the vote there;
- (ii) he did not know whether Weluzani Banda was a polling agent at any of the streams at JICA centre; and
- (iii) he confirmed that after the commotion ended the polling station re-opened and people voted up to 18:00 hours

3.58 Under cross examination by Mr Zulu, for the First Respondent, PW3 declined to answer the question about whether he did not see the First Respondent do anything wrong at JICA centre.

3.59 PW3 however testified when further cross examined by Mr. Zulu that –

- (i) he knew the First Respondent and did not see her do anything wrong inside the polling station and when he went outside, he did not see the First Respondent;
- (ii) the First Respondent did not shoot anyone and he did not see her instruct Weluzani Banda to shoot anyone;
- (iii) at the time of the shooting, he (PW3) was running for safety out of fear of getting shot having seen the gun and his attention and priority was on keeping safe;

- (iv) when he saw Weluzani Banda he also saw UPND members near him but did not see PW2 there and he heard 3 gunshots;
- (v) PW3 then changed his position to a denial that he ran away for safety to that he just stood by observing from 2 metres when he heard the three gunshots;
- (vi) PW3 avoided answering when asked whether he wanted the Court to believe that he only ran away when there was nothing to fear and opted to answer that there was something to fear;
- (vii) PW3 then stated that he did not run away because he was a polling agent but when questioned further, he changed position again to that he actually ran away for safety;
- (viii) he confirmed that after the commotion calm returned and people resumed voting;
- (ix) he had the voters register at Mtendere E and ticked off everyone who voted; and
- (x) looking at the records for Mtendere E at p.20 of the Petitioner's bundle, the Petitioner got 311 votes while

the First Respondent got 215 and he (PW3) agreed that the Petitioner convincingly won at the polling station.

3.60 PW3 was also cross examined by Ms Mukuka for the Second Respondent and testified:

- (i) he was a polling agent for UPND at Mtendere E and duties included to check that voters NRC and voters cards matched with the register and that the process ran smoothly;
- (ii) he agreed that if there was any confusion at the polling station, he was supposed to report it to ECZ;
- (iii) there was confusion at the polling station on voting day but he had no evidence to show that he reported it; and
- (iv) he was present when the results were being announced but had no evidence before Court to show that he objected to same or complained to ECZ over the confusion.

3.61 The final round of cross examination of PW3 was by Mr Musonda also for the Second Respondent during which PW3 testified:

- (i) after volunteering, he was appointed as a UPND polling agent and his identity as such included a letter signed by ECZ which he had not however produced before Court; and
- (ii) he however, denied that he had an identity card as a polling agent.

3.62 **PW3 was not re-examined by Counsel for the Petitioner.**

3.63 **PW4 was Joseph Chomba Lwimba**, a 47 year old resident of Chilanga, Lusaka and plumber by occupation.

3.64 **It was his testimony in chief** that on 12th August 2021 he voted at Mtendere E polling station around 08:40 hours but decided to hang around about 100 metres from the polling station for vote protection.

3.65 He testified that around 14 hours the First Respondent in the company of Messers Mwansa and Mohammed arrived in vehicles outside the polling station and entered the polling station for a short while before leaving it.

3.66 PW4 testified that at that point a female officer followed the First Respondent to her vehicle and came back with a chitenge that had something wrapped under it

- 3.67 PW4 testified that 4 men thereafter followed the First Respondent who gave them money.
- 3.68 It was his testimony that when the lady officer returned, he (PW4) and PW2 confronted her and demanded to see the contents of the parcel she received to which she refused and went into a makeshift stand.
- 3.69 PW4 stated that he and PW2 followed the officer to the stand and that upon their request she gave them the parcel which they opened and found t-shirts branded PF with portraits of former President Lungu after which the officer left them and returned to the polling station.
- 3.70 PW4 testified that the First Respondent then drove away and 20 minutes later a land cruiser with PF cadres arrived and they went to Weluzani Banda before approaching PW4 and PW2 and inquired about who Benjamin was to which there was no response.
- 3.71 It was PW4's testimony that he and group were then beaten and pepper sprayed and that the ensuing fight grew but PW4 and group over powered the PF group who then ran away.
- 3.72 He testified that he (PW4) and group approached Weluzani Banda to query the incident and that Mr Banda got upset and threatened

that he could kill PW4 and fired one gunshot in the air after which PW4 and group feared and ran.

3.73 PW4 testified that there ensued a chase around a vehicle and Mr Banda shot PW4 twice.

3.74 PW4 fell down and picked up a concrete object to stone Mr Banda but had no strength to do so and ended up hitting his vehicle.

3.75 It was his testimony that PW2 carried him to a taxi and after visiting different medical facilities he ended up at UTH for 2 weeks and 4 days which included surgery.

3.76 PW4 testified that he was still undergoing medical treatment every two days for the injuries.

3.77 He closed his evidence in chief by showing the Court the two bullet entry wound scars and the exit wound scars. He also showed the Court his medical report documents and photos from the hospital bed produced at p.13,14,15,16,17,18 and 28 of the Petitioner's bundle of documents.

3.78 **PW4 was cross examined firstly by Ms M Phiri** during which he testified:

- (i) he did not report the First Respondent to ECZ or Zambia Police and has not brought the PF t-shirts which he attributed to First Respondent; and

(ii) the First Respondent had already left when the fight started.

3.79 When cross examined by Mr Khosa for the First Respondent

PW4 testified-

(i) the First Respondent gave money, the amount of which he did not see, to 4 men who were with Weluzani Banda and he did not know their names;

(ii) he was part of the UPND votes protection unit which stayed after voting albeit beyond 100 metres from the polling station; and

(iii) him and the members of the organization were not accredited with ECZ.

3.80 PW4 was also cross examined by Mr Zulu during which he testified:

(i) the vote protection group was the security wing of UPND, comprising of 30-50 strong men assembled and led by PW2;

(ii) after the group bothered and troubled the lady officer she threw away the parcel and fled into the polling station;

(iii) all this time Weluzani Banda never approached PW4 and the group as he was elsewhere;

- (iv) when the group of people in the white land cruiser tried to challenge PW4 and the UPND security group, the latter beat and defeated the land cruiser group who left;
- (v) PW4 and his security group were not approached by Weluzani Banda and it is they who went to question him when he was alone and they would have defeated him if he did not have a gun as they were a large group;
- (vi) the shooting only started after a chase and Weluzani Banda was running around his vehicle;
- (vii) after a long pause and unconvincing look away from court PW4 then changed his testimony to state that Weluzani Banda was chasing after him (PW4) and PW2 while the 30-50 UPND security men were just watching;
- (viii) the First Respondent had left by that time and PW4 would not know whether she did not tell Weluzani Banda to shoot him;
- (ix) he picked up some concrete aggregate and tried to throw it at Weluzani Banda but hit his vehicle; and
- (x) the encounter with Weluzani Banda took place near his vehicle where PW4 and the UPND security group had approached him.

- (ii) he was at the command centre when the items were stolen;
- (iii) Innocent Kalimanshi and Nathan Phiri are agents of the First Respondent; and
- (iv) the First Respondent was not present during the attack at UPND centre.

3.151 When cross examined by Mr Botha for First Respondent PW10 testified:

- (i) he spoke of Erick Habwato (PW12) being injured on 14th July 2021 unlike the petition in paragraph 6(1) which mentions two names PW12 and PW14;
- (ii) he said two doors were stolen from the UPND centre unlike the petition in 6 (b) which says three doors;
- (iii) he confirmed that when, he went to hide he did not see what was happening at the UPND centre and that he also did not see who fired the shots which he heard;
- (iv) to the best of his knowledge the matter was not with the police anymore; and
- (v) he agreed that he had not told the Court what he did on 12th August 2021.

3.152 PW10 was also cross examined by Mr Zimba also for the First Respondent during which PW10 testified:

- (i) he was a PF member for 20 years then he defected to UPND in February 2021;
- (ii) he recalls writing a letter to the PF ward chair in 2019 over a disciplinary charge against him but could not confirm that he left PF for fear of disciplinary action;
- (iii) before 2021 elections he held a position in UPND of John Howard ward committee member, which committee was chaired by a Mr Chitatu;
- (iv) according to him the majority of people did not vote in Chawama constituency;
- (v) he stated that Chawama had about 92 000 registered voters and the declaration of poll at p.24 of Petitioner's bundle showed about 57,260 voted but denied that the latter was the majority as the margin was too much;
- (vi) he however agreed that out of the total votes cast of about 57,260, the First Respondent votes of 35,492 represented the majority; and
- (vii) he admitted that he had a problem with the fact that the majority of voters voted for PF or the First Respondent

and his problem is that his candidate of choice lost.

3.153 **PW10 was also cross examined by Mr Zulu** also for the First Respondent during which he PW10 testified:

- (i) he had a very good relationship with PF for 20 years and he sacrificed a lot for PF including using his own resources to ensure that the party was strong and because of him it was strong in John Howard ward;
- (ii) his last position was vice ward chair for John Howard which position he held for the past 5 years;
- (iii) he admitted that investing in a ward for 5 years was a lot of work and because of his hard work PF was strongest in John Howard ward and majority of the people there were members of PF;
- (iv) PW10 agreed that because of his hard work over the 5 years it did not come as a surprise that PF won in John Howard and his hard work showed in the results PF got;
- (v) he admitted that he only left his position in PF in February 2021 and that building a party takes a very long time and destroying good work done over 5 years will take a very long time;

- (vi) he agreed that when getting into the campaign for UPND he knew that he had a difficult task to undo his good work spanning 5 years;
- (vii) he disagreed that he left PF as a bitter person but agreed that he was not happy with the happenings in PF and felt helpless about them;
- (viii) he also admitted having being suspended for associating with the Petitioner who was a member of the then opposition and being charged for endorsing the Petitioner as candidate for 2021;
- (ix) he gave an explanation on 1st October 2019 and was suspended as vice ward chair on 15th October 2019;
- (x) he agreed that during his suspension he was not to take part in any party activities and that he was still on suspension when he defected to UPND;
- (xi) he in one breath said he sneaked into the PF meeting of January 2021 but denied that he disobeyed the condition of suspension and then changed his testimony to that he was invited to the meeting;

- (xii) when questioned about whether the Court should believe that he sneaked in or was invited, PW10 said the Court should believe that he was invited;
- (xiii) PW10 however denied that he lied when he testified that he sneaked into the meeting but admitted that it was not true that he had sneaked in;
- (xiv) the incident at Patuka house was in June 2021 and the attack at 14 hours and he advised everyone to hide which he did too and its only after an hour that he thought it wise to call for help;
- (xv) he confirmed that he never saw the First Respondent anywhere on scene during the period of the attack; and
- (xvi) he was not aware that every candidate submitted a list of agents to ECZ and could not tell whether Nathan Phiri and Innocent Kalimanshi were registered agents for the First Respondent but he denied that they could have been wrong when he said that the two were the First Respondents agents.

3.154 **PW10 was also cross examined by Mr. Musonda** during which he testified:

- (i) he was aware that ECZ had a code of conduct and that a voter or member of a party could lodge a complaint with ECZ; and
- (ii) he confirmed that he did not lodge a formal complaint with ECZ.

3.155 **PW10 was not re-examined by Counsel for the Petitioner.**

3.156 **PW11 was Petro Siatumfya who testified in chief** that he was a 42 year old business man resident in Chawama constituency.

3.157 It was his evidence that in June 2021 whilst he was at the UPND command centre some people came at about 9 hours and began to bang at the gate demanding that it be opened and querying about who lied to them at the centre that there was UPND in Chawama. Stones were also thrown over the fence and people who PW11 was with jumped in flight into the next yard while PW11 remained with two women who were cooking and with Nambula Nashebo, a youth chair. The people outside the gate threw over some last stones and left.

3.158 It was his testimony that around 10 :00 hours, people came to warn them that PF were coming in large numbers.

- 3.159 He went outside and found Nathan Phiri with some people and was asked who the leader of the centre was which he said was him (PW11).
- 3.160 PW11 testified that the group then got hold of him physically and expressed intention to take him to the office of Kalimanshi while others said they could not take him as he was differently abled.
- 3.161 It was his testimony that he heard Nathan Phiri make a telephone call then a larger group came and he heard gun fire and crawled away with the help of others to seek refuge and he was taken to a room.
- 3.162 The larger group went into the UPND centre and began to break things and loot the place.
- 3.163 PW11 testified that he sent youths to go and check at the centre and they reported that things were broken and items taken as follows:
- (i) foodstuffs;
 - (ii) PW11's bag with his NRC, voters' card and disability card;
 - (iii) mattress and blanket; and
 - (iv) wheelchair of PW11.

- 3.164 PW11 complained that he did not vote in the 2021 elections due to the absence of his NRC and voters' card.
- 3.165 He also testified that he knew Nathan Phiri and Innocent Kalimanshi as PF people who he has grown up with in Chawama.
- 3.166 **PW11 was cross examined firstly by Ms Phiri** for the First Respondent during which he testified:
- (i) the incident at the UPND command centre started around 09:00 hours and continued to 10 :00 hours up to 11:00 hours and he did not report it to the Police but his leaders did; and
 - (ii) the First Respondent was not present the whole time but her people were.
- 3.167 **When cross examined by Mr Botha** also for the First Respondent PW11 testified that –
- (i) there was documentary evidence before court of his lost voters' card; but
 - (ii) conceded that he had not produced before court a photocopy of his voters' card or a Police report of its loss.
- 3.168 **PW11 was also cross examined by Mr Khosa** for the First Respondent during which he testified:

3.81 PW4 was also cross examined by Counsel for the Second Respondent, Mr Musonda during which PW4 testified:

- (i) the function of the UPND security wing was to protect the vote, prevent rigging, fighting and commotion;
- (ii) he was aware that ECZ was in charge of regulating elections and that there were procedures by ECZ in place at polling stations to ensure transparency;
- (iii) he was aware that there were police officers at each polling station to maintain order and prevent commotion;
- (iv) the UPND security wing of strong men was not formulated by the Police or sanctioned by ECZ but instead UPND initiative;
- (v) he voted between 08:30- 09:00 hours and did not go back inside the polling station after and did not know about what happened inside after that; and
- (vi) he was shot between 14:40 – 15 hours outside the polling station and lost consciousness of his surroundings due to the pain.

3.82 PW4 was not re-examined by Counsel for the Petitioner.

3.83 PW5 was Margaret Kalumba who testified in chief that she was a 58 year old resident of Misisi compound in Nkoloma Ward of Chawama.

3.84 It was her testimony that on 11th August 2021 at about 19:30 hours the First Respondent came to Nkoloma Ward on a road called Worldwide near a polling station and began to distribute mealie meal with the aid of men one of whom she knows as Cisse.

3.85 PW5 stated that the brand of mealie meal was Shabicko and there were a lot of people who received the mealie meal but she could only identify 4 of them by name:

- (i) Mavis Chishinda (PW7);
- (ii) Elizabeth Malindi (PW8);
- (iii) Davies Muyambango(PW6); and
- (iv) Lutangu Susiku(PW9).

3.86 PW5 testified that when she went to try and collect mealie meal, she found that it had run out and was instead told by the First Respondent to queue up with the others to receive money which PW5 stated she did and received the sum of K200 from the First Respondent.

3.87 PW5 said the First Respondent stated that the money was for elections the next day and that the voting place would have a computer that would tell if they did not vote for PF.

3.88 **The first line of cross examination of PW5 was by Mr Zulu** for the First Respondent which the demeanour of PW5 was most unimpressive and unconvincing as:

- (i) she was very evasive to simple questions and had to be cautioned to answer; and
- (ii) she could not face the Court opting instead to look in a different direction and sometimes down.

3.89 That said she testified as follows in response to questions from Mr Zulu:

- (i) she was not a member of UPND but found herself in Court because she had received items and the UPND chairperson in the compound, Mr Malindi approached her on 10th October 2021 to be a witness;
- (ii) she agreed that the First Respondent never came to her house on 11th August 2021;
- (iii) when it was put to her that the First Respondent never approached her to offer her anything; PW5 nervously looked down and did not answer or state anything in response;

- (iv) PW5 then stated that the First Respondent is the one who came to her and then PW5 changed her statement to that she PW5 is the one who went to the First Respondent's vehicle; and
- (v) PW5 then admitted that she lied when she said the First Respondent is the one who came to her.

3.90 **PW5 was also cross examined by Ms Mukuka** for the second Respondent during which PW5 testified:

- (i) she knows that ECZ conducts election and that as a voter she could complain to ECZ if aggrieved; and
- (ii) she voted from World Wide polling station which had ECZ representatives but she did not complain to any of them.

3.91 **When .cross examined by Mr Musonda** also for the Second Respondent, PW5 returned to the unimpressive and unconvincing demeanour of evasiveness, looking away from the Court and looking down. That said, her testimony in this round was:

- (i) she went to a site where there was a motor vehicle on 11th August 2021 but did not tell the Court the registration number;
- (ii) she stated that she had notified ECZ about the incident but when questioned about the inconsistency with her answer

to Ms Mukuka's questions, PW5 stated that her complaint instead related to people who were coming drunk, albeit without PW5 elaborating;

(iii) she confirmed that she knew the Petitioner and the First Respondent as candidates for the Chawama parliamentary seat; and

(iv) when it was put to her that she voted for the Petitioner, PW5 looked down and away from the Court, hesitated and then denied it.

3.92 PW5 was not re-examined by the Petitioner's Counsel.

3.93 PW6 was Davy Muyambango who testified in chief that he was a 46 year old resident of Misisi compound in Chawama Constituency.

3.94 It was his evidence that he received mealie meal, a PF branded t-shirt and money (K200) from the First Respondent in Nkoloma Ward at Worldwide Church near a polling station on 3 different occasions as follows:

- (i) during campaigns;
- (ii) near voting period; and
- (iii) on 11th August 2021.

3.95 PW6 testified that the First Respondent would when distributing the items say they should vote for her as MP.

3.96 He closed his testimony in chief by stating that on 12th August 2021 he went to vote.

3.97 **When cross examined by Ms Phiri** for the First Respondent PW6 testified:

(i) he received items from the First Respondent on 11th August 2021 around 19 hours at Worldwide Church; and

(ii) he did not report the issue to anyone.

3.98 **PW6 was also cross examined by Mr. Zulu** for the First Respondent during which PW6 testified-

(i) he is a Christian and has been since 1978;

(ii) he admitted that he does not know months so he agreed that the incidents he described could very easily have been in January, February, March or April and he cannot tell;

(iii) he agreed that the First Respondent has never been to his home, and has never invited him to go to her to get things and he is the one who used to go on his own;

(iv) PW6 stated that he is a very responsible person who cannot be bought or corrupted;

- (v) PW6 then stated that he was corrupted by the First Respondent who gave him mealie meal which he ate;
- (vi) He admitted that he had lied when he said he could not be corrupted and that he could not be bought;
- (vii) he admitted that he was no longer a responsible person because he allowed himself to be corrupted because of hunger but he said he did not lie when he told the Court that he was a responsible person;
- (viii) PW6 attempted to justify his position by stating that it did not start with him as there are many Christians who are also corrupt and find it easy to lie like him;
- (ix) he does not know PW5, PW7, PW8 or PW9 and did not meet them;
- (x) on all three occasions that he received mealie meal, t-shirts and money, he got them from the First Respondent's people whose names he did not know;
- (xi) he was not happy that the Petitioner lost and was before court to help the Petitioner based on what he saw; and
- (xii) he disputes that the majority of people voted for the First Respondent as according to him they voted for the Petitioner and the Petitioner won the election.

3.99 PW6 was cross examined by Mr. Musonda for the Second Respondent during which he testified:

- (i) he had not brought any pictorial or video evidence showing him receiving items from the First Respondent on 3 occasions;
- (ii) he was not aware that ECZ has a code of conduct or that a voter can complain to ECZ;
- (iii) he did not lodge any complaint with ECZ over the 3 incidents he spoke of; and
- (iv) he voted on 12th August 2021.

3.100 PW6 was not re- examined by Counsel for the Petitioner.

3.101 PW7 was Mavis Chishinda who testified in chief that she was a 50 year old resident of Misisi Compound.

3.102 It was her testimony that on 11th August 2021 between 19-20 hours in Nkoloma Ward, she heard people making noise and went out to see and found a lot of people near Worldwide Church receiving mealie meal from men who she did not know and it was on a truck.

3.103 PW7 testified that she joined the queue but the mealie meal ran out so she instead got K200 from the First Respondent who was

in a vehicle behind the truck and the First Respondent said that PW7 should vote for her.

3.104 She (PW7) went to vote on 12th August 2021.

3.105 **When cross examined by Ms Phiri** for the First Respondent, PW7 testified:

(i) that she received the money from Worldwide Church not her house; and

(ii) she was not aware that the First Respondent was nowhere near Worldwide Church on 11th August 2021.

3.106 **PW7 testified when cross examined by Mr Khosa that:**

(i) she has been voting since 1991;

(ii) she voted from UCZ in 2021 and did so freely and the First Respondent was not there;

(iii) on 11th August 2021 there was a truck with mealie meal but she does not know its licence registration number nor any of the men who were distributing;

(iv) the First Respondent was in a vehicle behind the truck; and

(v) PW7 admitted that she had lined up to receive the mealie meal and when it ran out, she received money whilst still

standing in the queue while the First Respondent was still seated in a vehicle.

3.107 Under cross examination by Mr Zulu, PW7 testified:

- (i) she came alone to court and only knew that she, PW5, PW6 and others had come for the same case when they sat waiting in the next courtroom;
- (ii) she does not know where PW5, PW6 and PW9 stay but knows where PW8 stays and PW8 is the one who told her about having to testify in court;
- (iii) PW7 stated in one breath that the K200 was given to her by the First Respondent but in another breath stated that the First Respondent was in her vehicle while the mealie meal and money were being given at the truck;
- (iv) she knew that Worldwide Church was a polling station and that campaigns ended at 18 hours on 11th August 2021 after which ECZ took over the polling station;
- (v) PW7 also testified that she knew that when ECZ takes over a premises no political activity takes place there and that it was impossible for distribution of mealie meal and cash to take place there but she insisted that it happened between 19-20 hours and the lighting was good; and

(vi) She denied that she was a member of UPND but admitted that she was not happy that the Petitioner lost as she wanted him to win and would be happy if he was given a second chance by the court.

3.108 When cross examined by Ms Mukuka for the Second Respondent PW7 testified:

- (i) she has been voting for many years and knows ECZ is in charge of elections and any complaints over elections must be notified to ECZ;
- (ii) she did not notify ECZ of the allegations she has made against the First Respondent and according to her ECZ declared the First Respondent winner without ECZ knowing about the allegations; and
- (iii) PW7 stated in one breath that she managed to vote for the candidate of her choice but when her attention was drawn to the incident, she spoke of she changed position and said she did not manage to vote for the candidate of her choice.

PW7 was not re-examined by Counsel for the Petitioner.

3.109 PW8 was Elizabeth Malindi who testified in chief that she was a 56 year old resident of Missisi compound. It was her testimony that on 11th August 2021 between 19:30 -20 hours

she saw a lot of women running towards Worldwide Church in Nkoloma ward.

- 3.110 She inquired and was told that the First Respondent was around and distributing mealie meal.
- 3.111 PW8 went to the scene and found that the distribution had stopped and she complained about having slept hungry the previous day after which she was referred to the First Respondent who was in a small car.
- 3.112 PW8 testified that when she got there the First Respondent greeted her and gave her K200 before telling PW8 not to forget her (First Respondent) the next day.
- 3.113 It was PW8's testimony that she understood it to mean that the First Respondent wanted her vote.
- 3.114 According to PW8 the people who were distributing mealie meal were the First Respondent's people who she moves with.
- 3.115 PW8 stated that she voted at Worldwide Church Polling Station.
- 3.116 **PW8 was cross examined by Mr Botha** for the First Respondent during which she testified:
- (i) The incident never happened at her house or at 21:00 hours as alleged in paragraph 6 (n) of the petition;

- (ii) She never reported the matter to the Police and the incident was being spoken about for the first time by her in court;
- (iii) she was given K200 but it was not photographed;
- (iv) she is married but her husband does not work due to illness;
- (v) she is a UPND member and not happy that the Petitioner lost;
- (vi) she confirmed that she would do everything possible to ensure that the election is redone;
- (vii) she did not know the licence number of the vehicle that had the mealie meal nor of the one in which the First Respondent was or its make;
- (viii) She could confirm that she voted for a candidate of her choice, but confirmed that she was alone in the polling booth and no one forced her;
- (ix) She stated that her evidence and what was said in her testimony were the same but agreed that the petition speaks of the First Respondent doing a door to door campaign at 21 hours while she stated that she followed

the First Respondent at Worldwide at 19:00 hours which was different from the petition;

- (x) PW8 then confusingly stated that the petition and her evidence are the same and they are different; and
- (xi) PW8 however denied that she would do everything possible to make sure the Petitioner wins the case.

3.117 **When cross examined by Mr Zulu**, PW8 testified that:

- (i) she had been a very strong UPND member since 2004 and that she has been campaigning for UPND all these years including 2016 when the Petitioner stood for elections and lost, she campaigned for him;
- (ii) in 2021 they stopped UPND from campaigning for the Petitioner but she (PW8) still remained in UPND;
- (iii) her vote is secret so she would not say who she voted for but could confirm that it was for a candidate of her choice as no one could change her mind on who to vote for; and
- (iv) the Petitioner can count on her support no matter what happens as she is a free person and, in this case, she chose what she wanted to happen.

3.118 **PW8 was also cross examined by Ms Mukuka** during which she testified:

- (i) she did not previously know that ECZ is in charge of elections but has just learned; and
- (ii) she did not report any of the alleged incidents to ECZ and has not brought any pictorial or video evidence of the incidents to Court.

3.119 **PW8 was not re-examined by Counsel for the Petitioner.**

3.120 **PW9 was Lutangu Susiku who testified in chief** that she was a 53 year old resident of Misisi compound in Nkoloma Ward of Chawama constituency.

3.121 It was her testimony that on 11th August 2021 when she came from church, she found women carrying mealie meal which on inquiry she was informed was being distributed by the First Respondent at Worldwide Church and that an NRC and voters card were needed.

3.122 PW9 testified that she went home to get the two documents and proceeded to Worldwide Church where she found mealie meal distribution had stopped.

3.123 It was her testimony that she was referred to the First Respondent's vehicle parked behind the truck that had carried the mealie meal.

3.124 PW9 stated that the First Respondent opened the car window gave her money and told her (PW9) not to forget her (First Respondent).

3.125 It was her testimony that she voted on 12th August 2021.

3.126 **When cross examined by Mr Botha** for the First Respondent PW9 testified:

- (i) she was coming from the New Apostolic Church on 11th August 2021;
- (ii) she did not report the First Respondent to the Police;
- (iii) she had not brought any documentary or pictorial evidence of receiving money from the First Respondent or of the distribution of mealie meal;
- (iv) she had not brought any audio or video recording of what she said the First Respondent told her on 11th August 2021; and
- (v) the First Respondent never came to her (PW9's) house and PW9 agreed that the petition was not telling the truth that the First Respondent was following people door to door.

3.127 **PW9 was also cross examined by Mr Khosa** during which she testified:

- (i) she first voted in 2016;
- (ii) the mealie meal truck was parked about 100 metres away from the polling station at Worldwide Church;
- (iii) the brand of mealie meal which she saw women carrying was Shabicko and it was 25 kg size; and
- (iv) she was registered at Chimache B polling station at Worldwide and voted freely on 12th August 2021 for a candidate of her choice.

3.128 **When cross examined by Mr Zulu** also for the First Respondent, PW9 confirmed that she voted for the person who she (PW9) wanted to vote for.

3.129 **PW9 was cross examined by Mr. Musonda** for the Second Respondent and confirmed that she did not lodge any formal complaint with ECZ over what she alleged.

3.130 **PW9 was not re-examined by Counsel for the Petitioner.**

3.131 **PW10 was Felix Nondo Chitoka who testified in chief** that he was a 57 year old resident of John Howard ward in Chawama Constituency and proprietor of a civil engineering company.

- 3.132 It was his testimony that he was at some point the PF vice ward chairman for John Howard and that in January 2021 he attended a meeting chaired by the First Respondent as PF Chawama constituency chairperson.
- 3.133 PW10 testified that at that meeting, the First Respondent had invited all ward executive officials and called upon them to welcome Innocent Kalimanshi into PF and to give him solidarity, which motion PW10 said was supported unanimously.
- 3.134 PW10 also testified that the First Respondent was certain of being adopted as PF Chawama Constituency candidate and he stated that as ward executive officials they adopted her and resolved that Chawama would be what he called a “no fly area” for any opposition candidate.
- 3.135 It was PW10’s testimony that following the inclusion of Innocent kalimanshi, he (PW10) decided to resign from PF as Innocent Kalimanshi had a background of violence. PW10 thereafter joined UPND.
- 3.136 PW10 testified that in June 2021 he was at Patuka house in John Howard which was the UPND command and planning

centre for two of the four wards in Chawama Constituency namely John Howard and Chawama ward.

- 3.137 It was his testimony that at 09:00 hours on the day the said UPND centre was attacked by PF cadres and one UPND youth was injured.
- 3.138 PW10 testified that at 14:00 hours on the same day, a Nathan Phiri drove to the centre and inquired who was in charge to which Petro Siatumfya (PW11) answered that he was.
- 3.139 It was PW10's evidence that at that point Nathan Phiri and his people remarked that they could not abduct PW11 as he was a differently abled person, and they drove off.
- 3.140 PW10 testified that 15 minutes later Innocent Kalimanshi drove past the UPND centre, spoke on his mobile telephone and drove back towards the UPND centre.
- 3.141 PW10 stated that he then saw PF cadres approaching from different directions and armed with knives, pick handles and machetes upon which PW10 told his UPND group to flee for their lives and seek refuge in neighbouring houses.
- 3.142 It was PW10's testimony that he sought refuge at a place where Catholics were having prayers and he heard two gunshots.

- 3.143 After an hour, PW10 emerged from hiding and called the UPND centre manager Mr Chitalu to inform him of the attack and was informed that he was at the Police station with the UPND campaign manager.
- 3.144 PW10 testified that he returned to the UPND centre and found that the premises had been damaged as follows-
- (i) roofing sheets broken;
 - (ii) window panes shattered;
 - (iii) two car doors taken;
 - (iv) food being cooked taken;
 - (v) two pots and frying pan taken;
 - (vi) two 25kg bags of mealie meal and 90 kg charcoal taken;
and
 - (vii) personal items for PW11 taken namely mattress, suitcase, NRC, voters card and disability card.
- 3.145 PW10 complained that after the attack, campaigning became difficult since it was a planning office for the two mentioned wards (Chawama and John Howard).
- 3.146 It was his testimony that fear also spread to UPND supporters in John Howard Ward.

- 3.147 PW10 also testified that on 14th July 2021 Erick Habwato (PW12) was hit with a stone by PF cadres while putting up posters in Balmoral area. PW10 was at the time with Mr.Chitatu and some women and they reported the matter to the Police at John Howard.
- 3.148 PW10 closed his testimony in chief by stating that on 27th July 2021 Choolwe Malambo (PW14) was hit with a plank by PF cadres while doing road shows.
- 3.149 **When subjected to cross examination PW10 was very evasive, refusing to answer direct questions and volunteering explanations without being asked and also taking long pauses as if to think before answering and his demeanour was generally unimpressive and unconvincing.**
- 3.150 **That said, the first round of cross examination of PW10 was by Ms Phiri for the First Respondent during which PW10 testified:**
- (i) in one breath that he could not confirm that he did not see the people who stole the items as he was there but in another breath, said he was not withdrawing his evidence that he had taken refuge and on return is when he found that items were missing;

- (i) he has been a UPND member since 2010 and occupies the position of Branch Chairman at ward level;
- (ii) he first voted in 1996; and
- (iii) it was very bad according to him that the Petitioner lost and he was not happy about it.

3.169 **Under cross examination by Mr. Zimba** for the First Respondent, PW11 testified:

- (i) he used to stay at the UPND command centre and he had clothes there and some of his valuable property;
- (ii) when the incident took place, he was outside the yard and could not see what was happening inside the UPND centre;
- (iii) in one breath he said he did not see any PF cadre carrying property from the UPND centre but they are the ones who got inside yet in another breath he said that from a distance he could see them carrying things;
- (iv) he conceded that he did not state the latter part of the previous statement during his evidence in chief;
- (v) he heard that the First Respondent won as MP for Chawama but he has a problem with it as his candidate of choice did not win;

(vi) he conceded that he stated the people that he was with at the UPND centre but never mentioned Felix Chitota (PW10) as one of them; and

(vii) he admitted that he had not produced a police report in Court of lost vital documents or property and that the only way the Court would know that the incident was factual is if it looked at the report.

3.170 **PW11 was also cross examine by Ms Mukuka** during which he testified:

(i) he lodged a formal complaint with ECZ over the alleged incident; but

(ii) the document to show that had remained and was not before Court.

3.171 **PW11 was not re-examined by the Petitioner's Counsel.**

3.172 **PW12 was Erick Habwato who testified in chief** that he was a 20 year old resident of John Howard ward in Chawama.

3.173 It was his evidence that on the night of 14th July 2021 he and two others namely Choolwe Malambo (PW14) and Nchimunya Muyabe were putting up posters along Lilayi Road under good lighting from the gates around and from passing vehicles.

3.174 Then between 20-21 hours some men (about 10) wearing PF regalia came and hit PW14 with a stone on the head and PW12 and his two colleagues abandoned the exercise and reported the matter to the police as well as obtained a medical report.

3.175 The next day PW12 saw one of the attackers and him and his colleagues tried to apprehend him.

3.176 PW12 closed his evidence in chief by stating that the incident happened in John Howard.

3.177 **When cross examined by Mr Botha** for the First Respondent PW12 testified:

(i) the incident happened along Lilayi road and he confirmed that he personally was not beaten unlike what is stated in paragraph 6(l) of the petition that it was in Balmoral area and that he was hit with a stone; and

(ii) he confirmed that his evidence in chief was different from that alleged in paragraph 6 (l) of the petition.

3.178 **PW12 was also cross examined by Mr Khosa** during which he testified:

(i) he and his colleagues were putting up posters along Lilayi road which branches off the ring road called Tokyo way;

(ii) he knows where Balmoral is located and its near John Howard;

(iii) he joined UPND in 2014 but only became active in 2021;
and

(iv) he does not agree that he was not happy that the Petitioner lost but stated that he was not ok with the First Respondent winning.

3.179 **When cross examined by Mr Zimba, for the First Respondent PW12 testified:**

(i) he could confirm that he did not at any point testify about being hit on the mouth;

(ii) he campaigned for UPND prior to the 12th August 2021 election and it involved telling people about the UPND manifesto and giving posters for its candidates;

(iii) he agreed that the campaign exercise was very successful;

(iv) he voted on 12th August 2021;

(v) he denied that he had come to Court because the candidate he campaigned for lost but agreed that he was not happy that his candidate lost;

(vi) he knew about the Court proceedings from the campaign manager who sent messages;

(vii) he was aware that he was testifying on the side of the Petitioner but the Petitioner did not call him to testify;

(viii) the incident he spoke of related to his campaigns in Balmoral area; and

(ix) he has not brought to Court any medical report for himself or for PW14 and he has not named anyone of the PF cadres who he saw on 14th July 2021.

3.180 **When cross examined by Mr Musonda** for the Second Respondent, PW12 confirmed that he did not lodge a formal complaint with ECZ over the alleged incident.

3.181 **PW12 was not re-examined by Counsel for the Petitioner.**

3.182 **PW13 was Christopher Mulele who testified in chief** that he was a 27 year old security officer resident in Freedom Compound Lilayi Ward, Chawama constituency.

3.183 It was his testimony that on 12th August 2021 he was in a queue for voting at JICA centre, Mtendere E polling station then around 14 hours he saw the First Respondent arrive in a vehicle with someone else and they went into the voting room.

- 3.184 PW13 testified that, the First Respondent then went back to her vehicle and got out a chitenge which had PF t-shirts in it and she gave it to a nearby police officer.
- 3.185 It was his testimony that there was then then commotion as a result of which the First Respondent left.
- 3.186 PW13 stated that a Landcruiser arrived on the scene with about 10 people who began to beat people and cause confusion. He then heard a gunshot and saw a man fall down.
- 3.187 It was his evidence that at that point he ran away to avoid being shot or affected and he did not even vote on the day despite having been eager to do so.
- 3.188 He stated that the First Respondent caused the confusion.
- 3.189 **Under cross examination by Ms Phiri** for the First Respondent PW13 testified:
- (i) he confirmed that was standing far when the First Respondent was leaving the polling station and did not know what was happening at her car;
 - (ii) he knows why the confusion started and the First Respondent was there when it started;

(iii) he was not aware that other witnesses had testified that the First Respondent was not present when the confusion started; and

(iv) when asked who was telling the truth between him and those witnesses, PW13 avoided the question and remarked that he would not know what they said but only what he saw.

3.190 **When cross examined by Mr Botha** also for the First Respondent PW13 testified:

(i) when the First Respondent came out of the polling station, she went to her car and removed a chitenge which had t-shirts and the police officer followed her;

(ii) he does not know PW2 or whether PW2 was lying when he testified that the parcel was concealed;

(iii) he confirmed that he did not say that the First Respondent gave anyone money and he confirmed that he did not see her do so;

(iv) he does not know whether the witnesses who testified that the First Respondent gave anyone money lied and he did not see it; and

(v) he does not know the circumstances under which the First Respondent gave a parcel to the Police officer and does not know what the latter did after.

3.191 **PW13 was also cross examined By Mr Khosa** for the First Respondent and testified:

- (i) he is related to PW3 and was aware that PW3 was a polling agent for UPND at Mtendere E polling station;
- (ii) he was not aware that PW3 stayed at the polling station up to 18 hours and after observing the confusion he did not call PW3 to see if he was ok;
- (iii) after he (PW13) left the polling station he did not return to see if things were calm and people voting nor did he try to contact anyone to update him;
- (iv) in one breath PW13 said he did not take any further steps to vote because he was afraid but in another breath, he said it was because he was rushing for work;
- (v) he said he heard two gunshots; none of which were fired by the First Respondent; and
- (vi) he stated that he heard that the First Respondent won in Lilayi Ward and that it was reported as such on the radio.

3.192 **When cross examined by Mr Zimba** for the First Respondent PW13 testified:

- (i) he does not live in the same house as PW3 who is his brother and a UPND supporter but he knows where PW3 stays;
- (ii) the Mtendere E polling station was in a wall fence and the First Respondent parked outside the wall fence;
- (iii) PW13 was outside the wall fence about 20 metres from the gate and did not notice a group of 30-50 UPND youths who were protecting the vote as he did not pay much attention;
- (iv) in one breath PW13 stated that the First Respondent got a chitenge with t shirts from her vehicle but in another breath, he confirmed that the parcel given by First Respondent to an officer was concealed;
- (v) PW13 stated that if someone who was outside the gate said the First Respondent just got outside and greeted people they would be lying;
- (vi) he was not aware that the commotion was caused by 30-50 UPND youths who were at the gate and there was no officer at the gate;

- (vii) he saw the officer receiving the parcel near the gate and there was an uprising thereafter as youths were unhappy with the parcel;
- (viii) he was not aware that every candidate is allowed to visit all polling stations in the constituency and confirmed that had he known he would not be saying that if the First Respondent had not come there would not have been any noise;
- (ix) he was not aware that for fenced polling stations, the fence is the boundary;
- (x) he denied that he supported UPND because of his brother (PW3) and stated that he is independent;
- (xi) he however confirmed that he supported the UPND councillor and that he (PW13) was not happy because his parliamentary candidate lost; and
- (xii) he was aware that the majority of voters in Chawama voted on 12th August 2021 but was not aware that the majority of those who voted, voted for First Respondent who is the current MP.

- 3.193 When cross examined by Ms Mukuka for the Second Respondent PW13 confirmed that he has not raised any issues with the Second Respondent.
- 3.194 **PW13 was not re-examined by Counsel for the Petitioner.**
- 3.195 **PW14 was Choolwe Malambo who testified in chief** that he was a 19 year old shop trader resident in Makeni, Lusaka.
- 3.196 It was his evidence that on 14th July 2021 at around 20:00 hours, him, Muyabe Nchimunya and PW12 were putting up campaign posters for President Hichilema, the Petitioner and the UPND councillor candidate.
- 3.197 PW14 was on top of a pole when he saw about 10 people wearing PF regalia approach and began to beat his colleagues.
- 3.198 It was his testimony that when he got down to try and escape he was also beaten including with a stone on his head which left him scarred.
- 3.199 PW14 then showed the Court a scar on the left top side of his head.
- 3.200 It was his testimony that as his attackers left, he heard them sing in celebration that “over Tasila they would be harm”.
- 3.201 PW14 testified that he reported the incident to the Police at John Howard and was attended to at Chawama level 1 hospital.

- 3.202 It was his evidence that his medical report remained at the Tribunal where he had testified as a witness.
- 3.203 **When cross examined by Ms Phiri** for the First Respondent PW14 testified that he had not named his attackers.
- 3.204 **Under cross examination by Mr Botha** for the First Respondent PW14 conceded that he had not told the Court where the incident allegedly happened nor what he did on 12th August 2021.
- 3.205 **When cross examined by Mr Zimba** also for the First Respondent, PW14 testified:
- (i) he had not brought any medical report;
 - (ii) he was initially about 2.5 metres high on top of a pole after being helped up by his colleagues on their shoulders and he remained there hanging when they were being beaten;
 - (iii) he never saw the First Respondent on scene during the incident; and
 - (iv) he confirmed that his parliamentary candidate lost.
- 3.206 **PW14 was also cross examined by Mr Musonda** for the First Respondent during which he confirmed that he did not lodge any complaint with ECZ over the alleged incident.

- 3.207 PW14 was not re-examined by Counsel for the Petitioner.
- 3.208 PW15 was Gilani Simfukwe who testified in chief that he was a 41 year old resident of Misisi compound, Nkoloma ward and businessman by occupation.
- 3.209 He testified that he was also the UPND branch chairman for Nkoloma ward and that on 9th July 2021 at about 23:30 hours he received a telephone call from his father in law James Chingenge advising him to leave home as PF cadres were on their way to cause destruction.
- 3.210 It was his evidence that he went outside and saw a group of people approaching so he jumped over the fence but found even more.
- 3.211 PW15 stated that he was hit on the head with a machete and with an axe on the rear of his right leg. He fell down and pretended to be dead and his attackers remarked that he should be left since he was dead.
- 3.212 It was his testimony that before they left, they searched his pockets and robbed him of K320 and an Itel mobile phone.
- 3.213 It was PW15's evidence that his attackers then went to his home destroyed things and robbed it of two fridges and two television sets.

- 3.214 He testified that he got up and hid then when the noise quietened, he went to the Police and together they went to his home and found his wife and children being removed from the house as it was set ablaze with garden chairs from his bar.
- 3.215 PW15 then went to hospital and received stitches on his head and leg and also obtained a medical report which he identified as the one at page 4 of the Petitioner's bundle.
- 3.216 PW15 also showed the Court a scar at the back of his head and another at the back knee area on his right leg.
- 3.217 It was his evidence that his attackers were PF cadres who he knew well and they included Divo, Cisse and Rabbi. PW15 testified that the First Respondent used to move with them when she was a councillor and also for campaigns.
- 3.218 PW15 complained that the Police recorded a statement from him but did nothing about the matter.
- 3.219 **When cross examined by Ms Phiri** for the First Respondent, PW15 testified:
- (i) that he has not produced a police report over the events of 9th July 2021; and
 - (ii) he did not see the First Respondent during the attack.

3.220 **PW15 was also cross examined by Mr Zimba** during which he testified:

- (i) the medical report at page 4 of the Petitioner's bundle speaks of his cut on the head but does not anywhere say he had a leg injury;
- (ii) the cut on the head was from persons he knows namely Divo, Cisse and Rabbi and they are the First Respondent's agents;
- (iii) he agreed that he has not brought any document to show that they were her ECZ registered agents and he agreed to that he did not in fact know who the First Respondent's ECZ registered agents are; and
- (iv) he could not confirm that as Ward Chair, he had a duty to protect the interests of UPND but he could confirm that he was not happy that his candidate lost the Chawama election.

3.221 **When cross examined by Ms Mukuka** for the Second Respondent, PW15 testified that he did not complain to ECZ about the incident.

3.222 **PW15 was not re-examined by Counsel for the Petitioner.**

- 3.223 **PW16 was Moses Musumali who testified in chief** that he was a 57 year old businessman resident in Misisi Compound, Chawama constituency, Lusaka.
- 3.224 It was his testimony that on 9th July 2021 around 23:00 hours whilst he was in his shop which is connected to his house, it was raided by more than 30 people whose faces were covered with black masks and dressed in green overalls labelled "PF empowered by ECL", and armed with knives and machetes.
- 3.225 He testified that they pushed him around and one said they were sent to work by the Councillor.
- 3.226 PW16 complained that the group ransacked his shop taking all the stock away and K15,000 cash as well as damaging his fridges.
- 3.227 He testified that he reported the matter to the police in Misisi who told him to wait for an arrest before he could be called.
- 3.228 **PW16 was cross examined by Mr Zimba** for the First Respondent during which he testified:
- (i) he was not alone in the shop but he did not in his evidence in chief mention any other person who he was with;

- (ii) cash worth K15,000 was stolen and goods worth K38,000 were stolen though he did not mention the latter in testimony in chief;
- (iii) in one breath he said it can be true that the value of goods stolen was K15,000 yet in another breath he said the value of goods stolen was K38,000;
- (iv) he confirmed that he was the person spoken of in paragraph 6(g) of the petition after which he changed his statement to that the value of the goods stolen was K15,000 as stated in the petition;
- (v) he agreed that his said statement was different from his earlier position that the value of goods stolen was K38,000;
- (vi) he agreed that it was true as stated in the petition that he was a UPND sympathizer;
- (vii) he conceded that he was before Court to serve the interests of UPND but denied that he could do anything to protect the said interests;
- (viii) he was aware that as at 9th July 2021 there was no Councillor or MP in government;
- (ix) he agreed that he did not see the First Respondent in his shop on 9th July 2021; and

(x) he said he verified the information that the people who came on 9th July 2021 were acting for the Councillor but he did not ask the First Respondent if she sent those people.

3.229 **PW16 was cross examined by Mr Musonda** for the Second Respondent and testified that he did not lodge any complaint to ECZ about the alleged incident.

3.230 **PW17 was Mavis Musonda who testified in chief** that she was a 40 year old beggar, resident in Misisi Compound, Lusaka.

3.231 It was her evidence that on 9th July 2021 at about 23 hours whilst sleeping with her 4 children in her two roomed house she heard people enter and they asked her for her NRC and voters card.

3.232 PW17 testified that the intruders queried about her attending UPND meetings and what she goes to do there to which she denied and they remarked that she would reveal when beaten. They began to beat her and her children ran away to a place she does not know since she is visually impaired.

3.233 PW17 lamented that 3 of the intruders then raped her and they never said anything during the act.

- 3.234 She also testified that she did not know who her attackers were as she is visually impaired.
- 3.235 It was PW17's evidence that the following day she was helped by UPND people to go to Kamwala Clinic where she was treated.
- 3.236 **PW17 was cross examined by Mr Khosa** during which she testified:
- (i) her four children were Blessing Sakala, Purity Sakala, Agness Sakala and Beatrice Sakala; and
 - (ii) the children ran away and were not in the house when she was being raped by three people.
- 3.237 **PW17 was not cross examined by Counsel for the Second Respondent** nor was she **re-examined by Counsel for the Petitioner.**
- 3.238 **PW18 was Andrew Zulu who testified in chief** that he was a 40 year old resident of Chawama constituency and an electrician by occupation.
- 3.239 It was his testimony that he was also the campaign manager for the Petitioner for the 2021 Chawama parliamentary elections.
- 3.240 PW18 testified that following the filing of nomination on 17th May 2021 he assembled a campaign team of 12 persons and

assigned each of the 4 wards in Chawama constituency with two of such persons to help him manage the campaigns.

- 3.241 It was his testimony that on the first day of the campaign trail, 22nd May 2021 he and team embarked on a door to door exercise in Chawama ward which was however curtailed by an attack by PF cadres clad in green PF regalia labelled ECL 2021.
- 3.242 PW18 testified that the attack left a person, Terry Chingo injured and the matter was reported to the Police. The injured person received medical attention as per medical report identified by PW18 as the one at page 1 of the Petitioner's bundle of documents.
- 3.243 It was his testimony that he also reported the incident to ECZ which called for a stakeholder meeting on 10th June 2021 held at Civic Centre, Nakatindi Hall.
- 3.244 PW18 testified that the meeting culminated in a campaign timetable for the political parties to campaign in different wards each day on a rotation basis to avoid clashes. The timetable was also shared with the Police.
- 3.245 It was his testimony that however, the PF did not follow the timetable as they campaigned in every ward everyday.

- 3.246 PW18 complained about it to the ECZ returning officer for Chawama constituency Mr Jonathan Nkhata (RW3) but to no avail.
- 3.247 It was his testimony that thereafter he complained to Mr Tembo, Officer in Charge, Chawama Police but the breach by PF continued despite the assurance from the police that it would be addressed.
- 3.248 PW18 testified that in June 2021 he received a telephone call around 09:00 hours from his deputy campaign manager, Godfrey Chitalu that the UPND campaign centre (Patuka House) located on the boundary of Chawama ward and John Howard ward which serviced the two wards had been visited by PF persons called Nathan Phiri and Innocent Kalimanshi who gave them a 2 hour ultimatum to close the centre and vacate.
- 3.249 PW18 advised Mr Chitalu to report the matter to the Zambia Police. PW18 himself reported the matter and whilst there at about 14:00 hours same day, he received a distress call that Patuka house was under attack by the same people.
- 3.250 It was PW18's testimony that at his instance, he and the Police led by the Officer in Charge, Mr Tembo went to Patuka house and found that the attackers had left.

3.251 PW18 testified that they found that nshima and relish had been thrown on the roadside.

3.252 It was his testimony that when they entered the premises of Patuka house they found PW11 who complained that Innocent Kalimanshi had taken his wheelchair and that other items taken were:

- (i) food stuffs;
- (ii) doors for a vehicle;
- (iii) mattress;
- (iv) cooking implements; and
- (v) a grinder.

3.253 PW18 testified that PW11 informed him that he was not alone when attacked but with a Mr. Mutabo who was badly beaten but fled into the neighbouring yard. The matter was also reported to the Police by PW18.

3.254 It was PW18's testimony that on the night of 9th July 2021 around 23 hours he got a distress call from Mr. Chingenge, in Misisi compound, Nkoloma Ward that they were under attack by PF cadres recognised as from the bus station and needed the matter reported to the Police. PW18 lamented that he had no transport to assist to which Mr. Chingenge also lamented

that he could not report it himself as they were surrounded by the attackers.

- 3.255 It was PW18's testimony that he went to the area the next day about 05:00 hours and found it looking like a war zone. The first house he saw was for PW15 who was hacked at the back of his head, back of knee and robbed of household items and ashes which showed of a fire. PW18 took photos of the scene.
- 3.256 The second house was for James Chingenge who PW18 found to have been beaten up and robbed too.
- 3.257 He visited a third house for PW17 who he found crying badly about being raped.
- 3.258 PW18 testified that he visited the house of Chanda Mulenga an expectant/pregnant lady who complained of being beaten and fingers put in her private parts.
- 3.259 It was his testimony that he visited Angela Milimo and Melissa Milimo and found them lying down crying about being beaten and raped. He said he also saw a Mr. Edwin Musonda who was hacked on the head.
- 3.260 PW18 said he visited a 6th house for Mr. McDon that was demolished from outside and he took pictures.

3.261 It was his testimony that he also visited PW16 at his shop and was shown empty space which was said to house the fridge taken and that PW16 also complained of money and his telephone also being stolen.

3.262 PW18 testified that he advised the UPND campaign team and all victims to report the incidents to the police and seek medical attention.

3.263 He then identified the photos and documents in the Petitioner's bundle of documents in the Petitioner's bundle of documents as follows –

P1 is the medical report for Terry Chingo;

P2 is the medical report for Oscar Nyumbe;

P3 is the medical report for McDon;

P4 is the medical report for PW15;

P5 is the medical report for Edwin Chanda with an OB No for Zambia Police;

P6 is the medical report for PW17;

P7 is the medical report for Mulenga Chanda;

P8 is the medical report for Luckson Lungu;

P9 is the medical report for Melissa Milimo;

P10 is the medical report for Angela Milimo;

P11 is the medical report for Martha Banda;
P29 is a picture of PW15;
P32 is a picture of PW15 injured leg;
P33 is a picture of a house damaged in Misisi Compound;
P34 is a picture of Musonda who was hacked on the shoulder;
P35 is a picture of PW18 inspecting a damaged house;
P36 is a picture of a damaged house;
P37 is a picture of another damaged house;
P39 is a picture of a damaged house; and
P42 is a picture of a man hacked on his waist.

- 3.264 It was PW18's testimony that sometime in July 2021, ECZ suspended campaigns in Lusaka and 3 other districts for a duration of two weeks, due to violence.
- 3.265 When the suspension was lifted, certain restrictions such as against rallies and roadshows were in place but roadshows allowed.
- 3.266 PW18 testified that he inquired from the ECZ returning officer (RW3) about how the campaigns would run and was advised that they would follow the existing rotational timetable.

- 3.267 It was his testimony that the first campaign thereafter by his team were on 23rd July 2021 in Chawama ward for a door to door exercise.
- 3.268 PW18 testified that he notified the Police Officer in Charge who advised that the UPND could go ahead as he was aware of the campaign timetable.
- 3.269 It was PW18's testimony that the timetable showed that PF was supposed to campaign in Lilayi ward on the day, 23rd July 2021.
- 3.270 PW18 testified that he and team began campaigning at Chawama Basic School amongst marketeers who they were giving flyers for UPND presidential, parliamentary and councillor candidates, then they met Saidi Phiri, the PF Chawama ward youth chairman.
- 3.271 PW18 testified that he queried Mr Phiri about why he was there instead of Lilayi and Mr Phiri counter queried if UPND did not know that Chawama constituency was for the First Respondent and former President Lungu, which PW18 for his part refuted.
- 3.272 It was his testimony that he then saw Mr Phiri make a call on his mobile telephone and PW18 decided to notify the Police Officer in Charge, Mr Tembo that he had found the PF youth

chairman for the ward there in Chawama instead of being in Lilayi.

- 3.273 Through the efforts of the Officer in Charge, police officers were deployed but before they arrived, PW18 urged his team to ignore Mr Phiri who was looking for provocation and to carry on campaigning which they did amongst the marketeers.
- 3.274 PW18 testified that they however saw PF cadres approaching dressed in green overalls and t shirts branded "Powered by ECL 2021". It was his evidence that the said group were armed with instruments like planks, bars, gold clubs and machetes and were singing a song translated as "when it comes to Lungu we will hurt you."
- 3.275 PW18 also recounted that the cadres wore boots like soldiers and padding on their knees and elbows.
- 3.276 It was his testimony that he made a follow up call with the police whose personnel then arrived on the scene before the PF cadres reached PW18 and team.
- 3.277 It was his evidence that at that point the PF cadres scampered and hid in houses, which PW18 informed the police of.

- 3.278 PW18 testified that the police team decided to keep vigil and patrol the area, while PW18 and team proceeded with door to door campaigns.
- 3.279 It was his testimony that whilst he was campaigning at a house, he saw the man he was talking to fall down bleeding and noticed that his team had disappeared.
- 3.280 PW18 testified that he was then confronted by a group of PF cadres who hit him with a plank on the forehead which PW18 queried and he was called a cow and counter queried about whether he did not know that that area is for "Tasila" and "Edgar".
- 3.281 It was his testimony that the PF group grew in number and it was verbalized that he was the trouble maker in Chawama who they were looking for.
- 3.282 PW18 testified that one cadre attempted to stab him in the neck with a screw driver but he blocked it with his own arm which was in the process wounded on the left wrist.
- 3.283 PW18 showed the Court a scar on his left inner wrist area.
- 3.284 It was his testimony that the group lifted him on their shoulders and said they would take him to their commander while one said they should cut off his head. Others said they

had captured a cow and they continued beating him along the way.

- 3.285 PW18 testified that they then took him to an unfinished building near Chawama bus stop and began to debate about what to do with him, some saying he should be killed ,others that his eyes removed while some said he should be taken to their commander and others saying he should be left alone as he is innocent.
- 3.286 It was his testimony that when his telephone rang the cadres answered and said that he was dead and they threatened to follow the caller.
- 3.287 He then heard music from a vehicle playing a PF campaign song for former President Lungu and one of the cadres informed the others that the "Honourable" has come and it was time to go and get paid for their work. One asked which "Honourable" and another said it was the First Respondent.
- 3.288 PW18 testified that as the cadres were leaving, they would step on him and kick him. One then remarked that as he was a cow he would run away while another said he would not since he was injured.

- 3.289 It was his testimony that he was also robbed of K500 cash and his mobile telephone by the same group.
- 3.290 PW18 testified that he received medical treatment for the injuries at Kwacha Clinic and he identified the medical report as featured at p.12 of the Petitioner's bundle.
- 3.291 PW18 also testified that he reported the incident to Police.
- 3.292 It was his testimony that after his attack his followers became afraid and complained that it was not safe to do their work in Chawama.
- 3.293 PW18 advised them to do their work at night but they complained that even that was not safe as PW12 and PW14 were attacked in John Howard at night while putting up campaign posters.
- 3.294 It was PW18's testimony that the violence was so rampant in Chawama constituency that if someone wore red (UPND colour) they would be attacked.
- 3.295 He testified that even red cars were being damaged including that of the UPND youth chairman damaged in John Howard which damage was photographed by PW18, appearing at p. 41 of the Petitioner's bundle and reported to the police.

- 3.296 PW18 complained that the noise continued such that UPND could not penetrate in Chawama constituency.
- 3.297 It was his testimony that on 11th August 2021 at about 20:00 hours he got a telephone call from PW8 who was the UPND Nkoloma ward chairlady complaining about the First Respondent distributing mealie meal and money at Hope Worldwide in Misisi compound.
- 3.298 PW18 stated that he advised PW8 to report the incident to the Police and to go and receive her share of the items since according to PW18 it was government property and PW8 was hungry.
- 3.299 PW18 said PW8 expressed reluctance about reporting the matter to the Police saying she believed nothing would happen as the First Respondent was the daughter of the then President.
- 3.300 It was PW18's testimony that he notified the matter to the ECZ returning officer (RW3), who undertook to follow up on the matter but did not revert to PW18 over it thereafter.
- 3.301 PW18 also testified that on 12th August 2021 at about 14:00 hours he got a telephone call from the UPND Lilayi ward chairman. The report was that the First Respondent had been there and brought a wrapped parcel given to the police. The

UPND team had wanted to know what was in the parcel, which resulted in the commotion and in the process PW4 who was the UPND youth chairman was shot.

- 3.302 PW18 testified that he advised his team to report the matter to the Police, which PW18 later followed up and confirmed the reporting at Chilanga station. PW18 also found that PW4 had been taken to the hospital.
- 3.303 PW18 testified that he went to the ECZ totalling centre for the constituency on 12th August 2021 at around 20:00 hours to wait for results and none came in that night.
- 3.304 It was his testimony that results began to trickle in on 13th August 2021 and that by 17:00 hours the next day (14th August 2021) not all results were in but only 96 out of 111 polling stations.
- 3.305 PW18 testified that irregularities were then discovered between the ECZ record of proceedings and the Gen 20 forms which the returning officer RW3 said were failing to balance.
- 3.306 It was PW18's testimony that one of the irregularities was that at the Methodist Eye Clinic Polling Station the First Respondent polled 300 votes but ECZ added an extra vote to make it 301 for her.

- 3.307 PW18 testified that he queried RW3 about how many more of the 96 polling station results had votes added to balance.
- 3.308 It was his testimony that soldiers then came and queried why there was a delay in results and RW3 advised that they were still waiting for 15 polling stations. The soldiers complained that other constituencies with a lot of voters had managed to announce results and that if the soldiers were to come back they threatened that they would eject RW3.
- 3.309 PW18 testified that RW3 then addressed the stakeholders at the totalling centre to reduce on their queries to allow the process move faster as even soldiers were concerned about progress.
- 3.310 It was his testimony that RW3 called the LCC Town Clerk Mr Mwansa who appeared for a meeting which also had officials from PF and UPND.
- 3.311 PW18 stated that RW3 made a plea that if anyone from PF or UPND had results for the remaining 15 polling stations they should submit them to ECZ to be entered and he wrote down a list of the stations, to which PW18 advised that they did not have them and the day ended without the said results.

- 3.312 On 15th August 2021 at 06:00 hours soldiers came and inquired about the delay in announcing and threatened to abandon securing the totalling centre leaving it vulnerable.
- 3.313 According to PW18, RW3 then panicked and began to prepare to announce results. PW18 queried why he would do that without the remaining results and RW3 responded that even if all the results from the remaining stations were to be given to Petitioner, he would not catch up with the First Respondent's votes as the gap was too big.
- 3.314 PW18 testified that he and team then boycotted the declaration and announcement of results, while RW3 went ahead to do it outside at the totalling centre.
- 3.315 It was PW18's testimony that he queried RW3 further who stated that Gen 20 forms for the 15 polling stations had arrived and were being captured by Information Technology staff and would be seen in ECZ form 19.
- 3.316 PW18 testified that ECZ then printed form 19 and 21 and asked the stakeholders to sign to which PW18 declined and requested for a result rejection form to sign and was told by RW3 that it was only available at ECZ head office.

3.317 It was PW18's evidence that RW3 also advised that if they were not satisfied with the process they can go to Court and that is why the petition was brought by them.

3.318 **PW18 was cross examined firstly by Ms Phiri** for the First Respondent during which he testified:

(i) he was not present when the homes in Misisi were being attacked and only visited them in the morning of 10th July 2021; and

(ii) out of the alleged PF cadres who abducted him he named Saidi Phiri, the youth chairman.

3.319 **When cross examined by Mr Botha** also for the First Respondent, PW18 testified:

(i) he confirmed that the petition was brought collectively but said he was not aware that there was only one Petitioner;

(ii) he was first attacked by alleged PF cadres on 27th May 2021 when he was with the Petitioner, Terry Chingo and other campaign team members and did not know that there was no medical report for the Petitioner for that incident;

- (iii) he confirmed that he was not present at the UPND command centre/patuka house during the attack;
- (iv) the first person to call him over the attack at Misisi on 9th July 2021 was James Chingenge and he only reported the matter to the police after PW18 visited him on 10th July 2021;
- (v) according to PW18 Mr Chingenge went to Kamwala hospital but he did not know that there was no medical report for Mr Chingenge before Court;
- (vi) the second person he visited in Misisi was PW15 and he (PW15) also went to the police after PW18 had visited him on 10th July 2021 and the record should reflect that the report to the police was on 10th July 2021 but the police stamp on the medical report at p.4 of the Petitioner's bundle says 9th July 2021;
- (vii) he visited PW17 next and she also reported to the police on 10th July 2021 but he agreed that the medical report at p.6 of the Petitioner's bundle bore a police stamp of 11th July 2021;
- (viii) he also visited Chanda Mulenga who was also attacked on 9th July 2021 and could only have been attended to

after the attack but he agreed that the medical report at p.7 of the Petitioner's bundle showed a date stamp of 12th June 2021 for the Lusaka District Health Office and PW18 reiterated that he knew the attack happened on 9th July 2021;

- (ix) he also visited Angela and Melissa Milimo but did not find any PF cadres at their house;
- (x) he visited Luckson Lungu too but could not clearly make out the dates on the stamp of the medical report at p.8 of the Petitioner's bundle;
- (xi) he got a medical report following his abduction but the stamp on it at p.2 of the Petitioner's bundle was not clear; and;
- (xii) he does not know that PW2 testified in Court that the fracas at Mtendere E polling stations was caused by UPND cadres.

3.320 **PW18 was also cross examined by Mr Khosa** for the First Respondent which he testified:

- (i) he was the Petitioner's campaign manager from May 2021 to August 2021 and still is;

- (ii) he was aware of measures by ECZ on mode of campaigns which included COVID related restrictions and use of door to door campaigns;
- (iii) sometime in July 2021 ECZ suspended campaigns in Lusaka district and two other districts but he was not aware of suspension in Lusaka being unique to Kanyama constituency;
- (iv) as UPND they strictly followed the ECZ timetable to avoid clashes and fights but denied that UPND knew that PF was in every ward every day because UPND too was not following the timetable;
- (v) he confirmed that when he visited UPND command centre Patuka house after the attack he did not find any alleged PF cadres there;
- (vi) he admitted that he did not know for sure that Nathan Phiri and Innocent Kalimanshi who reportedly visited the UPND command centre were registered election or polling agents for the First Respondent;
- (vii) he conceded that he did not know whether Saidi Phiri was a registered election or polling agent for the First Respondent with ECZ;

- (viii) he did not know that PW11 testified in Court that he did not know who got away with his wheelchair;
- (ix) he confirmed having visited members of UPND who had been attacked on 9th July 2021 and the houses were various distances apart e.g. 20 metres, 40 metres, 50 metres;
- (x) he confirmed having visited the shop of PW16 but could not remember if PW16 had told him the value of the goods stolen;
- (xi) he recounted a near attack whilst at Chawama Basic School which he said was about 1 km from Chawama police but denied that he actually campaigned during that period;
- (xii) he does not know whether PW8 reported the First Respondent to ECZ or the police for allegedly distributing mealie meal and money;
- (xiii) he confirmed that the Petitioner won in Lilayi ward which he knows has the least number of registered voters in Chawama constituency;

- (xiv) he is not aware that the First Respondent won in the other 3 wards because he did not sign off on the final ECZ results;
- (xv) there was a police report of his being attacked and robbed of money and a Samsung telephone;
- (xvi) as campaign manager, he was well versed with the electoral code of conduct of ECZ but he did not make any written report of any of the incidents to RW3 (returning officer);
- (xvii) he is not happy because he was not given a platform to campaign;
- (xviii) he confirmed that his campaign team had 12 people and he allocated two persons to each ward in Chawama constituency; and
- (xix) he also confirmed that the said structure was maintained throughout the campaign period but they never campaigned.

3.321 **PW18 was also cross examined by Mr Musonda** for the Second Respondent during which he testified:

- (i) he is familiar with the ECZ code of conduct and when showed the text in paragraph 6 he agreed that it has duties for the Police;
- (ii) he also confirmed that ECZ has power under the code of conduct to instruct the police to act professionally and impartially;
- (iii) he knows that the Police have a duty to maintain law and order in Zambia;
- (iv) ECZ held a stakeholder meeting and came up with a timetable to prevent fighting between parties and the timetable applied to all of them and was given to the Police;
- (v) he complained to RW3 (returning officer) about the timetable not being followed but had no document in Court to show that he did nor any audio recording;
- (vi) the break in and destruction of UPND campaign centre; attack in Misisi compound; Nkoloma ward; and the incidents involving Saidi Phiri were all reported to the police but not ECZ;
- (vii) PW18 was not happy with the conduct of the police but never reported the police to ECZ;

- (viii) he confirmed that ECZ had suspended campaigns by all parties with a view to curbing violence;
- (ix) he confirmed that when the suspension was lifted the police advised that the ECZ timetable would continue to apply and the police would monitor the campaigns;
- (x) he was notified over the telephone that the First Respondent was distributing money and mealie meal and he called the returning officer (RW3) over the telephone on MTN network but did not bring any call records to prove it nor any recording of the call;
- (xi) the damaging of a red vehicle was reported to the police not ECZ;
- (xii) UPND had polling agents in the 15 polling stations which he said had missing Gen 20 forms but he (PW18) was not a polling agent and was not at the said stations;
- (xiii) he did not know whether the UPND polling agents complained to ECZ at the 15 polling stations about the absence of Gen 20 forms; and
- (xiv) he confirmed that there was no documentary record in the Petitioner's bundle complaining about Gen 20 forms for the 15 polling stations.

3.322 PW18 was also cross examined by Ms Mukuka also for the Second Respondent during which he testified:

- (i) he confirmed that whilst at the totalling centre he was shown a list of polling stations with missing results and for that reason he asked for a rejection form to which he was advised to go to ECZ Headquarters but he never went there;
- (ii) he has not brought any formal complaint in writing or audio showing that he actually complained to ECZ;
- (iii) he was the campaign manager for the Petitioner but did not know the number of registered voters in various polling stations;
- (iv) when referred to p.1 of the Second Respondent's bundle, PW18 agreed that it showed a total of 111 polling stations for Chawama constituency;
- (v) he agreed that if 15 polling stations were taken away from 111 what remains would still be the majority and it would give majority of the results; and
- (vi) he has not brought any minutes of a meeting with RW3.

- 3.323 **PW18 was not re-examined by Counsel for the Petitioner who instead informed the Court that it was the close of the case for the Petitioner.**
- 3.324 **RW1 was the First Respondent** who testified on her own behalf.
- 3.325 **It was her evidence in chief** that she was a 38 year old farmer and politician resident at Farm 919/50 Lusaka South.
- 3.326 The First Respondent testified that the campaign period leading up to the elections in Chawama Constituency was generally peaceful and that the election was free and fair.
- 3.327 She denied that she or her agents were involved in the alleged acts of violence pleaded in paragraphs 6a-m of the petition. She also stated that she was not even present during or aware of the said occurrences.
- 3.328 It was the First Respondent's testimony that the named alleged perpetrators of some of the said acts namely Nathan Phiri and Innocent Kalimanshi were not her agents and were not PF members.
- 3.329 She testified that another named alleged perpetrator, Mr Saidi was not a person who she knew and she did not know whether he was a PF member.

- 3.330 The First Respondent denied that she engaged in the vote buying antics on 11th August 2021, the day before voting as alleged in paragraph 6(a) of the petition, which she stated was a lie.
- 3.331 She testified that she had a total of 444 ECZ registered agents and spent the day of 11th August 2021 at the PF Chawama Command Centre located in Nkoloma Ward from 08:00 hours where she began with a meeting with her campaign manager and others before proceeding to meet her registered agents in groups.
- 3.332 The latter meetings were to discuss responsibilities and logistics for voting day.
- 3.333 It was the First Respondent's testimony that she thereafter left the Command Centre after 17 hours and went home to rest ahead of election day.
- 3.334 In response to the incident of vote buying and violence alleged to have taken place on 12th August 2021 as pleaded in paragraph 6(o) and (p) the First Respondent said that it was a lie as she did not distribute any monecy or rcgalia at JICA centre or anywhere else in the constituency on that day.

- 3.335 The First Respondent also stated that she and her agents were not involved in the violence at JICA centre which even took place after she had left.
- 3.336 The First Respondent thereafter gave an account of her visit to JICA centre on 12th August 2021 as follows.
- 3.337 She had set out to conduct a tour of the polling stations in the constituency to see the voter turnout and if there were any issues.
- 3.338 At about 13 hours, she, her campaign manager Mr Mwansa, Mr Kafula, Mr Mutete and Mr Pandiwa set off in a convey of vehicles to the JICA Centre and parked outside the polling station and walked in.
- 3.339 Mr Mwansa conversed with ECZ staff about how the process was going while the First Respondent never spoke to anyone. They left for another polling station in a different ward (Nkoloma) at Nyerere hall.
- 3.340 It was her testimony that she remained in the car and shortly after Mr Mutete instructed her driver to take her to the command centre which he did and that when there Mr Mwansa dispersed the people there and advised that the tours could not be completed owing to a shooting at JICA Centre.

- 3.341 According to the First Respondent that is how her day ended.
- 3.342 In relation to paragraph 8 of the petition, the First Respondent testified that it was a lie as neither she nor her agents were involved in defacing campaign materials for the Petitioner.
- 3.343 As for paragraphs 7,9,10 and 11 of the petitions the First Respondent testified that the allegations were not true. She and her agents followed the ECZ code of conduct. The named alleged perpetrators of the violence (Kalimanshi & Phiri) were not detained for violence but drug charges. She did not instruct anyone to act violently towards the Petitioner or anyone else.
- 3.344 There was generally peace and the public was not in fear but instead turned out to vote in large numbers of more than 57,000 out of which over 35,000 voted for her as preferred candidate while over 20,000 voted for the Petitioner.
- 3.345 As for the paragraphs 13-17 of the Petition the First Respondent testified that the Second Respondent was in a better position to respond to the alleged irregularities in the electoral process but that she was announced as winner.
- 3.346 She agreed with paragraph 18 of the petition which was a summary of the results of the Chawama Parliamentary election.

- 3.347 The First Respondent closed off by reiterating that the campaign period and election were generally peaceful with the exception of the shooting at JICA Centre on 12th August 2021 in Lilayi Ward where the Petitioner and UPND Councillor still won notwithstanding.
- 3.348 The people of Chawama turned out in large numbers and spoke through their vote in a free and fair election where she was duly declared as winner.
- 3.349 The reliefs in the petition should be refused including costs.
- 3.350 **The first round of cross examination of the First Respondent was by Mr Mweemba** for the Petitioner, during which the First Respondent testified:
- (i) she agreed that she had not mentioned any name of the 444 persons who she alleged to be her agents registered with ECZ and that for that reason the Court will never know about them;
 - (ii) she confirmed that she did appoint the 444 agents in writing filed with ECZ;
 - (iii) she maintained that the alleged perpetrators of violence named in the petition were not her agents and that

Innocent Kalimanshi and Nathan Phiri were not members of PF but UPND;

- (iv) she conceded that the PF did not have any membership cards;
- (v) she denied that because the Petitioner made allegations that the alleged perpetrators of violence were her agents and that since ECZ records of her registered agents existed she had a duty to bring those records to contradict the allegations;
- (vi) she maintained that Innocent Kalimanshi and Nathan Phiri were detained for drug charges but she had no document to prove it and relied on what she heard on the news though she was not aware whether the former is still in custody nor whether the latter was released;
- (vii) she denied that all she gave was a bare denial of the allegation that she was distributing mealie meal and money on 11th August 2021;
- (viii) she denied that she gave a Police officer a parcel wrapped in chitenge material containing PF t-shirts but said that the evidence of the Petitioner's witness on the point was not challenged by her lawyers in cross examination;

- (ix) her maiden speech to the National Assembly was recorded on video and is accessible from the institution's website and she did in the said speech talk about observing a minute of silence for the dead but denies having spoken about violence in Chawama or about people who died in Chawama;
- (x) she denied the assertion by Counsel that the testimonies alleging that she was giving out K200 were not challenged in cross examination;
- (xi) Patrick Mwansa was her campaign manager and is her husband; and
- (xii) Mr Mwansa was with her when she visited JICA Centre on 12th August 2021, day of the shooting and she wished the record to change that he spoke to only 1 ECZ official whose name she could not remember;

3.351 **The second round of cross examination of the First Respondent was by Mr Phiri** also for the Petitioner, during which the First Respondent testified:

- (i) she does not know whether ECZ stopped campaigns in Chawama on 15th June 2021;

- (ii) she does not recall ECZ ever stopping campaigns in Chawama for violence or at all at any time from nomination day to voting day;
- (iii) she wants the Court to believe that there was no violence in Chawama from nominations in May up until election day save for the shooting at JICA Centre on 12th August 2021;
- (iv) according to her events alleged in the petition of destruction of property did not occur and as far as she is aware the violence and injuries of persons alleged therein did not occur;
- (v) she did not know whether the evidence of medical reports at p.1-18 of the Petitioner's bundle were fabrications;
- (vi) she confirmed that the pictures at p.28-42 of the Petitioner's bundle showed injuries to persons and damage to buildings and she listened to the witness testimonies of the same;
- (vii) having seen the pictures and listened to the testimonies she did not know whether the pictures were a fabrication;
- (viii) at nomination stage she filed Gen 7 – National Assembly Nomination Paper with ECZ which she had names of people supporting her nomination and she also filed a candidates

details confirmation form which had a list of her official electoral agents but not the 444 agents she spoke of;

- (ix) she agreed that she had not produced the Gen 7 form or the details confirmation form in Court and that neither were they contained in the ECZ bundles filed in Court on 11th October 2021 and 21st October 2021;
- (x) she was elected as Councillor in 2016 on PF ticket for Nkoloma Ward which was the same ward where Petitioner's witnesses testified about her distributing mealie meal and money;
- (xi) she endorsed the appointment of and had 444 registered agents but did not know all of them by name and was not with them all the time during the campaign period;
- (xii) she does not know Innocent Kalimanshi and Nathan Phiri and has not met them;
- (xiii) she knew Mr Chitoka (PW10) and confirmed that he was a PF member in the past;
- (xiv) she also confirmed that she was at some point in time the PF Chawama Constituency Chairperson;

- (xv) she denied having welcomed Innocent Kalimanshi to PF at a meeting in January 2021 as testified by PW10 and did not recall being present at that meeting;
- (xvi) she admitted being the ultimate political head of PF in the constituency when she was Chairperson, and that she had knowledge of all key PF meetings that took place there and would receive reports of any incidents;
- (xvii) she agreed that ECZ had issued a timetable to govern campaigns in Chawama constituency in 2021 which campaigns involved roadshows and door to door visits;
- (xviii) she did not receive a report of an attack on the Petitioner during a door to door campaign and did not know whether the lack of receipt of it made the allegations false;
- (xix) she did not receive any report of the shooting of Mr Lwimba (PW4) but heard about it after it happened and that the shooter was Mr Banda, a PF official;
- (xx) she maintained that when she visited the Mtendere E Polling Station at JICA Centre no one approached her vehicle to collect anything from her;

- (xxi) she admitted that whilst there her entourage included Mr Mohammed Mutete a former Councillor and that her and her campaign manager arrived there in different vehicles;
- (xxii) she has not since learnt what sparked off the shooting there;
- (xxiii) it was her campaign manager (Patrick Mwansa) who informed her at the PF command centre on 12th August 2021 that she could not continue her tour of polling stations;
- (xxiv) she agreed that more than 35,000 people did not vote in Chawama constituency and that she won by about 15,000 votes which by comparison is less than half of those who did not vote;
- (xxv) she maintained that more than 57% of the voters voted and she specified the percentage of voter turnout in paragraph 7 of her answer as 62.6%;
- (xxvi) the agreed supplementary bundle of documents at p.5 showed that Chawama had a total of 92,879 registered voters;
- (xxvii) she was not aware that the average voter turnout in the country was 72%;

- (xxviii) she admitted that she won the election in Nkoloma Ward where Petitioner's witnesses testified that she had been distributing money and mealie meal on 11th August 2021 and she had not brought any location services evidence to show where she was after 17 hours that day;
- (xxix) she agreed that PW17 told the Court that she had 4 children in the house who ran away that day but did not say the total number of children she had; and
- (xxx) the Police in Chawama did not inform her of violence of PF supporters.

3.352 **The last round of cross examination of the First Respondent was by Ms Mukuka for the Second Respondent/ECZ during which the First Respondent testified that -**

- (i) she was a candidate for the Chawama parliamentary election in 2021 under PF ticket against 3 other candidates from DP, UPND and SP;
- (ii) she was aware that ECZ had a code of conduct which governs the activities of parties and candidates in elections and provides for a complaint reporting mechanism

exercisable by a party, candidate's or voter if there are any breaches;

(iii) she had polling agents in all polling stations in Chawama but did not maintain active communication with them throughout on 12th August 2021 though in the event of any complaint they should have communicated with her;

(iv) in relation to the allegation in paragraph 13 of the petition, neither her as a candidate nor PF lodged any complaint with ECZ over the mentioned 15 polling stations nor was she aware of any complaint lodged by the other political parties;

(v) her polling agents were present throughout the counting of votes at the totalling centre and she is not aware of any complaints by them or by other polling agents at the totalling centre;

(vi) she is not aware of any complaints by herself or by other candidates that ECZ did not follow due process;

(vii) she could not confirm that all ECZ meetings that she attended also had presence of the other political parties or their agents;

- (viii) she confirmed that the actions taken by ECZ over the campaigns and voting applied to all political parties;
- (ix) the elections were conducted in a peaceful manner on 12th August 2021 and she managed to vote and return home;
- (x) according to the ECZ declaration form and record of proceedings she won;
- (xi) she is not aware of any objections lodged with ECZ against her declaration as winner; and
- (xii) the voter turnout in this election was larger than the previous and from that she agreed that ECZ actually did a good job.

3.353 **The First Respondent was not re-examined by Counsel.**

3.354 **Bernard Zimba (RW2)** was the second and closing witness in the case for the First Respondent.

3.355 **It was his evidence in chief** that he was a 49 year old resident of Chilanga and a businessman as well as being the head supervisor of the PF monitors and supervisors and polling agents in the 2021 election in Chawama.

3.356 He narrated to the Court that on 12th August 2021 he went to JICA centre and he waited to know if the agents and monitors had gone to their streams of operation, so he approached

Weluzani Banda who had a vehicle to assist with the movements.

- 3.357 They toured Lima C and D polling station in Lilayi before returning to the one at JICA centre where he (RW2) voted. RW2 and Mr Banda left and returned in the latter's vehicle between 13-14 hours.
- 3.358 RW2 testified that he then saw the First Respondent's vehicle arrive and it had a vehicle behind which it had Mohammed Mutete and Patrick Mwansa, the former of who opened the car door for the First Respondent.
- 3.359 The First Respondent walked into the polling station with the two men and then left and they drove away.
- 3.360 RW2 remained in the vicinity with the PF agents who were eating and he received a phone call after which he turned to return to Mr Banda's vehicle but saw a group of UPND persons coming from the polling station headed their way. He knew and could identify the leader of the group as someone who stayed in the same community as him.
- 3.361 RW2 thought the group wanted a meeting but when they got within 15 metres, he heard them say that his team would sweat on the day.

- 3.362 It was RW2's testimony that PW4 and another from the group went to a Lupiya who closed the door of Mr. Banda's vehicle. PW4 then went to Mr. Banda and began to beat him together with another who joined in the beating.
- 3.363 RW2 testified that he retracted about 10 metres from Banda's vehicle and then the UPND group advanced towards it. Mr Banda removed a gun and shot once in the air but the fight continued. He fired two more shots in the air and the UPND group retreated but PW4 got a rock and broke the rear windshield of Mr Banda's vehicle after which Mr. Banda's shot PW4 twice.
- 3.364 The tussle between the two continued and then RW2 saw Mr Banda get into his vehicle with Alastair Chimbwe and Lupiya before driving off and ignoring RW2's efforts to stop the vehicle.
- 3.365 It was RW2's testimony that he heard the UPND group shout that he was alone and then they began to beat him and hit him with a plank on the head after which he fainted.
- 3.366 RW2 testified that when he regained consciousness, he was escorted away from the polling station and saw a police vehicle and military vehicle approaching. He was attended to at Chawama level 1 hospital and discharged around 23 hours.

3.367 He reported the incident to Chawama Police who have the medical report and documents of his assault.

3.368 The first round of cross examination of RW2 was by Mr Mweemba for the Petitioner during which he displayed a most unimpressive and unconvincing demeanour characterized by evasiveness when questioned, avoiding to face the Court by looking away and sometimes down before answering. He would at times even pause and look to the ceiling as if to think before answering even otherwise simple questions.

3.369 That notwithstanding he did state **when cross examined** as such that –

- (i) he had no medical report or documentary proof before Court to show that he was attended to at the hospital on 12th August 2021;
- (ii) he had no documentary record of having reported his alleged assault to the Police;
- (iii) he does not know who the dealing officer for his case was at Chawama Police;
- (iv) he does not know the name of the Police officer who opened the docket;

- (v) he gave two statements to the Police on 12th August 2021 one between 19-20 hours and the other between 22-23 hours;
- (vi) he admitted that in his evidence in chief he said he was discharged from the hospital around 23 hours;
- (vii) he conceded that it's not possible for him to have given a second statement at the Police station around 22-23 hours before he was discharged from hospital around 23 hours;
- (viii) he wants the Court to believe that he was attacked by people well known to him and yet they have not been arrested to date;
- (ix) he did not name who hit him but it was Martin who is well known to him;
- (x) he has never gone back to the Police to tell them to arrest Martin because he is scared of being attacked again if he does;
- (xi) his second statement was recorded in the presence of 3 male officers one of whom was the officer in charge Chawama and it was read out to him and he signed it;
- (xii) he witnessed Mr Banda shoot in the air 3 times as the UPND group advanced before shooting PW4 twice;

- (xiii) he wants the Court to believe that despite Mr Banda's shots he was still standing observing without being scared of being shot;
- (xiv) he witnessed it from 10 metres away in a face to face confrontation when he got shot and in another breath, he said after Banda's shots in the air, PW4 turned away and ran then got a rock with both hands and broke the screen of Banda's vehicle then Banda shot him from behind and chased him around the vehicle. PW4 tried to pick another rock with hands and Banda shot him again in the back;
- (xv) he doesn't have any proof that the group that charged at them were UPND cadres;
- (xvi) he does not have any documentary evidence to exclude the possibility that PF cadres caused the fight at JICA or to prove that UPND cadres were to blame;
- (xvii) Banda used a pistol to shoot PW4 which he carried to the polling station and used instead of seeking refuge with the police who were present at JICA centre;
- (xviii) Banda was with many PF people including RW2 and they had the opportunity to inform the Police about the fight;

- (xix) RW2 was the Vice Information Publicity Secretary for PF Chawama constituency and Banda was the constituency secretary for PF and they both campaigned for the First Respondent with her full blessings;
- (xx) the witnesses who testified that the First Respondent came to JICA centre with two men on 12th August 2021 were right;
- (xxi) he RW2 was busy on the day so he did not observe everything that happened and did not know the nature of items that the First Respondent gave to a Police officer;
- (xxii) there was peace at JICA centre before the First Respondent came and confusion after her visit; and
- (xxiii) he only fainted 15 minutes after the shooting which period was sufficient for him to observe if people scampered after the shots but he still maintained that he did not see people scamper because he had collapsed.

3.370 **The second round of cross examination of RW2 was by Mr Phiri** also for the Petitioner during which RW2 maintained the unimpressive and unconvincing demeanour as he testified that

- (i) Rodgers Nkole and not the First Respondent is the PF Chawama Constituency Chairperson;

- (ii) the First Respondent was not the chairperson when he (RW2) was appointed as vice publicity secretary;
- (iii) the First Respondent has been Chairperson before but is no longer;
- (iv) the First Respondent stopped being chairperson after being nominated as parliamentary candidate;
- (v) no elections were held to replace her as chairperson and she was given leave away from the role for the duration of campaigns;
- (vi) she is not the chairperson now that campaigns were over;
- (vii) RW2 and Banda worked closely with the First Respondent during campaigns and were her agents but she was not paying them for it;
- (viii) he voted at JICA centre around 8 hours and was still there at 15 hours during the fracas;
- (ix) he never reported his beating to ECZ and the shooting for its part occurred while there were people lined up to vote;
- (x) he agreed that the shooting and fracas that followed shows that the election at JICA centre polling station could not have been free and fair;

- (xi) he does not recall seeing a Landcruiser arrive at JICA centre with about 12 persons nor does he recall anyone being paper sprayed;
- (xii) as person in charge of supervisors, monitors and agents he reported to the acting constituency chairman Rodgers Nkole who in turn was reporting to the First Respondent;
- (xiii) the incident at JICA centre was reported to the First Respondent by George Rupiah;
- (xiv) the Police have not refused to avail him (RW2) with his police report and medical report of his alleged assault;
- (xv) as vice information and publicity secretary for the PF in Chawama he publicizes and attends all PF meetings in the constituency;
- (xvi) he was not present at a meeting in February 2021 when the First Respondent allegedly welcomed Innocent Kalimanshi to PF; and he had not heard about it;
- (xvii) he has heard of Innocent Kalimanshi but has not seen him;
- (xviii) he does not know Nathan Phiri;
- (xix) he did not come into possession of the Gen 20 forms alluded to in paragraph 13 of the petition;

- (xx) he did play any role at the totalling centre for Chawama constituency and his role in the elections ended after he was beaten up;
- (xxi) he did not hear of any attacks on any individuals campaigning for UPND in Chawama nor of any destruction of their property;
- (xxii) he did not hear of the abduction of PW18, the Petitioner's campaign manager nor of the attack in June 2021 at Patuka house, UPND command centre; and
- (xxiii) according to him everything in Chawama during campaigns and elections was peaceful apart from the shooting at JICA and his beating.

3.371 **The last round of cross examination of RW2 was by Mr Musonda** for the Second Respondent during which RW2 testified:

- (i) he did not know of any complaint lodged with ECZ about the shooting at JICA disturbing the elections at the polling station or that the elections were not free and fair;
- (ii) he was not a registered polling agent with ECZ; and
- (iii) he was not a registered election agent with ECZ.

- 3.372 RW2 was not re-examined by Counsel for the First Respondent who also informed the Court that his testimony marked the close of the case for the First Respondent.
- 3.373 **The sole witness for the Second Respondent was Jonathan Nkhata, RW3. It was his testimony in chief** that he was a 54 year old teacher resident at State Lodge Police Camp in Lusaka. He also informed the Court that he was the Returning Officer for Chawama Constituency in the 2021 elections.
- 3.374 It was his testimony that Chawama Constituency had 111 polling districts as shown in the ECZ record proceedings before Court.
- 3.375 In response to allegations in paragraph 13 of the petition, RW3 testified that all the polling districts for Chawama constituency had their Gen 20 forms availed to all participating political parties and that none of them lodged a complaint of not having received the Gen 20 forms.
- 3.376 As for the allegations in paragraph 14 of the petition in respect of Nyerere Community centre and Chawama Primary School – 6, RW3 testified that the allegation was unclear as –
- (i) Nyerere Community Centre has 10 polling districts; and

(ii) Chawama Primary School has 15 polling districts, according to the ECZ registered voters compilation at p.3 of the agreed supplementary bundle of documents.

3.377 This, he contrasted with paragraph 13 of the petition which he said was specific on the polling districts in issue.

3.378 RW3 testified in response to paragraph 15 of the petition that he did not receive any complaint lodged by the participating political parties.

3.379 He did however concede that in relation to paragraph 16 of the petition, it could have been a human error in data capturing.

3.380 When referred to the allegation in paragraph 17 of the petition RW3 testified that he worked according to all laid down procedures.

3.381 RW3 also volunteered information that there are two scenarios for the declaration of results that is:

(i) when there are some polling districts yet to submit results but the difference between the leading and second candidate is such that even if the remaining results were apportioned to the latter, it would not affect the outcome of the election;
or

(ii) when there is receipt of all results for the polling districts as was the case for Chawama Constituency.

3.382 RW3 testified that it was after all the tabulation was done that, he declared the First Respondent as duly elected MP and he relied on the record of proceedings at p.1 of the Second Respondent's bundle of documents.

3.383 It was his testimony that after the declaration on 15th August 2021 there was no complaint lodged or received on the date.

3.384 He closed his evidence in chief by stating that the Electoral Statute allows for a 1 week window during which any aggrieved political party can lodge a complaint.

3.385 **The first round of cross examination of RW3 was by Mr Mweemba** for the Petitioner during which RW3 testified-

(i) he was present in Court during the testimony of the First Respondent and her witness (RW2) and he heard their evidence;

(ii) he was thereafter keen to tell the Court his side of the story;

(iii) he had managed elections 3 times namely in 2001, 2008 and 2021;

- (iv) he has only testified once before in an election petition at local government level in September 2021 for Chawama Ward;
- (v) he did not know that he was not supposed to be in Court when another witness was testifying;
- (vi) he was familiar with the Electoral Processes;
- (vii) he maintained that there was no complaint lodged by any political party;
- (viii) all parties were present when he was declaring the First Respondent duly elected as per declaration at p.24 of the Petitioner's bundle which was signed by 3 political parties in his presence but not signed by the Petitioner or his representative;
- (ix) he denied that the UPND did not sign the declaration due to protest over missing Gen 20 forms and said that the UPND did not tell him why they did not sign;
- (x) he denied that he had a duty to inquire from UPND why they did not sign the declaration;
- (xi) there was no written or verbal complaint from the UPND candidate who did not sign and he (RW3) denied that he had

- received numerous complaints from the Petitioner or his agents during campaign period;
- (xii) he knows Andrew Zulu (PW18) but cannot remember whether he lodged any complaints during campaign period;
 - (xiii) RW3 interacted with PW18 during campaign period when looking at the timetable for campaigns for political parties;
 - (xiv) the meeting was not necessitated by a complaint from PW18 or a spate of violence but by the need to guide political parties to respect each other's zones when campaigning;
 - (xv) he denied that as a result of violence the campaigns were once suspended in Chawama but stated that it was instead for the whole of Lusaka District;
 - (xvi) he admitted that Chawama was in Lusaka district and that ECZ was very categorical that the reasons for suspension of campaigns was because of violence;
 - (xvii) he testified that Nyerere Community Hall had multiple polling districts as referred to on the left column of the table at p.3 of the record of proceedings;
 - (xviii) he admitted that the complaint in paragraph 16 of the petition could have been caused by human error and that he had a duty to correct it;

- (xix) he stated that he was not a Police officer but a teacher at Chimwemwe primary school in Chawama constituency but resided in the police camp at state lodge area; and
- (xx) he was in support of the decision by ECZ to suspend campaigns as a way to curb violence.

3.386 **RW3 was also cross examined by Mr Phiri, also for the** Petitioner during which he testified-

- (i) the allegation in paragraph 13 of the petition is about absence of Gen 20 forms and he agreed that in completing the ECZ form 19 records of proceedings, the primary document used to generate data is Gen 20;
- (ii) he agreed that without Gen 20 forms the record of proceedings cannot be completed;
- (iii) he agreed that the Gen 20 forms for the 15 polling stations complained of in paragraph of the petition were not before Court;
- (iv) he however insisted that the 15 Gen 20 forms do exist;
- (v) the first exhibit labelled PT2 in the affidavit verifying facts is a Gen 20 with the name Bridget on the presiding officer slot but too faint to make out the name of the polling station;

- (vi) the figures there on are however clearly stated as 371 votes for First Respondent and 182 for the petitioner and also shows clearly that it was signed by all political parties;
- (vii) turning to exhibit PT4, record of proceedings, nowhere does it show that the First Respondent got 371 votes;
- (viii) he compiled the figures on the record of proceedings as Returning Officer and what it means is that he allocated a different figure to the First Respondent since 371 votes was not appearing;
- (ix) the second exhibit PT2 under the affidavit verifying facts is a Gen 20 form for Chawama primary school which according to RW3 has 15 polling districts;
- (x) the said Gen 20 form falls under Chawalila 6 but does not say so on its face;
- (xi) the said Gen 20 shows that First Respondent got 388 votes but the record of proceedings PT4 page 3 of 6 shows that First Respondent got 358 votes which is another discrepancy and a gross error;
- (xii) he agreed that other than guess work there is no way of telling whether the second PT2, Gen 20 form was for Chawalila 6;

- (xiii) the total number of votes cast shown on the said Gen 20 was 538 while the record of proceedings exhibit PT4 showed that the total was 534 for Chawalila 6 and he agreed that this is another serious discrepancy between the Gen 20 forms and the record of proceedings;
- (xiv) he also agreed that these discrepancies violated the electoral processes and principles enshrined in article 45 of the Constitution; and that it did not matter whether it was the First Respondent or any other candidate that lost votes, it should never have happened;
- (xv) RW3 also agreed that he never told the Court that any mistakes were corrected over tabulation of votes at the totalling centre;
- (xvi) he was aware that ECZ may correct a mistake committed by an electoral officer in tabulation of results within 7 days of declaration of results;
- (xvii) he was familiar with the Electoral Processes Act and s.76 is a provision that addresses correction of mistakes by ECZ;
- (xviii) he reiterated that in relation to paragraph 15 of the Petition he never received any complaints from the participating

candidates not even verbal complaints from them or their campaign managers;

(xix) he was not aware of the assertion that it only applied to presidential elections that a victor could be declared even in the absence of all results if those remaining would not affect the outcome;

(xx) he denied that he went ahead to announce the results of the Chawama constituency petition without receiving results from all polling stations and insisted that he had results from all 111 polling districts;

(xxi) the declaration of results that he announced were those on p.24 of the Petitioner's bundle of documents and representatives of all were present with him but only 3 signed;

(xxii) he was appointed Returning Officer for Chawama constituency in May 2021 and duties included coordinating activities and programmes on how they should run and communicating any information from ECZ to candidates and their agents;

- (xxiii) RW3 agreed that if there were any problems with the campaigns particularly violence it would be communicated to him;
- (xxiv) he could only act on incidents of violence when they were reported to him;
- (xxv) he was a member of the conflict management committee for Chawama constituency and he chaired it and the committee had no matters to resolve in Chawama for the duration of the elections;
- (xxvi) the District Electoral Officer, Mr. Mwansa who was also Lusaka Town Clerk convened a meeting in Chawama on 14th August 2021 to find out why there was a delay in announcing results;
- (xxvii) the delay in announcing was not because of the Petitioner's contention over the 15 Gen 20 forms;
- (xxviii) the results were announced on 15th August 2021 but not because the military threatened to leave the totalling centre and they did not make any such threat;
- (xxix) RW3 confirmed that the documents at p.1-18 of the Petitioner's bundle were medical reports and p.28 and 31 were pictures of a person lying down;

- (xxx) he heard of the shooting incident at Mtendere E Polling station on 12th August 2021 from the Police on the same day but not of the identity of the person shot;
- (xxxix) he was informed that after the shooting the polling station was temporarily closed and that one of the polling streams that was outdoor had its ballot boxes relocated indoors;
- (xxxii) he was not informed that the First Respondent had visited the polling station at Mtendere E or that the incident was sparked off because of her presence;
- (xxxiii) he confirmed that he could see that p.39-40 of the Petitioners bundle depicted damage to property and p.41 damage to a motor vehicle;
- (xxxiv) p.32,34 and 42 of the Petitioner's bundle depicted injured persons;
- (xxxv) RW3 confirmed that he wanted the Court to believe that he never received a single report of damage to property or to people;
- (xxxvi) he does not know Innocent Kalimanshi but has heard of him in particular about being arrested for drugs and also when there was a fracas at PF offices; and

(xxxvii) he could not confirm whether Innocent Kalimashi belongs to PF but could confirm that during his time as Chawama Returning Officer he never heard of Innocent Kalimanshi associated with violence there.

3.387 The last round of cross examination of RW3 was by Ms Phiri

for the First Respondent during which RW3 testified-

- (i) he could not tell from the first exhibit PT2 in the affidavit verifying petition which polling station it referred to;
- (ii) he was able to tell that the Second PT2 referred to Chawalila 6 because Chawama is a polling station while polling district is Chawalila as could be confirmed by reference to the register of voters at the polling station;
- (iii) he did not receive any complaint over the discrepancies under Chawalila 6;
- (iv) RW3 stated that the allegations in the petition affected only the minority of the total polling stations and voters;
- (v) he stated that as an electoral officer he complied with the laid down procedure in the Electoral Processes Act when conducting elections; and
- (vi) RW3 also stated that the First Respondent is the duly elected MP for Chawama constituency.

3.388RW3 was not re-examined by Counsel for the Second Respondent who at that point informed the Court that it marked the close of the Second Respondent's case.

4. THE LAW ON CHALLENGING PARLIAMENTARY ELECTIONS

4.1 The law relating to the subject is largely codified with the primary legislation being the **Electoral Process Act** No. 35 of 2016 (the "**EPA**"). Some of the salient provisions of relevance to this case are:

- (i) an interested person may petition the High Court to challenge the outcome of a parliamentary election within 14 days of the results (s.96 (1),97 (1) and 100 (3));
- (ii) interested persons for that purpose/with locus to petition include (s. 98) –
 - a) registered voters;
 - b) persons who were eligible to be nominated to contest in the election;
 - c) candidates who contested in the election; and
 - d) the Attorney General;
- (iii) there are three grounds on which parliamentary election results can be nullified –

- a) misconduct committed by the victorious candidate (or for which they or their official agent are blameworthy) which misconduct hindered or may have hindered the majority of the electorate in voting for their preferred candidate (s.97(2)(a);
- b) procedural irregularity in the conduct of the election which affected the outcome (s. 97 (2) (b)); and
- c) eligibility of the victorious candidate (s. 97 (2)(c)).

(iv) the High Court must determine the petition within 90 days of filing and either declare the election result as void or declare any candidate as duly elected (s. 99 and s. 106(1)).

4.2 I will now proceed to examine the grounds for nullification in detail and also the burden of proof.

Misconduct

4.3 Section 97(2)(a) of the EPA reads:

"97. (1) ---.

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

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

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;" (Emphasis added)

4.4 The EPA goes further to particularize some of the forms of misconduct as:

(i) bribery (s.81)

(ii) impersonation (s. 82)

(iii) undue influence (s. 83)

(iv) publishing false statements about opposing candidates (s. 84)

(v) tampering with ballot boxes/paper (s. 87)

(vi) solicitation or lobbying for votes on election day within 400 metres of a polling station (s.89(1)(e)).

4.5 The said provision is to be read with the proviso under 97(3) which stipulates:

"Despite the provisions of subsection (2), where, upon the trial of an election petition, the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election

petition, and the High Court or a tribunal further finds that such candidate has proved that—

- (a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;
- (b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and
- (c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent;

the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.”

4.6 Section 97(2)(a) of the EPA was the subject of judicial interpretation by the Constitutional Court in the case of *Nkandu Luo & ECZ v Doreen Sefuke Mwamba & AG*¹ wherein it was pronounced:

“As earlier stated, we have in unequivocal terms, stated our position on the above provisions. 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

¹ Selected Judgment No. 51 of 2018 at p. J50-51

candidate or his or her election or polling agent. Sections 81-95 in Part VIII of the Act and also the relevant provisions of the Electoral Code of Conduct outline the corrupt or illegal practices or misconduct in the electoral process.

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.” (Emphasis added)

- 4.7 It can therefore be concluded that as far as misconduct (in a Parliamentary election challenge) goes, a petitioner must prove:
- (i) **there was an act of misconduct** relating to the election;
 - (ii) **the actor** was either a candidate or someone else clothed with the knowledge, consent or approval of the candidate or that of their election or polling agent (in other words a connection or link of culpability between the misconduct and a candidate);
 - (iii) **the magnitude** of the act of misconduct was that it was widespread; and
 - (iv) **the effect of the act** was that it prevented/swayed or may have prevented/swayed the majority of voters in the constituency from electing their preferred candidate.

Procedural irregularity

4.8 Section 97(2)(b) of the EPA stipulates:

“97. (1) ---

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

(a)---

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

4.9 The above provision is to be read with the proviso under s.97(4) which states:

“4. An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer’s official duty in connection with an election if it appears to the High Court or 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.” (Emphasis added)

4.10 The learned authors of *Halsbury's Laws of England*² explain what is meant by 'the result' in a challenge of the election procedure as:

"The result means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate." (Emphasis added)

4.11 The said authors go on to cite the case of *Clare, Eastern Division Case*³ as authority for the proposition.

4.12 As for what amounts to substantial conformity with the law, the English case of *Morgan & Ors. v Simpson & Anr.*⁴ is useful because of the similarities between s.37(1) of the Representation of People Act, 1949 and s. 97(4) of our EPA and I quote Stephenson, L.J. who succinctly put it that:

"For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot."
(Emphasis added)

² 5th Edition (2013) Volume 38A (Elections and Referendums), Lexis Nexis: London at p. 176, footnote 4

³ (1892) 4 O'M & H 162 at 164

⁴ (1974) 3 All ER 722 at 731 from line h

4.13 The principle has been applied in Zambia in *Sibongile Mwamba v Kelvin M. Sampa & Anr.*⁵ where the Constitutional Court endorsed the said English case before pronouncing:

“This shows that the threshold is high if the Court is to nullify an election based on the fact that the election was not conducted substantially in conformity with the law. It should be of such a scale or level or of such a nature that it can be said to amount to a travesty of an election or a sham.” (Emphasis added)

4.14 It is therefore incumbent upon a petitioner relying on this ground

to:

- (i) specify a provision of the **EPA** (or related legislation, primary or secondary) which prescribes an electoral process/procedure;
- (ii) prove that there was an occurrence(s) in respect of the election which occurrence did not comply with that procedural prescription;
- (iii) prove that due to the occurrence(s) the election was a sham or travesty as it was not conducted substantially in accordance with the **EPA**; and

⁵ Vol 3 (2007) ZR 284 at 316 -317

- (iv) prove that the procedural anomaly affected the outcome of the election in terms of the success of one candidate over the other(s).

Eligibility

4.15 The **EPA** in s.97(2)(c) stipulates:

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

4.16 The qualifications for election as MP are prescribed in Article 70(1) of the **Constitution of Zambia** (the “**Constitution**”).

4.17 The grounds for disqualification from being elected as MP are also codified albeit in Article 70(2) of the **Constitution**.

Burden and standard of proof

4.18 In *Galaunia Farms Limited v National Milling Company Limited*⁶, the Supreme Court re-affirmed that the burden of proof in a civil case lies with he who alleges.

⁶ (2004) ZR1 at pages 9-10

- 4.19 Closer to this case is the decision of the Constitutional Court in *Nkandu Luo & ECZ v Doreen Sefuke Mwamba & AG*⁷ earlier cited, wherein it was categorically stated that onus is on a Petitioner to prove that there is cause for nullification of a parliamentary election under section 97(2) of the **EPA**.
- 4.20 Turning to the standard of proof, the Supreme Court in *Mwalimu Simfukwe v Evaristo David Kasunga*⁸ (decided prior to enactment of the **EPA**) did canvass the principle that the standard of proof to be discharged by a petitioner in election petitions is higher than on a balance of probabilities.
- 4.21 The said case was cited and the principle entrenched by the Constitutional Court, post enactment of the **EPA** in the decision in *Abiud Kawangu v Elijah Muchima*.⁹
- 4.22 It follows therefore that the Petitioner as proponent bears the burden to prove his case against the Respondents and to do so beyond a simple balance of probabilities.

⁷ Selected Judgment No. 51 of 2018 at p. J50-51

⁸ Appeal No. 50 of 2013

⁹ Judgment dated 9th February 2018 in Appeal No. 8 of 2017 (2016/CC/A039)

5. ANALYSIS AND FINDINGS

- 5.1 Following the conclusion of trial, the Petitioner tendered final submissions on 4th November 2021 to which the First and Second Respondents reacted with opposing submissions both filed on 10th November 2021.
- 5.2 I propose to dispense with a copious reproduction of the submissions for reasons which shall become apparent.
- 5.3 That said, I have closely studied the material on record, evidence and competing submissions which were well researched and immensely useful. After a careful consideration, my decision is as set out below.
- 5.4 I will begin with a tabulation of the election statistics for Chawama constituency in terms of names of polling stations, number of registered voters and votes cast for each of the Petitioner and First Respondent as lead contenders.
- 5.5 The portion of the statistics that represents the number of registered voters at each polling station is based on documentary evidence produced by the ECZ in the agreed supplementary bundle of documents filed 21st October 2021, at p.2 to 5.

5.6 The part of the statistics representing the votes cast is derived from the ECZ form 19 produced by the Petitioner in his bundle of documents filed 22nd September 2021, at p.19 to 23.

5.7 The statistics are necessary for illustration purposes along the way and in aid of proper context to my decision.

NKOLOMA WARD

NO	Polling station (in Gen 19)/ Polling District in ECZ Register	No. of Registered Voters	No. of votes cast	No. of votes for Petitioner	No. of votes for First Respondent
1.	BATOKA B-1	953	563	169	370
2.	BATOKA B-2	952	603	157	413
3.	KAOMA B-1	553	371	140	215
4.	KAOMA B-2	552	372	132	226
5.	UFULU A-1	726	418	136	269
6.	UFULU A-2	726	426	132	289
7.	UFULU B-1	862	504	165	334
8.	UFULU B-2	862	489	143	332
9.	NJANJI-1	800	580	212	347
10.	CHIMACHE A-1	748	408	158	231
11.	CHIMACHE A-2	747	447	152	282
12.	CHIMACHE A-3	747	458	148	289
13.	CHIMACHE B-1	938	556	205	331
14.	CHIMACHE B-2	937	504	178	296
15.	CHUMA CHIYENDA	815	555	225	320
16.	DZIKO NI ANTHU-1	519	360	129	221
17.	KUOMBOKA-1	864	465	139	312
18.	KUOMOBOKA-2	864	531	193	322
19.	KUOMBOKA-3	864	518	141	369
20.	CHITIMBA-1	862	577	251	317
21.	CHITIMBA-2	862	561	215	336
22.	ZAMBEZI C-1	996	586	149	424
23.	ZAMBEZI C-2	996	542	174	356
24.	ZAMBEZI C-3	996	502	184	304
25.	ZAMBEZI C-4	996	572	182	372
26.	ZAMBEZI C-5	996	496	137	341
27.	ZAMBEZI C-6	996	540	126	401
28.	ZAMBEZI C-7	995	489	152	332
29.	MWAZIONA -1	889	514	137	358
30.	MWAZIONA-2	889	524	214	290
31.	MWAZIONA-3	889	479	174	293

32.	MWAZIONA-4	889	538	167	341
33.	MWAZIONA-5	889	546	190	309
34.	CHISOKONE-1	924	559	172	375
35.	CHISOKONE-2	924	550	215	318
36.	CHISOKONE-3	923	561	151	387
37.	BATOKA A-1	960	534	144	365
38.	BATOKA A-2	960	531	193	322
39.	BATOKA A-3	959	576	151	404
TOTALS	Total No. of Registered Voters	33,819			
	Total No. of votes cast		19,905		
	Total No. of votes Petitioner			6,532	
	Total No. votes for First Respondent				12,713

CHAWAMA WARD

NO	Polling station (in Gen 19)/ Polling District in ECZ Register	No. of Registered Voters	No. of votes cast	No. of votes for Petitioner	No. of votes for First Respondent
1.	CHAWALILA-1	940	526	127	379
2.	CHAWALILA-2	940	522	179	334
3.	CHAWALILA-3	940	544	170	364
4.	CHAWALILA-4	940	522	209	302
5.	CHAWALILA-5	940	551	182	359
6.	CHAWALLA-6	940	534	158	358
7.	CHAWALILA-7	940	529	136	375
8.	CHAWALILA-8	940	540	184	339
9.	CHAWALILA-9	940	534	148	369
10.	MOTOMOTO A1	805	484	121	353
11.	MOTOMOTO A2	805	470	163	298
12.	MOTOMOTO A3	805	510	149	350
13.	MOTOMOTO A4	805	507	122	375
14.	MOTOMOTO A5	804	515	165	334
15.	MOTOMOTO B1	878	655	201	445
16.	MAZUNZO A-1	885	565	201	352
17.	MAZUNZO A-2	885	600	282	305
18.	MAZUNZO A-3	885	576	236	328
19.	MAZUNZO A-4	884	558	212	337
20.	MAZUNZO A-5	884	546	238	296
21.	LWIPA B-1	925	560	146	407
22.	LWIPA B-2	924	580	235	335
23.	LWIPA B-3	924	558	225	322
24.	LWIPA B-4	924	497	179	300
25.	LWIPA B-5	924	540	128	397
26.	LWIPA B-6	924	589	230	341
27.	MWEETWA-1	507	355	143	206

28.	MWEETWA-2	507	335	120	206
29.	ZNS-1	768	488	225	254
30.	ZNS-2	767	480	209	260
31.	LWIPA A-1	627	470	115	335
32.	MBABALA-1	840	592	245	332
33.	MBABALA-2	840	565	198	352
34.	NAKATINDI-1	807	521	157	355
35.	NAKATINDI-2	806	510	186	305
36.	NAKATINDI-3	806	534	153	373
37.	BASOPO-1	952	578	192	372
38.	BASOPO-2	951	556	196	352
39.	BASOPO-3	951	534	172	348
40.	BASOPO-4	951	576	172	398
41.	EYE CLINIC-1	836	572	269	294
42.	EYE CLINIC-2	836	596	278	301
43.	EYE CLINIC-3	835	573	226	337
44.	LITUNGA-1	726	468	139	322
45.	LITUNGA-2	726	471	174	286
46.	LITUNGA-3	725	485	159	311
47.	LUBWA-1	665	442	154	275
48.	LUBWA-2	664	468	144	317
49.	MAZUNZO B-1	524	386	174	203
50.	MAZUNZO B-2	523	357	122	221
TOTALS	Total of registered voters	41,470			
	Total No. of votes cast		26,024		
	Total No. of votes Petitioner			9,048	
	Total No. votes for First Respondent				16,369

JOHN HOWARD WARD

NO	Polling station (in Gen 19) / Polling District in ECZ Register	No. of Registered Voters	No. of votes cast	No. of votes for Petitioner	No. of votes for First Respondent
1.	LUMUMBA MARKET-1	676	411	136	264
2.	LUMUMBA MARKET-2	675	434	172	254
3.	LUMUMBA MARKET-3	675	398	137	246
4.	LUMUMBA A-1	897	581	224	344
5.	LUMUMBA C-1	867	560	200	353
6.	LUMUMBA C-2	867	541	164	361
7.	MTONDO-1	622	414	167	239

8.	MTONDO-2	621	425	147	265
9.	LUMUMBA B-1	933	609	221	373
10.	LUMUMBA B-2	932	569	176	377
11.	ANDREW MWENYA-1	820	542	162	365
12.	ANDREW MWENYA-2	820	539	208	320
13.	ANDREW MWENYA-3	819	568	189	365
14.	ANDREW MWENYA-4	819	516	119	388
15.	ANDREW MWENYA-5	819	538	150	373
TOTALS	Total No. of Registered Voters	11,862			
	Total No. of votes cast		7,645		
	Total No. of votes for Petitioner			2,572	
	Total No. of votes for First Respondent				4,887

LILAYI WARD

NO	Polling station (in Gen 19)/ Polling District in ECZ Register	No. of Registered Voters	No. of votes cast	No. of votes for Petitioner	No. of votes for First Respondent
1.	LIMA C-1	799	589	420	157
2.	LIMA D-1	456	339	222	107
3.	MTENDERE E-1	893	523	295	220
4.	MTENDERE E-2	893	531	311	215
5.	MTENDERE E-3	893	513	236	263
6.	MTENDERE F-1	938	622	300	312
7.	FREEDOM B-1	856	569	308	249
TOTALS	Total No. of Registered Voters	5,728			
	Total No. of votes cast		3,686		
	Total No. of votes for Petitioner			2,092	
	Total No. of votes for First Respondent				1,523

The contention of misconduct

Alleged violence and intimidation

5.8 This sub-contention is particularised in paragraph 6.(a),(b),(c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (o) of the petition and I will deal with them in sequence beginning with (a) reproduced as follows -

“On 27th May 2021, the Petitioner was attacked by PF cadres while on a door -to- door campaign. The people in his company including aspiring councillors were also beaten and a UPND member Terry Chingo was badly injured and Abigail, another UPND sympathizer, was undressed. The matter was reported at Chawama Police.”

5.9 The Petitioner testified in chief that this incident occurred in Chawama ward and in cross examination by Mr Khosa stated that the attackers wore PF regalia but that he did not know their names but has a witness who did.

5.10 When cross examined by Mr Zulu the Petitioner admitted that the First Respondent was not present during the incident and that he did not know whether the attackers were her agents. He also conceded that out of all the incidents alleged in paragraph 6 of the Petition, the incident of 27th May 2021 is the only one where he was present and personally witnessed.

5.11 Besides the Petitioner, PW18 was the only other witness who testified about this incident and his addition to the Petitioner's evidence was that it took place during a door to door campaign and that the attackers wore green PF regalia branded 'ECL 2021'.

5.12 Neither the Petitioner nor PW18 testified about 'Abigail' being undressed as alleged in the petition and neither she nor Terry Chingo were called to testify, nor were the aspiring councillors alleged to have been beaten also called.

5.13 Further, the Petitioner did not testify that he was with PW18 at the time of the incident nor did PW18 state that he was with the Petitioner.

5.14 Given:

- (i) the said inconsistencies between the testimonies of the Petitioner and PW18;
- (ii) the variance of their testimonies with the precise pleading in 6(a) of the petition which brings 'Abigail to the fore'; and
- (iii) the absence of testimonies from Terry Chingo, 'Abigail' and the aspiring councillors said to have been beaten;

I am not convinced on the accuracy of the testimonies of the Petitioner and PW18 on the incident.

- 5.15 Additionally, the admission that the First Respondent was not present during the incident rules her out as one of the attackers.
- 5.16 Further, neither the Petitioner nor PW18 led evidence to show that the attackers were otherwise linked to the First Respondent or her polling or election agents, while the First Respondent in her testimony denied any involvement or even knowledge of the incident.
- 5.17 Consequently, this Court is left to assume or speculate that because the attackers are said to have worn regalia of PF which was the same party as the First Respondent then there was a link, which regalia was not even said to feature the First Respondent but '*ECL 2021*'.
- 5.18 However, I am mindful of jurisprudence on the point that mere proof of involvement of cadres in an incident does not give rise to an inference that a candidate of the same party had directly or indirectly incited them as to do so would be speculative and it is not the duty of the Court to fill in evidential gaps by making assumptions.

5.19 A case in point is the decision of the Constitutional Court in *Richwell Siamunene v Sialubalo Gift*¹⁰ wherein it was pronounced:

“We note that there is insufficient evidence to support a finding that the documented acts of violence that occurred after the nomination day are linked to the respondent. Mere proof that the UPND supporters were indeed involved in the said acts does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election.”
(Emphasis added)

5.20 By virtue of the doctrine of *stare decisis*, the said and all other decisions of the Constitutional Court are binding on this Court which is hierarchically inferior.¹¹

5.21 I accordingly find that whereas the Petitioner has proven that the incident in 6(a) occurred albeit not in the manner exaggerated in the pleading, there is no proof that the First Respondent is culpable over and above the wider party of PF. The incident is thus of no significance to this case.

¹⁰ Vol. 3 (2017) ZR 335 at 354

¹¹ Article 121 of the Constitution stipulates that the Constitutional Court ranks equivalent to the Supreme Court and *Match Corporation Limited v Development Bank of Zambia & Anr* (1999) ZR 18 at p.23 lines 23 to 30 is authority for applicability of the doctrine of *stare decisis* in Zambia.

5.22 I move on to the allegation in paragraph 6.(b) of the petition reproduced as:

“Sometime in June 2021, the UPND offices in John Howard, which building had been donated to the party by a Mr. Patuka, were attacked by Patriotic Front cadres, who were physically led by the Respondent’s well-known agents – Innocent Kalimanshi and Nathan Phiri, firstly in the morning at around 09:00 hours and later at 14:00 hours. Two gunshots were fired in the air to scare people. The PF group stole plates, two big pots, one frying pan, two bags of mealie meal, a container of cooking oil, a double mattress, three car doors, a grinder and a wheelchair for a disabled UPND member, Petro Siafunta. A bag containing important documents including National Registration Card and Voters Card for Petro Siafunta was also grabbed. Eight windows were also broken while food including nshima and chicken which was in the pots was thrown on the tarmac. While perpetrating the attack, the PF cadres were shouting that they did not want UPND in Chawama Constituency. The matter was reported to Chawama police and the Officer-in-charge Mr. Tembo even visited the scene and inspected the damage.”

5.23 The Petitioner and three of his witnesses (PW10, PW11 and PW18) spoke about the incidents.

5.24 The evidence of the Petitioner was that he did not witness the occurrence of the incidents but that he received a report. It was the same for PW18.

5.25 PW10 testified that on a day in June 2021, Patuka House which was the UPND command centre in John Howard was attacked by PF cadres at 09:00 hours and one UPND youth injured. He spoke

of another incident same day at 14:00 hours where there was property damage and looting of the same premises by PF cadres.

- 5.26 PW10 implicated Nathan Phiri and Innocent Kalimanshi as being involved and said that he had earlier in the year (January 2021) attended a PF meeting of ward leaders, chaired by the First Respondent as constituency head where she welcomed Innocent Kalimanshi to PF and urged for his support.
- 5.27 The issue of Innocent Kalimanshi and the meeting of January 2021 is material as PW10 was attempting to establish a link to the First Respondent.
- 5.28 However, I am not persuaded that the meeting ever took place as firstly, I did in the summary of his evidence, earlier in this judgment flag the demeanour of PW10 as unimpressive and unconvincing (with reasons).
- 5.29 Secondly, when cross examined, PW10 kept changing statements about the manner in which he attended the alleged meeting as in one breath he claimed that he was invited and in another breath that he sneaked in. When questioned further, PW10 changed his testimony back to that he was invited.
- 5.30 Thirdly, PW10 did admit that he was on suspension from PF and party activities at the material time and that the reason for

suspension was his endorsement of the Petitioner who belonged to a competitor party. I do not think it plausible that a suspendee on such grave grounds would be invited to attend a high level political meeting.

5.31 In *Steven Masumba v Elliot Kamondo*¹² the Constitutional Court guided that evidence of a witness shown to be untruthful in material respects carries very little weight as it goes to the root of their credibility.

5.32 Thus over and above the issues with his demeanour, the untruthfulness of PW10 over his attendance of the alleged meeting makes him a less than credible witness whose evidence is unreliable.

5.33 Moving on to PW11, his testimony also casts a shadow of doubt on the credibility of PW10 and on that of PW11 himself. I say so as PW11 who testified that he was a victim of the attack:

- (i) stated when cross examined by Ms Phiri that the property damage and theft occurred in the morning (between 09:00 hours to 10:00 hours) while PW10 stated that it was in the afternoon; and

¹² Vol. 3 (2017) ZR 130 at p 172-173

(ii) stated that he (PW11) was with people at Patuka House who included Nambula Nashebo but he did not mention PW10 as one of them and he (PW11) said that he informed the PF cadres that he was the one in charge.

5.34 By contrast, PW10 in his testimony in chief created the impression he (PW10) was the one directing things at Patuka House during the incidents.

5.35 PW10 and PW11 were however consistent in their evidence that the First Respondent was not present and that Nathan Phiri led a group of PF cadres that approached PW11.

5.36 However the Petitioner's evidence on the alleged role of Innocent Kalimanshi was inconsistent.

5.37 I say so as according to PW10, Innocent Kalimanshi appeared 15 minutes after Nathan Phiri while PW11 stated that it was only suggested that he (PW11) be taken to Innocent Kalimanshi but rejected by fellow PF cadres on account of PW11 being differently abled.

5.38 PW11 for his part spoke of a larger group of PF cadres appearing at some point after which he fled and the damage and looting occurred but he did not mention that Innocent Kalimanshi came at any point.

5.39 PW18, who claims to have visited the scene after the fact testified that PW11 told him that Innocent Kalimanshi had taken his wheelchair.

5.40 Given the inconsistencies in evidence of PW10 and PW11 (and PW18) on:

- (i) the time of occurrence of the alleged property damage and looting;
- (ii) who was present from UPND; and
- (iii) who was present from the attackers;

I am not persuaded by their evidence as a stand alone.

5.41 Further, it is noteworthy that both PW10 and PW11 admitted that they were members of UPND like the Petitioner. PW10 in particular said when cross examined by Mr Zimba that he (PW10) was a member of the UPND committee for John Howard ward while PW11 testified (when cross examined by Mr Khosa) that he was the UPND branch chairman for the same ward.

5.42 In *Steven Masumba v Elliot Kamondo*¹³ the Constitutional Court guided that evidence of partisan witnesses requires corroboration before it can be relied on and that partisan witnesses cannot corroborate each other. In the case before Court

¹³ Vol. 3 (2017) ZR 130 at p 163-164

no independent evidence has been led by a non-partisan observer of facts to corroborate the testimony of PW10 and PW11.

5.43 Turning to the First Respondent, her testimony was that she was not present nor aware of the incidents and that Nathan Phiri and Innocent Kalimanshi were not her agents. This was not shaken in cross examination.

5.44 Therefore, when faced with:

- (i) the inconsistent evidence from the Petitioner's witnesses;
- (ii) credibility issues alluded to;
- (iii) lack of corroboration; and
- (iv) the First Respondent's testimony;

I find that the Petitioner has failed to prove that the incidents alleged in 6(b) occurred exactly as pleaded and more importantly that they bore any culpable connection to the First Respondent over and above the wider party of PF.

5.45 As for the allegation in paragraph 6.(c) of the petition it was worded as:

"Further to the above, Siyanda Mutau was attacked at UPND offices at Patuka House in John Howard ward offices by Innocent Kalimanshi and Nathan Phiri who are PF cadres."

5.46 Siyanda Mutau was not called to testify about the incident and there was no medical report produced by the Petitioner in his bundle. There is no witness for the Petitioner that otherwise testified that they saw Siyanda Mutau being attacked.

5.47 I thus find that the Petitioner has failed to prove that the incident pleaded in 6. (c) of the petition ever occurred.

5.48 In paragraph 6. (d) of the petition it is contended:

“Between 5th and 18th June 2021, the UPND Chawama Constituency Chairman and Campaign Manager of the Petitioner, Andrew Zulu, was abducted by about twenty PF cadres donning PF regalia and led by a PF official and agent of the Respondent known as Mr. Saidi. Mr. Zulu was abducted while on a door-to-door campaign near Chawama market and was in the process assaulted with a plank and stabbed on the hand with a screw driver. The said Andrew Zulu was later held in an uncompleted building and was only left alone when his abductors ran to the First Respondent’s vehicle when she came on the scene and was later rescued by the people from neighbouring houses. The matter was reported to Chawama Police.”

5.49 PW18 was the sole witness called by the Petitioner in respect of this alleged incident in Chawama ward and testified about being attacked, assaulted and abducted by PF after an exchange of words with Saidi Phiri who PW18 said was the PF youth chairman in Chawama ward. PW18 also recounted that repeated death threats were uttered during the ordeal.

5.50 However, there were discrepancies between his testimony and the petition as follows-

- (i) PW18 testified that the incident occurred on 23rd July 2021 while the petition alleged that it was in June 2021;
- (ii) PW18 testified that his abduction only ended when a vehicle playing campaign songs was heard passing in the area (to which one of his assailants remarked indicated that the First Respondent had come) while the petition categorically alleged that the First Respondent actually came on the scene.

5.51 There were also discrepancies between the injury sustained as per testimony of PW18 and in the medical report produced at page 12 of the Petitioner's bundle:

- (i) PW18 said he was injured on *inter alia* his left wrist/hand while the medical report said right wrist/hand; and
- (ii) PW18 said he suffered a stab wound and showed the Court a scar on his left wrist while the medical report spoke of a swollen right hand.

5.52 In addition, whereas PW18 (as campaign manager) testified about having reported the very first (and less serious) incident of violence (27th May 2021) to *inter alia* ECZ, he admitted that he did

not report his assault and abduction to ECZ which I find strange considering the gravity of the incident and insinuation that it was connected to the First Respondent.

5.53 Lastly, taking into account the intimate partisan connection of PW18 to this matter, his evidence cannot escape the requirement for corroboration, which requirement the Petitioner has fulfilled with respect to physical injury (through the medical report) but not over those culpable for the barbaric ordeal.

5.54 Turning to the First Respondent, her testimony was a denial of any involvement, presence or knowledge of the incident. She also denied that she knew the Saidi Phiri singled out by PW18. This part of her testimony was not discredited in cross examination.

5.55 Given the mosaic formed by the aforesaid, I find that whereas the Petitioner has proven that PW18 was savagely assaulted and abducted, it has not been proven to the requisite standard that that it bore any culpable link to the Petitioner beyond the wider party of PF.

5.56 Moving on to paragraph 6. (e) of the petition in which it is alleged:

“On 9th July 2021 Gilani Simfukwe, a UPND Branch Chairman, was hit with a panga on the back of his head by a PF cadre known as Divo while his fellow PF cadres hit him with an axe on the back of his knee and the said official heard the PF cadres proclaim that he was dead,

and they searched his pockets and went away with an ITEL P32 phone and a sum of ZMW 320.00. The PF cadres also stole his household goods and attempted to set his house on fire. The matter was reported to Misisi Police.”

5.57 The Petitioner and two of his witnesses (PW15 and PW18) spoke about this incident in Nkoloma ward.

5.58 The evidence of the Petitioner was that he did not witness the occurrence but that he received a report.

5.59 It was the same for PW18 who said he visited PW15's home the day after and took photos.

5.60 PW15 for his part gave a chilling account of how following a tip-off from his inlaw (Mr Chingenge) that PF cadres were on their way to him to cause destruction, he was savagely attacked and injured on the head and back of leg.

5.61 He testified that it happened in Nkoloma ward on the night of 9th July 2021 and he produced a medical report at page 4 of the Petitioner's bundle. PW15 also showed the Court a scar on his head and at the back of right leg knee area.

5.62 PW15 testified that his attackers were Divo, Cisse and Rabbi who he knew well as PF cadres who used to move with the First Respondent when she was the area councillor.

- 5.63 There was however some discrepancy between the evidence of PW15 which spoke of a head and knee injury while his medical report showed only a head injury.
- 5.64 Further, to the extent that PW15 was by his own testimony a high ranking UPND official in the constituency (Nkoloma ward branch chairman), his evidence required corroboration.
- 5.65 The medical report corroborates the fact of injury on 9th July 2021 but there is no independent evidence to corroborate his testimony on the perpetrators.
- 5.66 Turning to the First Respondent, her testimony was a denial of any involvement, presence or knowledge of the incident.
- 5.67 I accordingly find that whereas it has been proven that PW15 was brutally assaulted on 9th July 2021, it has not been proven to the requisite standard that the First Respondent was to blame for the attack instead of just the wider PF party.
- 5.68 I now address the contention in paragraph 6. (f) of the petition worded as:

“On the evening of 9th July 2021, in Misisi compound in Chawama constituency, the PF cadres gained entry into Gilani Simfukwe’s house using picks, shovels, butchery tools, while accusing the occupants of harbouring UPND supporters and proceeded to ransack the house and the shop attached to it and went away with beer from the

fridge, two Defy deep freezers, 21-inch Sharp television set and a 32-inch L.G plasma television set."

- 5.69 The Petitioner did not call anyone who actually witnessed what transpired during the alleged incident. The Petitioner himself testified simply about having received a report of it.
- 5.70 PW15 for his part testified that he got on the scene (with the Police) after the fact, and found his wife and children being evacuated from the house as it was set ablaze. His wife and / or children were not however called to testify.
- 5.71 As for PW18, his testimony was simply that he visited the house of PW15 the next day (10th July 2021) and that he took photographs. He did not however produce the photographs and no reason was given.
- 5.72 There was even no Police report, occurrence book record or other documentary evidence to prove the very occurrence of the incident, considering that PW15 said he went on scene with the Police.
- 5.73 Given the aforesaid evidential deficiency, I find that it has not been proven that the incident alleged in paragraph 6.(f) of the petition bore any culpable link to the First Respondent or that it even occurred at all.

5.74 In paragraph 6. (g) of the petition it is alleged:

“On 9th July 2021 Moses Musumali, a UPND sympathizer’s shop was broken into by PF cadres and looted while accusing him of belonging to the UPND. All goods in the shop worth about ZMW 15,000.00 were stolen and his business partner who was sleeping in the store was badly assaulted. The matter was reported to Misisi Police.”

5.75 The Petitioner and two of his witnesses (PW16 and PW18) spoke about this incident in Nkoloma ward.

5.76 The evidence of the Petitioner was that he did not witness the occurrence but received a report.

5.77 It was the same for PW18 who said he visited PW16 at the scene the day after and was informed of the looting of PW16’s shop including theft of money and his telephone.

5.78 PW16 for his part testified that on 9th July 2021 at about 23:00 hours his shop was raided by more than 30 masked men who also wore green overalls branded ‘PF empowered by ECL’ and they pushed him around saying they were sent by the Councillor. He stated that they ransacked his shop of stock and cash amounting to K15,000.

5.79 When PW16 was cross examined by Mr Zimba, the inconsistencies between his evidence and the petition became apparent –

- (i) he testified that stock worth K38,000 was looted and cash amounting to K15,000 was taken while the petition does not speak of cash being stolen but only goods worth K15,000; and
- (ii) he never stated that anyone was beaten during the incident while the petition states that his partner was badly assaulted.

5.80 Further, during cross examination still by Mr Zimba, it became apparent that PW15 had an interest to serve as when he was shown paragraph 6(g) of the petition:

- (i) he changed his testimony to that the value of goods stolen was K15,000 not the earlier value of K38,000 stated by him; and
- (ii) he agreed that he was a UPND sympathiser and that he was before Court to serve the interests of UPND.

5.81 His partisanship is confirmed by the testimony of PW18 who conceded in cross examination by Mr Botha that the victims of the attacks of 9th July 2021 who he visited were UPND members.

5.82 Thus given:

- (i) the inconsistencies between the evidence adduced and the allegation as pleaded;

- (ii) the inconsistencies in the evidence of the alleged victim (PW16) in his testimony in chief and in cross examination; and
- (iii) the lack of corroborating evidence given PW16's partisan status;

I find that the Petitioner has failed to prove that the incident alleged in paragraph 6. (f) of the petition occurred exactly as pleaded and more importantly that it bore any culpable link to the First Respondent.

5.83 The allegation in paragraph 6. (h) of the petition is:

"On 9th July 2021 James Chingenge's house in Nkoloma ward of Chawama Constituency was destroyed by PF cadres who removed door and window frames. The said Mr. Chingenge is the UPND Vice Chairman for Protocol, Lusaka District Youth Wing. The matter was reported to Misisi Police."

5.84 The Petitioner did not call Mr Chingenge to testify nor any eye witness to prove the occurrence of the alleged incident, its circumstances, the identities of the perpetrators and establish a link to the First Respondent.

5.85 All the Petitioner did was call PW18 who testified about having been called by Mr Chingenge the night of the incident and having followed him up the next day (10th July 2021).

5.86 I accordingly find that the Petitioner has failed to prove that the incident (if at all it happened) bore any culpable link to the First Respondent.

5.87 It is alleged in paragraph 6. (i) of the petition that-

“On 9th July 2021 Milimo Melisah while asleep in the house with her sister Angela Milimo was attacked by PF cadres who broke down the door of the entrance to the house. Two of the cadres squeezed her neck and one stuck his fingers into her private parts and sexually abused her. Angela Milimo’s knickers were removed and the assailants attempted to rape her. A television set, Top Star Decoder, mattress and a laptop were stolen while plates and windowpanes were broken. The said Melisah and Angela fled their rented accommodation and never even voted.”

5.88 Neither Ms Melisah Milimo nor Ms Angela Milimo was called to testify nor was there otherwise any eye witness to prove the occurrence of the alleged incident, its circumstances, the identities of the perpetrators and establish a link to the First Respondent.

5.89 Instead the Petitioner relied on PW18 who stated that he visited the two ladies the next day (10th July 2021) and produced the medical reports at pages 9 and 10 of the Petitioner’s bundle.

5.90 The First Respondent for her part testified in response to the allegation that she was not involved in or even aware of the incident.

5.91 I accordingly find that the Petitioner has failed to prove that the incident bore any culpable link to the First Respondent.

5.92 The contention in paragraph 6. (j) of the petition is particularised as:

“In July 2021, Mavis Musonda, a blind woman was raped twice by two PF cadres for allegedly hosting UPND meetings. She was further hacked with a panga in her head and on the body. The rape and assault took place in front of Mavis Musonda’s six (6) young children whose ages range from 4 to 16 years. The said Ms. Musonda could not walk for days after the said rape.”

5.93 Ms Mavis Musonda testified as PW17 and gave a vivid account of the barbaric attack and diabolical violation of her person by three different people. However, she stated that she is visually impaired and for that reason did not see and does not know who the perpetrators of that heinous crime were.

5.94 The Petitioner supplemented her evidence by producing a medical report at page 6 of the Petitioner’s bundle and with the testimony of PW18 who visited her the morning after the incident.

5.95 Whilst I am convinced and do hereby find that PW17 was attacked and gruesomely violated as narrated by her, I find that the

Petitioner has not proven: (i) the identity of the perpetrators; and more importantly (ii) any culpable link of the incident to the First Respondent.

5.96 I now move on to paragraph 6. (k) of the petition in which it is alleged:

“On 9th July 2021 Mulenga Chanda, a female UPND sympathizer of Nkoloma ward, while asleep in her house with her 17-year-old son Edwin Chanda, was assaulted and sexually abused by three PF cadres who took turns in putting their fingers in her vagina. Thereafter she struggled with walking and pus started coming out of her private parts. She was further hit with a metal bar on her hip while her son was hit with a plank on the leg and hacked with a panga as he ran away. The matter was reported at Misisi police.”

5.97 Ms Mulenga Chanda was not called to testify nor was Mr Edwin Chanda. There was also no eye witness testimony to prove the occurrence of the alleged incident, its circumstances, the identities of the perpetrators and who was behind the alleged attack.

5.98 Instead the Petitioner relied on PW18 who stated that he visited the victims' home on 10th July 2021, the morning after the incident and he produced their medical reports at pages 5 and 7 of the Petitioner's bundle.

5.99 The medical report for Edwin Chanda is date stamped 9th July 2021 and confirms that he was injured on the day. The one for Mulenga Chanda however shows a date stamp of 12th June 2021 from Chawama hospital which is at variance with the date of alleged incident (9th July 2021).

5.100 Based on the medical report of Edwin Chanda I am satisfied and find that he was injured on 9th July 2021. As for Mulenga Chanda, given the discrepancy in the date on her report and that pleaded in the petition, I am not satisfied that she was one of those injured on 9th July 2021.

5.101 Perhaps of more significance is that in the absence of eye witness testimony of the incident alleged in 6. (k), I find that the Petitioner has failed to prove that it bore any culpable link to the First Respondent.

5.102 Turning to paragraph 6.(l) of the petition, it is alleged thereunder that-

“On 14th July 2021, while putting up campaign posters in Balmoral area, Ericky Habwato was stoned and punched on the mouth while Choolwe Malambo was hit with a stone in the head by PF cadres who were clad in PF regalia.”

5.103 PW1 testified that he received a report of this incident occurring in John Howard ward and so too did PW18.

- 5.104 The alleged victims testified as PW12 and PW14 respectively. PW12 testified that on the night of 14th July 2021 he and his colleagues including PW14 were confronted by about 10 men dressed in PF regalia and that PW14 was hit with a stone on the head. The incident happened whilst they were putting up UPND campaign posters in John Howard ward. When cross examined by Mr Botha, PW12 admitted that he was not beaten as alleged in the petition. When cross examined by Mr Khosa he admitted that he was a member of the UPND and its campaign team.
- 5.105 PW14 for his part confirmed what was stated by PW12 but in his account his colleagues were beaten first followed by him when he got down from a pole. He also added that the attackers sang a solidarity song for the First Respondent as they left.
- 5.106 Unlike PW12 who admitted that he was a UPND member, there is no evidence that PW14 was also a UPND member so in my estimation the evidence of PW14 corroborated that of PW12.
- 5.107 The First Respondent for her part testified that she was not involved in or aware of the incident.
- 5.108 Given the credibility of the evidence of PW12 and PW14 save for the minor inconsistency on who was beaten, it is tempting to find that the allegation is proven in its entirety.

- 5.109 However, I am mindful that one of the threshold requirements under section 97(2)(a) of the EPA for an act of misconduct to be of significance is that the actor must be a candidate or someone clothed with the knowledge, consent or approval of the candidate or that of their agents (polling or election).
- 5.110 In the case before Court the evidence establishes and I find that PW12, PW14 and team were attacked on 14th July 2021 by PF cadres whilst they were putting up UPND campaign posters.
- 5.111 However while I accept that the attackers were supporters of the First Respondent, that on its own is not enough to meet the threshold of a culpable link as the evidence does not show that the First Respondent committed the attack or that those who did were clothed with her knowledge, consent or approval or that of her agents (polling or election). I accordingly find that the Petitioner has failed to prove that link.
- 5.112 I will now address the allegation in paragraph 6. (m) of the petition, which particularises:

“On 27th July 2021, Franco Masebo was badly assaulted by PF cadres while on a UPND campaign roadshow near Crawford School when he displayed a UPND poster. He was hit with a plank on the head and when he fell down, he was kicked around. This UPND roadshow could not continue any further and had to be stopped around 12:00

hours even though it was supposed to last from 08:00 hours to 18:00 hours.”

5.113 The Petitioner did not call Mr Masebo to testify nor any eye witness to prove the occurrence of the alleged incident, its circumstances, the identities of the perpetrators and establish who was responsible. There was even no medical report produced in the Petitioner’s bundle unlike for other victims of violence.

5.114 The First Respondent for her part testified in response to the allegation that she was not involved or even aware of the incident.

5.115 I accordingly find that the Petitioner has failed to prove that the incident bore any link to the First Respondent, let alone that it even occurred at all.

5.116 I turn to paragraph 6. (o) of the petition, which I reproduce as:

“On 12th August 2021, Mr. Joseph Lwimba Chomba a UPND Lilayi Ward Youth Chairman was shot twice in the stomach by Mr. Weluzani Banda, a PF official who is also the Constituency Development Fund (CDF) Committee Chairman for Chawama Constituency at Mtendere E Polling Station at JICA Water Trust. This shooting happened in the presence of the Respondent. Pepper spray was also used by PF cadres during this attack. All this happened in the presence of voters who were on the queue. Most of the voters scampered and some failed to vote.”

- 5.117 The Petitioner testified that he did not personally perceive the incident but that he had witnesses who did. He did however concede that he won the vote at the polling station. PW18 also testified about only having received a report.
- 5.118 The four eye witnesses who testified over the incident were PW2, PW3, PW4 and PW13.
- 5.119 PW2 testified in chief that the shooting happened outside the polling station after Weluzani Banda (in a car) gave chase to PW2 and PW4 who were on foot at the time and that the First Respondent was not present.
- 5.120 When cross examined by Mr Zulu, PW2's testimony changed to that the shooting occurred during a fight of about 30 UPND cadres with PF cadres. He also admitted that the Petitioner won at the polling station.
- 5.121 PW3 for his part conceded under cross examination by Mr Zulu that he did not see what caused the commotion as he was inside the polling station. He also confirmed that the First Respondent was not around at the time.
- 5.122 PW4 testified that he was shot outside the polling station after he approached Weluzani Banda (of PF) who was alone while he

(PW4) was with about 30-50 fellow UPND security strongmen. He also admitted that the First Respondent was not present at the time.

5.123 PW4 also showed the Court bullet wound scars on his body and his medical report documents and photograph whilst hospitalised at p.13,15,16,17,18 and 28 of the Petitioner's bundle of documents.

5.124 Based on the unchallenged evidence on the occurrence of the shooting and identity of the shooter, I find that the Petitioner has proven that PW4 was shot by Weluzani Banda on 12th August 2021 outside Mtendere E2 polling station.

5.125 However, given the convergence of evidence on the point that the shooting occurring after a clash between PF and UPND persons and that the First Respondent was not present at the time, I find that the Petitioner has not proven that the shooting was incited by or linked to the First Respondent.

5.126 Even assuming that it had been proven that the incident constituted a form of misconduct for which the First Respondent was culpable, the results tabulation produced earlier in this judgment under Lilayi Ward – Mtendere E 2 polling station shows that 531 out of 893 registered voters at the polling station

voted, representing about a 59.46% turnout. Further that the Petitioner pulled 311 votes (representing about 58.57% of the total votes cast) while the First Respondent got 215.

5.127 This means that either way the incident did not prevent the majority of voters from voting nor did it stop the majority of those who voted from casting for the Petitioner as their preferred candidate.

5.128 Moving on to the inter-related paragraphs 8 and 11 of the petition in which it was alleged:

“8. There was widespread non-compliance both of the Electoral Process Act and the Electoral Code of Conduct as the First Respondent and her sponsoring Party the Patriotic Front (PF) also engaged in the defacing of campaign materials.

11. There was widespread non-compliance with the Electoral Process Act and the Electoral Code of Conduct by the First Respondent, her agents and PF cadres as they ensured, with the knowledge and approval of the First Respondent, that the Petitioner and UPND did not wear their party regalia in public or put up any posters as they were physically attacked when they did so.”

5.129 PW18 did testify that as campaign manager for the Petitioner, his efforts were frustrated by attacks from PF cadres on UPND

members wearing UPND regalia and displaying campaign materials. His testimony was not shaken by cross examination.

5.130 On the strength of the case of *Steven Masumba*¹⁴ already cited in this judgment, his evidence requires corroboration because of his intimate partisan link to the Petitioner.

5.131 PW14 did corroborate the evidence of PW12 over attacks by PF cadres during a UPND poster displaying exercise. The evidence of PW14 can and does also corroborate that of PW18 on the point.

5.132 There is however no independent evidence that has been led by the Petitioner to corroborate that of PW18 that PF cadres were also attacking UPND cadres who were dressed in UPND regalia.

5.133 I therefore find it proven that owing to attacks from PF cadres, UPND was prevented from displaying its campaign materials. I however find that the Petitioner has not proven that such attacks extended to UPND cadres wearing party regalia.

5.134 Moving on to who was responsible for the proven attacks, the Petitioner has not led any cogent evidence to prove that the attackers were incited by the First Respondent or that they

¹⁴ Vol. 3 (2017) ZR 130 at p 163-164

otherwise bore the culpable link (under section 92(2)(a) of the EPA) to her as distinct from the wider party of PF.

5.135 Thus the case of *Richwell Stamunene v Sialubalo Gift*¹⁵ already cited is applicable as authority for my finding that the Petitioner has failed to prove that the First Respondent is to blame for the PF cadres who prevented the Petitioner and his supporters from displaying their campaign materials in Chawama constituency.

5.136 I now address the allegation in paragraph 12 of the petition reproduced as:

“As a result of the acts of violence unleashed by the PF that characterized the Parliamentary election members of the United Party for National Development (UPND) and the general public feared for their safety.”

5.137 The Petitioner and PW18 did testify that owing to violence and intimidation in the constituency their members were in fear and less effective in the campaign. I find that plausible considering some of the chilling and savage incidents which were proven.

5.138 However, the Petitioner did not call any non-partisan witness to testify that the violence which appeared targeted at UPND

¹⁵ Vol. 3 (2017) ZR 335 at 354

members struck fear in the general public over and above the UPND team.

- 5.139 I therefore find that for those incidents of violence which I have found in this judgment to have been proven to be committed by PF cadres, the Petitioner has also proven as alleged in paragraph 12 of the petition that his fellow UPND members were in fear.
- 5.140 I however find that it has not been proven beyond a simple balance of probabilities that over and above the UPND members, the general public in Chawama constituency were also in fear.
- 5.141 I further note that the allegation in paragraph 12 of the petition speaks of the PF party in general as culpable and does not single out the First Respondent and I agree with that as it is consistent with my findings in those instances of violence where it was proven that PF cadres were involved.
- 5.142 It is noteworthy however, that even assuming that a link had been made between the violence and the First Respondent, there is not a single witness who testified that the violence dissuaded them from voting for their preferred candidate.
- 5.143 I therefore find that while the issue in paragraph 12 of the petition is very grave and serious, it has not been proven to be of significance to determination of this case.

5.144 Before I conclude on the sub-limb of violence and intimidation under the wider ground of misconduct, the Petitioner has alleged as follows in paragraph 9 of the petition:

“The levels of violence during the campaign period were so high that the violent cadres associated with the Patriotic Front, Innocent Kalimanshi and Nathan Phiri, among others, were apprehended and detained by law enforcement officers.”

5.145 The evidence on this allegation was less than cogent. The Petitioner did not call any Police or law enforcement officers from the wards to testify about receiving any such reports and this is despite PW18 as campaign manager testifying that he had repeated contact with one of the Officers in Charge in the constituency.

5.146 The Petitioner also did not alternatively produce records of occurrence books from Police stations dotted around the constituency.

5.147 I therefore find that the Petitioner has not proven the allegation to the requisite standard in election petitions and I dismiss it as baseless.

Alleged bribery and vote buying

5.148 This sub-contention is introduced in paragraph 6. (n) and (p) of the petition and I will begin with 6(n) reproduced as:

“On 11th August 2021, around 21:00 hours the First Respondent distributed mealie meal, 2.5 litre containers of cooking oil and a sum of ZMW 200.00 door-to-door in almost all the wards in Chawama.”
(Emphasis added)

5.149 The Petitioner testified that he did not personally perceive the alleged incident[s] but that he had witnesses who did.

5.150 Out of the six witnesses who the Petitioner called to testify on this allegation namely PW5, PW6, PW7, PW8, PW9 and PW18:

- (i) none of them testified that the incident took place at around 21:00 hours (as pleaded) and those who mentioned time said (19:30 hours according to PW5, 19:00-20:00 hours according to PW7, 19:30-20:00 hours according to PW8 and about 20:00 hours according to PW18);
- (ii) none of them testified that part of the items distributed by the Petitioner was cooking oil (as pleaded);
- (iii) none of them testified that the Petitioner was going around door to door distributing the items (as pleaded); and

(iv) none of them testified that the distribution took place in most of the wards in Chawama (as pleaded) instead all testified that it took place only in Nkoloma ward at a specific site (near World Wide Church in Missisi compound).

5.151 Further, PW5 who testified first on the point had an unconvincing demeanour in examination in chief as she could not face the Court.

5.152 Her demeanour worsened in cross examination as on top of avoiding facing the Court, PW5 was evasive and sometimes paused as if to think before answering. She also completely avoided to answer a question from Mr Zulu about whether she was ever approached by the First Respondent to offer her something on 11th August 2021.

5.153 To cap it all, PW5 admitted when further questioned by Mr Zulu that she is the one who went to the First Respondent on 11th August 2021 and that she had lied to the Court when she said that the First Respondent is the one who came to her.

5.154 I have thus discounted her evidence altogether as I found her to be an untruthful and less than credible witness.

5.155 Turning to the Petitioner's second witness on the point namely PW6, I found him to be an unreliable witness as-

- (i) he could not face the Court and was evasive when questioned;
- (ii) when cross examined by Mr Zulu he admitted that –
 - a) he lied to the Court that he could not be corrupted and could not be bought;
 - b) he was a Christian who found it easy to lie but sought to justify it that the lying did not start with him as many other Christians also tell lies; and
 - c) the 3 incidents of alleged vote buying by the First Respondent that he spoke of could easily have been in January, February, March or April (prior to campaign period) as he could not tell exactly since he did not know the calendar months of a year.

5.156 As for PW7, she appeared to be a more credible witness than PW5 and PW6. She however appeared to have an interest to serve of implicating the First Respondent as:

- (i) she admitted that she was unhappy that the Petitioner lost the election as she wanted him to win;
- (ii) she admitted that she would be happy if the Court gave the Petitioner another chance at the election; and

(iii) (when cross examined by Mr Zulu) she said in one breath that the K200 was given to her by the First Respondent but in another changed that it was given to her by the First Respondent's people at a truck whilst the First Respondent was in a car behind.

5.157 I therefore treat her as a suspect witness whose testimony requires supporting independent evidence.

5.158 The next witness on allegation 6(n) was PW8 who showed an even deeper bias or interest to serve as, when cross examined by Mr Botha, she admitted that -

- (i) she was a member of the same party as the Petitioner (UPND);
- (ii) she was not happy that the Petitioner lost the election;
- (iii) she would do everything possible to make sure that the election is re-done; and
- (iv) she admitted that the allegations in 6(n) of the petition were different from her testimony but in another breath said they were the same, as if attempting to salvage that part of the petition from collapse.

5.159 Additionally, when cross examined by Mr Zulu, PW8 did admit that she was a very strong UPND member since 2004 and that

she had campaigned for the Petitioner even in 2016 when he stood and lost.

5.160 Through the testimony of PW18 it was disclosed that PW8 was infact the UPND Nkoloma ward chairlady which all but adds to the suspicion of bias or interest to serve which she demonstrated.

5.161 As for PW9, her testimony of having followed the First Respondent to her car and been given K200 in the evening of 11th August 2021 in Nkoloma ward near World Wide church, coupled with a plea for her vote, was not shaken in cross examination.

5.162 However, PW9 did state when cross examined by Mr Botha that the allegation in the petition that the First Respondent was going door to door distributing mealie meal and money was not true.

5.163 Turning to PW18, his evidence on the allegation was simply that he had received a telephone call from PW8 informing him of the incident and conceded that he did not perceive it first hand.

5.164 In my estimation therefore, the evidence of the Petitioner's alleged eye witnesses was not only inconsistent but also at variance with the pleading (in 6(n) of the petition) and was (save for PW9) less than credible, such that it is manifestly unreliable.

5.165 The First Respondent's evidence in reaction to the allegation was that she spent the day on 11th August 2021 at the PF command centre in Nkoloma ward meeting her polling agents over roles and logistics for election day. It was her testimony that she was there from 08:00 hours and left after 17:00 hours to go and rest at home ahead of election day.

5.166 The First Respondent's evidence was not shaken in cross examination as Mr Mweemba simply asked her about whether her pleading made a bare denial of the allegation in 6(n) of the petition while Mr Phiri got the First Respondent to admit that she had not produced location services data to show where she was on 11th August 2021 after 17:00 hours.

5.167 Given that:

- (i) there was no evidence to prove the exact version of the incident as pleaded in paragraph 6(n) of the petition (i.e that it was door to door; was at 21:00 hours; took place in most wards; and cooking oil was also being distributed);
- (ii) the Petitioner's alleged eye witnesses (said by PW5 to have all been present at the scene) gave inconsistent versions of the incident from each other;

(iii) while the First Respondent admitted not having brought location data to show her whereabouts in the evening of 11th August 2021, the Petitioner too did not bring location data showing that PW5, PW6, PW7, PW8 and PW9 were actually at the scene on the day; and

(iv) it is plausible that preparatory meetings with the 444 polling agents in sequence could have taken the whole day (08:00 - 17:00 hours) for the First Respondent and left her tired to go and rest as stated by her;

I find that the allegation of misconduct complained of in paragraph 6(n) of the petition has not been proven by the Petitioner beyond a simple balance of probabilities.

5.168 Even assuming that the allegation under 6(n) had been proven and the First Respondent identified as perpetrator, none of the 5 witnesses testified that the alleged receipt of money by them influenced them from voting for their preferred candidate.

5.169 Infact three of them (PW7, PW8 and PW9) expressly admitted in cross examination that they exercised their free will when voting and selected a candidate of their choice.

5.170 I now turn to the allegation in 6(p) of the petition reproduced as:

“On 12th August 2021 the First Respondent was distributing regalia and dishing out money to voters and polling staff. The distribution of regalia to polling staff was witnessed at Mtendere E polling station, JICA Water Trust.” (Emphasis added)

5.171 The Petitioner testified that he did not personally perceive the incident but that he had witnesses who did. It was the same for PW18 who testified about only having received a report.

5.172 The four eye witnesses who testified over the incident were PW2, PW3, PW4 and PW13.

5.173 However, given that:

- (i) the alleged parcel containing PF regalia was said (by PW2, PW4 and PW13 in chief and cross examination) to have been concealed; and not handed to any voter or polling staff but to a Police officer; and not at the polling station but outside it;
- (ii) PW2 and PW4 who said they witnessed the handing out of money, specified that it took place outside the polling station; and was given to 4 people who were with Weluzani Banda (a PF official) and not voters or polling staff;
- (iii) PW13 who stated that he observed the First Respondent arrive outside the polling station and later leave (after

having entered) said in cross examination that he did not see her give anyone money;

- (iv) PW2 admitted in cross examination by Mr Zulu that he was the leader of a vote protection unit of UPND that observed things at the JICA Centre and that the First Respondent did not do anything that could have compromised the vote; and
- (v) PW3 testified in chief that he was a polling agent and when cross examined by Mr Zulu confirmed that he did not see the First Respondent do anything wrong inside the polling station;

I find that the allegation in paragraph 6(n) of the petition has not been proven beyond a simple balance of probabilities.

5.174 Even assuming that it had been proven, PW2 and the Petitioner himself admitted in cross examination that the Petitioner won the vote at Mtendere E 2 polling station at JICA centre and indeed in Lilayi ward.

5.175 More importantly, the ECZ statistics for Lilayi ward illustrated in the table earlier featured show that the majority of the registered voters voted (3,686 out of 5,728) and that out of the said majority of those who voted, they cast in favour of the Petitioner (2,092 out of 3,686).

- 5.179 Firstly, there is convergence on the fact that Chawama constituency has 4 wards, 111 polling stations and 92,879 registered voters.
- 5.180 Secondly, various witnesses for the Petitioner indicated that Chawama constituency is geographically vast.
- 5.181 Thirdly, the Petitioner did concede in cross examination that PF won the parliamentary seat 5 years ago in 2016 while he lost.
- 5.182 Fourthly, PW10 confirmed that PF was popular in the constituency and he took credit for having worked hard over the past 5 years to contribute to that popularity, before he defected to UPND.
- 5.183 Fifthly, PW10 also conceded that as he defected from PF this year, he knew that it would be difficult for UPND to penetrate in the constituency within a short space of time.
- 5.184 Sixthly, PW18 who was the Petitioner's campaign manager stated in chief and in cross examination that he maintained a campaign team of only 12 persons out of which he deployed 2 to each of the 4 wards. PW18 confirmed that this lean structure was maintained throughout the campaign period.
- 5.185 By contrast, the First Respondent spoke of having 444 polling agents. This meant that statistically:

- (i) the ratio of the Petitioner's campaign agents to those of the First Respondent was 1 to 37;
- (ii) whereas the Petitioner had 2 people to campaign per ward, the First Respondent could have 111 per ward; and
- (iii) looking at the number of registered voters in the constituency (92,879), the ratio of the Petitioner's campaign agents to voters was about 1 to 7,739 while the First Respondent could have about 1 person to 209 voters.

5.186 Therefore, on the totality of the foregoing, it is evident that the two lead contestants (Petitioner and First Respondent) were not evenly matched in terms of capacity to campaign and reach out to the electorate.

5.187 Consequently, it is logical and reasonable to conclude that the First Respondent had statistically higher chances of winning the election even without the misconduct alleged against her in the petition.

5.188 Lastly, the Petitioner did not bring any witness who testified that as a result of the acts complained of in the petition, they were influenced into voting for someone other than their preferred candidate.

5.189 Thus I find that even if the alleged misconduct had been proven against the First Respondent, the evidence does not support a conclusion and finding that it would have swayed or did sway the majority of voters in Chawama constituency from electing their preferred candidate.

The contention of procedural irregularity

5.190 The Petitioner's grievances in this contention can be split into two as firstly absence of Gen 20a forms; and secondly discrepancy between results on Gen 20a forms and the Record of Proceedings (ECZ form 19).

5.191 The issue of absence of Gen 20a forms is pleaded in paragraphs 13 and 15 of the petition as:

"13. The Second Respondent did not avail the Petitioner's agents with Gen 20 forms at the polling stations for the following 15 polling stations: Zambezi C-1, Mazunzo A-3, Mazunzo A-4, Lwipa B-4, Lwipa B-5, Mwazona 1, Mwazona 5, Chawalila 1, Chawalila 6, Chawalila 9, Nyerere Community Centre, Eye Clinic 1, Andrew Mwenya, Ufulu A-2 and Kuomboka and yet the results for these centres were surprisingly reflected in the Record of Proceedings by the said Second Respondent.

14. --

15. *That further to paragraph 14 above, the Second Respondent's agents were frantically requesting the*

Petitioner's agents at the Totalling Centre to avail them with the results for the 15 polling stations in paragraph 13 above as the said Second Respondent's did not have the results evidencing that the electoral process and system of administering elections was inefficient and lacked transparency.

5.192 In addressing this sub-limb, it is important to get an understanding of what a Gen 20 form is. It is created by the **Electoral Process (General) Regulations**¹⁶ as a record generated by a presiding officer at a polling station indicating therein:

- (i) the total number of votes cast;
- (ii) the total number of votes rejected; and
- (iii) the breakdown of the valid votes cast in terms of each candidate.

5.193 The Gen 20 form is also used by the presiding officer to announce the results at a polling station.¹⁷

5.194 The Petitioner testified in chief on this sub-contention that the 15 named polling stations had no Gen 20a forms and he wondered where ECZ got the results announced at p.24 of his bundle of documents. He also complained that the issue was

¹⁶ S. I. No. 63 of 2016 in regulation 49(2)

¹⁷ Ibid., in regulation 49(2)

raised with RW3 (returning officer) but yielded no satisfactory answer.

5.195 When cross examined by Mr Zulu and Mr Musonda, the Petitioner admitted that he was not physically present at the 15 polling stations but had atleast two polling agents at each of them. He also conceded that the results for the 15 polling stations are featured in the ECZ Record of Proceedings / ECZ form 19 and he has not disputed the results in form 19.

5.196 The Petitioner also admitted that there was no record before Court of a complaint to ECZ by him or his agents over the Gen 20a forms.

5.197 PW18 also testified over the 15 polling stations and conceded in cross examination that he was not physically present at them but instead stationed at the totalling centre.

5.198 It is clear from the aforesaid that both the Petitioner and PW18 did not perceive first hand what actually happened at the 15 polling stations.

5.199 Further, the Petitioner did not call any of his polling agents from the 15 polling stations to testify about what transpired and confirm to the Court that they indeed were not given the Gen 20a forms.

5.200 The Petitioner also did not call any of his agents referred to in paragraph 13 and 15 of the petition.

5.201 Such first hand evidence would have greatly aided this Court in determining this sub-contention.

5.202 I say so because by contrast, RW3 (Returning Officer):

(i) testified in chief that all polling stations in the constituency had their Gen 20a forms availed to all participating parties and that none of them complained about not receiving; and

(ii) while he admitted in cross examination by Mr Phiri that the Gen 20a forms for the 15 polling stations in issue were not before Court he insisted that they existed and that there was no complaint over them.

5.203 The end result is that it is not clear where the balance of probability is tilted over the allegation about absence of Gen 20a forms for the 15 polling stations.

5.204 While that doubt does not vindicate the ECZ it also does not aid the Petitioner who bears the burden of proof and to a standard

beyond a simple balance of probabilities as per authority of the *Abiud Kawangu v Elijah Muchima*¹⁸ case already cited.

5.205 I am fortified in this regard by the learned authors of **Phipson on Evidence**¹⁹ who posit:

“While a judge or tribunal of fact should make findings of fact if it can, in exceptional cases it may be forced to the conclusion that it cannot say that either version of events satisfies the balance of probabilities. In such a case the burden of proof may determine which party succeeds.” (Emphasis added)

5.206 I accordingly find that the Petitioner (who bore the burden to do so) has failed to prove the allegation in paragraph 13 and 15 of the petition.

5.207 Further, [even assuming that the allegation had been proven] no evidence has been led to show that it would have affected the outcome of the election in terms of victory of one candidate over the other. Such is the threshold for procedural irregularity to be of significance in an election petition, according to the authorities of **Halsbury’s Laws of England**²⁰ and the **Clare, Eastern Division Case**²¹ already cited in this judgment.

¹⁸ Judgment dated 9th February 2018 in Appeal No. 8 of 2017 (2016/CC/A039)

¹⁹ 17th Edition (2009) Sweet & Maxwell: London at p.152, para 6-07

²⁰ 5th Edition (2013) Volume 38A (Elections and Referendums), Lexis Nexis: London at p. 176, footnote 4

²¹ (1892) 4 O’M & H 162 at 164

5.208 The issue of discrepancy between results on Gen 20a forms and the Record of Proceedings / ECZ form 19 is featured in paragraphs 14, 16 and 17 of the petition as:

"14. In gross mismanagement of the electoral process, the Second Respondent produced Gen 20 Forms for Nyerere Community Centre signed by its Presiding Officer, Bridget Ngoma and for Chawama Primary School -6 signed by the Presiding Officer Kaemba Davis and yet the results endorsed on two forms do not reflect on the Record of Proceedings, Form ECZ 19 and yet the agents of the candidates appended their signatures for the two polling stations.

15. --

16. The foregoing further illustrates that the election was not conducted in accordance with the principles laid down in the electoral laws by the Second Respondents as in some instances there was a mismatch between the votes on Gen 20a form and those that were entered on the Record of Proceedings, ECZ 19 Form. This is apparent for African Methodist Polling station where the Second Respondent's servants inputted total votes of 301 for the First Respondent for Eye Clinic 2 polling station and yet the Gen 20a Form had a total of 300.

17. On Sunday the 15th day of August 2021 the Returning Officer, Mrs Nkhata, declared the First Respondent Tasila E. Lungu as duly elected and returned Member of Parliament for the Chawama Parliamentary Constituency despite pending issues of Form Gen 20 figures not tallying up and Second Respondent's officials tasked with inputting data posting wrong figures for the Petitioner."

- 5.209 The Petitioner confirmed that paragraph 17 of his affidavit verifying facts (which corresponds to paragraph 14 of the petition) brings into issue 2 out of the 111 polling stations in the constituency.
- 5.210 He also confirmed that the relevant Gen 20a Forms for them were the two produced as PT2 in his said affidavit and that when the votes cast at the two stations was totalled it would amount to 1110. This was all during cross examination by Ms Mukuka.
- 5.211 During the said round of cross examination, the Petitioner confirmed that under paragraph 18 of his said affidavit (which corresponds with paragraph 16 of the petition) what was in issue was 1 vote.
- 5.212 He explained that whereas the source document Gen 20a form exhibited as PT3 shows the First Respondent got 300 votes at the station, exhibit PT4 which is the Record of Proceedings has an entry for the station showing 301.
- 5.213 The Petitioner however conceded that if the total number of votes cast (1110) shown on both PT2 was subtracted from the global figure polled by the First Respondent in the constituency and the 1 vote wrongly posted on PT4 taken from the First

Respondent and given to him, it still would not have closed the gap between the two for him to win the election.

- 5.214 The Returning Officer (RW3) for his part conceded that the figure of 371 votes shown as polled by the First Respondent on the first of the two Gen 20a forms exhibited collectively as PT2 did not appear in ECZ form 19.
- 5.215 He also conceded that the second Gen 20a form under PT2 shows the First Respondent polled 388 votes at Chawilila – 6 station but that ECZ form 19 shows only 358 votes for her.
- 5.216 RW3 also admitted that the total votes cast on the said Gen 20a form is 538 while the figure in ECZ form 19 for the station erroneously shows it as 534. This was all under cross examination by Mr Phiri.
- 5.217 This again shows that the totalling of results by the ECZ in the Record of Proceedings / Form 19 had some errors.
- 5.218 However, the votes affected by the said errors is in my view insignificant in terms of closing the gap of votes between the Petitioner and First Respondent.
- 5.219 This is because in terms of arithmetic, the evidence shows that the Petitioner polled 20,244 votes versus the 35,492 of the First Respondent, giving a difference of 15,248.

5.220 Clearly, that difference that could not be bridged by the votes in issue at the 3 polling stations complained of in paragraphs 14,16 and 17 of the Petition out of the total 111 stations in the constituency.

5.221 Therefore, I find that whereas there were some incidents of irregularity in the electoral process, the conduct of the election cannot be said to have substantially deviated from the **EPA**.

5.222 I further find that the number of votes in issue did not affect the result in terms victory by one candidate over the other[s].

5.223 The provisions of section 97(4) of the **EPA** are thus applicable to bar nullification of the election on the basis of the proven minor procedural irregularities.

6. CONCLUSION AND ORDERS

6.1 The Petitioner challenged the election of the First Respondent as MP for Chawama constituency on two out of the three possible grounds under section 97(2) of the **EPA** namely:

- (i) misconduct; and
- (ii) procedural irregularity.

6.2 The Petitioner has failed to prove many of the alleged acts of misconduct and for those that were established, the Petitioner failed to prove as required under s. 97(2)(a) of the **EPA**:

(i) that there was a link of culpability to the First Respondent; and

(ii) that the acts did or may have prevented the majority of the 92,879 registered voters in the constituency from electing their preferred candidate.

6.3 As for the electoral process, it was conducted by the Second Respondent substantially in accordance with the law and the few procedural irregularities proven were not significant enough to have affected the result in terms of the success of one candidate over the other.

6.4 Consequently, both grounds of the petition are hereby dismissed and the petition fails in its entirety.

6.5 With that outcome, I invoke section 99(b) of the **EPA** and declare that the First Respondent was duly elected on 12th August 2021 as MP for Chawama constituency.

6.6 As for costs, section 109 of the EPA confers discretion on this Court and the case of *Afrope Zambia Limited v Anthony Chate & Ors*²² serves as a useful guide for the exercise of that power. I quote Wood, JS who aptly put it on behalf of the Supreme Court that -

“It is a settled principle of law that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs.” (Emphasis added)

6.7 In the case herein, the Petitioner has failed against both Respondents whose conduct in the Court proceedings was above board (as with the Petitioner).

6.8 However, the acrimony in the underlying political rivalry (between the camps of the Petitioner and First Respondent) which gave rise to this case leads me to conclude that the interests of justice weigh in promoting the spirit of reconciliation and healing.

6.9 Therefore, I order that the Petitioner and First Respondent shall bear their own costs of this case as between them in the hope that it will foster the much needed reconciliation and healing in Chawama constituency.

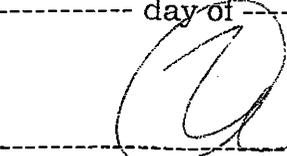
²² Appeal No. 160/2013 at p. J16

6.10 As for the Second Respondent, it has expended considerable public resources in successfully defending an unmeritorious suit against it.

6.11 Further, unlike the First Respondent, the Second Respondent was not privy to the political rivalry such that the nature of the case is not a factor.

6.12 Accordingly, the Petitioner (as proponent) must make good on that cost exposure and I hereby order that the Petitioner should pay the Second Respondent's costs of this case, to be taxed in default of agreement.

Dated this 19th day of November 2021.



K. CHENDA
Judge of the High Court