

IN THE HIGH COURT FOR ZAMBIA  
AT THE DISTRICT REGISTRY  
HOLDEN AT MKUSHI  
(CONSTITUTIONAL JURISDICTION)

2021/HB/EP/01



IN THE MATTER OF : ARTICLE 49(2), 51, 54, 72 (2) (C) AND 73  
(1) OF THE CONSTITUTION OF ZAMBIA

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

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

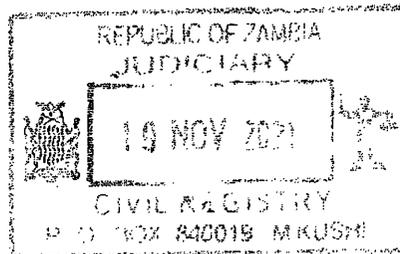
IN THE MATTER OF : MKUSHI SOUTH CONSTITUENCY ELECTION  
HELD IN ZAMBIA ON 12<sup>TH</sup> AUGUST, 2021

BETWEEN:

SYDNEY CHISANGA

AND

DAVIS CHISOPA  
ELECTORAL COMMISSION OF ZAMBIA



PETITIONER

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

Before Hon. Mr. Justice K. Limbani, at Mkushi on the .....<sup>12/11</sup> November, 2021

For the Petitioner: Mr. A. Kasolo of Messrs Mulilansolo Chambers, Mr. M.  
Mulenga, Mr. D. Musonda and Ms. L. Mbilika of  
Messrs Maybin and Partners

For the 1<sup>st</sup> Respondent: Mr. K. Kaunda and Mr. A. Mwila of Messrs  
Kaunda Kaunda Legal Practitioners

For the 2<sup>nd</sup> Respondent: Mr. M. Bwalya – State Advocate

J U D G M E N T

### Cases Referred to:

1. *Lewanika and Others vs Chiluba* (1998) ZR 49.
2. *Brelsford James Gondwe vs Catherine Namugala*, SCZ Appeal No. 129 of 2012.
3. *Sunday Chitungu Maluba vs Rodgers Mwewa and Attorney General*, CCZ, Appeal No. 4 of 2017.
4. *Matildah Macarius Mutale vs Sebio Mukuka and Electoral Commission of Zambia* SCZ, AC 45/2003.
5. *Joseph Mlewa vs Eric Wightman* (1996) ZMSC 2.
6. *Micheal Mabenga vs Sikota Wina and Others*, SCZ, Judg. No. 15 of 2003.
7. *August vs Electoral Commission and Others* (CCT 8/99) [1999] ZACC 3; 1999 (3) SA 1.
8. *Nsofu vs The People* (1973) ZR 287.
9. *The Attorney General vs Mutembo Nchito*, SCZ, Selected Judg. No. 1 of 2016.
10. *Mafo Wallace Mafiyo and Hearge Samulela* SCZ, Judg. No. 15 of 2003.
11. *Alex Cadman Luhila vs Batuke Imenda* (2002) HP/EP/0017.
12. *Saul Zulu vs Victoria Kalima*, SCZ, Judg. No. 2/2014.
13. *Akashambatwa Mbikusita Lewanika, Hichunga Evaristo Kambaila, Dean Namulya Mun'gomba, Sebastian Saizi Zulu and Jennifer Mwaba vs Fredrick Jacob Titus Chiluba* (1998) ZR 79.
14. *Anderson Kambela Mazoka, Lt. General, Christon Sifapi Tembo, Godfrey Kenneth Miyanda vs Levy Patrick Mwanawasa, The Electoral Commission of Zambia and The Attorney General* (2005) ZR 138.
15. *Sydney Chisanga vs Davis Chisopa*, Appeal No. 10 of 2017.
16. *Op. Cit (Akashambatwa Mbikusita Lewanika)*.

17. *Muhali George Imbuwa vs Enock Kaywala Mundia – Selected Judg. No. 12 of 2018 (CC – Appeal No. 11 of 2016).*
18. *Op. Cit (Akashambatwa Mbikusita Lewanika).*
19. *Richwell Siamunene vs Siabulo Gift, Selected Judgment No. 58 of 2017.*
20. *Re Sigsworth (Bedford vs Bedford) (1934) All ER 113.*
21. *Beresford vs Royal Insurance Company Limited (1938) 2 All ER 602 at 607.*
22. *Nakbukeera Hussein Hunifa vs Kibule Ronald and Another (2011) UGHC 64.*
23. *Mubika Mubika vs Poniso Njeulu, SCZ Appeal No. 114 of 2007.*
24. *Jonathan Kapaili vs Newton Samakai, CCZ Appeal No. 13/2017.*
25. *Nkandu Luo and Another vs Doreen Sefuke Mwamba and Attorney General, Judg. No. 51 of 2018.*
26. *Dean Musole vs Romeo Kangombe 2019/CC/A002.*
27. *Muhali George Imbuwa vs Enock Kaywala Mundia, Selected Judg. No. 12 of 2018.*

**Legislation Referred to:**

1. *The Constitution of Zambia Chapter 1, (Amendment) Act No 2 of 2016.*
2. *The Electoral Process Act No. 35 of 2016.*
3. *The Electoral Code of Conduct Regulations No. 35 of 2016.*
4. *Rules of the Supreme Court of England (White Book) 1999 Edition.*

**Works Referred to:**

1. *Halsbury's Law of England Volume 15 and 37.*

## 1.0.0. INTRODUCTION

Zambia has held nine Presidential Elections and Seven Parliamentary and Local Government elections since the introduction of democratic elections in 1991. It held its recent Presidential, Parliamentary and Local Government Elections on the 12<sup>th</sup> August, 2021. Following the said elections and announcement of the results several parliamentary election results were petitioned. The Mkushi South Constituency election was the first among the several petitions to be filed on the 23<sup>rd</sup> August, 2021.

## 2.0.0. THE MKUSHI SOUTH ELECTION PETITION

The Mkushi South Parliamentary Constituency was contested by Mr. Sydney Chisanga of the United Party for National Development (UPND) and Mr. Davis Chisopa of the Patriotic Front (PF). Mr. Davis Chisopa was declared the winner of the said election after the Returning Officer announced the results as follows;

Sydney Chisanga	UPND	7,459
Davis Chisopa	PF	8,313

Mr. Sydney Chisanga, hereinafter referred to as the Petitioner, petitioned the elections and advanced fifteen grounds for his petition arguing that as a consequence of the illegal practices committed by Mr. Davis Chisopa, hereinafter referred to as the 1<sup>st</sup> Respondent, and his agents and or members, the

failure by the Electoral Commission of Zambia to conduct the election fairly, the majority of the voters in the affected areas were prevented from electing the candidate of their choice in the Constituency. The Petitioner averred, as per paragraph 7 of the affidavit in support of the petition, that;

- (i) Soon after his adoption, his campaign started on or around 20<sup>th</sup> May, 2021 and that there was no time-table drawn for the candidate's meeting.
- (ii) On or about the 24<sup>th</sup> May, 2021 the Petitioner and his campaign team went to have a party meeting in Mibanga, Mkushi Copper Mines area, but before the meeting would start they proceeded to the market to pick up their District Secretary and other members. The 1<sup>st</sup> Respondent ordered his cadres to assault his (Petitioner) members and burnt their campaign materials. They also damaged the Petitioner's Toyota Land Cruiser registration number AAV 8078.
- (iii) The police took three to four days to issue the Petitioner medical and police reports for fear of the party in power. The issued medical and police reports were exhibited "SC 1 to SC 6".
- (iv) By the beginning of June, 2021, due to the unlawful actions by the 1<sup>st</sup> Respondent and his PF cadres, the Petitioner was forced to complain to the Conflict Management Committee who eventually issued a time-table of how and where parties had to hold meetings.

- (v) According to the time-table, the Petitioner was from the 23<sup>rd</sup> to the 27<sup>th</sup> June, 2021 meant to be in Kamimbya, Lundashi and Lwambula areas. To his surprise the 1<sup>st</sup> Respondent and his cadres decided to campaign in Kamimbya area on 24<sup>th</sup> June, 2021. A report was made to the Police Officer in Charge at Mboroma and the Officer Commanding at Kapiri Mposhi though it did not change the situation.
- (vi) On the 12<sup>th</sup> July, 2021 the 1<sup>st</sup> Respondent and his Cadres removed and damaged UPND posters and other materials at Masansa Market. They also removed the erected banner at Alpha Masansa filling station.
- (vii) As per the time-table of the campaign, UPND were allocated 12<sup>th</sup> to 17<sup>th</sup> July, 2021 to campaign in Kamimbya Ward. The 1<sup>st</sup> Respondent and his PF team ignored the time-table and decided to go to Kamimbya Ward on the 13<sup>th</sup> July, 2021. On the material day while the Petitioner was driving through Mibanga he was stoned by the 1<sup>st</sup> Respondent and his supporters. Other UPND supporters were also stoned by the 1<sup>st</sup> Respondent and his supporters. The incidents were reported to Mboroma Police Station but the police refused to issue police reports for medical examination purposes.
- (viii) On the 14<sup>th</sup> July, 2021 as per the campaign time-table, the Petitioner and his supporters were campaigning in Mibanga Ward. He was attacked by the 1<sup>st</sup> Respondent and his supporters who blocked his vehicle with their

Hilux and Pajero and assaulted them with stones. The Petitioner and his supporters drove to Mkushi Police Station for safety. The 1<sup>st</sup> Respondent and his supporters followed them in full view of the police. It took the Police to fire gunshots to disperse the unruly PF cadres who damaged the Petitioner's vehicles with registration numbers ABJ 6700 and BAD 1992.

- (ix) The Police were not able to arrest any of the PF cadres even after filing complaints and naming the perpetrators.
- (x) The Petitioner filed complaints to the Luano Electoral Conflict Management Committee on the 1<sup>st</sup> and 15<sup>th</sup> July, 2021 for the damage caused to the two vehicles as per the exhibits marked "SC 8 to SC 15".
- (xi) The 1<sup>st</sup> Respondent and the PF in order to cover up their illegal actions also raised a complaint against the Petitioner as per exhibit marked "SC 16".
- (xii) On the 8<sup>th</sup> July, 2021 the Luano Conflict Management Committee convened a meeting with the parties signing and agreeing to abide by the rules of the campaign but the 1<sup>st</sup> Respondent refused to sign the accord.
- (xiii) On the polling day the PF supporters under the instructions of the 1<sup>st</sup> Respondent distributed Social Security funds and paid voters on the lines cash in the sums of K50.00 each voter and told them to vote for the 1<sup>st</sup> Respondent if they wanted to continue getting the same.

- (xiv) On polling day at Kambushi Polling Station, the 1<sup>st</sup> Respondent instructed PF cadres to beat people who were in the lines to vote and went into the polling room and assaulted the Petitioner's polling agents Mr. Bornwell Kalambo, Mr. Habasimbi G. Moonga, Mr. Cashwell and Mr. Malambo who obtained and exhibited medical reports marked "SC 18 to SC 20". To the 1<sup>st</sup> Respondent anything and anyone that was associated with Tonga and living in Mkushi South was an enemy.
- (xv) The 1<sup>st</sup> Respondent gave instructions to his supporters on polling day to distribute mealie meal and Social Security funds to the voters in the voting line and no one stopped them. They gave the voters K50.00 each and told them to vote for the 1<sup>st</sup> Respondent. The role of giving Social Security funds is the responsibility of the Ministry of Community Development and Social Welfare.

The Petitioner also argued that;

- (xvi) The 1<sup>st</sup> Respondent and the District Commissioner for Mkushi ordered the police to detain him and went around telling his members and supporters that he would never be seen again as he had been arrested.
- (xvii) In Muswishi Ward, the UPND Council Candidate was not able to file for the election as he was way laid by the 1<sup>st</sup> Respondent's agents under the 1<sup>st</sup> Respondent's orders and was beaten making it impossible for him to file his papers.

(xviii) Councilor Mr. Chrispin Mboloma was placing nails and logs on the route that the Petitioner and his team were using for campaigns resulting in the Petitioner's vehicles getting punctured. This made it very difficult for the Petitioner and his team to do their work.

#### 2.0.1. THE PETITIONER'S PRAYER

As a result of the above, the Petitioner prays for;

1. A declaration that the election of the 1<sup>st</sup> Respondent as a member of Parliament for Mkushi South Constituency is null and void.
2. A declaration that the illegal practices committed by the 1<sup>st</sup> Respondent and or his agents and members affected the election result and that the same ought to be nullified.
3. An order that the costs occasioned by the Petitioner be borne by the Respondents.

#### 2.0.2. THE 1<sup>ST</sup> RESPONDENT'S ANSWER

The 1<sup>st</sup> Respondent filed his answer and affidavit verifying the answer to the petition on the 2<sup>nd</sup> September, 2021. It was his position that he was validly elected and duly declared as member of parliament. The electoral process was free and fair as evidenced by the total number of votes cast. He denied the allegations that there was an election campaign time-table

drawn and or that the PF cadres burnt the campaign materials and or assaulted the Petitioner and his team.

He further argued that the Petitioner hit a woman with vehicle after he had abducted her child. This led to the members of the Community to rise against the Petitioner and his entourage which led to the damage of his vehicle.

The 1<sup>st</sup> Respondent denied having any control over the operations of the police. He argued that he was the one who made a complaint before the Conflict Management Committee on account of the incidences and spate of violence by the non-residents of Mkushi South Constituency who always accompanied the Petitioner. The 1<sup>st</sup> Respondent also denied violating the campaign time-table.

It was also his position that he was not involved in any distribution of the social cash transfer funds and or were his election agents involved. He also denied having ordered the arrest of the Petitioner together with the District Commissioner. The issues of violence were equally denied and in relation to the failure to have the Councilor for Muswishi Ward file for the Local Government election, it was his position that the failure was merely due to the disqualification of the candidate who did not have the requisite documents.

The 1<sup>st</sup> Respondent argued that the electoral process and the elections were free and fair as the process was substantially

in line with the law. The Constituency has 12 Wards with 36 polling stations and a total of 22,814 registered voters. It was his position that assuming the allegations in the petition were true, they would not affect the election results thus the Petitioner is not entitled to the reliefs sought in the petition.

### 2.0.3. THE 2<sup>ND</sup> RESPONDENT'S ANSWER

The 2<sup>nd</sup> Respondent filed its answer and affidavit in support of the answer on the 13<sup>th</sup> September, 2021. It confirmed the election results for the Mkushi South Constituency parliamentary election that was held on the 12<sup>th</sup> August, 2021 and contested by the Petitioner and the 1<sup>st</sup> Respondent as being;

1. Chisanga Sydney (UPND)	7 459
2. Chisopa Davies (PF)	8 313
3. Rejected as invalid votes	355
4. Total votes cast	16,127

The affidavit in support of the 2<sup>nd</sup> Respondent's answer and deposed to by Mr. Kryticous Patrick Nshindano the 2<sup>nd</sup> Respondent's Chief Electoral Officer confirmed that the 1<sup>st</sup> Respondent was dully declared elected member of parliament.

It was also averred that the election was conducted in substantial conformity with the electoral laws and procedures. The Electoral Process Act and the Regulations

provided adequate grievance mechanism although the Petitioner did not disclose any breach of the electoral laws and processes on the part of the 2<sup>nd</sup> Respondent.

#### 2.0.4. THE PETITIONER'S REPLY TO THE ANSWER

The Petitioner responded to the affidavits in reply by the Respondents and restated that he would prove his allegations at trial.

#### 3.0.0. THE BURDEN OF PROOF IN ELECTION PETITIONS

At the outset and before considering the evidence before Court it is important to state that the burden of proof in election petitions, as is the case in any other civil matters, lies with the Petitioner who has to establish the electoral malpractices. The Petitioner has to prove his allegations on a fairly high degree of convincing clarity.<sup>1</sup> The Supreme Court guided on the burden of proof in election petitions that;

“the burden of establishing the grounds lies on the person making the allegations and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions namely fairly high degree of convincing clarity”.<sup>2</sup>

The standard of proof in election petitions is thus higher than the civil standard of a mere balance of probabilities.<sup>3</sup>

#### 4.0.0. THE PETITIONER'S EVIDENCE

Thirteen witnesses gave evidence to substantiate the petition.

#### 4.0.1. MR. RODRICK MAZYOPA

Mr. Rodrick Mazyopa, an Assistant Superintendent with the Zambia Police Service based at Kabwe, testified that on the 12<sup>th</sup> August, 2021 he was deployed to man Kambushi Polling Station in Mkushi South Constituency. Voting at the polling station started peacefully at 06:00 hours.

Later around 12:45 hours, he was informed by a Community Crime Prevention Officer (CCPU) while in the polling station that there was confusion outside. He saw the voters scamper in all directions. When he rushed to where the incident took place he found a brown Land Cruiser with the 1<sup>st</sup> Respondent and some weight lifters who had sticks. They beat the voters.

Mr. Mazyopa spoke to the 1<sup>st</sup> Respondent and asked him what was happening. He responded that the police had let them down. When asked how he had been let down he did not respond. He continued beating the people with some bleeding and crying for help.

It was Mr. Mazyopa's evidence that he could not help the victims as he was not armed to counter the violence. He was scared as he was threatened to be beaten by the weight lifters who were armed with sticks. He abandoned the victims who were put in the Land Cruiser which sped off. It was his further evidence that he saw four victims who bled, had bruises with their faces swollen.

When the Land Cruiser left he informed the Presiding Officer of the polling station, a Mr. Mwansa, about the incident which he noted in his note book. The polling station had been deserted after the incident thus Mr. Mazyopa called the voters and persuaded them to start casting their votes. A few people got back despite being apprehensive. The incident was also reported by phone to the Officer in Charge at Mboloma Police Station who later got to the scene. Voting ended at 18:00 hours.

When cross examined by the 2<sup>nd</sup> Respondent's Counsel, Mr. Mazyopa stated that the voting lines were longer before the beating incidence and shorter afterwards. It was his observation that the voting pattern was affected.

#### 4.0.2. MR. WELLINGTON FWALANGA

Mr. Wellington Fwalanga, an Assistant Superintendent in the Police Criminal Investigations Office at Mkushi, testified that on the 1<sup>st</sup> June, 2021 he received four dockets of assault

occasioning actual bodily harm and malicious damage of property from Mboroma Police Station. UPND members, that is Mr. Justine Siamumba, Mr. Yobo Mwansa, Ms. Fungai Njovu and Ms. Merindah Mumbi, complained that they had been assaulted by PF cadres. Mr. Emanes Bwalya, another UPND member, also reported on behalf of the Petitioner that the windscreen to a Toyota Land Cruiser with registration number AAV 8078 was maliciously damaged by PF cadres. The incident occurred on the 24<sup>th</sup> May, 2021 around 15:40 hours in Mkushi Copper Mines.

Investigations were instituted and one of the identified PF cadres, Mr. Sali Mwenya, was apprehended and officially charged with four counts of assault and a count of malicious damage to property.

Mr. Fwalanga went on to state that on the 4<sup>th</sup> July, 2021, around 15:00 hours while he was on duty at Mkushi Police Station two vehicles for the UPND which carried cadres got to the station. As the police was attending to the group whose vehicles had the windscreens and side mirrors damaged, PF vehicles arrived with cadres being led by the 1<sup>st</sup> Respondent.

There was confusion at the police with the 1<sup>st</sup> Respondent physically attacking the Petitioner who had to be taken away for safety by the police. The PF cadres were unruly which led the police to fire shots in the air to calm the situation. The 1<sup>st</sup> Respondent was later questioned as to why he chased the

Petitioner and his team from the Copper Mine but he did not give any satisfactory response. He told the police that he did not want the Petitioner to step a foot in Luano area as there would be bloodshed.

Mr. Fwalanga stated that the above incident happened on the 14<sup>th</sup> July, 2021 between 12:00 to 13:00 hours and that the Petitioner lodged a complaint that the 1<sup>st</sup> Respondent had instructed his PF cadres who damaged the windscreen and a side mirror to his vehicles registration numbers BAD 1992 and ABJ 6700.

In cross examination, Mr. Fwalanga stated that there was no proof that Mr. Saili Mwenya and Mr. Chomba are PF cadres. The incident involving Mr. Saili Mwenya happened in Luano District. He also clarified that the 1<sup>st</sup> Respondent did not assault the Petitioner but that they grabbed each other after which the police separated them.

In re-examination, he stated that some minutes after the Petitioner's vehicle got to the police the 1<sup>st</sup> Respondent's vehicle also arrived. The 1<sup>st</sup> Respondent attacked the Petitioner who was whisked away by the police officers as the PF cadres became unruly which led the police to fire warning shots to contain the situation. It was his position that the violence affected the results of the elections. A police report was issued to the Petitioner for the purpose of repairing his damaged vehicles.

#### 4.0.3. MR. JERRY KALUMBA

Mr. Jerry Kalumba, a Chief Inspector in the Zambia Police Service, gave evidence that on the 12<sup>th</sup> August, 2021 at around 14:00 hours he was at Mboroma Police when he saw a brown Land Cruiser belonging to the 1<sup>st</sup> Respondent. He used to see the said vehicle carrying cadres who wore PF regalia. Nine PF cadres who sat behind the said vehicle dragged three men out of the vehicle. The three men looked swollen and when they got to the police inquiries they screamed and complained of the pain that they had been subjected.

Mr. Kalumba further testified that when he inquired from the PF Constituency Chairperson Mr. Damson Chisenga on why the three men had been taken to the police station, a Mr. Chalwe Chama a PF cadre and leader of their security wing narrated what happened. He stated that the three men had been blocking voters perceived to be PF from casting their votes at Kambushi Polling Station.

The men who were taken to the police station, Mr. Bonwell Kalambo, Mr. Godfrey Mudenda, Mr. Siyamusimbi and Weld Siyanamba, were interviewed and they told him that while at the polling station they saw the 1<sup>st</sup> Respondent who fished them from the queue and beat them. Mr. Mudenda had a swollen chick while the others complained of abdominal pains, severe headache with painful legs. They were issued

with medical report forms to enable them seek medical attention.

In cross examination, Mr. Kalumba stated that he had no proof that Mr. Chalwe Chama was a security member of the PF. It was his position that Mr. Chisenga told him that the people who had been taken to the police had prevented voters from voting. He also stated that the cadres that he saw were on the vehicle that belonged to the 1<sup>st</sup> Respondent thus he concluded that they were PF members.

#### 4.0.4. MR. BORNWELL KALAMBO

Mr. Kalambo, a UPND member, testified that on the 12<sup>th</sup> August, 2021 he was one of the two polling agents deployed at Kambushi Polling Station. Voting at the station began at 06:00 hours.

At around 12:45 hours he saw a Toyota Land Cruiser with the 1<sup>st</sup> Respondent and his people. When it got to the polling Station where he was standing near the voters, the PF cadres beat him and two other persons that they found. He sustained a cut on the right eye and on the eye brow. He called for help but no one got to his rescue.

The 1<sup>st</sup> Respondent and his people picked them using their Land Cruiser and on their way they met a police vehicle. When the police asked them why they were beating the three

they responded that they had been beating the voters. The police directed that they be taken to the police station.

On their way to the police station the 1<sup>st</sup> Respondent dropped off the vehicle which later proceeded with the other cadres to the police station. An officer at the police station asked for the statement from the cadres but they failed to give one. The three who were left at the police and in pain of the beatings were kept for safety. They were later released and issued with medical reports.

In cross examination, Mr. Kalambo stated that he is a member of the UNPD and voted at Kambushi Polling Station. There were a lot people at the polling station on the material day. It was his position that he knew that the Land Cruiser motor vehicle belonged to the 1<sup>st</sup> Respondent as he saw him.

#### 4.0.5. MR. CASHWELL CHEEPA

Mr. Cheepa gave evidence that on the 12<sup>th</sup> August, 2021 he went to vote at Kambushi Polling Station. He got to the station around 12:45 hours. He later saw a Land Cruiser with the 1<sup>st</sup> Respondent and his cadres who started beating him without asking him anything. They apprehended him and took him to their motor vehicle while beating him.

As the attackers threw the other person into the vehicle he managed to run away into the bush. After the attackers left

he proceeded to vote after which he informed his relatives using his phone that he had been injured. He struggled to get back home and got there late. He only managed to get a medical report after some days and was attended to at the clinic.

#### 4.0.6. MR. SYDNEY CHISANGA

Mr. Chisanga testified that he stood on the UPND ticket for the 2021 Mkushi South Parliamentary Elections. After his adoption he started the campaigns from the Plateu.

He had a campaign program and sometime in May he had plans to hold three meetings. The 1<sup>st</sup> Respondent had however instructed the Councilors and agents in Luano that that was a no go area for the Petitioner. The Petitioner proceeded with a cousin to the PF Local Government candidate of Muswishi Ward, a Mr. Crispin Chiwana, for his campaigns in Mulembo where they held door to door campaigns.

After the campaigns they got back to Mboroma and also held door to door campaigns. When they left Mboroma, Mr. Crispin Mbolomo the PF Local Government candidate placed nails on the road which led to their vehicles having tyre punctures. They had to attend to the vehicles which resulted in their last meeting flopping.

When they managed to mend the tyres they proceeded and spent a night at Chingombe. They had door to door campaigns the following morning after which Father Palangwa of Chingombe Catholic Church (Mission) alerted the Petitioner that Mr. Crispin Mboroma had blocked the only road to and from Chingombe with rocks.

On their way to Masansa they found that the road had indeed been blocked with logs. They managed to remove some of the logs and had to bypass the road in areas that they could not move the items used to block it.

The next program was the visit to Milanga Ward. The Petitioner proceeded to the ward where a meeting had been planned. When he got to the ward he found UPND cadres being beaten by the PF cadres for wearing the UPND regalia. Mr. Saili and other PF cadres had sticks and they damaged the windscreen of the Petitioner's motor vehicle. The incident was reported to the police.

They had another campaign trip set for Kaungula in Nkomeshi Ward. While at the meeting five people started stoning the people who had gathered. One of the attackers was apprehended and due to the distance to the nearest police station he was taken to the Chief's palace. At the palace and in the presence of the Petitioner the attacker told the Chief that he had been sent by the PF Chairman for Kaundula. He was warned by the Chief.

The Petitioner also narrated about an incident after a meeting and door to door campaign at Kalundaleka. On their way back they were by passed by a PF cadre on a motor bike. When they got to the market they were blocked by PF cadres and a fight ensued with his cadres who included Mr. Goliath Kampemba being beaten. The incident was reported at Masansa Police Station but the police officers refused to issue medical reports to the victims.

The Petitioner was also told, while in Masansa, that the 1<sup>st</sup> Respondent was seen removing his posters at Chikupili junction and also that the PF cadres had removed and replaced his posters and two big banners with their posters and banners. The banners had been placed at the market and the filling station. One of the cadres was apprehended and taken to the police. A complaint was made to the Conflict Management Committee and copies sent to Mkushi Police, the Commanding Officer and the 2<sup>nd</sup> Respondent. Nothing was done over the complaint.

In relation to the Social Cash transfer, the Petitioner argued that it falls under the Ministry of Community Development and Social Welfare. The 1<sup>st</sup> Respondent took advantage of it as a candidate of the party in government. He went round and told the old aged and widows that they should not attend the Petitioner's meetings. He told them at a meeting at Chingombe that whoever would attend the Petitioner's

meetings would be removed from the list of beneficiaries of the social fund transfer. The people believed the 1<sup>st</sup> Respondent as he was a candidate of the PF, the party in government.

The 1<sup>st</sup> Respondent also assured the beneficiaries of the Social Cash transfer that they would be paid on the 11<sup>th</sup> August, 2021. The beneficiaries in Luano District of Mkushi South Constituency were paid their Social Cash funds as promised.

On the mealie meal, the Petitioner stated that a truck branded with the 1<sup>st</sup> Respondent's portraits and for the PF loaded 12.5 Kg bags of mealie meal labeled Disaster Management and Mitigation Unit (DMMU) on several occasions from the Food Reserve Agency (FRA) shed in Masansa. The mealie meal was distributed to all the polling stations including the hunger stricken valley and on the polling day at Mbosha.

The Petitioner also stated that a program had been drawn for the campaigns after a meeting was called by the Conflict Management Committee which the 1<sup>st</sup> Respondent refused to attend. In accordance with the calendar of campaigns, the Petitioner on the 14<sup>th</sup> July, 2021 was supposed to be campaigning in Milanga Ward while the 1<sup>st</sup> Respondent was to be in the valley. The Petitioner proceeded to draw a

program for the visits to Milanga Ward that included Kaloko, Coppermines and Mapalo.

He held door to door meetings at Kaloko after which he proceeded to Coppermine market. While at the market he saw a PF branded truck loaded with stones pass. He then dropped food at his campaign camp and saw three vehicles, a Pajero that the 1<sup>st</sup> Respondent drove, a branded Hilux and a Land Cruiser which all had lights on. The PF branded Pajero that the 1<sup>st</sup> Respondent drove stopped besides the Petitioner's vehicle while the other two vehicles blocked him.

The 1<sup>st</sup> Respondent got out of his vehicle and instructed his cadres who jumped off the Hilux and Land Cruiser with stones and machetes to sort him out and kill him. As they stoned him while in the company of his Campaign Manager, Mr. Jonathan Kapungwe, he tried to reverse his vehicle but noticed that he was blocked by the truck that he had seen at the market. He managed to drive off through the small space in front while being stoned. His other vehicle followed while the 1<sup>st</sup> Respondent and his team gave chase.

They proceeded to Mkushi Police Station, some 70 Kilometers away, as there were few police officers at Masansa Police Post to render any help. When they got to the police station the 1<sup>st</sup> Respondent also got there within a few minutes and tried to attack him while the PF cadres attacked the UPND cadres. The 1<sup>st</sup> Respondent tried to punch the Petitioner but a police

officer got in between while threats of death were uttered. The police officers fired a gun shot to try and control the situation. The police rescued the Petitioner while a UPND cadre was beaten. The incident was reported to the police the following day.

It was the Petitioner's evidence that due to the damaged motor vehicles he was unable to campaign. The 1<sup>st</sup> Respondent got back to Masansa and told the electorates that they would never see him again. As he was busy repairing his vehicles the 1<sup>st</sup> Respondent was busy campaigning with people believing his message that they would never see him. The Petitioner took time to repair his vehicle and did not do any campaigns after the 14<sup>th</sup> July, 2021.

It was the Petitioner's further evidence that on voting day he received a telephone call from Kambushi Polling Station that his polling agents were beaten by the 1<sup>st</sup> Respondent. He called the Officer in Charge at Mboroma Police Station and his brother in law Mr. Peter Lukata to follow up the matter. His brother in law was chased by the 1<sup>st</sup> Respondent. The agents who were beaten are Mr. Bornwell Kalambo, Mr. Cashwell Malambo and Mr. Habasimbi.

The Petitioner argued that due to the above assaults, damage to property and breaking of the law the election was not free and fair and it should thus be nullified.

In cross examination, the Petitioner stated that he had no proof that the 1<sup>st</sup> Respondent instructed his Councilors that Luano was a no go area for him. He also stated that there were no Councilors during the campaign period. He further stated that he did not see Mr. Chrispine Mboloma place nails on the road. It was his evidence that there was no document before Court that referred to the 1<sup>st</sup> Respondent's election agents. In relation to the incidence at Mibanga, a medical report had been adduced in respect of the beating of Ms. Fungai.

The Petitioner also stated that he did not mention the 1<sup>st</sup> Respondent as being among the people who beat the UPND cadres at Coppermine or his agents. He also stated that he did not mention that Mr. Saili was an agent for the 1<sup>st</sup> Respondent. He denied that one of his vehicles was damaged by members of the public after it hit a woman and or after his team had abducted three boys.

In relation to the distribution of mealie meal by the DMMU, it was his position that it was an ongoing government program. There was no evidence that the 1<sup>st</sup> Respondent was working for the DMMU.

Social Cash transfer was also an ongoing government program.

The complaints made by the Petitioner to the Conflict Management Committee were not addressed.

In re-examination, the Petitioner stated that the 1<sup>st</sup> Respondent disrupted the voting at Kambushi as he knew that that was a UPND strong hold. Only half the people voted at Kambushi due to the violence as most of the voters went back home.

#### 4.0.7. MR. JONATHAN KAPUNGWE

Mr. Kapungwe, the Campaign Manager for the Petitioner, testified that on the 14<sup>th</sup> July, 2021 he proceeded to Kaloko within Mibanga Ward for campaigns as per the schedule prepared by the 2<sup>nd</sup> Respondent in the company of the Petitioner who drove one of the vehicles with other youths. Later around 12:00 hours, they proceeded to Coppermine for road shows. After the road shows they proceeded to their camp site and parked their vehicle along the road heading to Masansa.

While their vehicles were parked he saw three vehicles coming from the direction of Masansa and heading to Kapiri that is a PF branded Pajero with a portrait of the 1<sup>st</sup> Respondent, a Land Cruiser with a lot of youths and a Hilux which also had youths. The Pajero parked opposite their vehicle on the other side of the road followed by the Hilux while the Land Cruiser parked in front.

After the three vehicles parked some youths jumped out and got towards them. The 1<sup>st</sup> Respondent opened the door of the Pajero and instructed the youths to sort them out and kill the Petitioner. The youths threw stones at their vehicles and broke the screens.

The Petitioner negotiated and managed to drive his vehicle between the space that was left by the Hilux and the Land Cruiser. They fled the scene and drove to Mkushi Police Station with the 1<sup>st</sup> Respondent and his team chasing them up to the police station.

A few minutes after they got to the police station the 1<sup>st</sup> Respondent's vehicle and youths also arrived. The 1<sup>st</sup> Respondent got off his vehicle while insulting that he would beat the Petitioner. The police got in between the 1<sup>st</sup> Respondent and the Petitioner while Mr. Kapungwe stood next to the Petitioner. The 1<sup>st</sup> Respondent pushed through the police officers and wanted to harm the Petitioner with a fist on his forehead while his youths dragged the UPND youths and beat them. The police fired warning shots in the air which gave him and the Petitioner an opportunity to run away. They left their motor vehicles which had the screens shattered with big stones at the police.

Mr. Kapungwe also testified that on the 11<sup>th</sup> August, 2021 at around 11:00 hours while driving through Kangolwe in the company of some youths, he got near the polling station and

found a big number of over 35 to 50 elderly people who included women. They were waiting to receive Social Cash transfer money. He spoke to a Bana Kulu Mpundu who told him that they were waiting for the 1<sup>st</sup> Respondent who was bringing the money. The elderly people were later paid with some getting K300.00 and others K150.00.

It was further his evidence that on the 12<sup>th</sup> August, 2021 Ms. Galdencia Tembo called him around 15:00 hours from Chingombe and told him that the meeting that she attended the PF officials and a Teacher gave them money. She also told him that they were told that all those who would not vote for the 1<sup>st</sup> Respondent would be removed from the beneficiary list. Those identified as UPND sympathizers were chased away by the PF.

It was his further evidence that on the 11<sup>th</sup> August, 2021 Mr. Rodrick Chibuye, an agent at Chipawa Ward, called him around 17:00 hours and told him that he was given a bag of mealie meal and instructed that he should vote for the 1<sup>st</sup> Respondent.

He also gave evidence that on the 12<sup>th</sup> August, 2021 at around 11:50 hours he received a call from Mr. Habasimbi who told him that he was beaten by the 1<sup>st</sup> Respondent and his youths while in the queue awaiting to vote at Kambushi Polling Station. Mr. Habasimbi with his other colleagues were later taken to Luano Police Station. Mr. Kapungwe got to the

station and confirmed that his agents had been kept for safety.

It was his further evidence that the above incidences affected the campaigns as the Petitioner, for fear of his life, withdrew on the 14<sup>th</sup> July, 2021 and stopped campaigning. Most of the campaign agents also withdrew from the door to door campaign and went into hiding after the attack at Mkushi Police Station.

After the incident at the police the PF cadres went to Masansa while showing off pangas, slashers and Tezas as the UPND cadres who heard the incident left their command centers in fear. All the 41 polling stations were affected. These incidences disadvantaged them from freely campaigning in the constituency.

When cross examined, Mr. Kapungwe stated that there was no documentary evidence about the people receiving money for the Social Cash transfer or posters for PF at the scene. One of the people beaten at Kambushi was a UPND election agent. He also stated that 800 voters were registered at Kambushi Polling Station where UPND won but should have won with a big margin. Money was given to the electorates on the 11<sup>th</sup> August, 2021.

In re-examination, he stated that the violence that took place in Luano affected all the people and made them scared. Cash

transfer funds recipients were asked to attend meetings with their voters cards and national registration cards (NRC). Due to the violence some people did not turn up for the voting while those who turned up left which position affected the number of electorates at Kambushi which is a UPND strong hold.

#### 4.0.8. MR. RODGERS CHIBUYE

Mr. Chibuye testified that on the 11<sup>th</sup> August, 2021, at around 20:00 to 21:00 hours he heard a vehicle with loud PF campaign music coming from Chingombe and heading to Mbosha. It got to Mr. Arnold Mulimbwa a PF Council candidate's house where he later went and found him with some ten young men. The men were removing 12.5 Kg DMMU branded mealie meal from the PF branded Land Cruiser.

When Mr. Chibuye got near Mr. Mulimbwa asked him to help off load the mealie meal. After offloading the mealie meal he gave him a bag and told him to remember to vote for the PF candidates the following day. When he got home and after realising that what had happened was corruption he rang Mr. Kapungwe and narrated the incident so as to promote fairness in the process.

It was also his evidence that on the polling day Mr. Mulimbwa gave bags of mealie meal to all the PF members.

When cross examined, Mr. Chibuye stated that he is not partisan. He also stated that he did not adduce any documentary evidence to show that Mr. Mulimbwa was an election agent for the 1<sup>st</sup> Respondent. He did not report the corrupt activity due to the distance from the police to his village. It was also his evidence that the government does distribute relief food in the valley but not during the campaign time. He also stated that he voted from Chipaba Polling Station but that he did not vote freely.

In re-examination, he stated that the last time that the government distributed relief food was in November, 2020.

#### 4.0.9. MS. GALDENCIA TEMBO

Ms. Tembo gave evidence that on the 14<sup>th</sup> July, 2021 she attended a meeting addressed by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent told the people at the meeting that he had given authority to all the beneficiaries of the Social Cash transfer to take down the names of any of those who would be found at the Petitioner's meetings. It was her position that Social Cash transfer was given to widows and the elderly. She attended the meeting as a widow.

Ms. Tembo further testified that on the 24<sup>th</sup> July, 2021, the petitioner got to her area to campaign but that a lot of people got scared to attend his meetings as they were scared to have their names written down as per the instructions by the 1<sup>st</sup>

Respondent. When the Petitioner inquired why people did not attend his meetings they told him about the instructions from the 1<sup>st</sup> Respondent.

It was her evidence that Social Cash transfer was paid to 36 beneficiaries on the 11<sup>th</sup> August, 2021 by a teacher who reminded the beneficiaries about the words that the 1<sup>st</sup> Respondent had told them at a meeting.

In cross examination, Ms. Tembo stated that she is not a member of any party.

#### 4.1.0. MR. BORNFACE CHOGA

Mr. Choga, a Social Cash transfer Chairperson in Katukutu Ward, gave evidence that between the 13<sup>th</sup> and 17<sup>th</sup> July, 2021, he attended a meeting held by the PF. There were about 100 people whom the 1<sup>st</sup> Respondent addressed. He told the beneficiaries of Social Cash transfer and those in cooperative clubs that if they did not vote for the PF he would remove them from the Cash transfer list and the clubs. The said clubs were for women who received chickens, fertilizer and money.

It was also his position that the 1<sup>st</sup> Respondent also told his cadres to take note of any beneficiaries who would attend the Petitioner's meetings. He promised the people at the meeting that they would receive the Social Cash transfer before the

elections. At the end of the meeting all the people in attendance were paid K10.00. Social Cash transfer was paid on the 11<sup>th</sup> August, 2021 as had been promised.

4.1.1. MS. FUNGAI NJOVU

Ms. Njovu, the UPND Vice Secretary at Luano District, gave evidence that on the 24<sup>th</sup> May, 2021 at around 13:00 to 14:00 hours while on her way to a meeting in the company of her friends, Ms. Merinda Mumbi and Mr. Yuba Mwanji, they met PF cadres Mr. Mwenya Saili, Mr. Chinfwembe and Mr. Andrew Chinfwela who wore PF T-shirts. It was her evidence that she has lived with the three young men for some 24 years and knows them very well.

The young men held and beat Mr. Yuba Mwanji while Mr. Saili Mwenya told her that she was stupid for putting on a UPND regalia. When Ms. Mumbi asked why they beat him they turned on her and beat her. Mr. Justine Simumba, a UPND member who was passing by, tried to come to their rescue but also badly beaten.

Later Ms. Njovu in the company of the other three victims tried to report the matter at Mkushi Coppermine Police Post but were told by the officers that they were not able to handle violence cases and referred them to Masansa Police. At Masansa Police the Officer in Charge told them that the case had to be reported at Old Mkushi Boma. Due to the time, that

is in the evening when it was getting dark, and the distance from Masansa to Old Mkushi of about 100 to 120 Kilometers, the victims returned home. They only reported the matter on the 27<sup>th</sup> May, 2021 and were issued with Police reports as per the adduced exhibit "SC 3". It was her position that the violence installed fear in the electorates and most of them did not vote.

When cross examined, Ms. Njovu stated that she did not know whether the three youths who attacked them belonged to the PF or if they were election agents for the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent was not present during the beating incident. She also referred to some 805 voters who did not vote but stated that she did not have a list of the said voters.

In re-examination, Ms. Njovu stated that the three men who beat her are cadres for the 1<sup>st</sup> Respondent.

#### 4.1.2. MR. MICHELO MUCHIMBA

Mr. Muchimba testified that on the 14<sup>th</sup> July, 2021 they had a road show with the Petitioner in Coppermine. While leaving after the show three vehicles which had lights on blocked their way after which the 1<sup>st</sup> Respondent who was in one of the vehicles told the people that he was with to sort them out. The people in his vehicles who had pangas, round bars, stones and caterpots started throwing stones at the

Petitioner's vehicle and broke it. The Petitioner managed to drive off while he (Mr. Muchimba) was hit with a stone. They were followed until they reached Mkushi Police.

When they got to the police the 1<sup>st</sup> Respondent got to where the Petitioner was and tried to hit him with a fist but the police stopped him. He also threatened to break his legs. The Petitioner managed to escape with the police firing a warning shot in the air. Mr. Muchimba reported the beatings to the police who issued him with a police report. It was his position that after the incident the Petitioner could not campaign as he told his members that he had no means of transport.

#### 4.1.3. MS. GEORGINA MUNGWA

Ms. Mungwa gave evidence that in July, 2021 at around 18:00 to 19:00 hours she was on her way home when she met a tall young man who wore a PF regalia. He asked her to identify herself while holding a stick. She got scared and got back to her friends. The man got to where she was and told his friends that she was the one they had been looking for. They held her legs and arms, pulled her and later dragged her to the road side while kicking her. They threw her into a vehicle and took her to the 1<sup>st</sup> Respondent's farm.

At the farm some other young men got to her with tezas which, due to being scared, led her to wet herself. She was

later taken to Mkushi Police by the men who included Mr. Mwansa a PF cadre. She was left at Old Mkushi Police Station without being given reason as to why she was taken there.

When cross examined, Ms. Mungwa stated that she did not adduced any document to show that the people who beat her were the 1<sup>st</sup> Respondent's election agents. There was no evidence adduced to show that Mr. Mwansa was a PF member. She knew Mr. Mwansa who resides at Chikupili.

#### 5.0.0. THE 1<sup>ST</sup> RESPONDENT'S EVIDENCE

Six witnesses testified for the 1<sup>st</sup> Respondent's case.

#### 5.0.1. MS. DOREEN MOONGA

Ms. Moonga testified that on the 12<sup>th</sup> August, 2021 at around 08:30 hours she got to Kambushi Polling Station to cast her vote. There were a lot of people at the Polling Station. Later after about ten minutes Mr. Godfrey Habasimbi, Mr. Simwamba Fellow and a Mr. Kedrick whom she knew very well shouted that no one would vote. At around 10:00 hours they chased her and the other people. She stood some 15 meters away and later saw the police officer who was manning the polling station who told the people who were making noise to allow her to vote.

Ms. Moonga stated that Mr. Godfrey Habasimbi then grabbed the police officer which led her and the others to move closer and requested the officer to move away. They later moved some 30 meters away in fear as since the men had grabbed the officer they thought that it would be worse for them.

Later after 13:30 hours same people who had voted informed her that there was no confusion and that they should go and vote. She found a lot of people with two voting lines. She voted after 45 minutes and left the polling station which had a calm atmosphere.

In relation to the 1<sup>st</sup> Respondent giving K50.00 to the voters, Ms. Moonga stated that she did not see him do that or did she see any Land Cruiser. She also did not see any weight lifters around 12:00 hours when the incident happened.

When cross examined, she stated that she got to the polling station at 08:30 hours as per her wrist watch and that the men started shouting at 10:40 hours. They chased her at 10:00 hours. Between 08:00 hours and 10:00 hours she ignored what the men were saying.

It was also her evidence that she voted around 13:00 hours after waiting for 45 minutes. The noise at the polling station was from 08:30 hours to 10:00 hours.

Ms. Moonga also stated that she was not at the polling station from 08:30 hours to 13:00 hours.

It was her further evidence that when the incident happened at 12:00 hours she was not there. She stated that Mr. Habasimbi caused the confusion at 08:40 hours. He grabbed the police officer around 09:00 hours. She left the polling station after the noise.

#### 5.0.2. MR. ARNOLD MULIMBWA

Mr. Mulimbwa's evidence was that he was elected Counselor for Chipawa Ward during the 12<sup>th</sup> August, 2021 elections. He denied ever distributing mealie meal in order for the electorates to vote for him and the 1<sup>st</sup> Respondent. It was his position that the allegation by Mr. Rodgers Chibuye that he gave him mealie meal was a lie. There was no vehicle that went to his house with bags of mealie meal.

When cross examined, Mr. Mulimbwa stated that he is a Ward Councilor for the PF but was not an election agent for the 1<sup>st</sup> Respondent.

#### 5.0.3. MR. FRIDAY MBEWE

Mr. Mbeve testified that on the 13<sup>th</sup> July, 2021 he was at Mr. Kelvin Kazingwe's shop at Kamwililwe when he saw some vehicles. The occupants of the said vehicles beat him and

tied him with cables. They then put him inside a Land Cruiser and took him to Kapyanga where they were holding a meeting. They untied him and later tied him to a tree after which they asked him to shout that the 1<sup>st</sup> Respondent had caused him to be in the situation he found himself.

It was his position that he was sure that it was the Petitioner who tied him as he saw him at the meeting and his vehicle with registration number ABJ 6700. He was taken to Masansa Police but was not issued with a police report or told about the offence that he had committed.

When cross examined Mr. Mbewe stated that he was 23 years old and a grade nine pupil at Mkushi Coppermine Primary School. He later stated that he had lied about his age. It was also his position that he lives with his grandmother. He was assaulted by the Petitioner who also tied him to a tree.

Mr. Mbewe also stated that he had no proof of his incarceration at Masansa Police Station.

It was also his position that the meeting that the Petitioner chaired started at around 11:00 to 12:00 hours and ended at 14:00 hours. He was detained around 17:00 hours and released on the 14<sup>th</sup> July, 2021 around 10:00 hours.

He later stated that he was picked from the shops around 11:00 to 12:00 hours and changed his earlier position that he

had stated that the meeting that the Petitioner chaired started at 11:00 hours. It was his position that he had no answers on when the meeting started and or when he was picked.

He also stated that he was untied from the tree and taken to the police around 14:00 hours and detained around 17:00 hours. The meeting was held between 14:00 hours to 17:00 hours while he was in the vehicle tied. He further stated that he was tied for two hours from 11:00 hours and only released at 14:00 hours. He also stated that he does not know his NRC number or when he got it.

#### 5.0.4. MS. LEAH NAKAZWE

Ms. Nakazwe gave evidence that the Petitioner bashed her with his vehicle on the 14<sup>th</sup> July, 2021 at Mkushi Coppermine.

She narrated that the incident happened when she went to the market and found a lot of people. When she inquired from Mr. Kelvin Kazugwe what had happened he told her that the Petitioner was at the market and that he had beaten the people after which he picked her son (Mr. Friday Mbewe). Ms. Nakazwe later returned home and informed her parents who told her to wait as her son would get back the following morning.

The following morning, after one of her sisters told her to report the matter to the police, she proceeded and while on

her way she saw the vehicle belonging to the Petitioner with registration number ABJ 6700. She, while walking besides the road, looked at the vehicle carefully to check for her son. It later hit her and she fell to the ground after which she just heard shouts that someone had been bashed. She was taken to the clinic and later discharged.

After three days she had a swollen head. She went back to the clinic after she obtained a police report. It was her evidence that the said police report has her names and was dated 17<sup>th</sup> July, 2021. However, when she was shown the medical report she stated that it was dated 19<sup>th</sup> July, 2021.

In cross examination, Ms. Nakazwe stated that Mr. Friday Mbewe is her nephew and that she knows him very well. She stated that she did not know when he was born but that he was 23 years old.

It was also her evidence that the medical report did not have a police date stamp. It was issued on the 17<sup>th</sup> July, 2021 although it was dated 19<sup>th</sup> July, 2021.

She insisted that she got the medical report on the 17<sup>th</sup> July, 2021. She also stated that Mr. Mbewe lives with her and that they live in the same village with their grandmother. It was her position that when she went to report her bashing at the police her head was swollen.

When referred to the medical report, it was her position that it did not indicate that she had a swollen head or does it mention that the Petitioner bashed her. She stated that there

were a lot of people when she was hit although there was no eye witness to confirm that she was hit. She also stated that the Petitioner has never appeared at the police for any traffic offence in relation to her being hit with his vehicle.

5.0.5. MR. CHRISPINE MBOLOMA

Mr. Mboloma testified that the adduced evidence that he placed nails and logs on the roads during the campaigns of the 2021 General Elections in which he was elected Councilor for Muswishi Ward under the PF were lies. He also denied being counselled by either Father Palangwa or that the Chief spoke to his father in relation to the allegations.

When cross examined, Mr. Mboloma stated that his late father was Senior Chief Mboloma. He confirmed that he is a member of the PF.

5.0.6. MR DAVIS CHISOPA

The 1<sup>st</sup> Respondent testified in relation to paragraph 2.0.0 (ii) of the petition that it is not true as at the time of the allegation he was in Lusaka preparing for his campaigns. He left on the 17<sup>th</sup> May, 2021 and got back during the first week of June. He equally denied the allegations that he damaged the motor vehicles at Masansa. It was his position that he was not at the scene but was at his farm resting after getting back from attending a funeral.

While at the farm he received a call that the Petitioner had bashed a person at Coppermine and not Masansa. He then went to the police to report the violence that the Petitioner had caused which was getting out of hand. When he got to Mkushi Police Station he found that the Petitioner had already arrived. He talked to the Petitioner and reminded him how he pleaded during the nomination day that they should not be violent in the campaign.

The 1<sup>st</sup> Respondent further stated that while at the police station and in the company of Mr. John Musonda and some police officers who included the Criminal Investigations Officer who testified in the matter he pleaded with the police to talk to the Petitioner in relation to the various incidences of violence. Later after some days the Petitioner sent a representative who apologised for the violence.

He denied ever confronting the Petitioner while at the Police or attempting to hit him with a fist. He also denied paying people K50.00 during the campaign and or on the polling day as he did not go to Kambushi.

On the 12<sup>th</sup> August, 2021, after he voted he went back home to his farm. He therefore denied attacking people at Kambushi Polling Station.

He also denied enticing people with the Social Cash transfer, giving DMMU bags of mealie meal to the electorates so that they can vote for him, assaulting Mr. Mwenya whom he does

not know and placing nails on the road to prevent the Petitioner from campaigning.

He submitted that all the allegations made in the petition are not true and should be dismissed. It was his position that the elections were free and fair as the people voted without any interference or malpractice. He appealed that the petition be thrown out as it lacks merit as all the allegations are self-made.

When cross examined, the 1<sup>st</sup> Respondent stated that the electoral process was free and fair as the people went to vote. It was his position that elections are free and fair when there are no incidences of violence. It was also his position that the alleged incidences of violence indicate that the elections were free and fair.

On his evidence that he was informed about the violence at Coppermines, it was his position that he could not recall the name of the person who gave him the information. It was just a member of the community. He also stated that there was no evidence adduced that the Petitioner was arrested by the police.

In relation to paragraph 17 of the answer to the petition there was no evidence that connected the Petitioner and or his entourage to the assaults. There was also no evidence, as per paragraph 18 of the answer to the petition, that the Petitioner damaged any property or that a report was made to the police about the damage. He denied going to Kambushi Polling

Station on voting day which is about 80 to 90 Kilometers away from his farm and some 1:30 hours' drive due to the bad road.

On the statement issued by the PF Secretary General after the elections that the elections were not free and fair, it was his position that he did not agree with that statement.

It was also his position that he visited Ms. Nakazwe at the clinic on the 14<sup>th</sup> July, 2021 around 11:00 to 12:00 hours after she was bashed by the Petitioner.

He also stated that Mr. Mbewe was tied with two other boys. When challenged that Mr. Mbewe testified that he was alone, the 1<sup>st</sup> Respondent conceded that he lied in his testimony.

It was also his evidence that on the 14<sup>th</sup> July, 2021 he was at his farm and not Coppermine although there was no evidence to that effect. The 1<sup>st</sup> Respondent also stated that he has a good relationship with the police in the Constituency thus he had no reason why they would fabricate lies against him.

#### 6.0.0. THE 2<sup>ND</sup> RESPONDENT'S CASE

The 2<sup>nd</sup> Respondent called a witness in the matter.

#### 6.0.1. MR. WILLIAM MWANSA

Mr. Mwansa, a District Forest Officer who during the 12<sup>th</sup> August, 2021 Elections was the Presiding Officer at Kambushi Polling Station, gave evidence that on the 12<sup>th</sup>

August, 2021 at around 12:00 hours there was no disruption of the elections at Kambushi Polling Station. He opened the Polling Station at 06:00 hours and the electorates voted up to 18:45 hours when the last person at the station voted.

He did receive a report about some confusion outside the Polling Station during the voting period. The confusion was at the road side which was between 80 to 100 meters away. He did not see what happened at the road side. He informed the Returning Officer in relation to the situation at the Polling Station that it was okay.

When cross examined, Mr. Mwansa stated that he received a verbal report about the confusion outside the Polling Station. It was his position that it was part of his duty to find out what had happened outside the Polling Station and that he had breached that duty by not following up the report. There was only one police officer at the station, Mr. Mazyopa.

He also stated that a polling station covers a distance of 400 meters and that the confusion occurred within 400 meters. He did not take any interest to note the confusion. The queue for the voters was not disturbed during the election. He was able to see the queue through the window.

He confirmed that Mr. Mazyopa informed him about the confusion by the road side that some people were fighting, that is the PF and UPND. He did not see the fight thus he

could not confirm whether the report about the fight was true.

#### 7.0.0. THE SUBMISSIONS

At the close of the evidence the parties filed into court written submissions.

#### 7.1.0. THE PETITIONER'S SUBMISSIONS

In their submissions, the Learned Advocates for the Petitioner summarised the evidence adduced in court, highlighted their legal arguments and referred to several authorities. For the avoidance of repeating the adduced evidence consideration will be made to the submitted legal arguments and the authorities.

#### 7.1.1. USE OF GOVERNMENT RESOURCES

It was submitted that the rationale for the prohibition of the use of State resources to campaign is premised on the fact that elections must be conducted in a free and fair manner so that candidates should not gain any advantage from any position of privilege. The Court's attention was drawn to the provision of Regulation 3 (i) (b) of the Electoral Code of Conduct No. 35 of 2016 which provides that;

“ The Commission shall were reasonable and practicable to do so; ensure that political parties do not use State

resources to campaign for the benefit of any political party or Candidate”.

The provisions of Section 3 (b) (d) of the Electoral Process Act No. 35 of 2016 were also referred to in relation to the argument against the use of government resources, that is, that;

“ Subject to the Constitution, the Principles applied in the electoral system and process shall ensure the following;

(b) No discrimination based on gender or disability when providing electoral services.

(d) Special privilege accorded to a political party or social group, except for persons with special needs”.

From the adduced evidence, it was submitted that the use of government resources (DMMU mealie meal and Social Cash Transfer Funds) during the election campaign amounted to undue influence as the programs are the preserve of the government. The 1<sup>st</sup> Respondent and his agents distributed mealie meal under the guise of DMMU using PF branded, trucks. The acts amounted to undue influence as per the definition under paragraph 784 of the Halsbury’s Laws of England that;

“ In order to constitute undue influence, a threat should be judged by its effect on the person threatened and not by the intention of the person using the threat ... a threat may amount to undue

influence even though the person using the threat has no power to carry it out ...”

It was further submitted that the court should take into account the remoteness of Luano Valley and the standard of education in relation to the people of that area. The threat of the locals being removed from the list of Social Cash Transfer beneficiaries by the 1<sup>st</sup> Respondent who was standing on the ruling political party (PF) had undue influence on the electorate.

Reference was made to the holding in the case of **Matildah Macarius Mutale vs Sebio Mukuka and Electoral Commission of Zambia**<sup>4</sup> in relation to the issue of government programmes wherein it was noted that the timing for the distribution of fertilizer and maize by the District Commissioner who took advantage of the government programmes to influence the voters was bad. Similarly the acts of the 1<sup>st</sup> Respondent and his agents coerced the people of Mkushi South, as per the adduced evidence, into voting for him.

#### 7.1.2. PREPARATION OF MEALS TO ENTICE VOTERS

Counsel argued that evidence had been adduced that the 1<sup>st</sup> Respondent sponsored the preparation of meals for the voters before, during and after the voting. The electorate were also given money at meetings for transport. The acts amounted to

The attacks at Mkushi Coppermine, Mkushi Police Station and at Kambushi by the 1<sup>st</sup> Respondent and his agents were all in total disregard of the above provision of the law.

In support of the above position reference was also made to the holding by the Supreme Court in the case of **Josephat Mlewa vs Eric Wightman**<sup>5</sup> that;

“... in plural politics, it is the parties which mount the Campaigns for their candidates and that the consequences of any illegal dealings will inevitably affect the candidates so that a defence of not being personally involved would not be upheld if shown that the illegal acts complained of affected the results of the election.”

and also the case of **Micheal Mabenga vs Sikota Wina and Others**<sup>6</sup> that;

“ Satisfactory proof of any one corrupt or illegal practice or misconduct in an election is sufficient to nullify an election.”

The attacks by the 1<sup>st</sup> Respondent and his agents on the Petitioner and his campaign team affected the votes which have or should have been solicited freely and without coercion.

It was submitted that the importance of seeking for votes without violence was emphasised by the South African Constitutional Court in the case of **August vs Electoral**

**Commission and Others<sup>7</sup> that;**

“ Universal adult suffrage on a common voters roll is one other fundamental value of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship. The vote of every citizen is a badge of dignity and person hood, quite literally, it says that everybody counts in a country of great disparities of wealth, race and power, whoever we are, we all belong to the same democratic Country, that our destines are intertwined in a single interactive polity ... Democracy is for all and Democracy would be okay if ordinary people like me could participate rather than be told who to vote for. Violence, intimidation and corruption is telling the voter who to vote for ...”

#### 7.1.4. CORROBORATION

The Learned Advocates submitted that corroborative evidence has been adduced in the petition as per the definition of corroboration in the criminal case of **Nsofu vs The People<sup>8</sup>** that;

“ Corroboration is independent evidence which tends to confirm that the witness is telling the truth when she says that the offence was committed and that it was the accused who committed it ...”

and also the position in the case of **The Attorney General vs Mutembo Nchito**<sup>9</sup> that;

“ Law is not static, it is developing. There need not be a technical approach to corroboration. Evidence of “something more” which, though not constituting corroboration as a matter of strict law, yet satisfy the Court that the danger of false implication has been excluded and that it is safe to rely on the evidence implicating the accused. Odd coincidences constitute evidence of “something more”. They represent an additional piece of evidence which the court is entitled to take into account. They provide a support of the evidence of a suspect witness or an accomplice, or any other witness whose evidence requires corroboration.”

It was also submitted in respect of the credibility of the witnesses that it was imperative and should be put under strict scrutiny. The weight of the evidence adduced by the witnesses should be as per the law in the case of **Mafo Wallace Mafiyo and George Samulela**<sup>10</sup> (with more weight from the bottom - upwards), that is;

- “ 1. Witnesses who are party members of the Petitioner and the Respondents;
2. Witnesses engaged by the Electoral Commission of Zambia which is supposed to be neutral as a conductor of the electoral process;
3. Witness or witnesses belonging to the Petitioner’s or Respondent’s Party who gave evidence against their own party candidate; and

4. Monitors and Police officers who unlike the Electoral Commission of Zambia are not party to these proceedings.

In summation, the court's attention was drawn to the holding in the case of **Alex Cadman Luhila vs Batuke Imenda**<sup>11</sup> that;

“ those who think they can find their way to parliament on the platform of lies and claims intended to defame the character of opponents, those who think they can find their way to parliament on the platform of illegal practices of various shades, those who think they can find their way to Parliament on the platform of bribery and corruption the message is this; The Court will not hesitate to show them the door and eject them from Parliament.”

On the strength of the above submissions the Petitioner's Advocates submitted that the election of the 1<sup>st</sup> Respondent be annulled as he, by himself and or through his agents, acted in such a way that the voting process was not free and fair and was tainted with malpractice. The court was thus urged to grant the Petitioner his prayer.

#### 8.0.0. THE 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS

The Learned Advocates for the 1<sup>st</sup> Respondent considered the adduced evidence in relation to the allegations as per the petition and the connection of the 1<sup>st</sup> Respondent and or his agents to the allegations. Reference was also made to the

position of the law as per the various authorities and provisions of the Electoral Process Act of 2016.

#### 8.1.0. THE ARGUMENT ON PLEADINGS

The Learned Advocates submitted that election petitions, like any other civil claims, depend on pleadings.<sup>12</sup> As such only the issues that appear in the petition are subject for determination. The importance and function of pleadings was settled in the cases of **Akashambatwa Mbikusita Lewanika, Hichunga Everisto Kambaila, Dean Namulya Mun'gomba, Sebastian Saizi Zulu and Jennifer Mwaba vs Fredrick Jacob Titus Chiluba**<sup>13</sup> which position was restated in the case of **Anderson Kambela Mazoka, Lt. General Christon Sifapi Tembo, Godfrey Kenneth Miyanda vs Levy Patrick Mwanawasa, The Electoral Commission of Zambia and The Attorney General**<sup>14</sup> that;

“ The function of pleadings, is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleading and the court has to take them as such.”

It was submitted, as per the above position of the law, that any alleged incidents or dates and places not stated or particularised in the petition should not be considered.

8.1.1. SECTION 97 (2) (a) OF THE ELECTORAL PROCESS ACT OF 2016

Counsel submitted that Section 97 (2) (a) of the Electoral Process Act of 2016 provides that elections can only be nullified when the Court finds with convincing clarity that;

- (i) A corrupt or illegal practice and or a misconduct was committed by the 1<sup>st</sup> Respondent or with the knowledge and consent or approval of the 1<sup>st</sup> Respondent or of his election or polling agent, and
- (ii) As a result of (i) above, the majority of voters in Mkushi South Constituency were prevented from electing the Petitioner, since there were only two (2) Candidates in the election.

Counsel submitted that they would show that the above two mandatory statutory pre-requisites for the nullification of an election have not been met.

8.1.2. CATEGORIES OF WITNESSESS

The Learned Advocates submitted that the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> witnesses called by the Petitioner are members of the UPND thus their evidence was partisan and not enough to discharge the burden of proof or meet the requirements of Section 97 (2) (a) of the Electoral Process Act of 2016. The above position was augmented by the holding in the case of

**Sydney Chisanga vs Davis Chisopa<sup>15</sup>** by the Constitutional Court that;

“... it is clear that the evidence did not so establish. We stated in the case of Stephen Masumba vs Elliot Kamondo that the evidence of one’s partisan witnesses required something more to prove an allegation to the required standard.”

### 8.1.3. THE EVIDENCE OF POLICE WITNESSES

In respect of the police witnesses who testified, it was submitted that by volunteering to testify for the petitioner they took a side and thus became partisan as their evidence was skewed towards the Petitioner.

Furthermore, evidence was adduced that there was no disruption of the voting at Kambushi with the 1<sup>st</sup> Respondent denying going to the polling station. It was also confirmed that the UPND candidate won at Kambushi.

In relation to the incident at Mkushi Police Station, it was submitted that it cannot by any stretch of imagination have an influence on the voters in Mkushi South Constituency.

### 8.2.0. THE BURDEN AND STANDARD OF PROOF

Counsel submitted that the burden of proving every allegation was, throughout, on the petitioner. The standard of proof is

not the ordinary balance of probabilities but one that is higher.<sup>16</sup>

#### 8.3.0. ALLEGATIONS OR ALLEGED INCIDENCES NOT PROVED TO THE REQUIRED STANDARD OF CONVINCING CLARITY

It was submitted that none of the alleged grounds of the violence of the 14<sup>th</sup> July, 2021 and the 24<sup>th</sup> July, 2021, the placing of nails, issue of Social Cash transfer, the DMMU mealie meal, paying of K50.00 to each voter on election day and the incidences of violence at Kambushi Polling Station and Mkushi North Polling Station were proved as there was no proof by means of video or pictures to prove the incidences. The adduced evidence was also discredited.

#### 8.4.0. ABANDONED ALLEGATIONS

The allegations as per paragraph 5 (vii) and (ix) of the petition were abandoned by the Petitioner as no evidence was adduced to support the allegations. As such it cannot be considered.

#### 8.5.0. CONTRADICTIONS IN THE PROSECUTION WITNESSES

There were several contradictions and inconsistencies in the evidence adduced by the witnesses called by the Petitioner. The contradictions and inconsistencies are discussed below.

#### 8.5.1. FAILURE TO CAMPAIGN AFTER 14<sup>TH</sup> JULY, 2021

It was the Petitioner and his Campaign Manager's evidence that they could not campaign from the 14<sup>th</sup> July, 2021. However, in contradiction to the above position Ms. Galdencia Tembo gave evidence that on the 24<sup>th</sup> July, 2021 the Petitioner addressed a political meeting in Ching'ombe area of the Constituency.

#### 8.5.2. POLICE MEDICAL REPORTS

The police officers who testified contradicted themselves on whether police medical reports must be paid for or not.

#### 8.5.3. USE OF PHONES DURING THE CAMPAIGNS

Some of the witnesses stated that they did not use their phones during the campaigns thus their failure to take pictures or video evidence in support of the petition. However, the 11<sup>th</sup> witness, Mr. Fungai Njovu, testified that she had her phone during the campaigns thus she was able to call the 7<sup>th</sup> witness.

Counsel made reference to the decision of the Constitutional Court in the case of **Muhali George Imbuwa vs Enock Kaywala Mundia**<sup>17</sup> with regards contradictions that;

“We have equally held in *Steven Masumba vs Elliot Kamondo*, and in *Richwell Siamunene vs Siabulo Gift* among other cases that a petitioner has a duty to adduce credible or cogent evidence to prove his allegation to the required standard of proof. The evidence must be of a kind that is free from contradictions and truthful so as to convince a reasonable tribunal to give judgment in a party’s favour”.

#### 8.6.0. ELECTION AGENTS NOT LINKED TO THE ALLEGATIONS

It was submitted that neither the Petitioner nor his witnesses mentioned the 1<sup>st</sup> Respondent’s election agent, Mr. John Musonda, as being involved in any of the alleged malpractices. Thus the requirement of Section 97 (2) (a) of the Electoral Process Act was not met and also the position of the law in the *Akashambatwa Mbikusita Lewanika*<sup>18</sup> case that;

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

Reference was also made to the law in the case of *Richwell Siamunene vs Siabulo Gift*<sup>19</sup> that;

“ Mere proof that, UPND supporters were indeed involved in the said acts does not warrant an inference being drawn that the Respondent had directly incited

the UPND supporters to act as they did. To do so would amount to speculation and it is not the duty of the Court to make assumptions based on nothing more than party membership and candidacy in an election.”

8.7.0. REGISTERED VOTERS AND ACTUAL VOTERS (TURN OUT)

Counsel submitted that in order to establish that the majority of voters were prevented from voting for their preferred candidate, the Petitioner should have demonstrated as per Section 97 (2) (a) of the Electoral Process Act the;

- (i) Total number of registered voters in the constituency.
- (ii) Total number of votes cast was less than fifty (50) per cent of the registered votes.
- (iii) Total number of Wards.
- (iv) Wards as particularised in the petition where proved malpractices occurred are more than half the number of wards.

The 1<sup>st</sup> Respondent’s answer and verifying affidavit showed that there were 22,814 registered voters in Mkushi South Constituency with 12 Wards. The adduced bundle of documents shows that 16,127 votes were cast translating into a voter turnout of 70.7 per cent. Only three (3) of the 12 Wards have been stated by the Petitioner to be affected by the alleged incidences.

#### 8.8.0. THE PETITIONER CANNOT BENEFIT FROM HIS WRONGS

It was submitted that the evidence of the 3<sup>rd</sup> and 4<sup>th</sup> witnesses called by the 1<sup>st</sup> Respondent confirmed that it was in fact the Petitioner and his team that engaged in violence. This led the Petitioner to apologise for his misdeeds. There was further evidence that UPND polling agents chased the voters from Kambushi Polling Station.

It was argued that it was clear from the above that the Petitioner has come to court with soiled hands and cannot expect to be rewarded. The law in the case of **Re Sigsworth (Bedford vs Bedord)**<sup>20</sup> was referred to in relation to the above position, that is, that;

“ The principle grounded on public policy which precludes a sane murderer from benefiting under his victims will preclude him from claiming a benefit conferred on him by statement in the case of his victim dying intestate.”

Reference was also made to the case of **Beresford vs Royal Insurance Company Limited**<sup>21</sup> wherein Lord Alkin expressed the reason for the above rule that;

“ I think that the principle is that a man is not to be allowed to have recourse to a court of justice to claim a benefit from his crime, whether under a contract or under a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an

inducement to crime, or remove a restraint to crime, and that its effect is to act as a deterrent to crime, but, apart from these considerations, the absolute rule is that the courts will recognise a benefit accruing to a criminal from his crime.”

In conclusion, the Learned Advocate submitted that having shown that the petition is ill fated as none of the allegations have been proved to the required standard, it should be dismissed with costs.

#### 9.0.0. THE 2<sup>ND</sup> RESPONDENT'S SUBMISSIONS

In their submissions, the Learned Advocates for the 2<sup>nd</sup> Respondent's considered the standard of proof in election petition matters, the law relating to election petitions and the adduced evidence.

#### 9.1.0. THE BRIEF FACTS

It was submitted as per the brief facts, that the Petitioner had failed to prove the allegations to the acceptable standard of proof in election petitions as required by the law and the cited authorities.

Furthermore, the alleged allegations did not in any way affect the final outcome of the results. Reference was made to the law in the Ugandan case of **Nakbukeera Hussein Hanifa vs**

**Kibule Ronald and Another**<sup>22</sup> that;

“ in an election petition, just like in the election itself, each party is set out to win. Therefore, the Court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution. Scrutiny and circumspection ... it would be difficult indeed for a Court to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of the devil; further that in election contests of this nature, witnesses most of them motivated by the desire to secure victory against their opponents deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain and that the evidence of both parties is, entirely subjective and cannot be relied upon without testing its authenticity from a neutral and independent source.”

9.2.0. THE 2<sup>ND</sup> RESPONDENT'S SUMMARY

The 2<sup>nd</sup> Respondents summarised their arguments as below and prayed for the dismissal of the petition with costs.

9.2.1. The 2<sup>nd</sup> Respondent submits from the onset that, a perusal of the entire Election Petition filed into court on the 23<sup>rd</sup> August, 2021 and the Affidavit in support of the Election Petition does not disclose any cause of action against the 2<sup>nd</sup> Respondent.

9.2.2. The 2<sup>nd</sup> Respondent also submits that the Petitioner has not adduced any evidence before this Honourable Court to prove

that the 2<sup>nd</sup> Respondent breached its electoral laws and procedures.

9.2.3. The 2<sup>nd</sup> Respondent noted that the only general allegation leveled against it were that it failed to conduct the election for Mkushi South Parliamentary Constituency fairly and that the majority of voters in affected areas were prevented from electing the candidate of their choice.

#### 10.0.0. THE PETITIONER'S SUBMISSION IN REPLY TO THE 1<sup>ST</sup> RESPONDENT'S SUBMISSIOINS

In response to the 1<sup>st</sup> Respondent's submissions that a petition is a pleading thus the court should only make reliance on the petition it was submitted that that position was misconceived. The Court's attention was drawn to the editorial comment of Order 18/0/2 of the White Book which provides that;

“... the “pleading” does not include a petition, summons, or preliminary Act ...”

Reference was also made to the provision of Regulation Number 6 of the Electoral Process Act No. 35 of 2016 in relation to evidence that;

“ 6. Evidence shall not be stated in the petition but the Court may order such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial in the same way as in ordinary proceedings before the court

and upon such terms as to costs and otherwise as may be ordered.”

The petition as per the law should not contain evidence but the documents and or any evidential burden accompanying it should contain the evidence. The court should therefore consider the adduced evidence in determining the matter.

#### 11.0.0. THE SUBMISSION BY THE PARTIES

I am indebted for the submissions by the parties.

#### 11.0.1. ISSUE ON PLEADINGS

The Learned Counsel for the 1<sup>st</sup> Respondent raised an issue on pleadings in their submissions. A reaction was made by Counsel for the Petitioner in the reply to the submissions which to a large extent settled the issue.

Suffice to note, in relation to what should be contained in an election petition, that the Electoral Petition (Amendment) Rules 5.1 No.443 of 1968 prescribes the form in which the petition should be. That is, that it shall be in paragraphs each confined, as nearly as possible, to a distinct portion of the subject with each paragraph numbered consecutively. The holding and result of the election, the right of the petitioner to petition, the facts and grounds relied upon to sustain the prayer and the prayer should be stated.

Evidence shall not be stated in the petition although the court may order such particulars as may be necessary to prevent surprises and ensure a fair and effectual trial in the same way as in ordinary proceedings before the Court.

#### 12.0.0. THE LAW ON ELECTIONS

The Constitution of Zambia (Amendment) Act No. 2 of 2016, the Electoral Process Act No. 35 of 2016, the Electoral Code of Conduct, the decisions of the Superior Zambian Courts (which authorities are binding) and the jurisprudence of local and foreign jurisdictions (the authorities being persuasive) provide the law for the determination of election petitions.

#### 12.1.0. THE CONSTITUTION OF ZAMBIA

The Supreme law of the Republic of Zambia, the Constitution of Zambia (Amendment Act No. 2 of 2016) provides under Part V for the Electoral Systems and Process, that is; the Electoral System under Article 47 (2) for the first-past-the-post electoral system; compliance with the Electoral Code of Conduct as per Article 54; Vacancy of the office of Member of Parliament under Article 72 (2) by, among others, being disqualified for election in accordance with Article 70, acts contrary to a prescribed Code of Conduct and disqualification as a result of a decision of the Constitutional Court. Article 73 (1) provides for the challenge of the election of a member of parliament by a petition as the case in *casu*.

Suffice to note that Article 45 (2) of the Constitutional envisages an electoral Process and System that ensures that elections are free and fair; free from violence, intimidation and corruption; independence, accountability, efficiency and transparency of the electoral process; a simple and practical system of voting and timely resolution of electoral disputes.

12.2.0. THE ELECTORAL PROCESS ACT NO. 35 OF 2016

The Electoral Process Act No. 35 of 2016 provides for corrupt and illegal practices and other election offences under Part VIII that include; bribery under Section 81; and offences committed at a polling station as per Section 89 which include, among others, canvas for votes, induce persons not to vote and loiter within 400 meters from the entrance of a polling station on polling day.

The Act also provides for other matters such as the challenge of an election by means of a petition (Section 97 (1)), the presentation of the election petition by a candidate to an election (Section 98 (c)), the reliefs to be sought in the petition (Section 99) and the form and procedure for the presentation of the election petition (Section 100 (2)).

12.2.1. The Act also provides for the avoidance of elections as per Section 97 (2) (a) that;

“2. The election of a candidate as a Member of

Parliament ... shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court ... 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 ...”

Section 97 (3) (a) (b) and (c) provides that;

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

12.3.0. THE ELECTORAL CODE OF CONDUCT RULES 12 AND 15 (a)  
(h) AND (k)

The Electoral Code of Conduct provides for the complaints procedure at constituency level and the resolution of complaints through a Conflict Management Committee. Rule 15 of the Code provides some of the general offences that may be resolved which include, among others; conduct likely to lead to violence or intimidation during the campaign or election; carry or display arms or weapons at the political meeting or in the course of any march, demonstration or other public gathering; arrange a public meeting, demonstrate, rally or march at the same time and venue as another similar political event organised by another political party or candidate; deface, remove or destroy any political

campaign materials of any person or political party or publications of the commission; abuse or attempt to abuse a position of power, privilege or influence, including parental, patriarchal or traditional authority for political purposes. Use of government property during the campaign except by the President and the Vice President and discrimination against any person on grounds of race, ethnicity, class, disability, gender, sex and or religion.

#### 12.4.0. CASE LAW

The Superior Courts have passed several decisions in relation to the statutory provisions of the Electoral Process Act. In the case of **Mubika Mubika vs Poniso Njeulu**<sup>23</sup>, a Supreme Court decision which the Constitutional Court cited with approval in the case of **Jonathan Kapaipi vs Newton Samakai**,<sup>24</sup> the court stated that;

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

number of registered voters were prevented or might have been prevented from electing their preferred candidate.”

The above position of the law was similarly considered by the Constitutional Court in the case of **Nkandu Luo and Another vs Doreen Sefuke Mwamba and Attorney General**<sup>25</sup> and the more recent case of **Dean Musule vs Romeo Kangombe**<sup>26</sup> wherein the Constitutional Court stated, *inter alia*, that, Section 97 (2) of the Electoral Process Act is central to the judicial resolution of electoral disputes.

Consideration has also been made to the cited persuasive local and foreign authorities.

#### 13.0.0. EVALUATION OF THE EVIDENCE AND THE FINDINGS

The Petitioner and the witnesses attested to several allegations. It is important to note that in considering the allegation regard is taken to the required burden of proof, the supporting evidence, credibility and cogency of the witness, the consistences and contradictions of the evidence and the need to cautiously and carefully evaluate the evidence as per the laid down law. The analysis of the evidence and the allegation will be done in no specific sequence and or order.

13.0.1. PLACING OF NAILS ON THE ROAD BY MR. CRISPIN MBOLOMA

It was the Petitioner's evidence that while campaigning and when they left Mboroma, Mr. Crispin Mboloma a PF candidate for the Local Government election placed nails and logs on the road. This led to his vehicles being punctured.

The 1<sup>st</sup> Respondent denied the above allegation and so did Mr. Crispin Mboloma.

When the Petitioner was cross examined in relation to the allegation it was his position that he did not see the said Mr. Mboloma place the nails on the road.

There was no other evidence to support the allegation apart from the mere hearsay statement by the Petitioner. The allegation cannot therefore be said to have been established.

13.0.2. THE BEATING OF UPND CADRES AT MILANGA WARD FOR WEARING THEIR PARTY REGALIA

It was the Petitioner's evidence that some UPND cadres were beaten at Milanga Ward for wearing UPND regalia by a Mr. Saili and his colleagues. The incident was reported to the police.

Ms. Fungai Njovu attested to the above beatings on the 24<sup>th</sup> May, 2021. It was her evidence that Mr. Saili Mwenya while in the company of a Mr. Chinfwembe and Mr. Andrew Chinfwala beat her and her other party colleagues who included Ms. Mumbi and Mr. Mwanji. Mr. Justine Simumba another UPND cadre who tried to come to their rescue was also beaten.

Mr. Wellington Fwalanga, an officer in the Police, confirmed the above position and also stated that a windscreen to a motor vehicle with registration number AAV 8078 was damaged. It was however his evidence that there was no proof that Mr. Saili Mwenya and Mr. Chomba were PF cadres, a position that was also echoed by Ms. Njovu, that is, that she did not know whether the three youths who attacked them belonged to the PF and or if they were election agents for the 1<sup>st</sup> Respondent.

However, in re-examination, it was her position that the three were cadres for the 1<sup>st</sup> Respondent.

It is clear from the adduced evidence and the medical reports that indeed Ms. Njovu and her colleagues were assaulted on the said material day. Evidence has also been adduced with regards the damage to the motor vehicle.

It is also noted that no sufficient evidence was adduced to confirm whether the said attackers who are well known to Ms.

Njovu were agents for the 1<sup>st</sup> Respondent. The allegation accordingly fails.

13.0.3. THE STONING AT KAUNGULA IN NKOMESHI WARD

It was the Petitioner's evidence that while at a meeting at Kaungula in Nkomeshi Ward they were stoned by five men. One attacker was apprehended and later taken to the Chief's palace where he was warned.

There was no any other evidence to confirm the said attack and or reprimand from the Chief. The issue seems, as per the adduced evidence, to have been resolved at the Palace.

13.0.4. ABDUCTION OF MR. FRIDAY MBEWE ON THE 13<sup>TH</sup> JULY, 2021

Mr. Friday Mbewe's evidence with regards to his abduction appears to be the same incident of the above stoning at Kaungula in Nkomeshi Ward. Mr. Mbewe testified to the abduction and stated that he was tied by the Petitioner and later taken to the police. Both Ms. Leah Nakazwe and the 1<sup>st</sup> Respondent attested to and confirmed the abduction.

It is noted, however, that there were a lot of contradictions and inconsistencies in the testimony of Mr. Mbewe. It was his position that he was 23 years old although he did not know

when he was born. He later conceded that he lied about his age. He also stated that he had no proof of his incarceration.

It was also clear that he was not sure about the time and sequence of the events as he kept on changing on the time that the incident happened.

Upon analysing his testimony and demeanor, it is my considered view that he was a coached witness.

The evidence of Ms. Nakazwe did very little to support the disorganized and contradictory evidence of Mr. Mbewe.

The evidence of the 1<sup>st</sup> Respondent was equally not supportive. In fact, the 1<sup>st</sup> Respondent's evidence was that Mr. Mbewe was tied with two other boys which was not the position. The 1<sup>st</sup> Respondent conceded that he lied in relation to the above position in his testimony.

From the adduced evidence I do not find that there was any abduction of Mr. Mbewe.

#### 13.0.5. REMOVAL OF POSTERS BY THE 1<sup>ST</sup> RESPONDENT IN MASANSA

It was the Petitioner's evidence that he was told that the 1<sup>st</sup> Respondent was seen removing posters at Chikupili junction and that PF cadres had also replaced two big banners with

their posters. A complaint was made to the Conflict Management Committee and the police but nothing was done.

I note that the evidence for the above allegation is general and and thus it is difficult to substantiate the allegation.

If indeed the Conflict Management Committee and the police failed to deal with the report, it is sad as such conduct and incidences are recipes for violence. All irregularities and illegalities in the electoral process should be attended to and addressed to avoid escalation into problems that would be difficult to resolve.

13.0.6. CAMPAIGN ON AND DISTRIBUTION OF SOCIAL CASH TRANSFER BY THE 1<sup>ST</sup> RESPONDENT

Evidence was adduced by the Petitioner, Mr. Jonathan Kapungwe, Ms. Galdencia Tembo and Mr. Bornface Choga about the 1<sup>st</sup> Respondent's campaign based on the payment of the Social Cash transfer and his assurances that only those who would vote for him would be maintained on the list of beneficiaries. The electorates were assured that the said Social Cash would be paid on the 11<sup>th</sup> August, 2021, which position was met as per the evidence of the witnesses. The funds were paid to 36 beneficiaries who included elders and widows.

There is, however, no direct evidence to show that indeed the 1<sup>st</sup> Respondent paid the said Social Cash transfer funds to the beneficiaries. The adduced evidence only relates to allegations that he campaigned on the government programme and that the beneficiaries were assured of being paid on the 11<sup>th</sup> August, 2021 which was done.

I should state that if indeed the said funds were paid on the 11<sup>th</sup> August, 2021 on the basis that the electorate be enticed or corrupted to vote for a particular candidate it is very shameful and sad. It amounts to taking advantage of the citizens, in this case the electorates, which position was condemned by the South African Constitution Court in the referred to case of August vs Electoral Commission and Others.

It should be made very clear to all the citizens that government programs and government resources are never funded by individuals, they are funds raised by the people themselves and thus it is wrong for any one individual to claim ownership and or control of such public funds.

All citizens, especially the poor, should not be taken advantage of due to their situation and be brain washed that an individual is doing them a favour or good by giving them what in fact belongs to them. National resources and or public funds belong to the citizens and no one individual or group of individuals should claim ownership of such

resources for personal praise. If anyone seeks to be praised for any donation or activity then they should use their hard earned personal resources to help the under privileged. No under privileged or poor person should be taken advantage of for donations made from their own resources. Social Cash transfer is a government program that is meant to benefit the citizens without any political attachment whatsoever.

#### 13.0.7. DISTRIBUTION OF 12.5 KG DMMU MEALIE MEAL

It was the Petitioner's evidence that 12.5 Kg DMMU branded bags of mealie meal were distributed in PF branded vehicles. Mr. Rodgers Chibuye attested that on the 11<sup>th</sup> August, 2021 at around 20:00 to 21:00 hours he found one of the branded vehicles removing the said mealie meal at the house of Mr. Arnold Mulimbwa a PF Local Government candidate in the 2021 general elections. He was requested to assist in the offloading of the mealie meal after which he was given a bag and reminded to vote for the PF candidates the following day.

When cross examined, Mr. Chibuye stated that he had not adduced any evidence to show that Mr. Mulimbwa was an election agent for the 1<sup>st</sup> Respondent and or report the alleged corruption to the police. The allegation was denied by both the 1<sup>st</sup> Respondent and Mr. Arnold Mulimbwa.

It is clear from the above evidence that there is no evidence connecting the 1<sup>st</sup> Respondent to the act of the 11<sup>th</sup> August,

2021 and or that the said Mr. Mulimbwa was his election agent.

In the absence of sufficient evidence as per the required standard of proof, the adduced evidence remains mere allegations.

Suffice to state, as was the case in relation to the issue of Social Cash transfer, that if indeed there was any distribution of mealie meal for political expedience, that is sad as citizens should not be taken advantage of for political purposes.

#### 13.0.8. ATTACK OF MS. GEORGINA MUNGWA

Ms. Mungwa adduced evidence that she was sometime in July, 2021 at around 18:00 to 19:00 hours attacked by some men who included Mr. Mwansa, a PF cadre.

However, when cross examined it was her position that she did not adduce any evidence that the people who beat her were election agents of the 1<sup>st</sup> Respondent and or that the said Mr. Mwansa was a PF member.

The above alleged attack does not connect the 1<sup>st</sup> Respondent and or any of his agents to the incident.

13.0.9. THE BASHING OF MS. LEAH NAKAZWE BY THE PETITIONER

Ms. Nakazwe gave evidence that she was bashed by the Petitioner on the 14<sup>th</sup> July, 2021 while looking for her nephew who had been abducted. She reported the incident at the police on the 17<sup>th</sup> July, 2021 although when she was referred to the issued police medical report it was dated 19<sup>th</sup> July, 2021.

It was also her evidence that after being bashed she was taken to the clinic and later discharged.

The 1<sup>st</sup> Respondent gave evidence that he visited Ms. Nakazwe on the 14<sup>th</sup> July, 2021 at around 11:00 to 12:00 hours at the clinic after she was bashed by the Petitioner.

The Petitioner denied ever bashing Ms. Nakazwe and or that one of his vehicles was damaged by members of the public after he hit her.

When Ms. Nakazwe was cross examined, it was her position that her medical report did not have a police date stamp. She got the said report on the 17<sup>th</sup> July, 2021 although it was dated 19<sup>th</sup> July, 2021. When she reported her bashing at the police her head was swollen although the medical report did not indicate that she had a swollen head or does it disclose that the Petitioner was the one who bashed her. The

Petitioner has never been summoned for any traffic offence nor is there any eye witness to confirm that she was indeed bashed.

It is clear from the above evidence and my considered analysis that in the absence of an authentic medical report and any eye witnesses it is difficult if not impossible to confirm that Ms. Nakazwe was indeed bashed. The inconsistencies in her testimony which include the date that she was bashed, the lack of clarity on the medical report as to her injury, that is, the swollen head but strangely there were no eye witnesses to confirm the incident nor was the Petitioner arrested for any traffic offence speak volumes about alleged incident.

The totality of the above inconsistencies point to the fact that the alleged incident did not occur but was a mere fabrication. This is clear from the police report which did not have any date stamp and or the alleged injuries coupled with the two dates. Ms. Nakazwe was never bashed by the Petitioner on the material date.

#### 13.1.0. THE VIOLENCE AT KAMBUSHI POLLING STATION ON THE DAY OF VOTING

It was the Petitioner's evidence that his electoral agents, Mr. Bornface Kalambo, Mr. Cashwell Malambo and Mr.

Habasimbi, were beaten on the day of voting by the 1<sup>st</sup> Respondent and his cadres.

The incident was confirmed by Mr. Rodrick Mazyopa, the Police Officer who was manning the polling station. It was his evidence that the 1<sup>st</sup> Respondent in the company of some weight lifters who had sticks beat up the voters. Mr. Mazyopa could not help the victims as he was alone and not armed. He made a report about the incident via phone to the Officer in Charge at Mboroma Police and also informed Mr. Mwansa, the Presiding Officer at the Polling Station.

Mr. Jerry Kalumba, a Chief Inspector in the Police Service, confirmed attending to three men on the 12<sup>th</sup> August, 2021 at around 14:00 hours at Mboroma Police. The said men were taken to the police in a Land Cruiser that belonged to the 1<sup>st</sup> Respondent by nine PF cadres. The three injured men who were alleged to have been blocking the voters were issued medical reports.

Mr. Bornwell Kalambo and Mr. Cashwell Chepa confirmed being beaten at Kambushi Polling Station. Mr. Chepa managed to escape before being thrown into the Land Cruiser where the 1<sup>st</sup> Respondent and his cadres were while Mr. Kalambo confirmed that the 1<sup>st</sup> Respondent and his cadres picked him using the said vehicle. Mr. Kapungwe also gave evidence in relation to the above incidence.

Ms. Doreen Moonga gave evidence to the effect that Mr. Godfrey Habasimbi, Mr. Simwamba Fellow and a Mr. Kedrick caused confusion at the polling station. Mr. Habasimbi grabbed the police officer (Mr. Mazyopa) and chased her with the other voters. The situation was later calmed down and she proceeded to vote.

Suffice to state, as per her evidence on the sequence of events of the material day, she stated that she had a wrist watch were she checked when she got to the polling station but gave contradictory times on the events.

It was her position that the confusion was from 08:30 to 10:00 hours and that she voted at 13:00 hours after waiting for 45 minutes. She later stated that when the incident happened at 12:00 hours she was not there but later restated that she left the polling station after the noise.

The 1<sup>st</sup> Respondent denied attacking the men at Kambushi Polling Station. It was his evidence that after he voted he went back to his farm.

Mr. William Mwansa, the Presiding Officer at Kambushi Polling Station stated that there was no confusion at the Polling Station on voting day. He however confirmed having received a report about the confusion that occurred at the road side that was between 80 to 100 meters from the Polling Station.

When cross examined, it was his position that he did not take any interest to note the confusion which was within the prescribed 400 meters of the Polling Station.

He confirmed that Mr. Mazyopa told him about the fight between the PF and UPND at the road side although he could not confirm whether that was true.

It is clear from the adduced evidence that there was indeed violence at Kambushi Polling Station on the day of voting. The evidence of Mr. Mazyopa, Mr. Kalumba, Ms. Moonga and Mr. Mwansa the Polling Officer confirmed the above position. Mr. Mazyopa attested to the fact that the 1<sup>st</sup> Respondent was among the people who attacked the victims. Mr. Kalumba issued medical reports to the said victims.

I find the evidence of the witnesses truthful and consistent. Suffice to note, in respect of the identity of the 1<sup>st</sup> Respondent, that the witnesses had no motive to connect or implicate him to the said violence. This was confirmed by the 1<sup>st</sup> Respondent's evidence in cross examination that he had a good relationship with the police in the Constituency and thus had no reason as to why they would fabricate lies against him. The 1<sup>st</sup> Respondent was indeed among the people who attacked the victims at Kambushi Polling Station on the 12<sup>th</sup> August, 2021.

13.1.1. THE VIOLENCE AT COPPERMINE AND MKUSHI POLICE STATION

It was the Petitioner's evidence that after he concluded his door to door campaign at Kaloko he proceeded to Coppermine market to drop some food to his campaign camp. He later saw a PF branded Pajero driven by the 1<sup>st</sup> Respondent and two other motor vehicles, a Hilux and a Land Cruiser. The vehicles had their lights on. The Petitioner's vehicle was blocked but he managed to drive off after the 1<sup>st</sup> Respondent who jumped off his vehicle instructed his cadres who carried stones and machetes to sort him out and kill him. His vehicle was stoned. The Petitioner managed to drive to Mkushi Police Station with the 1<sup>st</sup> Respondent giving chase.

At the police station the 1<sup>st</sup> Respondent attempted to punch the Petitioner who was only rescued by the police. Some of the cadres that the Petitioner was with, who included Mr. Michelo Muchimba, were injured and issued with a medical reports. The Petitioner's motor vehicles were also damaged. The police had to fire a warning shot to control the unruly PF cadres.

Mr. Fwalanga, the Assistant Superintendent in the Police Criminal Investigations Office at Mkushi Police, Mr. Jonathan Kapungwe and Mr. Michelo Muchimba all confirmed the Petitioner's evidence and the attacks and damage to the motor vehicles.

The 1<sup>st</sup> Respondent denied any involvement in the attacks and damage and stated that he had received a call about the Petitioner bashing a woman at Coppermine and thus went to the police to report his violence. He also denied confronting the Petitioner at the Police.

I have carefully considered the adduced evidence.

It is not in issue that the 1<sup>st</sup> Respondent was at Mkushi Police Station when there was confusion which resulted in the police firing warning shots and also the assault of Mr. Muchimba.

It is also the evidence before Court that shortly after the Petitioner arrived at the Police Station the 1<sup>st</sup> Respondent also got there and charged at the Petitioner. It took the police to rescue the Petitioner. The above confirms the unchallenged evidence that the Petitioner and his team were chased from Coppermine to the police. Throughout the said dramatic ordeal, the 1<sup>st</sup> Respondent was present with the cadres.

It is therefore clear that his involvement in the assault and damage of the property cannot be doubted. His denial of the involvement is but an afterthought. He led and was in charge of the whole confrontation, attack and damage.

### 13.1.2. APPLICATION OF THE LAW TO THE FINDINGS

It is clear from the analysis of the adduced evidence that the violence at Kambushi Polling Station and from Coppermines to Mkushi Police Station that resulted in the assaults and damage of the motor vehicles has been established. The 1<sup>st</sup> Respondent was at the center of the said violence and damage.

It is, however, the requirement of the law, as per the referred to case of Mubika Mubika and Jonathan Kapaipi which positions were also considered in the Dean Musule case that it should be proved that the established wrongful conducts or acts were widespread, that is, that they affected the majority of voters in the Constituency.

Majority which has been elaborated through the use of the term widespread is the greater number of a part.<sup>27</sup>

Having established that a misconduct was committed, it is required as per Section 97 (2) (a) (ii) to show that the majority of the voters in the Constituency were as a result of the misconduct prevented from electing the candidate of their choice. The burden of proof for the petition is only established once the above is done.