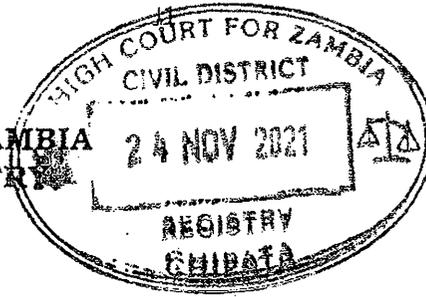


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2021/HP/EP/0028

IN THE MATTER OF:

**AN ELECTION PETITION RELATING TO THE
PARLIAMENTARY ELECTIONS FOR MKAIKA
CONSTITUENCY IN KATETE DISTRICT OF
THE EASTERN PROVINCE**

AND

IN THE MATTER OF:

**ARTICLES 45, 48, 49, 54, 72 AND 73 OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1 OF
THE LAWS OF ZAMBIA, AS AMENDED BY ACT
NO 2 OF 2016**

AND

IN THE MATTER OF:

**SECTIONS 29, 55, 81, 82, 83, 86, 89, 96, 97,
98, 99, 100, 106, 107 AND 108 OF THE
ELECTORAL PROCESS ACT NO 35 OF 2016
OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**RULE 15(1) (C) OF THE ELECTORAL
PROCESS (GENERAL) REGULATIONS 206 OF
THE LAWS OF ZAMBIA**

BETWEEN:

AMON BANDA

PETITIONER

AND

**PETER PHIRI
ELECTORAL COMMISSION OF ZAMBIA**

**1st RESPONDENT
2nd RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 24th DAY OF
NOVEMBER, 2021**

For the Petitioner : *Mr S. Mwila, Messrs M.K Achiume and Associates*
For the 1st Respondent : *Mr M.C Kanga, Makebi Zulu Advocates*

For the 2nd Respondent : Mr C. Nhari, Nhari Advocates

J U D G M E N T

CASES REFERRED TO:

1. *Subramaniam v Public Prosecutor* 1956 1 WLR 965
2. *Christopher Lubasi Mundia v Sentor Motors Limited* 1982 ZR 66
3. *Shamwana and seven others v The People* 1985 ZR 41
4. *Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v Frederick Jacob Titus Chiluba (Constitutional Jurisdiction)* 1998 ZR 49
5. *Kizza Besigye v Museveni Yoweri Kaguta v Electoral Commission Election Petition No 1 of 2001*
6. *Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela* SCZ No 15 of 2003
7. *Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, the Electoral Commission of Zambia, the Attorney General* 2005 ZR 138
8. *Mubika Mubika v Poniso Njeulu* SCZ Appeal No 114 of 2007
9. *Christopher Kalenge v Annie Munshya, the Electoral Commission of Zambia and the Attorney General* Appeal No 115/2012
10. *Brelsford James Gondwe v Catherine Namugala* Appeal No 175 of 2012
11. *Davies Chisopa v Sydney Chisenga* Appeal No 179 of 2012
12. *Reuben Mtolo Phiri v Lameck Mangani* SCZ No 2 of 2013 (unreported)
13. *Sunday Chitungu Maluba v Rodgers Mwewa and the Attorney General* CCZ Appeal No 4 of 2017
14. *Chrispin Siingwa v Stanley Kakubo* Appeal No 7 of 2017
15. *Abuid Kawangu v Elijah Muchima* Appeal No. 8 of 2017
16. *Jonathan Kapaipi v Newton Samakai* CCZ Appeal No 13/2017
17. *Samuel Mukwamataba Nayunda v Geoffrey Lungwangwa* Appeal No 15/2017
18. *Steven Masumba v Elliot Kamondo* SJ No 53 of 2017
19. *Giles Chomba Yamba Yamba v Kapembwa Simbao and others* Selected Judgment No 6 of 2018
20. *Austin Liato v Sitwala Sitwala* Selected Judgment No 23 of 2018
21. *Mbololwa Sibulwa v Kaliye Manyando* Selected Judgment No 25 of 2018
22. *Nkandu Luo (Prof) and the Electoral Commission of Zambia v*

Doreen Sefuke Mwamba and the Attorney General SJ No 5 of 2018

LEGISLATION REFERRED TO:

- 1. The Constitution of Zambia as amended by Act No 2 of 2016***
- 2. The Electoral Process Act No 35 of 2016***
- 3. The Electoral Process (General) Regulations, 2016***

This petition was filed on 27th August, 2021, challenging the election of the 1st Respondent, Peter Phiri, as the duly elected Member of Parliament in the Parliamentary elections that were held on 12th August, 2021 for Mkaika Constituency of the Katete District in the Eastern Province. The Petitioner, seeks the following reliefs in this petition;

- i. A declaration that the election of the 1st Respondent as Member of Parliament for Mkaika Constituency is null and void.*
- ii. A declaration that the illegal practices committed by the 1st and 2nd Respondents or their agents, affected the election results and the same should be nullified.*
- iii. An Order that costs be borne by the Respondents.*
- iv. Any other relief that the Court may deem fit.*

The petition states that the Petitioner, Amon Banda, was a candidate in the Mkaika Constituency Parliamentary Election, which was held on 12th August, 2021, having stood as an independent candidate in the said election. He states that the Returning Officer declared the results of the 12th August, 2021 elections as follows;

1. Peter Phiri - PF

9962 votes

2. Elina Sakala	-UPND	6043 votes
3. Tembo Hildah	-Independent	3, 902 votes
4. Banda Michael	-Independent	2, 980 votes
5. Mwanza Didia	-Independent	1, 644 votes
6. Phiri Beza	-Independent	1, 602 votes
7. Banda Amon	-Independent	1, 413 votes
8. Phiri Martin	-SP	902 votes
9. Zulu Zakeyas	-MMD	2, 980 votes

The Petitioner further states that the Electoral Commission of Zambia (ECZ) conducted the elections, and contrary to the declaration by the Returning Officer that the 1st Respondent was the duly elected candidate, that was not the position.

This, it is stated is because, with the knowledge and consent or approval of the 1st Respondent and or his agents, mealie meal from the Disaster Management and Mitigation Unit hereinafter called the DMMU, which was labelled with the immediate past President's particulars, was distributed to members of the public in Mkaika Constituency during the campaign period in the run up to the 12th August, 2021 General Elections, despite there being no declaration of hunger in the said constituency.

Further, on the day of the elections, the 1st Respondent and his agents and/or government officials slaughtered cattle and distributed it to the voters. It is also alleged that the 1st Respondent

with his agents and/or servants ferried voters to polling stations and back to their residences, with strict instructions not to vote for any candidate but the 1st Respondent and the Presidential candidate.

As regards the 2nd Respondent, the allegation is that in aiding the 1st Respondent to win the election, it deliberately, willfully and unlawfully confiscated the Gen 20 Forms, soon after the elections and doctored the results of each of the Gen 20 Forms to suit their preferred candidate, who is the 1st Respondent. The assertion is that the Petitioner was denied and/or prevented from entering the Totaling Centre, which was in itself a clear indication of unfairness and/or malpractice, to the extent that the Petitioner only accessed the final purported Gen 19 at the time of presenting his petition.

The Petitioner also states that the results announced by the 2nd Respondent's agents on 13th August, 2021 seen above, were not a true reflection of whom the electorate wanted as Member of Parliament for Mkaika Constituency. He contends that the 1st Respondent by himself, and his agents, clandestinely involved themselves in corrupt and illegal practices, and/or other misconduct committed in relation to the Mkaika Constituency Parliamentary Elections, which was against the spirit of the Republican Constitution, the Electoral Process Act No 35 of 2016 and the Electoral Code of Conduct of 2016.

That as a result of the foregoing, the majority of the voters in the affected areas and polling stations were prevented from electing a candidate in the constituency of their preference, and that for those

that voted in favour of the Petitioner, the results were tempered with in favour of the 1st Respondent.

In the affidavit verifying facts, which is deposed to by the Petitioner, there is exhibited thereto, as 'AB1', the nomination papers that the Petitioner filed to stand as an independent candidate in the Mkaika constituency parliamentary elections in the 12th August, 2021 general elections. He further deposes that the Returning Officer, Sydney Chipili, declared the results of the elections on 13th August, 2021, which were conducted by the ECZ.

The Petitioner reiterates his position taken in the petition, that the election was conducted in an atmosphere which was not free and fair due to wide spread malpractice, vote buying, bribery and corruption. The averments in the petition regarding the malpractice on the part of the 1st and 2nd Respondents during the elections is equally reiterated.

The 1st Respondent in an answer filed on 16th September, 2021, states that the Returning Officer from the ECZ in the exercise of the powers vested in him, declared him as duly elected Member of Parliament for Mkaika Constituency, contrary to the assertion by the Petitioner that he was not.

He denies having distributed mealie meal through his agents and with his consent and knowledge, which was from the DMMU, and which was labelled with the past President's particulars to members of the public in Mkaika constituency during the campaign

period in the run up to the 12th August, 2021 General Elections, when there was no declaration of hunger in the constituency.

The 1st Respondent further denies the allegation that himself, with his agents, and or government officials slaughtered cattle on the day of the elections and distributed the same to the voters. Also denied, is the assertion that the 1st Respondent with his agents and/or servants ferried voters to polling stations and back to their residences with strict instructions not to vote for any other candidate, but the 1st Respondent and their Presidential candidate.

The 1st Respondent makes no comment on the allegations made against the 2nd Respondent, and states that the assertion that the Petitioner was denied entry into the Totaling Centre, and was only availed the Gen 19 at the time he presented his petition, is within the Petitioner's peculiar knowledge. It is the 1st Respondent's contention that the results that were announced by the Returning Officer on 13th August, 2021, were a true reflection of the electorate.

In the affidavit in support of the 1st Respondent's answer, he denies the allegations made against him, as stated in the petition and the affidavit in support of the petition, contending that there were no acts of illegality that negatively affected the outcome of the elections, that were committed at his instance or that of his agents. He reiterates that the Petitioner was among the losing candidates in the Mkaika Parliamentary Elections, and that he, the 1st Respondent, was duly and validly elected as Member of Parliament

for Mkaika constituency, without any illegality or inducement of any form whatsoever.

The 2nd Respondent in an answer filed on 16th September, 2021 agrees with the results that were announced for each candidate that stood in the 12th August, 2021, Mkaika constituency Parliamentary Elections. The allegations relating to malpractice on the part of the 1st Respondent is said to be within the Petitioner's peculiar knowledge, and that it does not relate to the 2nd Respondent.

With regard to the allegations made against it, the 2nd Respondent states that the Mkaika Parliamentary Elections were conducted in conformity with the Constitution of Zambia, Chapter 1 of the Laws of Zambia, the Electoral Process Act, and the Regulations passed under that Act. The 2nd Respondent also states that it acted properly, openly and publicly in the conduct vitiating incidents of the 1st and 2nd Respondents.

It is contended that the petition lacks merit, and the Petitioner is not entitled to the reliefs sought, and the prayer is that the said Petition be dismissed with costs to the 2nd Respondent.

The affidavit verifying facts in the 2nd Respondent's answer is deposed to by Kryticous Patrick Nshindano, the Chief Electoral Officer of the ECZ, the 2nd Respondent herein. He avers that the 2nd Respondent by virtue of Article 299 of the Constitution of Zambia, is mandated to conduct elections, referenda, voter registration and delimitation of electoral boundaries.

The deponent further states that on 12th August, 2021, the 2nd Respondent conducted General Elections, which comprised the Presidential, Parliamentary and Local Government elections, and confirms that the Returning Officer for Mkaika Constituency declared the results for the parliamentary elections as deposed to by the Petitioner.

The averments relating to the Petitioner having contested as an independent candidate in the Parliamentary Elections for Mkaika constituency are admitted, and the deponent repeats that the allegations made against the 1st Respondent are within the Petitioner's peculiar knowledge, and do not relate to the 2nd Respondent.

The allegations made against the 2nd Respondent are denied, with the deponent deposing that the Mkaika Parliamentary Elections were conducted in conformity with the Constitution of Zambia, Chapter 1 of the Laws of Zambia and the Electoral Process Act No 35 of 2016 together with the Regulations made under that Act.

At the trial, the Petitioner testified and called fourteen (14) witnesses, as the testimony of one (1) of the witnesses was dispensed with, while the 1st Respondent called one (1) witness, and the 2nd Respondent did not call any witnesses.

In his testimony, the Petitioner told the Court that he successfully filed in his nomination as an independent candidate for Member of Parliament in Mkaika constituency in the 12th August, 2021 General Elections. The said nomination is exhibited as 'AB1' to the

affidavit in support of the petition. The Petitioner further told the Court that there are ten (10) wards in Mkaika constituency, and that due to COVID 19, they were given dates on which they could go to certain areas to campaign, and they followed the said time table.

It was further the Petitioner's testimony that the campaigns went on well, until two (2) days prior to the elections, when foods stuffs such as mealie meal, that had the former President, Edgar Chagwa Lungu's names written on it, was taken to the constituency by members of the Patriotic Front (PF) led by the 1st Respondent, Peter Phiri. The Petitioner further testified that those people slaughtered cattle, and they had designated homes where they cooked from. He alleged that they told the people to vote for them, and they ferried the voters to and from the polling stations, and took them to the selected areas to go and eat.

It was stated that the Petitioner passed through most polling stations during the day, and he told the Court that he did not however, manage to pass through all the polling stations, as the area is very vast. Then after the close of the elections, the Petitioner started calling his agents, and asked them to collect the GEN 20 Forms. He clarified that he had one hundred and forty-eight (148) agents, with each polling station having two (2), except for two (2) polling stations, where he had an agent each.

The evidence in his continued testimony was that his agents were not allowed to collect the GEN 20 Forms, stating that they were instructed to give them back. The Petitioner explained that the GEN

20 Form contains all the information pertaining to what goes on, in an election. He stated that on 13th August, he went to the Totaling Centre, but he was not allowed to enter, and he called two (2) of his agents who were inside the said Totaling Centre, who confirmed that he was not allowed to enter.

The Petitioner's testimony was that the police officers told him that their superiors had given them strict instructions not to allow him inside. Still in evidence, the Petitioner testified that he went back to the Totaling Centre on the 14th, and he was still denied entry inside. Therefore, he relied on his two (2) agents who were inside, and he stated that the conduct of the elections was unfair, and not in line with the Constitution.

He asked the Court to declare the elections null and void due to the malpractice that went on, which was contrary to the electoral processes, and that the Respondents should bear the costs of the proceedings.

When cross examined by Counsel for the 1st Respondent, the Petitioner testified that he had been a politician in the United Party for National Development (UPND), since its' inception in 1998. He stated that this was the first time that he had stood as Member of Parliament, and he explained that he is familiar with most of the electoral processes, although not everything. The Petitioner agreed that he was aware that the ECZ oriented all the candidates that stood in the elections at a school in Katete, but clarified that he was not in attendance.

It was his testimony that his agents attended the said orientation, and they briefed him on the deliberations. The Petitioner's testimony was also that he saw food stuffs being distributed by the 1st Respondent's agents, but not by the 1st Respondent himself. He agreed that he was not part of the gathering where the PF members told the electorate to vote for them, stating that he did not attend the PF meetings.

The Petitioner informed the Court that there are ten (10) wards in Mkaika, and seventy-eight (78) or forty-eight (48) polling stations, adding that he was not sure. He could not ascertain if the voters were ferried to all the polling stations, although he could confirm that they were ferried to some. It was stated that the Petitioner voted at Chimutende polling station, and he also testified that he did not meet the 1st Respondent during the campaigns, or see him take voters to Chimutende polling station.

The Petitioner reiterated that the malpractice started two (2) days before the elections, and continued on the day of the elections, to a day after the elections. He agreed that there are District resolution mechanisms, and explained that he told his agents to report the malpractice to the ECZ, although he did not report himself. The Petitioner was not aware if any of his agents reported the alleged electoral malpractice to the ECZ.

The Petitioner was not cross examined by Counsel for the 2nd Respondent.

In re-examination, the Petitioner testified that he saw the 1st Respondent's agents ferry food stuffs and the voters, to and from the polling stations.

Boyd Banda was PW2. His testimony was that he lives near Walubwe Polling Station in Katete District, and that he voted from there. It was further PW2's testimony that after voting on 12th August, 2021 around 08:00 hours, he saw a white canter, registration number ABE 1758, with red and blue stripes in the sides, take voters to the polling station.

After that, the said vehicle went back and returned carrying more voters, and PW2 was informed by his friend that the PF had booked the vehicle. It was also his testimony that the driver of the said canter is his friend, and he informed PW2 that the Councillor for the PF had booked the vehicle.

PW2 in cross examination agreed that he knows the 1st Respondent, stating that he is Peter Phiri. His testimony was that he did not see the 1st Respondent at the polling station where he voted from.

Counsel for the 2nd Respondent did not cross examine PW2.

The third witness of Mukota Village under Chief Mbangombe was Lazarous Nyirongo, who told the Court that he was a polling agent for the Petitioner. With regard to the conduct of the elections, PW3 testified that on 11th August, 2021, he saw mealie meal, cooking oil and chickens being taken by the PF Councillor. He explained that the mealie meal had the symbol for Edgar Lungu, and that when

the said food stuffs were taken there, the voters were told to vote for the PF and the candidate Peter Phiri, and thereafter they would go and eat.

On where the said food stuffs were taken, PW3 stated that it was to Ndelemani village and Davison Mbewe took them there. Then on 12th August, 2021, vehicles were booked, which ferried the voters who were told to vote for Peter Kafunka Phiri and the Councillor Salatiel Mbewe. PW3 also testified that when he went outside the polling station, leaving the other polling agent for the Petitioner inside, he saw the voters go to Davison Mbewe's house to go and eat nshima, after they voted.

The evidence given by PW3 in cross examination, was that it was the persons who delivered the food stuffs to Davison Mbewe's house that told the voters to vote for the PF. He stated that the food was taken on 11th August, 2021, and he witnessed the same, and that the voters were told to vote for the PF when being ferried to the polling stations on 12th August, 2021. It was also PW3's evidence that as a polling agent for the Petitioner, he had a book that had the pictures of the candidates that stood in the elections, and when the people voted, he ticked.

Then after the votes, PW3 witnessed the counting of the votes, and therefore, his colleague and himself, were the Petitioner's eyes and ears. He agreed that as polling agents, the ECZ sensitized them, and told them to report any electoral malpractice to it. However, PW3 reported the electoral malpractice to the Petitioner and not the

ECZ. PW3 agreed that he did not see the 1st Respondent either on 11th or 12th August, 2021, although he knows him.

PW3 was not cross examined by Counsel for the 2nd Respondent.

PW4, Clara Phiri of Chimutende Village in Katete testified that before 11th August, 2021, a canter whose registration number she did not recall, went to her home, with food items, cooking oil, bags of mealie meal, and salt. She further testified that also in the vehicle were buckets, t-shirts and chitenge materials. PW4 still in her testimony stated that there are a number of polling stations in Chimutende Ward, and the people were divided according to the polling stations.

She also explained that upon the voters returning from the polling stations, they went to eat, as there were people who were stationed to tell them to vote for the PF, and after voting, they should go and eat from the people who had been assigned to cook the food.

PW4 when cross examined, maintained that some food stuffs were taken to her house before 11th August, 2021. She stated that the 1st Respondent's friends, and not the 1st Respondent himself took the food stuffs to her house, even though the said food stuffs were not before Court. She did not know who was in the 1st Respondent's campaign team, but she knew the people who went to collect the items from her home, among them, the Councillor.

PW4 was not cross examined by Counsel for the 2nd Respondent.

Esau Sakala of Tambala village was PW5. His evidence was that between 16:00 and 17:00 hours on 11th August, 2021, the PF took

mealie meal in their vehicle, and they asked PW5 to keep it. However, PW5 refused, telling them that they had their own leaders who could keep it. He also testified that the said PF members had told him that the mealie meal should not land in the hands of the leaders, but faithful people.

PW5 stated that he had told them that he had no power to keep the mealie meal, but they had told him that it was for the PF Government, and was meant for them to eat on the 12th, that is, those who secretly voted for the PF. It was added that PW5 was told that they should vote for the PF and after doing so, they should go straight to eat.

PW5's testimony in cross examination was that he was approached by some people who asked him to keep some items in his home. He maintained that he refused to do so, as he knew that what they were doing was wrong. However, he did not report anywhere, as he was scared. PW5 agreed that he had no recording or any evidence in the form of pictures to support his allegations, and that the 1st Respondent was not among the people that approached him.

He was not cross examined by Counsel for the 2nd Respondent.

Thompson J. Banda, a resident of Kalonga village in Chief Mbangombe, was PW6. This witness testified that before he went to the polling station on 12th August, 2021, a vehicle went to ferry voters to the polling station, and instructed them to vote for the PF, as after voting, they could go and eat the food that had been prepared. PW6 testified that the food was eaten on the condition

that they voted for the PF, and they agreed. That is how the voters were ferried in the vehicles, and some headmen thereafter received the mealie meal that was distributed by the PF.

When cross examined, PW6 agreed that the 1st Respondent was not in the vehicle that ferried the voters, but maintained that some head men received mealie meal from the PF. He clarified that this was on the day of voting, and that the PF distributed the mealie meal door to door, and not at a meeting. PW6 did not know the number of headmen that received the mealie meal, and he told the Court that he was not there when the headmen received the mealie meal. He agreed that he is a headman, but stated that he did not receive any mealie meal.

PW6 was not cross examined by Counsel for the 2nd Respondent.

In re- examination, PW6 clarified that he is from Walubwe polling station, and that only headmen from Matunga ward received the mealie meal.

The seventh witness, Kolina Sakala of Chimutende ward under Chief Mbangombe, told the Court that she was among those people that were engaged to cook food for people in Chimutende ward. To that effect, her evidence was that she was given three (3) bags of mealie meal, relish, cooking oil and salt by the PF. PW7 testified that they were told to inform the people who came from voting to go and eat.

The testimony given by PW7 in cross examination was that the 1st Respondent instructed them to cook food for the voters to eat.

When cross examined further, she agreed that the 1st Respondent did not physically go and instruct them, but that it was the Councillor that did so. She did not know if the 1st Respondent went and physically instructed people to vote for the PF.

There was no cross examination by Counsel for the 2nd Respondent.

Daniel Mbewe of Jacob village in Chief Mbangombe's area, who was PW8, with regard to the 12th August, 2021 general elections, testified that he saw a canter registration number ABE 1758 that was taken there by the PF to ferry voters to go and vote. He also stated that they were told to vote for the PF, and the leader Peter Phiri, the 1st Respondent herein, after which they would be ferried to a house, which belonged to the party, to go and eat.

PW8's evidence was that they were many of them in the vehicle, although he could not say the number. That is how they were taken to vote, and thereafter, they were taken to a house to go and eat. He stated that after they ate, they were told to leave and go and inform others that the vehicle was going around picking up people to go and vote.

PW8 in cross examination by Counsel for the 1st Respondent agreed that the 1st Respondent was not in the vehicle, but stated that the people who were in the said vehicle said that the 1st Respondent had assigned them to pick up the voters.

There was no cross examination by Counsel for the 2nd Respondent.

Lawrence Chanda of Choma village under Chief Mbangombe of Katete was PW9. This witness was at the Totaling Centre as an

agent for the Petitioner, who stood as an independent candidate. His evidence was that on Friday morning, the Petitioner phoned him, and PW9 went outside the Totaling Centre, leaving his colleague to observe. He found the Petitioner outside the gate of the Totaling Centre, who informed him that he had been denied entry into the Totaling Centre, so that he could see how the results were going.

PW9 further testified that the Petitioner had told him that it was good that he had seen him, and PW9 should go back into the Totaling Centre and continue working. After that, PW9 went back inside, and the results continued to be announced. He stated that when the presiding officers went to announce the results, it was observed that some of the results had mistakes, and those who had taken the results were asked to go back and work on the said mistakes.

PW9 was not cross examined at all.

PW10 was Given Zulu, who testified that he lives in Muzima area in Chilundika village in Chief Kawaza's area in Katete. His testimony was that on 12th August, 2021, the day of the Elections, he went to vote and thereafter he received food, which was at Thomas' house. This witness could not recall Thomas' surname, but told the Court that Thomas was a polling agent. He also testified that the PF prepared the food and told them to vote for them, adding that they were many of them that ate the food. However, only four (4) of them had their names recorded.

PW10 in cross examination by Counsel for the 1st Respondent agreed that the 1st Respondent was not there when they were eating the food.

He was not cross examined by Counsel for the 2nd Respondent.

Gideon Lungu of Choma village under Chief Mbangombe was PW11. In support of the Petitioner's case, he testified that on 11th August, 2021, Sulani Lungu, the PF Ward Chairman, and who is his brother, went with some people with mealie meal to PW11's house. PW11 said that they had taken the mealie meal there so that they could vote for them. This witness also stated that as he lives near, he saw the food being cooked, and the instruction was that whoever ate the food should vote for the PF.

When cross examined by Counsel for the 1st Respondent, PW11 agreed that the 1st Respondent was not among the people that took the mealie meal. He further agreed that he did not see the 1st Respondent at the places where the food was being cooked.

He was not cross examined by Counsel for the 2nd Respondent.

Emmanuel Zulu of Lukweta village in Katete was PW12. This witness was at the Totaling Centre as an agent for the Petitioner. He confirmed the evidence given by the Petitioner that he was denied entry into the Totaling Centre on 13th August, 2021 to observe how the totaling of votes was going on. In this regard, he stated that the security guards stopped the Petitioner from entering the Totaling Centre.

PW12 was not cross examined by Counsel for the 1st Respondent, and in cross examination by Counsel for the 2nd Respondent, he testified that he did not enquire on the names of the security guards who stopped the Petitioner from entering the Totaling Centre. He however said that the same security guards wore police uniforms, but he did not know if they were from the police or the ECZ.

PW13, Richard Banda of Mupambeni village in Chief Kawaza's area told the Court that when they were voting, food was taken by the PF who told them that if they voted for them, they would eat nshima.

It was PW13's testimony when cross examined by Counsel for the 1st Respondent that he knows the 1st Respondent. He further stated that the 1st Respondent went and told them to vote for the PF. However, when cross examined further, PW13's evidence was that the 1st Respondent sent the people to tell them so, and that he did not see or meet the 1st Respondent on the day of the elections, although he had promised them from the start.

There was no cross examination by Counsel for the 2nd Respondent.

Kampamba Mutale of Mupambeni village under Chief Kawaza was PW14. His evidence was that was on 12th August, 2021, he went to vote, and after he did so, he ate nshima, which the Chairman of the PF Thomas gave them. He also testified that during the campaigns, they were told that on the day of voting, there would be a celebration, and they would cook nshima, so that they vote for

them. He concluded by testifying that many of them ate the nshima.

This witness when cross examined by Counsel for the 1st Respondent, stated that he attended about five (5) campaign meetings that were held by the 1st Respondent. He named the places where these meetings were held as being at Mupambeni village, Kaima village, Salivuka village, and then again at Mupambeni and Kaima villages. PW14 testified that he attended all the five (5) meetings, but that he had no recordings or pictorial evidence to show what happened and what was said.

He added that the only evidence that he had, was that he ate nshima on the day of voting, being 12th August. Still in cross examination, PW14 agreed that he attended the campaign meetings at Chavuka School and Mutika village. He told the Court that he was not really aware of the meetings that the 1st Respondent held, but he could say for sure, that on the day of voting, he ate nshima and the 1st Respondent was not there at the time.

PW14 when cross examined by Counsel for the 2nd Respondent reiterated that they ate nshima at the house for Thomas, the PF Chairman in Chavuka ward. He did not know the number of wards in Mkaika constituency, and he told the Court that Thomas does not have houses in all the wards in Mkaika.

The last witness called by the Petitioner was Faindani Phiri of Chilindila village under Chief Kawaza. He testified that on the day of voting, he went to vote with his friends. There, they found a

queue, and food that had been cooked. It was his evidence that after they voted, they ate the food and they returned home. He explained that those who were cooking the food said that those people that had spent time there should eat the food, that had been provided by Mr Kafunka. PW15 did not know in what capacity Mr Kafunka prepared the food.

He was not cross examined at all, and that marked the close of the Petitioner's case.

The only witness called by the 1st Respondent was the 1st Respondent himself. He told the Court that he was a candidate for the Mkaika Parliamentary seat in the 12th August, 2021 General Elections, under the PF. The 1st Respondent also testified that he had a campaign team, and the Campaign Manager was Smart Phiri. He further stated that he had ten (10) agents, that is one (1), in each of the ten (10) wards in the constituency.

The testimony was that door to door campaigns were conducted as guided by the ECZ, and that at some point during the campaigns, the 1st Respondent and his team contracted COVID 19. Thus, they had to halt the campaigns, and resumed them later. He stated that the campaigns were peaceful, and on 14th August, 2021, he was declared as duly elected Member of Parliament for Mkaika constituency, having polled 9, 962 votes, with his closest rival polling over 6, 000 votes.

The 1st Respondent denied all the allegations that had been levelled against him, stating that neither himself nor his agents, were

involved in the distribution of mealie meal as alleged. He further denied that himself or his agents or any government officials slaughtered cattle which was distributed to the voters. The 1st Respondent also in his testimony stated that at no point did he instruct the voters to vote for him, and he was not aware that with the 2nd Respondent's help, the GEN 20 Forms were confiscated after the Elections, and were doctored to suit him as the preferred candidate.

On Thomas, alleged to have distributed mealie meal, the 1st Respondent testified that Thomas was not his agent, and he does not know him.

The 1st Respondent when cross examined by Counsel for the 2nd Respondent stated that he was not aware that any GEN 20 Forms were doctored to suit him.

In cross examination by Counsel for the Petitioner, the 1st Respondent's evidence was that he joined the PF in 2020, having been a member of the Movement for Multi-Party Democracy (MMD) from 2013. He stated that it was the third time that he had been elected as an MP. He denied that he had an agent named Thomas, and he could not say why the said Thomas was alleged to have been distributing mealie meal and party regalia. The 1st Respondent however stated that his agents were from the Constituency and District Committees.

He denied having been given mealie meal or regalia to distribute, and stated that he was partly funded in the campaigns, but that no

well-wishers came forward to help him. The 1st Respondent's testimony was that he did not have access to the GEN 20 Forms prior to the declaration of the winner of the election. He however agreed that he went to the Totaling Centre, stating that he was a candidate, and he wanted to see what was going on.

Whilst denying that he does charity works, the 1st Respondent testified that he helps with transport when there are bereavements in Mkaika constituency. He maintained that himself and his campaign team contracted COVID 19 during the campaigns, and he told the Court that as a result, he was at the farm for two (2) weeks. The testimony also given by the 1st Respondent in cross examination, was that if people did what was alleged, he would have brought it to the attention of the District Conflict Management Committee. He denied that anyone distributed anything on his behalf during the campaigns.

That marked the close of the 1st Respondent's case.

I have considered the evidence and the submissions. This petition has been brought pursuant to **Articles 45, 48, 49, 54, 72 and 73 of the Constitution of Zambia**, as amended by **Act No 2 of 2016**, as well as **Sections 29, 55, 81, 82, 86, 87, 89, 96, 97, 98, 99, 100, 106, 107 and 108 of the Electoral Process Act No 35 of 2016** and **Rule 15 (1) (C) of the Electoral Process (General) Regulations, 2016 of the Laws of Zambia**.

It seeks to challenge the election of Peter Phiri as Member of Parliament for Mkaika Constituency in the Katete District of the

Eastern Province. **Article 45 of the Constitution as amended by Act No 2 of 2016** provides for the principles that govern the electoral process and systems. It states that;

“45. (1) The electoral systems provided for in Article 47 for the election of President, Member of Parliament or Councilor shall ensure—

- (a) that citizens are free to exercise their political rights;**
- (b) universal adult suffrage based on the equality of a vote;**
- (c) fair representation of the various interest groups in society; and**

(d) Gender equity in the National Assembly or council.

(2) The electoral process and system of administering elections shall ensure—

- (a) that elections are free and fair;**
- (b) that elections are free from violence, intimidation and corruption;**
- (c) independence, accountability, efficiency and transparency of the electoral process;**
- (d) a simple and practical system of voting and tabulating votes; and**
- (e) timely resolution of electoral disputes”**

Article 48 provides that the electoral process for electing a President, Member of Parliament or Councillor, shall be prescribed, while **Article**

49 states that the system of administering elections shall equally be prescribed. **Article 54** enjoins a candidate and a political party to comply with the prescribed code of conduct, while **Article 72** sets out the instances when a seat for a Member of Parliament becomes vacant, and when a political party is dissolved.

Article 73 empowers a person to petition the election of a Member of Parliament, and **Section 29 of the Electoral Process Act** provides for campaigns. It states as follows;

“29. (1) A public officer and public entity shall give equal treatment to candidates.

(2) A candidate and political party have the right to have the content of the candidate’s or political party’s campaign message reported in public media in a fair and balanced manner.

(3) A candidate or political party may, during an electoral campaign, publish or distribute campaign materials of such a nature and in such a manner as may be prescribed by the Commission.

(4) For the purposes of this section “campaign messages” means an activity, statement or any other form of expression aimed at promoting particular political ideas, policies and strategies for purposes of obtaining votes for a candidate or political party contesting an election”.

Section 55 of the said Electoral Process Act states that General Elections shall be held in accordance with the Constitution, the Act

and as may be prescribed. **Section 81** on the other hand sets out the electoral offences deemed as corrupt practices, while **Section 82** proscribes impersonation and **Section 83** sets out the instances deemed to amount to undue influence in relation to elections. **Section 86** prohibits illegal practices in respect of public meetings, and **Section 87** prohibits illegal practices in relation to the poll, while **Section 89** sets out other election offences.

Section 96 provides that a question may arise as to the election of a Member of Parliament, Mayor, Council Chairperson or Councillor, and **Section 97** provides that such question may only be raised through a petition. Who can petition, is provided for in **Section 98**, and **Section 99** provides for the reliefs that may be claimed in a petition. The form and procedure for presentation of an election petition is as provided in **Section 100**, and **Sections 106-108** provide for the trial of an election petition.

Regulation 15 (1) (c) of the Electoral Process (General) Regulations, 2016 provides for the filing of nominations. **Article 73 (1) of the Constitution** and **Section 106 (1) (b) of the Electoral Process Act No 35 of 2016** vest jurisdiction in the High Court to hear and determine election petitions in respect of Members of Parliament. **Article 73(1) of the Constitution** provides as follows;

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

Section 106 (1) (b) of the Electoral Process Act states that;

***“106. (1) An election petition shall be tried and determined by the High Court or a tribunal in open Court—
(b) in the case of the election of a candidate as a Member of Parliament, within ninety days from the date of filing an election petition”.***

In this matter, the Petitioner alleges that the 1st Respondent was not duly elected as Member of Parliament for Mkaika constituency, as himself and/or his agents engaged in acts of electoral malpractice, which rendered the election unfair, and that the 2nd Respondent willfully and unlawfully confiscated the GEN 20 Forms after the elections, and doctored them to suit the 1st Respondent, who was their preferred candidate. In this regard, five (5) allegations have been levelled against the Respondents.

1. THE 1st RESPONDENT, WITH THE KNOWLEDGE AND CONSENT OF HIMSELF AND HIS AGENTS DISTRIBUTED MEALIE MEAL FROM THE DMMU WHICH WAS LABELLED WITH THE PAST PRESIDENT EDGAR CHAGWA LUNGU’S PARTICULARS TO MEMBERS OF THE PUBLIC IN MKAIKA CONSTITUENCY DURING THE CAMPAIGN PERIOD IN THE RUN UP TO THE 12TH AUGUST, 2021 GENERAL ELECTIONS DESPITE THERE BEING NO DECLARATION OF HUNGER IN THE SAID CONSTITUENCY.

In support of this allegation, the Petitioner, PW3, PW4, PW5, PW6, PW7 and PW11 were called as witnesses. The Petitioner told the Court that mealie that had the former President, Edgar Chagwa Lungu’s particulars written on it, was ferried to the constituency, two (2) days

before the elections were held, by the campaign team for the PF, led by the 1st Respondent.

PW3 of Mukota village under Chief Mbangombe, and who was the Petitioner's polling agent, told the Court that on 11th August, 2021, he saw the PF Councillor take food stuffs, being mealie meal that had the former President Edgar Chagwa Lungu's particulars on it, together with cooking oil and chickens to Davison Mbewe of Ndelemanani village, and the people were told to vote for the PF and the Councillor Salatiel Mbewe.

PW4 of Chimutende village also under Chief Mbangombe, on the other hand, testified that she was asked to keep mealie meal, cooking oil and salt on 11th August, 2021. PW5 of Tambala village stated that he was also asked to keep mealie meal on 11th August, 2021, by the PF, but he refused to do so. PW6, a headman of Walubwe ward told the Court that on the day of the elections, the PF distributed mealie meal to headmen of Matunga ward in a door to door manner.

The evidence given by PW7 of Chimutende ward was that she was assigned to cook food for the electorate by the PF, and she was given mealie meal, relish, cooking oil and salt. PW11 of Choma village under Chief Mbangombe testified that his brother Sulani Lungu, who is the PF Ward Chairman and other PF officials took some mealie meal to him, and he was told that the mealie meal had been taken there so that they could vote for the PF.

The 1st Respondent denies having distributed mealie meal in Mkaika constituency as alleged.

It can be seen from the evidence adduced by the Petitioner and his witnesses that the allegation is that the 1st Respondent and his agents by their consent through the DMMU, distributed mealie meal to the electorate in Mkaika constituency, when there was no declaration of hunger. Only PW6 directly testified to the effect that the mealie meal was distributed, as his evidence was that Chiefs from Matunga ward were given the said mealie meal on the day of the elections.

The rest of the witnesses like the Petitioner, other than testifying that mealie meal was taken to the constituency two (2) days before the elections, testified in cross examination that the distribution of the food stuffs was done by the 1st Respondent's agents, and not by the 1st Respondent.

PW3 testified that he saw the mealie meal being taken there by the PF Councillor and PF members, and thereafter, he saw nshima being cooked. PW4's testimony was that food stuffs including mealie meal were taken to her on 11th August, 2021 by the 1st Respondent's friends, but she did not state the purpose why she was given the said mealie meal. In cross examination, she testified that the food stuffs were collected by some people who she could name, among them the PF Councillor. PW5 said that the PF took the mealie meal to his house, but he refused to keep it.

PW11 on the other hand told the Court that his brother Sulani Lungu, the PF Ward Chairperson took mealie meal to him, stating that the people should vote for the PF. It will be noted that this witness further testified that as he lives near, he saw food being cooked, and it is not

clear whether he was given the mealie meal to just keep, and it was collected, and he saw it being used to cook nshima for the voters.

In terms of the burden of proof, it is trite, that he who alleges must prove. The Petitioner in his submissions acknowledges that the burden is on him to prove the allegations in the petition. The Petitioner submits that through his witnesses, and in particular the testimony given by PW3, that with the consent and approval of the 1st Respondent's agents, there was indiscriminate distribution of food stuffs among the electorate in Mkaika constituency on 11th August, 2021, with the sole intent of influencing the majority of voters to vote in favour of the 1st Respondent.

It is also the Petitioner's submission that this amounted to vote buying, which is a malpractice under the Electoral Code of Conduct, and that in order to prove illegal practice, evidence must be led to show that the said illegal practice was committed in connection with an election by or with the consent or approval of a candidate or that of the candidate's election agent or polling agent.

The Petitioner relies on the case of *Brelsford James Gondwe v Catherine Namugala* ⁽¹⁰⁾, stating that in that matter, the Supreme Court held that the key ingredients of **Section 97 (2) of the Electoral Process Act** is that there must be non-compliance with the provisions of the Act relating to the conduct of an election, and it must appear to the Court or Tribunal that the electoral principles as laid down by the law have not been adhered to, and the non-compliance must affect the results of an election, and it calls for the annulment of the election.

Therefore, as there was vote buying by the 1st Respondent, the election must be nullified.

The 1st Respondent on the other hand in denying the allegation, submits that in line with **Section 97(1) of the Electoral Process Act**, it was the duty of the Petitioner, at the hearing, to show that the 1st Respondent, or his election or polling agents, with the 1st Respondent's consent and approval, engaged in corrupt practices, violence, malpractice or illegal conduct, which led to the majority of the voters not voting.

The 1st Respondent further relies on the case of ***Austin Liato v Sitwala Sitwala*** ⁽²⁰⁾ to argue that the burden of proof in election petitions is on a standard higher than a balance of probabilities that applies in civil cases, and this position was affirmed in the case of ***Bresford James Gondwe v Catherine Namugala*** ⁽¹⁰⁾.

It is submitted that the burden of proof as stated in that case, was reiterated in the case of ***Abuid Kawangu v Elijah Muchima*** ⁽¹⁵⁾ and the Ugandan Supreme Court case of ***Kizza Besigye v Museveni Yoweri Kaguta v Electoral Commission*** ⁽⁵⁾. On the standard of proof, the 1st Respondent relies on the case of ***Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v Frederick Jacob Titus Chiluba (Constitutional Jurisdiction)*** ⁽⁴⁾, where it was stated as follows;

“we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long

required to be proved to a standard higher than on a mere balance of probability. It follows, therefore, that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity”.

It is stated that this position was reiterated in the case of *Michael Mabenga v Sikota Wina, Wallace Mofu and George Samulela* ⁽⁶⁾.

In terms of proof of election petitions, *Section 97 (2) of the Electoral Process Act*, states that;

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

In interpreting that provision, the Constitutional Court in the case of *Abuid Kawangu v Elijah Muchima* ⁽¹⁵⁾ held that;

*“The standard remains higher and distinct from that required in an ordinary civil matter but lower than the standard of beyond reasonable doubt required in criminal matters. As the Supreme Court opined in the case of *Lewanika and Others* parliamentary election petitions are*

required to be proved to a standard higher than on a mere balance of probabilities and issues raised to be established to a fairly high degree of convincing clarity.”

This position was also stated in the case of *Steven Masumba v Elliot Kamondo* ⁽¹⁸⁾, and in the case of *Bresford James Gondwe v Catherine Namugala* ⁽¹⁰⁾ cited by both parties, the Supreme Court held that;

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

Therefore, a Petitioner in an election, must prove the allegations on a standard higher than a balance of probabilities, which is that of a fairly high degree of convincing clarity, but lower than beyond all reasonable doubt.

Section 97 of *the Electoral Process Act* provides for what must be proved in order for the election of a Member of Parliament, Mayor, Council Chairperson or Councillor to be avoided or nullified. It provides, and I quote;

“97. (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall

not be questioned except by an election petition presented under this Part.

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

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

(i) by a candidate; or

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

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

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

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

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

(a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;

(b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and;

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent; the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

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

From the above, it can be seen that an election will only be nullified in three (3) instances, which are;

1. *Where a corrupt practice or an illegal practice or other misconduct is committed in connection with an election by either a candidate, or by their agents or by any other person with the candidate's or their agent's knowledge and consent or approval, and as a result of the said corrupt or illegal practice or other misconduct, the majority of the voters in the constituency were or may have been prevented from electing a candidate that they preferred; or*
2. *Where it appears to the High Court or the Tribunal that the election was not conducted in accordance with the law, and as a result of the said non-compliance, the results were affected;*
3. *The candidate was at the time of the election a person not qualified to stand election.*

A further perusal of **Section 97** reveals that subsections (3) and (4) of that Section, contain provisos to subsection (2), which provides for when an election can be nullified, by stating that despite the High Court or Tribunal finding that a corrupt practice or illegal practice or

other misconduct 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, but the corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent, and the High Court or Tribunal finds that such candidate has proved that they and their election agent, took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election, and in all other respects, the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent, the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

Further, Subsection (4) provides that an election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election, if it appears to the High Court or a tribunal, that the election was so conducted, as to be substantially in accordance with the provisions of the Act, and that such act or omission did not affect the result of that election.

I have earlier noted that the allegation is that the 1st Respondent with his knowledge and consent and approval, and that of his agents, distributed mealie meal from the DMMU, which was labelled with the immediate past President Edgar Chagwa Lungu's particulars in Mkaika constituency, during the campaign period in the run up to the

12th August, 2021 General Elections, when there was no declaration of hunger in the constituency.

The question is whether this qualifies as a ground upon which an election can be nullified? **Section 2 of the Electoral Process Act** defines corrupt practice as;

“corrupt practice” means any conduct which is declared to be a corrupt practice in accordance with section eighty one;”

The same Section defines illegal practice as;

“illegal practice” means an offence which is declared under this Act to be an illegal practice;”

Section 81 of the Act states the acts that are deemed as corrupt practices, within the meaning of **Section 2** of the Act. The Act also goes further in **Sections 82-89** to stipulate other election offences, and there are also other electoral offences, other than those specified in **Section 89 of the Electoral Process Act**, in the **Electoral Code of Conduct**, which is the schedule to the **Electoral Process Act**.

In relation to this matter, **Section 81 (1) (c) and (d) of the Electoral Process Act** provides as follows;

“81. (1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly-

...

(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to

induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;

(d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure, the return of any candidate at any election or the vote of any voter at any election;”

This Section prohibits the act of offering gifts or making promises in order to procure the return of a candidate or to procure a vote of any voter at an election. Further, *Rule 15 (h) of the Electoral Code of Conduct* states in part that;

“15. (1) A person shall not—

(h) offer any inducement, reward or bribe to any person in consideration of such person—

(i) joining or not joining any political party;

(ii) attending or not attending any political event;

(iii) voting or not voting;”

Therefore, acts such as the distribution of free mealie meal in order to induce voters to vote for a particular candidate or not to vote at all, are in fact offences under the Act. In the case of *Mbololwa Sibulwa v Kaliye Manyando* ⁽²¹⁾ the Court noted that other misconduct stated in *Section 97 of the Electoral Process Act* is not defined, and it was held in that matter that offences under the Electoral Code of Conduct

are grounds for nullifying an election, as the Electoral Code of Conduct, is a schedule to the Act.

It is the 1st Respondent's contention that from the record, the Petitioner and his fourteen (14) witnesses failed to show that the 1st Respondent was directly involved in any corrupt practice, illegal or other malpractice, as alleged by the Petitioner. Further, the Petitioner failed to adduce any evidence showing or identifying the 1st Respondent as perpetrator of the said acts, but merely demonstrated to the Court that other persons who remained unknown were involved in the electoral malpractice.

The submission by the 1st Respondent is that it is important that where allegations are made against the 1st Respondent's agents, those agents must be identified, and in this case, **Section 2 of the Electoral Process Act** applies on the definition of an agent, and this position was affirmed in the case of **Chrispin Siingwa v Stanley Kakubo** (14).

The 1st Respondent further argues that the achievement of the standard of a fairly high degree of convincing clarity cannot be achieved by the number of witnesses called, but the quality of the witnesses called, as seen in the case of **Davies Chisopa v Sydney Chisenga** (11), which held that;

"It is not the number of witnesses that prove an allegation, but the substance of the witness".

Therefore, in this matter, while the Petitioner called sixteen (16) witnesses, including himself, the evidence before the Court does not

satisfy the burden incumbent on the Petitioner, and the 1st Respondent and his agents were not linked to the allegations, and the evidence does not show that the majority of the voters in Mkaika constituency were prevented from voting for the candidate of their choice. The case of *Mubika Mubika v Poniso Njeulu* ⁽⁸⁾ is cited as authority for that proposition, stating that the decision in that case was approved in the case of *Jonathan Kapaipi v Newton Samakai* ⁽¹⁶⁾.

The case of *Nkandu Luo and the Electoral Commission of Zambia v Doreen Mwamba Sefuke and the Attorney General* ⁽²²⁾ is also relied on as authority in that regard. In submitting further on the failure by the Petitioner to lead evidence to show that the majority of the voters were or may have been prevented from voting for the candidate of their choice, due to the alleged malpractice, the 1st Respondent states that no witnesses were called to show that effect, but the witnesses who testified stated that they were eating food, which was brought by unknown people, who were not even agents of the 1st Respondent.

The 1st Respondent contends that these witnesses also testified that unknown people distributed mealie meal, cooking oil and chickens, and these unknown people may have been good Samaritans, clothed as PF members that prepared the food that the witnesses and the other people ate. Thus, the standard of proof as laid down in the case of *Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, the*

Electoral Commission of Zambia, the Attorney General ⁽⁷⁾ has not been satisfied.

In particular, the 1st Respondent submits that the evidence given by PW2 and PW5 hinges on hearsay, and reference is made to the case of ***Shamwana and seven others v The People*** ⁽³⁾, which referred to the case of ***Subramaniam v The Public Prosecutor*** ⁽¹⁾. It is also submitted that even if the Petitioner has proved the allegations, he has not proved that the majority of the voters were or may have been prevented from voting for the candidate of their choice, as was held in the case of ***Nkandu Luo and the Electoral Commission of Zambia v Doreen Mwamba Sefuke and the Attorney General*** ⁽²²⁾.

It is trite that a party is bound by their pleadings, and with regard to election petitions, the case of ***Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela*** ⁽⁶⁾ held that;

“An election petition is like any other civil claim and depends on the pleadings...”

Further, ***Rule 5 of the Electoral Petition Rules of 1968, Statutory Instrument No 443*** states that;

“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 ensure a fair and effectual trial in the same way as in ordinary proceedings before the Court, and upon such terms and costs and otherwise, as may be ordered”.

In this case, it will be seen that none of the witnesses called by the Petitioner or indeed himself, who testified in respect of the first allegation, named the 1st Respondent as having distributed the mealie meal alleged to have had the particulars of the immediate past Republican President, Mr. Edgar Chagwa Lungu on it, but alleged that his agents did so, with a view to influencing the voters to vote for the 1st Respondent. They did not however state that the 1st Respondent's agents did so in conjunction with the DMMU, as alleged in the petition.

It has been seen that the Petitioner told the Court that the 1st Respondent's agents took the mealie meal and food stuffs to the constituency, but he did not name who those agents for the 1st Respondent were. PW3 stated that a PF Councillor took mealie meal to Davison Mbewe, while PW4 said that it was the 1st Respondent's friends that took mealie meal to her together with other food stuffs. PW5 on the other hand, said it was the PF that asked him to keep the mealie meal, but he declined to do so.

PW6 testified that the PF distributed mealie meal to headmen in Matunga Ward, on the day of the elections, door to door. **Section 97 of the Electoral Process Act** provides for the nullification of an election where a corrupt or illegal practice or other misconduct in connection with an election, is done by the candidate, their agent or by another person with the candidate or their agent's knowledge and consent or approval. Further, the corrupt or illegal practice or other misconduct must be widespread, such that the majority of the voters

were or may have been prevented from voting for a candidate of their choice.

While the allegation in the petition is that the mealie meal which had the particulars of the immediate past President, Edgar Chagwa Lungu on it was distributed by the DMMU with the knowledge and consent and approval of the 1st Respondent and his agents, I note that PW4 and PW5 testified that mealie meal was taken to them, but they did not say that this was done by the DMMU, which is an organ of the government, but by the 1st Respondent's agents and PF members.

It is a matter of common knowledge that the DMMU is involved in disaster management, and therefore, had there been a disaster for example, with regard to the failure of crops such as maize in Mkaika constituency, such that hunger was prevailing there, it would be expected that the DMMU would distribute mealie meal there. There is no such evidence on record, and the Petitioner's contention is that the distribution of the mealie meal was done with the intention of inducing the voters to vote for the 1st Respondent in the Parliamentary election.

The case of *Reuben Mtolo Phiri v Lameck Mangani* ⁽¹²⁾ distinguished between philanthropic activities and campaigns. It was held as follows in that matter;

“Philanthropic activities is the practice of helping the poor and those in need, especially by giving money and services.....In Zambia, philanthropic activities include developmental projects”.

PW3 whose evidence was not challenged, was that the PF Councillor took mealie meal which had the symbol for Edgar Chagwa Lungu on it to the constituency, and this could only have been done to entice the voters to vote for the PF, and its candidates, as his evidence was that this was done on 11th August, 2021, a day before the elections. Thus, the question that arises is whether it is the 1st Respondent's agents distributed the mealie meal in Mkaika constituency?

Section 2 of the said Electoral Process Act defines an election agent and polling agent. In this regard, an **election agent** is defined as;

“election agent” means a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate’s nomination paper.”

On the other hand, a **polling agent** is defined as follows;

“polling agent” means an agent appointed by a candidate in respect of a polling station.”

Further, **Regulation 55 (1) of the Electoral Process (General) Regulations, 2016** states that;

“55. (1) A candidate shall name an election agent in the nomination paper and, subject to the other provisions of this regulation, the person named shall be the election agent of the candidate for the purpose of that election”.

With that noted, there is no evidence on record to show who the 1st Respondent's election agents were, as documented on his nomination

papers, or indeed, whom he or his election agents had appointed as his polling agents, and whose particulars were notified in writing to the Returning Officers of the polling stations, as required by **Regulation 56**, which provides as follows;

“56. (1) Subject to the other provisions of this regulation, a candidate, or the candidate’s election agent may, in respect of each polling station within the constituency in which the candidate is nominated, appoint a person to be that candidate’s polling agent.

(2) A candidate or the candidate’s election agent shall, at least four days before the day appointed as polling day for the constituency, district or ward concerned, give written notice to the returning officer for the constituency, district or ward stating the names and addresses of the polling agents appointed under sub regulation (1) and specifying the polling station for which each person is appointed as polling agent”.

In the case of *Chrispin Siingwa v Stanley Kakubo* ⁽¹⁴⁾, a question arose as to whether Mr and Mrs Mundale who allegedly gave out money to the voters were the Respondent’s agents, as they campaigned generally for the UPND, and it was alleged that they were agents of the Respondent. The Constitutional Court in that matter stated that an agent of a candidate is the person indicated on the nomination paper in line with **Regulation 55(1) of the Electoral Process (General) Regulations** and **Section 2 of the Electoral Process Act**.

The Court also stated that under **Section 97 2 (a) (ii) of the Electoral Process Act**, a Respondent is only answerable for irregularities and malpractices which are committed by his agent or which are done by another person with the Respondent's knowledge and consent or approval, and in that matter, there was no evidence to show that the corrupt practices committed by Mr and Mrs Mundale were committed with the knowledge and consent or approval of the Respondent.

The 1st Respondent raised the defence that his campaign manager was Smart Phiri. None of the witnesses called by the Petitioner, let alone himself, named Smart Phiri as being part of the PF members that took mealie meal to Mkaika constituency just before the 12th August, 2021, general elections, or that the mealie meal was taken there with the 1st Respondent and Smart Phiri's consent and approval by the persons alleged to have done so, such that an inference can be drawn that the taking of the mealie meal to the constituency was done by the 1st Respondent's agents with the knowledge and consent or approval by the 1st Respondent, and the 1st Respondent should therefore be held accountable.

What the evidence on record shows, contrary to the assertions by the 1st Respondent in submission, that unknown people took the mealie meal, is that a person who PW3 and PW4 identified as a Councillor for the PF, although it is not clear what that term Councillor meant, took mealie meal to the constituency, and whether he is Davison Mbewe that PW3 referred to, while a person called Thomas who was stated as being the PF Chairman in a Ward in the constituency by PW14, or a

polling agent as testified by PW11, availed his home for the voters to eat from once they voted.

Further, PW4 in cross examination testified that she knew the people that went to collect the mealie meal after they left it at her house, stating that the Councillor was among them, although she did not state his name. PW11 named his brother Sulani Lungu, who he stated is a PF Ward Chairman as having taken mealie meal to him.

Therefore, the people who took the mealie meal to the constituency were identifiable, and were said to belong to the PF. The 1st Respondent told the Court that his agents were from the Constituency and District Committees, entailing that they were PF members, but none of the Petitioner's witnesses singled them out by name, such that it can be ascertained whether they were the 1st Respondent's agents. However, it is clear that the evidence on record does not directly connect the 1st Respondent or his agents to the taking of the mealie meal to the constituency.

Further, PW6 alleged that mealie meal was distributed to headmen in Matunga Ward by the PF, although in cross examination, he conceded that he was not there when this was done. Thus, that assertion was not established as a fact. However, there is the testimony that was given by PW4, PW5 and PW11, whose credibility was not discredited in any way, that they were given mealie meal to keep, and PW4 testified that the said mealie meal was thereafter collected. The evidence given by PW3, PW4, PW5 and PW11 was that the mealie meal was taken to the constituency on or around 11th August, 2021, a day before the elections.

In the absence of direct evidence to show that the mealie was distributed to the electorate, the only reasonable conclusion that can be drawn, is that the taking of the mealie meal to the constituency was done with a view to influence the voters to for the PF. PW11 in particular told the Court that his brother Sulani Lungu, the PF Chairman told him that they had taken the mealie meal there, so that the people could vote for the PF, which evidence was not challenged in any way.

This thus raises the question of whether this was done with a view to entice the electorate to vote for the 1st Respondent, with his knowledge and consent or approval or that of his agents? In the case of *Nkandu Luo (Prof) and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General* ⁽²²⁾, the Constitutional Court stated that;

“in addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.”

In the case of *Sunday Chitungu Maluba v Rodgers Mwewa and the Attorney General* ⁽¹³⁾, the Constitutional Court guided that widespread means widely distributed and disseminated. Further, the case of *Samuel Mukwamataba Nayunda v Geoffrey Lungwangwa* ⁽¹⁷⁾ held that under the current electoral regime, as provided in Section 97(2)(a), the position on proof of one corrupt or illegal practice or

misconduct being sufficient to nullify an election still stands, but only to the extent where it is also proved that the one act in issue prevented or may have prevented the majority of the voters from electing a candidate of their choice.

In this matter, the testimony given by PW4, PW5 and PW11, does not show that the act was widespread, such that the majority of the voters in the constituency were prevented from voting for a candidate of their choice. This is because other than the evidence showing that there are ten (10) wards in Mkaika constituency, there is no evidence on record to show how many registered voters are in that constituency, and how many voters are in the Wards where the mealie meal was taken, let alone, to which wards the mealie meal was taken, such that that number of voters can be compared against the rest of voters in the constituency, and a conclusion drawn, that the distribution of mealie meal in those wards affected the majority of the voters in the constituency, and therefore, the majority of the voters may or were prevented from voting for a candidate of their choice.

The closet evidence adduced in that respect, came from PW4 who testified that Chimutende Ward has a number of polling stations, and the people were divided according to the polling stations. However, she did not state the basis for her evidence, and it is therefore unclear, how that information came to her knowledge. In any event, Chimutende Ward is only but one ward out of the ten (10) in Mkaika constituency, and even if there was widespread distribution of mealie meal in that ward, this would not entail that the majority of the voters in the constituency were or may have been prevented from voting for

the candidate of their choice. This is because there is no evidence showing that such a practice prevailed in the rest of the wards in the Constituency.

The 1st Respondent in the submissions states that the testimony given by PW5 hinges on hearsay. However, the basis for this argument is not stated. It will be noted that the testimony of PW5 is that he was asked to keep mealie meal by some PF members, but he declined to do so. This witness testified that the mealie meal was taken to his house, which entails that he saw it. When he was cross examined, he was not asked on whether he did not see the mealie and he agreed. What he was asked in cross examination, was to confirm that he was approached by some people who asked him to stock some items, and he agreed.

Therefore, the fact that mealie meal was taken to PW5 and he was asked to keep it, although he refused to do so, is credible evidence. The only question is whether it was mealie meal that was labelled with the former President Edgar Chagwa Lungu's particulars, as alleged by the Petitioner, as PW5 did not establish that fact.

It has been seen that the evidence does not however establish that the 1st Respondent or his agents took the mealie meal to the constituency for distribution, as they were not identified as doing so, and neither does it establish that the people who did, did so with the 1st Respondent's knowledge and consent or approval, or that of his agents, as it has not been shown that either the 1st Respondent or his agents had the knowledge of the same and they consented or gave their approval.

In cross examination, the witnesses called by the Petitioner agreed that when this was done, they did not see the 1st Respondent among the said people.

The 2nd Respondent submits that the Petitioner whilst being aware of the alleged malpractice did not report the same to the ECZ. It is on record that the Petitioner testified that the malpractices began two (2) days prior to the election. **Section 113 of the Electoral Process Act** establishes Conflict Management Committees, whose purpose is to resolve electoral disputes. **Regulation 13 (3) of the Electoral Code of Conduct** states that;

“(3) Conflict management committees shall mediate in electoral disputes and shall encourage amicable settlement of electoral disputes within twenty four hours of receipt of a formal complaint”.

This is similar to what is provided in **Regulation 5 of the Electoral Process (Code of Conduct) (Enforcement) Regulations, 2016**. As the evidence shows that the malpractices began about two (2) days before the elections, which evidence was not contested, even if the Petitioner had reported the same to the District Conflict Management Committee on the day that it happened, the Committee would have had to summon the 1st Respondent or his agents, and by then, the elections would have been held.

In short, reporting to the District Conflict Management Committee would not have achieved any purpose. Further, in any event, even if the District Conflict Management Committee had dealt with the

complaint, that would not have prevented the Petitioner from bringing the petition based on the complaint.

It has been seen that what the evidence establishes is that there was taking of mealie meal to the constituency, and cooking of nshima for the voters in some wards, but the cooking of nshima for the voters is not the allegation in the first ground. In the *Nkandu Luo (Prof)* case seen above, in noting that the evidence adduced did not support one of the allegations in the petition, the Constitutional Court referred to the case of *Christopher Lubasi Mundia v Sentor Motors Limited* (2), where it was held that where the pleadings are at variance with the evidence in Court, the case fails, since the case is completely recast without actual amendment of the pleadings.

Thus, the evidence regarding the cooking of nshima for the voters cannot stand in respect of the first allegation. I have found that while PW3, PW4, PW5 and PW11 were not discredited on their evidence that mealie meal was taken by the PF to their constituency, by a person identified as a Councillor, with other PF members, among them Davison Mbewe and Sulani Lungu, that evidence did not establish that this was done with the 1st Respondent's knowledge and consent or approval or that of his agents, and that the practice was widespread, such that the majority of the voters in the constituency were or may have been prevented from voting for the candidate that they preferred.

It will be noted that in the *Nkandu Luo (Prof)* case, the Constitutional Court stated that it was not sufficient for the petitioner to say that the act complained of, was done by a member of the respondent's political

party or his supporters. The act being done by another person can only stand as a ground for nullification of an election, if it is established that it was done with the candidate's knowledge and consent or approval or of that of their agent.

There being no such evidence on record, and bearing in mind that acts done by members of a candidate's political party do not suffice, unless they are done with the candidate's knowledge and consent or approval, the first allegation therefore fails.

2. THE 1ST RESPONDENT WITH HIS AGENTS AND/OR GOVERNMENT OFFICIALS SLAUGHTERED CATTLE ON ELECTION DAY AND DISTRIBUTED TO VOTERS

With regard to this allegation, the evidence on record shows that PW3 testified that chickens were taken to his village called Mukota by a person he alleged was a PF Councillor, who was with other people. PW4 of Chimutende village who was given food stuffs to keep did not refer to any cattle, while PW7 also of Chimutende ward, who was one of the persons assigned to cook food for the voters testified that she was given relish among other food stuffs, but she did not specify any cattle.

This allegation is denied by the 1st Respondent.

In short, there is no evidence that was led to prove that allegation, even though the Petitioner testified that the 1st Respondent and his agents slaughtered cattle, which was distributed to the voters, as he agreed in cross examination, that he did not witness the same, in the

polling stations that he visited, although not all of them, as the area is vast.

The Petitioner testified that he told his agents to report the malpractice to the District Conflict Management Committee, and there is no evidence to show that this was done. However, as already noted, the Petitioner testified that the malpractice began about two (2) days before the elections, and his witnesses verified that position by stating that it was around the 11th August, 2021 that they saw mealie meal and other food stuffs being taken to the constituency.

If at all, the Petitioner or his agents had reported the malpractice to the Conflict Management Committee, by the time that Committee summoned the 1st Respondent or his agents, the elections would have been held, and resolving the dispute would have been academic. The second allegation fails.

3. THE 1st RESPONDENT AND HIS AGENTS AND/OR SERVANTS FERRIED VOTERS TO POLLING STATIONS AND BACK TO THEIR RESIDENCES WITH STRICT INSTRUCTIONS NOT TO VOTE FOR ANY OTHER CANDIDATE BUT THE 1st RESPONDENT AND THEIR PRESIDENTIAL CANDIDATE

The witnesses that were called in respect of this allegation were the Petitioner, PW2, PW3, PW4, PW6, PW8, PW13, PW14 and PW15. The Petitioner in re-examination told the Court that he saw the 1st Respondent's agents ferry voters to and from the polling stations. PW2 testified that he lives at Walubwe School which is near the polling station. He stated that upon returning from voting, he saw a white

canter registration number ABE 1758, which had blue and red stripes in the side, ferrying voters to the polling station. He also stated that the driver of the vehicle who is his friend, informed him that the Councillor for the PF had booked the vehicle.

PW3, who as already seen, was the Petitioner's polling agent, on the other hand, testified that on the day of voting, vehicles were booked to ferry voters to the polling stations, with the voters being instructed to vote for the 1st Respondent and the Councillor Salatiel Mbewe. PW3 further testified that after the voters voted, they went to Davison Mbewe's house to eat nshima.

PW4 told the Court that the PF told the voters to vote for them, and that these people were divided according to the polling stations, and they told the voters that upon voting, they could go and eat at the places that had been designated for cooking of the food. PW6's testimony was that he saw a vehicle go and ferry the voters to the polling station, and he like PW3 stated that the voters were instructed to go and vote for the PF, and thereafter they could go and eat the food that had been prepared for them. This witness told the Court that he got on a vehicle to go and vote.

PW8 like PW2, gave the registration number of the canter that he saw going to ferry the voters as ABE 1758, and he confirmed the other witnesses' testimony that the voters who were ferried in the vehicle were instructed to go and vote for the PF, and the 1st Respondent. It was also his testimony, that after he voted, he and the other voters were taken to house where food had been prepared for them to eat.

It will be seen that witnesses like PW10 and PW14 testified that after they voted, they received food cooked by the PF at Thomas' house, who PW10 said was a polling agent, and PW14 stated was the Chairman of the PF. PW13 testified that as they were voting, the PF took food there, and told them that if they voted for the PF, they would eat nshima. The evidence given by PW15 was that he went with his friends to vote, and as they were on the queue, they saw food being cooked. After, they voted, they ate the food, which he said was prepared by Mr Kafunka, although he did not know in what capacity Mr Kafunka did so.

The 1st Respondent denies this allegation, stating that he did not have an agent named Thomas.

None of these witnesses called by the Petitioner testified that they saw the 1st Respondent or his agents ferry the voters and tell them to vote for the PF. PW13 in cross examination, stated that the 1st Respondent had promised them at the start, while PW14 testified that he heard the 1st Respondent tell the voters during the campaign meetings, that on the day of voting, there would be a celebration and nshima would be cooked, if they voted for the PF.

In cross examination, whilst PW14 initially named five (5) places where he said the 1st Respondent held meetings, as being Mupambeni and Kaima villages twice and at Salivuka village, when cross examined further, agreed that the 1st Respondent held meetings at Chavuka School and Mutika village. PW14 conceded that he may not have been aware of how many meetings the 1st Respondent held, but reiterated that on the day of voting, he ate nshima.

While PW14 may not have known the exact number of meetings that the 1st Respondent held in the constituency, during the campaign period, he certainly was not discredited on the fact that after he voted, he ate nshima that was prepared by the PF.

The testimony given by PW2 alleges that a person who was a PF Councillor booked the vehicle registration number ABE 1758 to ferry the voters to go and vote, although I agree with the submissions by the 1st Respondent that this evidence is hearsay. This is because, PW2 testified that the driver of the canter who is his friend, informed him that the Councillor had booked the vehicle. The said friend did not come to Court to testify, and the case of *Subramaniam v Public Prosecutor* ⁽¹⁾ held that;

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made”.

It is clear in this matter, that the object of PW2 testifying as to who hired the canter that ferried voters to and from the polling stations to go and vote, was meant to establish the truth of that statement. Thus, it is hearsay evidence, and is inadmissible.

I must however state that ferrying of voters to and from polling stations to go and vote, if done using one's personal resources, on its'

own is not an electoral malpractice. **Rule 15 (1) (l) of the Electoral Code of Conduct** states as follows;

“15. (1) A person shall not—

(l) use Government transportation or resources or facilities to transport voters to polling stations;”

Therefore, what is prohibited is the use of government vehicles and resources to ferry voters to polling stations. This can even be seen from the case of **Christopher Kalenge v Annie Munshya, the Electoral Commission of Zambia and the Attorney General** ⁽⁹⁾, where the Supreme Court stated as follows;

“The argument by learned Counsel for the appellant while relying on the Mabenga case⁷ is that the use of government transport is an illegal practice. We agree. However, in this case the transport used was private transport and it is settled that the use of private transport to ferry voters is not an offence under our Electoral Laws. Indeed, as the learned Judge found, there was no evidence to show that the two trucks were government vehicles or that they had been hired by the 1st respondent. There was also no evidence to show that the persons who were on the trucks were agents of the 1st respondent. We have given due consideration to the authorities cited by Counsel for the appellant herein such as the cases of Webster Chipili⁸ and Victor Kachaka⁶ which in our view cannot assist the appellant. To argue that the use of private transport which

had a message to vote on the clock to ferry voters amounted to a "corrupt practice or illegal practice" in terms of Section 93 (2) (a) of the Act; that it amounted to bribery as defined under Section 79(1)(c) of the Act and that it amounted to treating as defined under Section 81 of the Act is casting the net too wide".

For a private individual using their own resources, what becomes an electoral malpractice or illegal practice is ferrying voters to go and vote, and exerting influence on them with regard to the manner in which they should vote, as it a person's right to freely choose who they should vote for in an election.

While the witnesses called by the Petitioner established that vehicles were hired to ferry voters to the polling stations, and that the voters were instructed to vote for the PF when being ferricd, as none of the witnesses who testified to that effect were discredited in their testimony, there is however no evidence to show that the practice of ferrying the voters to and from the polling stations so that they could go and vote, and instructing them to vote for the PF was widespread in the constituency, such that it can be said that as a result, the majority of the voters were or may have been prevented from voting for the candidate of their choice.

This is because there is no evidence to show that the ferrying of voters took place in the majority of the ten (10) wards in Mkaika constituency. PW2, who lives near Walubwe polling station and saw the white canter registration number ABE 1758 that he said ferried the voters, did not say in what ward Walubwe is, but PW6 testified

that he is from Walubwe ward. Therefore, Walubwe polling station is in Walubwe ward. PW3 said that he is from Chilongamawe ward, and PW8 on the other hand said that he is from Jacob village in Chief Mbangombe, but he did not name the ward in which this village is located.

This evidence while showing that voters in two (2) wards were ferried to polling stations, and were told to vote for the PF, does not establish how many voters in those wards were affected by the act of being ferried in the transport that was hired and were influenced to vote for the 1st Respondent. It has not also been established that this was done with the knowledge and consent or approval of the 1st Respondent and his agents.

It will be noted that the fact that nshima was prepared for the voters to eat after they voted, was not seriously challenged, and neither was the assertion that the voters were told that they would eat nshima after they voted for the PF, when they were ferried to the polling stations to go and vote. However, the allegation that the voters were told to vote for the PF, and that they would eat nshima thereafter, was not pleaded, and as I have noted with regard to the first allegation, it cannot stand as evidence in support of the allegation.

Having found that the ferrying of voters to and from the polling stations and telling them to vote for the PF, has not been established to have been done with the knowledge and consent or approval of the 1st Respondent and his agents, or that indeed it was widespread in the constituency that the majority of the voters may or were prevented from voting for the candidate of their choice, the third ground fails.

4. THE 2nd RESPONDENT IN AIDING THE 1st RESPONDENT TO WIN THE ELECTION DELIBERATELY, WILFULLY AND UNLAWFULLY CONFISCATED FORM GEN 20 AFTER THE ELECTIONS AND DOCTORED THE RESULTS ON EACH OF THE SAID FORMS TO SUIT THEIR PREFERRED CANDIDATE WHO IS THE 1st RESPONDENT

With respect to this allegation, the Petitioner testified that after the close of the voting and counting of the votes had been done, he had called his polling agents and asked them to collect the GEN 20 Forms. However, his polling agents told him that the said forms had been confiscated. PW3 testified that he was the Petitioner's polling agent. In cross examination, he agreed that as a polling agent, he had witnessed the counting of votes, and he had observed the conduct of the elections.

PW9 who stated that he was a political official and agent for the Petitioner, and was at the Totaling Centre, testified that when some results were taken to the Returning Officers for announcement, they had noted that some of the results had mistakes, and the Returning Officers told the people who had taken the results to go and correct the said mistakes.

Both Respondents deny this allegation.

Section 35 (1) of the Electoral Process Act provides for polling and election agents. It states as follows;

"35. (1) A candidate may appoint—

(e) two polling agents for each polling station; and

(f) two election agents for each venue where counting of the votes will take place”.

Further, **Section 36** provides for the powers and duties of polling and election agents, and it states in part that;

“36. (1) An election or polling agent may observe the proceedings during—

(a) voting;

(b) the counting of votes; and

(c) the announcement and declaration of the result of an election.

(2) The absence of an election or polling agent from a gazette or prescribed place where an electoral proceeding is being conducted shall not invalidate those proceedings”.

Further, **Regulation 5 of the Electoral Code of Conduct** states that;

“5. (1) An election agent or polling agent shall, subject to this Code, have the following duties during an election:

(a) observe the opening and closing of a polling station assigned to them on polling day;

(b) witness the voting process;

(c) witness the count of ballot papers for candidates;

(d) witness the announcement of results; and

(e) witness the declaration of results, where applicable.

(2) An election agent or polling agent shall counter sign the election results duly announced or declared by a presiding officer or returning officer, as the case may be, except that failure to countersign the election results by such election agent or polling agent shall not render the results invalid”.

In terms of counting of votes, *Section 67(1) of the Electoral Process Act* states that;

“(1) Votes shall be counted at the polling station at which those votes were cast”.

This is also provided for in *Regulation 44(1) of the Electoral Process (General) Regulations, 2016*. With regard to any objections with the counting votes, *Section 70 of the Electoral Process Act* provides that;

“70. (1) An election or polling agent may object to an alleged inaccuracy in the counting of the votes or the announcement of a result under section seventy-one.

(2) An objection under subsection (1) shall be made to a presiding officer, in the prescribed form, at any stage before the presiding officer has announced the result.

(3) A presiding officer shall determine the objection and decide whether to order a recount.

(4) A presiding officer shall notify the objector and any other party involved in the objection, of the decision made under subsection (3).

(5) If a presiding officer orders a recount, the presiding officer shall announce the result afresh.

(6) An appeal against the decision of a presiding officer may be made to the returning officer in the prescribed form.

(7) A presiding officer shall keep a written record, in the prescribed form, of each objection under subsection (1) and each decision under this section”.

Further, *Regulation 47 of the Electoral Process (General) Regulations, 2016* states that;

“47. A candidate, an election agent or polling agent may, if present when the counting or recounting of the votes is completed, request the presiding officer to have the votes re-counted, or the presiding officer may, have the votes re-counted or again recounted, except that the presiding officer may refuse the request if, in the opinion of the presiding officer, it is unreasonable”.

From the above provisions, PW3 and PW9 as polling agents and election agents of the Petitioner, who were at the polling station and Totaling Centre were entitled to observe the counting and announcement of the votes, and to object in the prescribed form to any alleged irregularity in the counting of the votes to the presiding officer, if there was error in the same, as alleged by PW9. Further, if they were present during the counting or re-counting of the votes, they

could have asked the presiding officer to recount the said votes, if they had observed any irregularity in the counting.

The conduct of elections is governed by the law, and under **Article 229 (2) (b) of the Constitution**, the ECZ, who is the 2nd Respondent herein, is mandated to conduct elections. The case of **Giles Chomba Yamba Yamba v Kapembwa Simbao and others** ⁽¹⁹⁾ held that the ECZ fulfils its functions by ensuring that the requirements of the Act are respected and observed in the electoral process. Under **Regulation 4 (1) of the Electoral Process (General) Regulations**, Returning Officers are appointed for each constituency, district and ward.

Then under **Regulation 29 (1) (b)** of the said Regulations, Returning Officers are required to provide materials for the ballot.

In this matter, the allegation is that the 2nd Respondent in aiding the 1st Respondent to win the election, deliberately, willfully and unlawfully confiscated the GEN 20 Forms soon after the elections, and doctored them to suit the preferred candidate, who was the 1st Respondent. The GEN 20 Form is provided for in **Regulation 49 (2) of the Electoral Process (General) Regulations, 2016** which states that;

“(2) The presiding officer shall announce how the votes have been cast for each candidate in Form GEN 20 set out in the Schedule, and how many have been rejected in the polling station and may require if present, election agents or monitors to countersign the results, except that failure

to countersign the election results does not render the results invalid”.

From the above, it can be seen that the GEN 20 Form contains the details of how the votes are cast at a particular polling station for each candidate, and the number of votes that have been rejected in the polling station for each candidate. The form is signed by election agents and election monitors who are present, but their failure to sign does not invalidate the results. In short, the GEN 20 contains details of the results of the votes for each candidate in the election.

In terms of nullification of an election where there has been non-compliance with the Electoral Process Act, in relation to the conduct of an election, ***Section 97 (2) (b) of the said Act*** provides that;

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

The Petitioner on being cross examined, agreed that his polling and election agents were sensitized by the ECZ, and PW3 confirmed this when he was cross examined. Therefore, PW3 was aware of the procedure that he could have used to air any grievance with regard to the counting of the votes, although the evidence shows that he did not testify with regard to the confiscation of the GEN 20 Forms, even

though he stated that he was at a polling station when the votes were being counted.

PW3's evidence in respect of the polling station where he was, with regard to any confiscation of the GEN 20 Forms, would have substantiated the Petitioner's allegation, and the Petitioner's testimony in relation to the GEN 20 Forms being confiscated with a view to doctoring them, is hearsay evidence. This is because in his evidence, he stated that he called his agents and told them to collect the GEN 20 Forms, and he was told that they had been confiscated, entailing that he did not observe the same. In any event there is no evidence to show in how many of the polling stations the GEN 20 Forms are said to have been confiscated as alleged.

PW9, on the other hand stated that some of the results of the election had mistakes, but he did not state that he raised objection to those results as prescribed by law.

Doctoring of the GEN 20 Forms to suit a preferred candidate is a very serious allegation, and if successfully proved, affects the results of an election, as the 2nd Respondent would not have complied with the provisions of the Act in the conduct of an election, and would also have invariably, have prevented the electorate from voting for a candidate of their choice, by the said doctoring of the results. However, there is no evidence to show that the GEN 20 Forms were in fact confiscated by the ECZ officials after the voting and counting of votes was done, and they were doctored to suit the 1st Respondent, as alleged. The fourth ground fails.

5. AGAINST THE ELECTORAL REGULATIONS, THE PETITIONER WAS DENIED AND/OR PREVENTED FROM ENTERING THE TALLING CENTRE, WHICH IN ITSELF WAS A CLEAR INDICATION OF UNFAIRNESS OR MALPRACTICE TO THE EXTENT THAT THE PETITIONER ONLY ACCESSED THE FINAL PURPORTED GEN 19 FORM AT THE TIME OF PRESENTING HIS PETITION

In support of this allegation, PW9 testified that on Friday, as he was at the Totalling Centre, when the Petitioner phoned him. When he went outside, he found the Petitioner outside the gate, who told him that he had been denied access into the Totalling Centre. PW12, who was also at the Totalling Centre as the Petitioner's agent, stated that on 13th August, 2021, the security guards who were at the gate did not allow the Petitioner to enter the Totalling Centre.

PW12 in cross examination, could not state whether the said security guards who stopped the Petitioner from entering the Totalling Centre were from the police or the ECZ, but testified that they wore police uniforms.

The 2nd Respondent has denied this allegation, and in the submissions, states that PW9 and PW13, who I believe is PW12, as the initial PW10 was dispensed with as a witness, who were the Petitioner's agents and were at the Totalling Centre, testified that the Petitioner was denied access into the Totalling Centre. However, none of these witnesses testified that the alleged blockade of the Petitioner was by or at the instance of the Respondents or their agents. That in

fact, none of them testified that the 2nd Respondent was made aware of such allegation.

The 2nd Respondent further submits that it is equally clear that the conduct of the elections by the 2nd Respondent cannot be faulted, and that this case did not warrant the addition of the 2nd Respondent, and the threshold which would have justified such acts as envisaged in *Section 97(4) of the Electoral Process Act* has not been met.

Section 4 (6) of the Electoral Process Act states that;

“The Zambia Police Service shall enforce law and Order at polling stations and undertake any criminal proceedings, subject to subsection (2), in respect of an offence committed by any person in contravention of this Act”.

A polling station is defined in *Section 2 of the Electoral Process Act* as;

“polling station” means a place established as a polling station by the Commission under section twenty-four;”

Going by the above, it is only police officers who are mandated to guard polling stations, and it has been seen that PW12's testimony was that the security guards who denied the Petitioner entry into the Totaling Centre were wearing police uniforms. This entails that they were indeed police officers, as mandated by the law. Further, it is an offence under the law for one to wear a police uniform, when they are not. The allegation by the Petitioner that he was denied entry into the

Totaling Centre so that he could observe how the results of the polls were flowing, was not discredited by the cross examination.

Regulation 32 (4) of the Electoral Process (General) Regulations, 2016 states that;

“(4) A candidate, election agent, polling agent or a person accredited by the Commission to enter and remain in a polling station shall, before attending the taking of a poll at any polling station, take and subscribe an oath or make an affirmation, in Form GEN 1 set out in the Schedule before the returning officer for that constituency, district or ward”.

Under this Regulation, a candidate is empowered to enter and remain in a polling station. **Rule 3 of the Electoral Code of Conduct** states that;

“3. (1) The Commission shall, where reasonable and practicable to do so—

.....

(h)ensure that police officers act professionally and impartially during the electoral process;

(j) ensure that equal opportunity is given to all stakeholders, particularly political parties and independent candidates to participate in and conduct their political activities in accordance with the law; and”

The Petitioner was a candidate in the elections, and he had a right to access the results of the elections, let alone enter the Totaling Centre, to observe how the counting of votes was going on. The 1st Respondent in his testimony in cross examination, told the Court that he was allowed into the Totaling Centre, as he was a candidate in the election. Thus, it was irregular to have allowed the 1st Respondent to enter the Totaling Centre, and at the same time deny the Petitioner entry when both were candidates in the election.

The evidence does not establish the reason why the Petitioner was not allowed into the Totaling Centre, and the Petitioner's testimony was that the police officers who were manning the Totaling Centre told him that they were under strict instructions from their superiors not to allow him into the Totaling Centre. Therefore, the reason why he was not allowed into the Totaling Centre remains speculative, and neither PW9 nor PW12 who were at the Totaling Centre gave reasons why this was so, but they just confirmed the Petitioner's allegation.

However, the 2nd Respondent being mandated by the law to ensure that police officers act professionally and impartially during the electoral process, by the said police officers denying the Petitioner entry into the Totaling Centre, when the 1st Respondent was allowed, the 2nd Respondent did not act in accordance with the law. The question that thus arises, is whether the denial of the Petitioner to enter the Totaling Centre is ground for nullification of the elections?

It is not in contention that the Petitioner was a candidate in the election, and his entry into the Totaling Centre cannot be said to have had an effect on how the elections were conducted. Rather, his denial

into the Totaling Centre undermined the principles of transparency, as each candidate had the right to observe how the counting of votes was going on. This also went against the spirit of Article 45 of the Constitution which requires that the electoral process and system of administering elections shall be free and fair.

It will be noted that the Petitioner had his agents like PW9 and PW12 who were inside the Totaling Centre, and who observed the proceedings, and they should have raised any issues, if there was any irregularity with respect to the Mkaika Parliamentary results in line with the law, although this does not excuse the refusal to allow the Petitioner into the Totaling Centre.

Section 97 (4) of the Electoral Process Act states that;

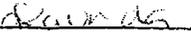
(4)An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions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

While there is no evidence to show that the Petitioner reported the failure to allow him into the Totaling Centre to the ECZ, such that remedial measures could have been taken, in line with **Section 97 (4) of the Electoral Process Act**, the omission by the ECZ did not render the conduct of the elections not to have been in conformity with the

law, and as a result, it affected the results of the election. The fifth ground also fails.

Having found that all the grounds raised have failed, the petition is hereby dismissed, and pursuant to **Section 108 (1) of the Electoral Process Act**, I find that the 1st Respondent, Peter Phiri, was duly elected as Member of Parliament for Mkaika Constituency, and I so declare. The petition having been made in the public interest, I order that each party shall bear their own costs of the proceedings. Leave to appeal is granted.

Delivered in Open Court at Chipata This 24th Day of November, 2021


S. KAUNDA NEWA
HIGH COURT JUDGE