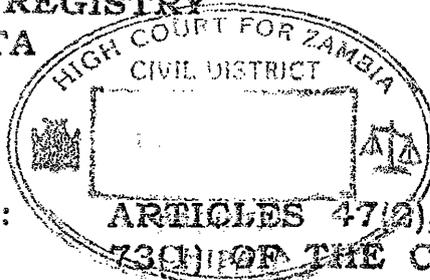


IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT CHIPATA
(Civil Jurisdiction)

2021/HP/EP/0034



IN THE MATTER OF: ARTICLES 47(2), 51, 54, 58, 72(2) C,
73(1) OF THE CONSTITUTION OF THE
REPUBLIC OF ZAMBIA.

AND

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

AND

IN THE MATTER OF: CODE OF CONDUCT RULES 12, 15(A), (H),
(K).

AND

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

BETWEEN:

YAMIKANI PHIRI

PETITIONER

AND

JONATHAN DAKA
ELECTORAL COMMISSION OF ZAMBIA

1ST RESPONDENT
2ND RESPONDENT

Delivered in Open Court before the Honourable Mrs. Justice Mwenda-Zimba on the 17th
day of November, 2021.

For the Petitioner : Mr. G. Lungu of Muleza Mwiimbu and Company
For the 1st Respondent : Mr. R. Ngulube of Tembo Ngulube and Associates
For the 2nd Respondent : Mr. M. Lisimba of Mambwe, Siwila and Lisimba Advocates

JUDGMENT

Cases referred to:

1. Micheal Mabenga v. Sikota Wina, Mafo Wallace Mafiyo and George Samulela, (2003) Z.R. 110.
2. Nkandu Luo v. Doreen Sefuke Mwamba & Attorney-General, Selected C.C.Z Judgment No. 51 of 2016. (unreported)
3. Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v. Frederick Jacob Titus Chiluba, (1998) Z.R. 79.
4. Richwell Siamunene v. Sialubalo Gift, (2017) 3 Z.R. 335.
5. Giles Chomba Yamba Yamba v. Kapembwa Simbao, Selected C.C.Z Judgment No. 6 of 2018.
6. Abiud Kawangu v. Elijah Muchima C.C.Z, Appeal No. 8 of 2017. (unreported)
7. Brelsford James Gondwe v. Catherine Namugala, Appeal No. 175 of 2012. (unreported)
8. Steven Masumba v. Elliot Kamondo, (2017) 3 Z.R. 130.
9. Mubita Mwangala v. Inonge Mutukwa Wina, Appeal No. 80 of 2007 (unreported)
10. Mazoka v. Mwanawasa, (2005) ZR 138.
11. Kafuka Kafuka v. Mundia Ndalamei, Appeal Number 15 of 2016. (unreported)
12. Subramaniam v. Public Prosecutor, (1956) 1 WLR 965.
13. Masauso Zulu v. Avondale Housing Project, (1982) ZR 172.
14. Kakoma v. Kundoti Mulonda, C.C.Z Appeal No. 5 of 2017.
15. Maluba v. Mwelwa and the Attorney-General, CCZ Appeal No. 4 of 2017.

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016, Articles 47(2), 68(2) and 73(1).
2. The Electoral Process Act No. 35 of 2016, Section 97.
3. The Electoral Process Act No. 35 of 2016, Code of Conduct, Regulations 5 (2), 15(1) (k) and (l).

Other work referred to:

Halsbury's Laws of England, 5th Edition, Vol. 38A, paragraph 667.

1.0 INTRODUCTION

- 1.1 This is a Judgment in the Petition relating to the parliamentary elections held in Chadiza Constituency on the 12th day of August, 2021. In those elections, the Petitioner herein, Mr. Yamikani Daka of the United Party for National Development (UPND), and 5 other candidates vied for the Chadiza parliamentary seat. The 5 others are Jonathan Daka (the 1st Respondent), who was a candidate on the Patriotic Front (PF) ticket, Obet Phiri, an Independent candidate, Banda Aaron Phiri of the Socialist Party (SP), Olivia Phiri sponsored by the People's Alliance for Change (PAC) and Chaka Zulu of the Movement for Multi-party Democracy (MMD).
- 1.2 At the close of the vote counting exercise, the Returning Officer declared the 1st Respondent as the winner of the seat, after he polled 9,396 votes. The Petitioner, of the (UPND), was the runner-up, having garnered 9,354 votes. In third position was Obet Phiri, who polled 9,101, while 381 votes went to Aaron Banda of SP. Next was Olivia Phiri (PAC), who got 336 votes, while Chaka Zulu (MMD) polled 274.
- 1.3 Dissatisfied with the results, the UPND candidate, Yamikani Phiri, petitioned this Court on the 27th of August, 2021 for, among other

things, a declaration that the election of the 1st Respondent as Member of Parliament for Chadiza Constituency be declared null and void *ab initio*.

2.0 THE PETITION

2.1 According to the Petition, the 1st Respondent was not validly elected for the following reasons:

- “1. That there was massive manipulation of votes and tampering with the GEN 20a form where UPND polling agents were not allowed to sign the said form at-
 - a. Ambizi polling station;
 - b. Taferansoni polling station, the Presiding Officer did not sign; and
 - c. Kalongwezi polling station, the Presiding Officer did not sign.
2. That the GEN 20a form for Chamaseche polling station and Ambizi polling station were never signed or filled with the details of the polling agents apart from the Presiding Officers who signed the said documents.
3. That the record of proceedings for Chiyambi Stream-01 and Chadiza Primary School Stream-03 were not signed by the Presiding Officers nor were there details indicated.

4. That there was rampant voter buying or treating at Chilenga polling station on the day of voting by the Respondent with his agents.
5. The Respondent gave out bicycles to voters to vote for him and one such beneficiary was Christopher Phiri.
6. The 1st Respondent using a GRZ Vehicle belonging to the DC, George Phiri, GRZ 232CM and while working for the Disaster Management and Mitigation Unit (DMMU) were seen distributing bags of mealie meal to the voters in all the Polling stations in the Constituency at Chadiza.
7. That the 1st Respondent continued with the distribution of the said mealie-meal particularly on the 9th of August, 2021, using a Canter branded in PF materials Registration No. ALJ 3523 to all voters in the Constituency.
8. That a UPND cadre Skeva Banda was beaten by PF cadres on voting day when he was moving from Kampini polling station to Chimbala polling station where he went to monitor and protect votes in favour of the Petitioner.
9. Another UPND Cadre Godfrey Phiri was badly beaten by PF cadres on 3rd August, 2021 after accusing him of de-campaigning the PF.

10. A well-known PF campaign member Samuel Phiri was employed by the 2nd Respondent as an usher at Ngala polling station on voting day;
11. That a Police Officer on 11th August, 2021, was seen driving a white double cab Hilux motor vehicle belonging to the 1st Respondent with Registration No. GRZ 471BX which number plate was later removed and the following day being the 12th of August, 2021, the said motor vehicle was seen being driven by the 1st Respondent as the owner but this time with a different number plate.
12. That a PF cadre, Isaac Lungu, was employed by the 2nd Respondent to work on the 2nd Respondent's servers at Chadiza totaling centre.
13. That prior to the elections, the 2nd Respondent, working in conjunction with the 1st Respondent and his agents registered a lot of foreign nationals, particularly from Mozambique who were even allowed to vote in Zambia.”
[sic]

2.2 The affidavit verifying petition was sworn by the Petitioner, and it was a reverberation of the contents of the Petition.

2.3 The Petitioner deposed, in addition, that the name of the Police Officer who was seen driving a white double cab Hilux motor vehicle was Chama Mpundu. With regard to the allegation of

rampant voter buying, he referred me to a video clip showing the activities of the 1st Respondent. It was marked as “YP5”. According to the Petitioner, the election was not properly conducted as all the candidates refused to sign on the declaration of results form, exhibited as “YP11”.

2.4 The deponent swore that on account of the malpractices perpetrated by the 1st Respondent and his agents, coupled with the 2nd Respondent’s less than professional conduct, the majority of voters in the Constituency and all polling stations were prevented from voting for their preferred candidate.

3.0 THE 1ST RESPONDENT’S ANSWER TO THE PETITION

3.1 On the 14th of September, 2021, the 1st Respondent filed his Answer to the Petition. He denied the contents of the Petition and stated that the Petitioner’s agents were absent from the polling stations at the time when they were required to sign the GEN 20a forms.

3.2 According to the 1st Respondent, the story of voter buying and treating at Chilenga polling station was false. He stated, in his Answer, that neither he nor his official election or polling agent

participated in any such thing. Further, that he never gave any bicycle to one Christopher Phiri. His version was that the PF, as a party, distributed bicycles to all of its 20 ward officials for party mobilization, but that this was done on the 13th of August, 2021, post-election day.

3.3 The 1st Respondent flatly denied ever working with the District Commissioner (DC), Mr. George Phiri, on any DMMU or other function related to elections. It was the 1st Respondent's further reaction that he had never driven or operated a Mitsubishi Canter bearing Registration No. ALJ 3523.

3.4 The Answer went on to describe the narrative of assault allegedly perpetrated against Skeva Banda and Godfrey Phiri as vague and ambiguous. The 1st Respondent denied having personally, or by his polling agents, participated in the vice.

3.5 It was also stated in the Answer that the 1st Respondent did not have any Samuel Phiri or Isaac Lungu in his campaign team. Further, that no individuals going by those names were registered as the 1st Respondent's election or polling agents.

3.6 In his affidavit verifying Answer, the 1st Respondent swore that the statements in the Answer were true and correct to the best of his knowledge, information and belief.

4.0 THE 2ND RESPONDENT'S ANSWER TO THE PETITION

4.1 On 22nd September, 2021, the 2nd Respondent filed its Answer and affidavit verifying Answer. It was averred, in the Answer, that the 2nd Respondent is non-partisan in election disputes and in the conduct of elections generally, but no comment was made on the allegations relating to voter buying and treating, assault, as well as distribution of mealie-meal and bicycles.

4.2 The accusation of voter manipulation and tampering with the GEN 20a forms, as well as the UPND polling agents not being allowed to sign, was similarly refuted. According to the 2nd Respondent, all the agents of participating political parties and other stakeholders completed and signed on the GEN 20a forms. This included the GEN 20a forms for both Chamaseche and Ambizi polling stations. It was stated by the 2nd Respondent that, likewise, the Presiding Officers for Taferansoni and Kalongwezi polling stations signed the GEN 20a forms.

4.3 The 2nd Respondent's Answer further indicated that the record of proceedings for both Chiyambi and Chadiza Primary School polling stations number 3 were completed and duly signed by the Presiding Officers.

4.4 The affidavit verifying Answer was sworn by one Kryticous Patrick Nshindano, the 2nd Respondent's Chief Electoral Officer. The said affidavit was more or less a replication of the contents of the 2nd Respondent's Answer to Petition. I shall therefore not repeat it.

5.0 THE REPLY TO THE ANSWER

5.1 In reply, the Petitioner reiterated his allegations as contained in the affidavit verifying Petition. Therefore, I do not find it necessary to repeat them here.

6.0 THE PETITIONER'S CASE

6.1 **Yamikani Phiri**, the Petitioner herein, testified as PW1. His evidence was, by and large, a reprise of the contents of his Petition. He testified that the 1st Respondent was not validly elected because the elections were marred with massive voter manipulation. That GEN 20a forms for certain polling stations were not signed, let alone availed to polling agents to sign.

- 6.2 It was **PW1**'s evidence that at Chamaseche polling station the information availed to **PW1** by polling agents from various parties was that at Chamaseche polling station, the 1st Respondent was given 219 votes at the totaling centre when, in fact, he only polled 205 votes at the polling station. That an additional 14 votes were given to him. The witness referred me to the GEN 20a form for Chamaseche polling station appearing at page 1 of the Petitioner's bundle of documents.
- 6.3 The story, as told by **PW1**, was that at Chamaseche polling station, the PF deployed a scheme where they voted on behalf of persons 90% of whom they claimed could not vote unaided. He told the Court that this mischief went on almost the whole day of voting and it annoyed the Petitioner's polling agents, who sent word to their monitor, Mr. Skeva Banda. That on his way from Chanida to Chamaseche, Mr. Banda fell into the clutches of the 1st Respondent's cadres, and they beat him up. He referred me to a Medical Report for Skeva Banda appearing at page 8 of the Petitioner's bundle of documents.
- 6.4 Another UPND member alleged to have had the misfortune of being mugged by the 1st Respondent and his accomplices was one

Geoffrey Phiri. The victim's only transgression, according to **PW1**, was that he had been accused of disorganizing the PF in Mwangazi ward. In this regard, I was referred to page 14 of the Petitioner's bundle of documents showing a picture of someone whom **PW1** named as Geoffrey Phiri. According to this witness, the incident was reported to Chadiza police station and a Medical Report was issued.

6.5 **PW1** testified that at Taferansoni and Chiyambi stream-01 polling stations, the respective Presiding Officers did not sign the GEN 20a form. That similarly, the record of proceedings at Chiyambi stream-01 and Chadiza Primary School stream-03 polling stations were not signed by the Presiding Officers.

6.6 It was **PW1**'s further testimony, in aid of the vote buying and treating assertion that on the day of voting, the 1st Respondent went to Chilenga polling station in a white Toyota Hilux and started buying bananas, sugarcane, buns and fritters, which he distributed to voters at that polling station, including those in the queue for voting. That he was being assisted, in that activity, by his polling agent called Samuel Banda. **PW1** referred me to a video clip exhibited as "YP5" in his affidavit verifying Petition. He also

drew my attention to a list of polling agents at page 4 of the 1st Respondent's bundle of documents, which included the aforesaid name, as well as a picture at page 37 of the Petitioner's bundle of documents showing a person dressed in red. The witness identified this person as Samuel Banda.

6.7 In addition, I was shown pictures of Chilenga polling station at pages 15 to 17 of the Petitioner's bundle of documents. These were pictures showing a queue of people and a Toyota Hilux which **PW1** said belonged to the 1st Respondent.

6.8 Aside from the above, **PW1** testified that the 1st Respondent, using a white Mitsubishi Canter registration No. ALJ 3225, distributed DMMU-branded mealie-meal. He pointed me to pictures at pages 20 to 22 of his bundle of documents.

6.9 According to this witness, the 1st Respondent was assisted in the distribution of the said mealie-meal by the DC for Chadiza, Mr. George Phiri, who was using a government Land Cruiser Registration No. BAD 6862. It was his testimony that the said vehicle was being driven by Teddy Zulu and, sometimes, Smart Phiri. In the pictures at pages 18 and 19 of his bundle of

documents, he identified the DC as the person wearing a white hat and standing with a PF official in a PF overcoat. He maintained that even though the vehicle does not bear a GRZ number plate, it belongs to the Ministry of Agriculture.

6.10 It was his evidence that during campaigns, the 1st Respondent was also involved in the distribution of bicycles.

6.11 **PW1** testified that in Chadiza, PF party cadres were used by the 2nd Respondent to conduct elections. That one of them, by the name of Samuel Phiri, was made an usher at Ngala polling station. That man, according to **PW1**, was also very violent, and the Petitioner once complained to the Conflict Management Committee about his behaviour. Despite being summoned by the Committee, he did not appear before it.

6.12 **PW1** informed the Court that a PF cadre called Isaac Lungu was employed by the 2nd Respondent to work in the computer room at Chadiza totaling centre. It was **PW1**'s evidence that a complaint lodged with the 2nd Respondent proved futile as the 2nd Respondent went ahead to employ him to receive results from polling stations. That three days after the election, enraged stakeholders went and

forced Isaac Lungu out of the totaling centre. He fled and has never returned to Chadiza.

6.13 In his continued testimony, **PW1** alleged that the difference in results between himself and the 1st Respondent was 42 votes. He lamented that the playing field was not level. According to him, foreigners were allowed to vote in Chadiza and, in that regard, he referred me to Mozambican identity cards, Zambian National Registration Cards (NRCs) and Zambian voter's cards appearing at pages 29 to 32 and pages 33 to 36, respectively, of the Petitioner's bundle of documents.

6.14 Further testimony of **PW1** was to the effect that the Chadiza DC, Mr. George Phiri, and PF officials went to Mozambique and encouraged citizens of that country to come to Zambia and vote. That in exchange, the foreigners were given mealie-meal and money, and promised medical services.

6.15 In cross-examination, **PW1** indicated being familiar with the *Electoral Commission of Zambia Voter Education Facilitator's Handbook, 2016*. He conceded that at the close of the vote counting exercise, the results are transposed onto the GEN 20a

form, after which the Presiding Officer signs and gives it to the polling agents and other accredited persons to do likewise. **PW1** agreed that it is the 2nd Respondent's duty to prepare the GEN 20a form, and a candidate plays no role in that process or signing the form. That the Presiding Officer cannot force a polling agent to sign the GEN 20a form.

6.16 According to **PW1**, the information that the 1st Respondent obtained 205 and not 219 votes was from all the polling agents who observed the election at the polling station. He agreed that when results are collected, they are recorded in the record of proceedings. The witness had no difficulty confirming that the record of proceedings for the election in question appears at page 14 of the 1st Respondent's bundle of documents, but hastened to add that the results were wrong. Asked to produce the correct results, **PW1** said he did not have them. He agreed that the results in the record of proceedings for Chamaseche polling station are the same as those appearing on GEN 20a form at page 1 of the Petitioner's bundle of documents.

6.17 As regards the GEN 20a form which he produced for Ambizi polling station, **PW1** said he could not confirm that the figures therein

had been manipulated in favour of the 1st Respondent. He agreed that according to this document, the 1st Respondent lost to Mr. Obet Phiri, an Independent candidate. Further, that the record of proceedings shows the same results as those on the said GEN 20a form. His only concern in respect of Ambizi polling station was that the GEN 20a form was never signed by the Presiding Officer.

6.18 When cross-examined in relation to the results for Taferansoni polling station, **PW1** conceded that there was no manipulation of votes there. He testified that his complaint about the results from Kalongwezi polling station was that the GEN 20a form form was signed by the polling agents, including his own, but not the Presiding Officer. He disclosed that his polling agents had no misgivings about signing the form despite it not having been signed by the Presiding Officer.

6.19 It was the testimony of **PW1** that of the four GEN 20a forms with which he had taken issue, there was not one in which he came out first. He disclosed that there are 73 polling stations in Chadiza Constituency, and the four are not the only ones where he lost. He did not agree that in most cases, his agents obtained copies of the

GEN 20a forms but refused to sign them if they observed that he had lost.

6.20 In further cross-examination, **PW1** said that according to the declaration of results form for Chadiza Constituency at page 2 of the Petitioner's bundle of documents, the 1st Respondent was declared winner, followed by himself. He agreed that the Returning Officer signed this form, but that his witnesses did not. When referred to page 5 of the 1st Respondent's bundle of documents, he confirmed that it too is a declaration of results form for Chadiza Constituency. That the figures on the two declaration forms are matching and the one at page 5 of the 1st Respondent's bundle was signed by the PF and other credible stakeholders such as TIZ and FODEP.

6.21 **PW1** testified that where he disputed the results, the UPND opted not to sign the GEN 20a forms.

6.22 Asked whether he personally saw the 1st Respondent engage in vote buying and treating at Chilenga polling station, **PW1** rejoined that the 1st Respondent was seen giving out foodstuffs at Chilenga. The witness added that the pictures at pages 15 -17 of his bundle

of documents and the video exhibited as "YP5" in his affidavit demonstrate this. When invited to point at the 1st Respondent in the pictures referred to, he could not. Further, PW1 conceded that the picture of a man he identified as Samuel Banda, at page 37 of the Petitioner's bundle of documents, does not show the said man distributing food.

6.23 On the allegation that the 1st Respondent was distributing DMMU-branded mealie-meal, PW1 relied on the pictures at page 20, 21 and 22 of his bundle of documents. However, when challenged to show the Court any bag branded 'DMMU' in the Mitsubishi Canter at page 22, he could not. He also agreed that the pictures were taken from one location in the entire Constituency, and that there was no indication as to whether they were taken during or after the campaign.

6.24 As regards the allegation that the 1st Respondent was assisted by the District Commissioner in giving out mealie-meal, PW1 referred me to pictures at pages 18 and 19 of his bundle of documents. However, he agreed that none of them depicted distribution of any mealie-meal. Further, despite insisting that a Ministry of

Agriculture motor vehicle was being used, **PW1** agreed that the number plate does not show that it was a GRZ vehicle.

6.25 **PW1** also told the Court that he was not there when Skeva Banda and Godfrey Phiri were allegedly beaten at behest of the 1st Respondent. In further cross-examination he testified that he had no evidence of Isaac Lungu having manipulated any votes. He also did not see Samuel Phiri at Ngala polling station, where the latter was alleged to have been employed as an usher by the 2nd Respondent.

6.26 On the allegation that foreigners were allowed to vote, **PW1** agreed that the registration of voters was done 6 or 7 months before the elections, by which time PF had not adopted the 1st Respondent as its candidate for Chadiza Constituency. The witness conceded that the mandate to register voters and issue NRCs resides in the 2nd Respondent and the Government through the National Registration Office, respectively, as opposed to the 1st Respondent. Further, he could not confirm that any Mozambicans, in fact, voted for the 1st Respondent.

6.27 With regard to assistance given to voters, **PW1** agreed that he was aware that it is allowed to aid people such as the blind at a polling station. Further, that from the record of proceedings for Chadiza Constituency, the voter turnout of about 69.76% was good, and he did not have any evidence to show that the figures were manipulated to his disadvantage.

6.28 In re-examination, **PW1** explained that he complained about voters being aided at Chamaseche because 90% of voters were being 'assisted' by PF. That complaining to the 2nd Respondent did not help matters. He reiterated that all his polling agents signed the GEN 20a form for Chamaseche polling station.

6.29 Further, as regards the declaration of results form in his bundle and the one in the 1st Respondent's bundle, he clarified that the dates on the two forms are different. That the one in the 1st Respondent's bundle is dated 14th August, 2021, while his is dated 20th August, 2021.

6.30 **Skeva Banda**, a monitor appointed by the UPND presidential candidate to monitor elections at all polling stations, was **PW2**. His version was that on 12th August, 2021, he saw the 1st

Respondent at Kampini polling station, talking to Kasongo Nkhata, Mallon and Makambo Francis, all of the PF. That after a short while, **PW2**, with four of his friends, got into his vehicle and headed to Chimbala polling station. He narrated that he stopped at RR turnoff to drop off one of his friends. A vehicle, the registration number he recognized, came from behind and also stopped. According to **PW2**, he noticed that the men in this vehicle were PF cadres from the border, the same people that had been talking to the 1st Respondent at Kampini.

6.31. It was **PW2**'s evidence that Mallon, a PF treasurer, Kasongo and Francis stepped out of their vehicle and started beating him and his friends. That Kasongo, while photographing the vehicle, announced that "*we have caught him*", which sent **PW2**'s friends fleeing and leaving him at the mercy of the assailants.

6.32 **PW2** told the Court that as he begged his attackers to leave him alone, a woman arrived and asked what was happening. Exploiting that little window of opportunity, **PW2** made a dash for the woman's house, leaving behind everything but his phone, which he used to call the police. He added that one of his friends

also called the police, who arrived a short while later. That soon, members of the public assembled there.

6.33 **PW2** wound up his examination-in-chief by telling the Court that the UPND provincial chairperson was informed about the foregoing incident and that he got a Medical Report, which appears at page 8 of the Petitioner's bundle of documents.

6.34 When cross-examined by Mr. Ngulube, **PW2** testified that he could not hear what the 1st Respondent was saying to the PF cadres at Kampini polling station. This witness testified that the named assailants do not appear on the list of agents appearing at page 1 and 2 of the 1st Respondent's bundle of documents. **PW2** further testified that during the beating, his head was hit against the vehicle and he but narrowly dodged a block that was aimed at his head.

6.35 Despite **PW2**'s testimony that he was beaten severely and hit with a block on the eye, he conceded that the Medical Report at page 8 of his bundle of documents does not show any head injuries. He testified that he went to the hospital 2 days after the incident because the doctor in charge at Katete District Hospital did not

work on the 12th of August, 2021. However, he agreed that on the 13th of August, 2021, hospitals in Zambia were not closed. He further stated that he opted to go to the hospital in Katete because the road from the border to Katete is better than the road from the border to Chadiza.

6.36 It was this witness' evidence that he reported the matter to the police and that the dealing officer was a Mr. Njovu. That his attackers were arrested and given police bond but had not yet appeared in Court.

6.37 When cross-examined by Mr. Lisimba, **PW2** stated that he is not a registered voter. Further, that he had not heard of the complaint that the 2nd Respondent registered foreigners.

6.38 In re examination, he informed the Court that Mallon Zulu was the campaign manager for the 1st Respondent.

6.39 **PW3** was **Ailosi Phiri**, a Resident of Chanida border in Chanida District. His evidence was more or less a repetition of that of **PW2**. The point of departure was that on poll day, he was called by **PW2**, Skeva Banda, to accompany him to Chimbala and Mulolo polling

stations to take food for their party members. That they started off, with 2 other young men, in their vehicle.

6.40 **PW3** testified that while **PW2** was being beaten, he ran away and when he returned, he heard Kasongo Nkhata suggesting that **PW3** should be shot. Out of fear, he ran away again but stood at a distance, from which he saw Kasongo Nkhata hitting the vehicle. He told the Court that he called the Petitioner to let him know about the incident. The story, as recounted by this witness, was that when police arrived at the scene, they took **PW2** to St Francis Hospital in Katete.

6.41 When cross-examined by Mr. Ngulube, **PW3** said that there were four of them in the vehicle, including **PW2**. That if **PW2** said he carried four people, he would not know what to make of that as he himself was telling the Court what he knew.

6.42 **PW3** testified that the 1st Respondent was wearing a blue jacket when he saw him at Kampini polling station. However, he conceded that he could not hear what the 1st Respondent was saying to the PF cadres. He refuted the claim that the people who

were with the 1st Respondent were polling agents, but admitted that that he was a member of the UPND.

6.43 It was **PW3**'s evidence that he witnessed **PW2** being beaten and his head hit against the vehicle. He reiterated that when the police arrived, they picked up **PW2** and took him to Katete hospital that very day. When shown the medical report for **PW2**, he agreed that according to it, **PW2** was taken to the hospital on the 14th of August, 2021. He stated that Mallon, Kasongo and Francis were summoned by the police after the inauguration of the current President on or about the 24th of August, 2021.

6.44 When cross-examined by Mr. Lisimba, **PW3** stated that when registering as a voter, he only presented his NRC and his old voter's card at the registration centre.

6.45 In re-examination, it was explained by **PW3** that Mallon Zulu was a campaign manager for the 1st Respondent.

6.46 The Petitioner called **Gideon Mwale**, a polling agent for UPND at Chamaseche polling station, as **PW4**. According to this witness, on the 12th of August, 2021, the Presiding Officer closed Chamaseche polling station at 18:00 hours. He recalled that in

the presidential election, PF polled 205 votes, while 101 votes went to UPND. In terms of the parliamentary votes, the 1st Respondent polled 205 votes, Independent candidate Obet Phiri had 90, while the Petitioner managed 12 votes.

6.47 **PW4** told the Court that after counting of the votes, he signed on all GEN 20a forms, after which the Presiding Officer left for the totaling centre. That to **PW4**'s surprise, the results at the totaling centre showed that the 1st Respondent had received 219 votes instead of the 205. That the GEN 20a form delivered to the totaling centre and showing 219 votes in favour of the 1st Respondent was not signed.

6.48 In cross-examination, **PW4** confirmed being a polling agent for the Petitioner. He conceded that Chamaseche polling station is located in the 1st Respondent's village. Asked whether he had any other document showing the results for Chamaseche polling station, **PW4** said that he had none, except a copy of GEN 20a form at page 1 of the Petitioner's bundle of documents, which was not the one that he signed. According to him, the GEN 20a form at page 1 of the Petitioner's bundle of documents came from the Petitioner. It was **PW4**'s evidence that he asked for a copy of the GEN 20a

form but was not given any. Further, that he was not aware that, as a polling agent, he was entitled to a copy of the form.

6.49 When cross-examined by Mr. Lisimba, **PW4** told the Court that he has a document showing that he is a duly appointed agent but that it is not in the bundle of documents. Asked whether he discussed the GEN 20a form with anyone, he said that the Petitioner once went to him and the duo discussed the GEN 20a form that was signed and the one that was not signed.

6.50 **PW5** was **Elita Mbewe**. She was a local monitor for the UPND. Her version was largely the same as that of **PW4**. She recalled being surprised when she heard that the GEN 20a form for Chamaseche polling station was not signed because she and other people were alleged to have run away.

6.51 In cross-examination, this witness informed the Court that she was appointed as a local monitor by the UPND. That she was given an identity card and told that she could sit inside the polling station. **PW5** said that she was not aware that local monitors, unless accredited by the 2nd Respondent, were not allowed inside polling stations.

6.52 According to this witness, the 1st Respondent got the same number of votes as the PF presidential candidate, but that she had no document to support her claim. When asked about the votes obtained by other candidates, she told the Court that Mr. Obet Phiri, an independent candidate, polled 90 votes. However, she could not recall how many votes were obtained by Aaron Banda and Olivia Phiri.

6.53 **PW5** testified that she did not ask for a copy of the GEN 20a form from the Presiding Officer and she knew nothing about the GEN 20a form appearing at page 1 of the Petitioner's bundle of documents.

6.54 It was the testimony of **PW5** that three polling agents, namely; **PW4**, Obvious, an independent, and Kenneth Banda signed the GEN 20a form she was aware of. She later abandoned that version, stating instead that everyone who was at the polling station signed the GEN 20a form for Chamaseche, but she could only remember three of them.

6.55 When cross-examined by Mr. Lisimba, **PW5** told the Court that she is a UPND supporter and that she was not happy that her

party had lost. Further, that she based the loss on the GEN 20a form which she signed.

6.56 In re-examination, this witness testified that she did not know what happened to the GEN 20a form which she signed.

6.57 **PW6** was **Olovesi Chirwa**, a polling agent at Chamaseche polling station. To a great extent, his evidence echoed that of **PW4** and **PW5**. He added that all the agents and stakeholders signed the GEN 20a form for Chamaseche and it was taken by the Presiding Officer.

6.58 Cross-examination of this witness drew the response that he could write in Nyanja and could read. When referred to GEN 20a form at page 1 of the Petitioner's bundle of documents, **PW6** would not confirm that this was the GEN 20a form for Chamaseche. He further said that he could not remember the name of the Presiding Officer for Chamaseche as he only saw him once. However, he recalled having seen the signature and name of the Presiding Officer on the said GEN 20a form.

6.59 In further cross-examination, **PW6** stated that he could read and write in Nyanja, but not in English, because he only went up to

grade 5. When asked about a document showing that the PF presidential and parliamentary candidates polled 205 votes each, the witness said that he did not have a document to support that position as he had lost the paper. He agreed that during his training as a polling agent, he was told that he was entitled to a copy of the GEN 20a form. According to him, the Presiding Officer refused to give him a copy of the form showing that the 1st Respondent had received 205 votes, but he lodged no complaint about it with the 2nd Respondent.

6.60 When cross-examined by Mr. Lisimba, **PW6** testified that the GEN 20a form was in English but he understood it because his friends told him what was written on it. He added that five people from UPND signed the GEN 20a form for Chamaseche, but he had no idea how many people from other parties signed it. Later, he assumed a different position by telling the Court that not all five people from UPND signed the GEN 20a form.

6.61 **PW7** was **Godfrey Phiri**, a Farmer in Changuda Village of Chief Mwangala of Chadiza District. He testified that on the 3rd of August, 2021, around 14:00 hours, he started off on a motor bike to go and buy a cow.

6.62 On the way, he met the 1st Respondent with his driver and a person known as Bazilio in a Toyota pickup. The 1st Respondent reversed at high speed and when he stopped, he commanded **PW7** to draw close to the vehicle. After commanding him to draw close, he told his driver to apprehend **PW7** and all of them started beating him until he fell. He fainted and did not know what happened after. When he reached home, he discovered that the ZMW10,000.00 and phone he had were missing.

6.63 When cross-examined by Mr. Ngulube, he told the Court that he had never met the 1st Respondent prior to this incident but that the 1st Respondent knew him. When asked how the 1st Respondent knew him, he stated that when the 1st Respondent was with Bazilio, Bazilio must have told him that that is Godfrey Phiri, who is in the opposition. He testified that he reported this incident to the police. He admitted knowing where Bazilio stays but that no one had been arrested.

6.64 **PW8** was Mathias Banda, a farmer in Matiyele Village of Chadiza District. He testified that on the 5th of August, 2021, he started off for Chadiza using a motor bike to buy a plough. On the way, he found a group of people near the Catholic Church receiving

bicycles. He joined the queue and the 1st Respondent took a bicycle to him and told him that on the 12th of August, 2021, he should vote for him and that further when he goes back to his home, he should tell his family members to vote for the 1st Respondent, which he did.

6.65 When cross-examined by Mr. Ngulube, he testified that he has a voter's card but that it was not included in the bundle of documents. He added that he informed the whole village that they should vote for the 1st Respondent. He conceded that not everyone in the village has a voter's card. He added that he told Phineas Mbewe about voting for the 1st Respondent but that he did not get Phineas' voter's card to show the Court as evidence. He disclosed that Matiyele Village falls under Ngala polling station and that the 1st Respondent won at Ngala polling station.

6.66 When referred to the record of proceedings at pages 14 and 16 of the 1st Respondent's bundle of documents, **PW8** conceded that it was the Petitioner who obtained the most votes at Ngala polling station. He told the Court that he still had the bicycle given to him but that he did not get photos of the bicycle or bring it to Court.

6.67 **Emelia Banda**, a businesswoman of Chilenga Ward in Chadiza was **PW9**. She informed the Court that on 12th August, 2021, she went to vote at Chilenga polling station. At some point, she decided to go back home and get buns worth ZMW162.00 for sale.

6.68 It was her evidence that around 13:30 hours, the 1st Respondent arrived with some people in his vehicle and started buying food. He bought fritters, fresh maize, sugarcane and lastly, her buns. When he was buying her buns, people saw him and those who were in the queue for voting followed to get the buns. When he saw that people started following, he paid her ZMW100.00 and left without paying the balance of ZMW60.00.

6.69 She testified that a lady called Catherine Banda helped her trace the 1st Respondent and she was told to get her money from one John Moomba. However, her efforts had been futile to date and that she still wanted her money.

6.70 In cross-examination by Mr. Ngulube, she conceded that she does not appear in the pictures at pages 15, 16 and 17 of the Petitioner's bundle of documents relied upon by the Petitioner and that she could not see the 1st Respondent in those pictures. She

was quick to point out that the 1st Respondent was wearing a blue jacket on that day and that she knew him as he had previously campaigned at her village on 3 occasions. She added that she was aware that the Petitioner won the polls at Chilenga polling station.

6.71 **PW10** was **Ineli Banda**, a farmer and businesswoman of Chilenga in Chadiza. She testified that on poll day, she voted around 12:00 hours and after voting, she found her friends selling merchandise along the road. As a result, she called her children to bring bananas to the roadside and she started selling them for ZMW1.00 each. She testified that the 1st Respondent bought all the bananas from her at ZMW40.00 and one Sam Gunde was asked to distribute them to the people in the queue. After he distributed them, he took the empty sack back to her and she went home.

6.72 When cross-examined, she changed her testimony and said that the 1st Respondent produced the money and gave it to "his people" to buy the bananas. When asked what colour of trousers the 1st Respondent was wearing, she was quick to point out that he was wearing a blue jacket. When asked why she was quick to talk about the blue jacket when she was asked about the trousers, she

stated that she made a mistake by rushing to say that he wore a blue jacket instead of a blue trousers.

6.73 When asked about the distance between the people in the queue and the roadside where the bananas were being sold, she estimated that it was like from the Local Court Room at Chipata to where the road is. That in between, there was a hedge of plants and a borehole. She conceded that the people in the queue only knew the people who carried the bananas and did not see who bought them. When asked about the person who collected the bananas, she stated that his name was Sam Gunde and that she did not know his surname. She confirmed that Sam Gunde was in the 1st Respondent's campaign team and when referred to the pictures relied upon by the Petitioner appearing at pages 15, 16 and 17 of the Petitioner's bundle of documents, she stated that she could not see Sam Gunde in the pictures.

6.74 **PW11** was **Christine Sakala**, a farmer in Kalandila Village of Chadiza District. She testified that on the 12th of August, 2021, she went to vote at Chilenga polling station and whilst in the queue, the 1st Respondent and his team arrived with a bucket of fritters and started giving people in the queue. That as the fritters

were not enough for everyone, she did not get any. As a result, the 1st Respondent and his people went to the roadside where people were selling bananas and sugarcane. They bought 10 sugarcanes for distribution to people in the queue and that she was given some.

6.75 She disclosed that she had kept a ZMW1.00 to buy a banana and while buying the banana, the 1st Respondent appeared and bought all the bananas, saying he wanted to give them to people in the queue. She also asked for some bananas from the person distributing, and after being given she went back to the queue and voted.

6.76 In cross-examination, she disclosed that she went to buy food around 13 hours just before voting. She added that she voted around 13:30 hours. **PW11** disclosed that she did not take long in the queue because when she was buying the food, she found that the sugarcanes had already been cut and shared.

6.77 The witness testified that she talked to the 1st Respondent personally, but she did not see the shirt he was wearing. She was quick to point out that she only saw the jacket which was blue in

colour. When asked about the colour of his trousers, she stated that it was blue. She confirmed that there is a borehole and flower hedge between the polling station and where the food was being sold. She refuted the claim that the people in the queue could not see the people who were at the place where food was being sold. That this is because the flower hedge had been cut so people could see.

6.78 She added that Samuel Banda was with the 1st Respondent on the day but that she did not pay attention to the colour of trousers he was wearing. She testified that she did not personally interact with Samuel Banda but that he was the one carrying and distributing food.

6.79 PW12 was Catherine Banda, a farmer of Chikoloka Village in Chadiza District. She testified that on poll day, she was in the queue, waiting to vote, when she saw the 1st Respondent buying bananas, sugarcane, fresh maize, fritters and buns. She disclosed that after he bought buns, people wanted to beat him and this caused confusion.

6.80 It was her evidence that the 1st Respondent ran away and she did not know that he had not paid for the buns in full. She testified that a young lady called "Eme" went to ask her to call the 1st Respondent and inform him that he had gone away with a balance of ZMW60.00. Upon calling the 1st Respondent, he informed her that he would send the money through John Moomba. She passed on this message to Eme who later informed her that she had gone to John Moomba's house 3 times to no avail.

6.81 When cross-examination, she maintained that when the 1st Respondent bought the buns, there was confusion because people wanted to beat him. When referred to pictures at pages 15, 16 and 17 of the Petitioner's bundle of documents, she confirmed that the 1st Respondent is not in those pictures. It was her evidence that the 1st Respondent sent Sam Gunde Banda to distribute the food to people in the queue.

6.82 She told the Court that she could not recall what the 1st Respondent was wearing and that she is aware that the 1st Respondent lost at Chilenga polling station.

6.83 **PW13** was **Simon Banda**, a farmer of Kazawe Village in Chadiza District. His evidence echoed that of **PW12**. He testified that around 13 hours and while in the queue for voting, he saw the 1st Respondent buy scones, fritters, sugarcane and fresh maize. As a result, **PW13** left the queue so that he could receive some of the food. When he reached, he saw Sam Banda heading to the queue with the food. **PW13** rushed back to the queue and was given 2 fritters. He went on to testify that after a short time, the people who had gone to receive the food went back to the queue while eating the food they had been given.

6.84 In cross-examination, **PW13** told the Court that he did not know which parliamentary candidate got the most votes at Chilenga. When referred to the record of proceedings, he told the Court that he had a problem with eyesight and could not see clearly. Further, that he did not go far in education, so he was unable to read.

6.85 **Onesta Zulu**, a farmer of Chaingo Section, Manje Ward in Chadiza District was **PW14**. She testified that on 9th August, 2021, the chairlady for Manje Ward informed her that all the clubs in Manje Ward were called to attend a meeting by the 1st Respondent at 12:00 hours. She disclosed that the hosts of the meeting only

arrived around 17:50 hours but the 1st Respondent was not part of the delegation. She added that they were told that the 1st Respondent would be represented by the DC, Mr. George Phiri.

6.86 It was her testimony that she was given mealie-meal and a document marked 'X', saying that they should vote for the 1st Respondent and teach others how to vote for the 1st Respondent. She disclosed that they were threatened that if they did not vote for the 1st Respondent, they were going to apply smoke as fertilizer in their fields as their names would disappear from the Fertilizer Input Support Program (FISP). Further, that they would not receive any social cash transfer payment.

6.87 In cross-examination, **PW14** reiterated that the 1st Respondent was not present at the meeting and that it was Mr. George Phiri, the DC who was present. She testified that she did not know that Mr. George Phiri was a government official responsible for the distribution of mealie-meal under DMMU.

6.88 **PW15** was **Zalia Daka**, a farmer of Manje Ward, which hosts Manje polling station, in Samuel Village. Her evidence was more of a replication of that of **PW14**. She testified that she was given

mealie-meal on the 9th of August, 2021 and during this period, she had enough food as she had just harvested and ground her maize. That the mealie-meal she received had maggots, so she did not eat it.

6.89 In cross-examination, she revealed that the 1st Respondent was not present at the meeting of 9th August, 2021 and further, that she was aware that the Petitioner is the one that got the most votes at Manje polling station.

6.90 **PW16** was **Spade Tembo**, a farmer of Tiyimbe Village. He testified that sometime in June, 2021, on a day he could not recall, he received visitors from Chipata, who he was taking round the wards in Chadiza District. Around 13:00 hours and while on their way to Mangwe Primary School, they met Headman Chikalipo carrying a bag of mealie-meal labeled 'GRZ'. When asked where he got the mealie-meal, he informed them that he received it from a political party at Mangwe Primary School. When **PW16** reached Mangwe Primary School with his visitors, he found the DC, Bazilio Banda and the 1st Respondent and a GRZ Ranger vehicle with four doors parked. He asked the DC under what programme the mealie-meal was being distributed but that the DC did not respond in a good

way, so the two argued. He added that the DC informed him that there was hunger in Mambwe and, therefore, he had come to distribute mealie-meal to the people affected.

6.91 It was his evidence that he asked the DC to also give him and his visitors some mealie-meal since there was hunger, and they were given four bags.

6.92 The following day, he went for a district conflict management committee meeting, where he took a complaint which was not answered.

6.93 When cross-examined by Mr. Ngulube, **PW16** testified that the registration number of the vehicle was GRZ 323CM. He disclosed that he is the District Youth Chairman in UPND. He conceded that he had not taken any pictures of this vehicle laden with mealie-meal. Further, that the matter he took to the Conflict Management Committee was not discussed. He told the Court that he did not know that the 1st Respondent was not in Chadiza in June as his mother was unwell and eventually passed away.

6.94 He added that he had no evidence such as a letter showing that he had complained to the District Conflict Management Committee.

6.95 In re-examination, he told the Court that he did not take pictures of the incident because he did not think that the issue would reach this far.

7.0 THE 1ST RESPONDENT'S CASE

7.1 **Kenneth Banda**, a farmer in Chikwalavu Village in Chadiza District was RW1. He testified that he was a polling agent at Chamaseche polling station for PF in the 12th August, 2021 elections. He revealed that when it was time to count the votes, a ballot would be lifted up for everyone to see who had been voted for, and it would then be placed on the pile for that particular candidate. After counting the votes, he signed a paper for parliamentary candidates given to him by the Presiding Officer. He revealed that the 1st Respondent, an independent candidate and the Petitioner obtained 219, 90 and 12 votes, respectively.

7.2 It was his evidence that if the Petitioner's witnesses said that the PF parliamentary candidate got 205 votes, they were mistaken

because the 205 votes were for the PF presidential candidate. That after signing the forms, the one who was supervising them got all the forms, and none of them was given copies.

7.3 In cross-examination, he denied knowing Samuel Banda. He also denied knowing the person wearing red in the picture at page 37 of the Petitioner's bundle of documents. He testified that he did not know the document that he was supposed to be given but that it was white. He disclosed that he went up to Grade 6 in his education and did not read what was on the document. When shown the GEN 20a form for Chamaseche polling station, he testified that this form is not signed and that as far as he was concerned, he signed the form.

7.4 **RW2** was **Thompson Banda**, a farmer of Esaya Village in Chadiza District. His evidence was more of a duplication of that of **RW1**. He testified that he was also a monitor under the PF at Chamaseche polling station. He disclosed that he signed a form as confirmation of what had happened inside the polling station. That for parliamentary votes, the 1st Respondent, an independent candidate and the Petitioner polled 219, 90 and 12 votes, respectively.

- 7.5 He explained that the Presiding Officer got the signed forms but that he did not know what is written on the form he signed.
- 7.6 When cross-examined by Mr. Lungu, he reiterated that the Presiding Officer got the forms he signed and that he did not know that he was entitled to a copy. He conceded that he knew that the form he signed is called a GEN 20a form.
- 7.7 **Lazarus Banda**, a farmer and resident of Chilenga in Chadiza District was next to testify as **RW3**. His testimony was that on the 12th of August, 2021, he went to vote from Chilenga Primary School. It was his testimony that he did not see the 1st Respondent buy sugarcane or any food at Chilenga Primary School but that the person who bought food was his friend Gezani Phiri.
- 7.8 His story was that the buns were bought from Edna Banda, but he could not remember the name of the person who was selling sugarcane. He added that the place where the food was being sold was outside the voting area, but he could not estimate the distance between the voting area and where the food was being sold as it was outside the voting premises. He revealed that after Gezani Phiri bought the food, he left.

7.9 In cross-examination by Mr. Lungu, he testified that Gezani Phiri did not give food to people waiting to vote in the queue. He disclosed that he voted around 11:00 hours and was not present around 13 to 14 hours. He revealed that Gezani Phiri bought food worth ZMW162 for his young siblings on the 12th of August.

7.10 He denied knowing that the 1st Respondent had not finished paying for the buns or being aware that the owner of the money testified in Court.

7.11 In re-examination, he testified that after voting, he wanted to go home but Gezani called him. That he found Gezani with his sisters and other siblings and together they went to where food was being sold.

7.12 The 1st Respondent's 4th witness was **Nelia Phiri, RW4**, a farmer of Chikamba Village in Chadiza District. She testified that around 10 hours on 12th August, 2021, she voted at Chilenga polling station where she met her brother, Gezani Phiri, who bought sugarcane, bananas and fritters for her. She explained that the place where food was sold was outside the strings that marked the demarcation between the area for voting and the tarred road. She

disclosed that when she was getting her food, other people asked Gezani for some food as well. That after allowing some to get, a lot of people followed but that all this was happening in the absence of the 1st Respondent.

7.13 In cross-examination, she disclosed that she got bananas for ZMW20.00, fritters for ZMW30.00 and sugarcane for ZMW20.00, bringing the total to ZMW70.00. That if someone said that the amount spent on food was ZMW162.00, that person would be lying.

7.14 She revealed that apart from Gezani Phiri, she was with her older brother, Mabvuto Phiri and her younger sister. When asked whether Lazarus Banda was present, she testified that she had forgotten to mention his name but he was present, together with her other younger sister Vaines Phiri. She told the Court that there is no relationship between Gezani Phiri and Lazarus Banda.

7.15 The evidence of **RW5, Christopher Banda** was that he is a freelance journalist and that on 12th August, 2021, he was assigned to monitor and cover elections in Chadiza on behalf of Breeze FM.

7.16 It was his evidence that when voting ended about 18:00 hours, he was at Chadiza Primary School and when counting started, he decided to go to the totaling centre at Chadiza Boarding Secondary School hall.

7.17 He testified that between 22:00 and 23:00 hours, together with his colleagues from other media institutions and monitors from FODEP and GEARS, he observed that results started coming in when the Presiding Officers started arriving at the totaling centre and were taking their papers to the Returning Officer for verification. That these papers were the GEN 20a forms and the record of proceedings at the polling station.

7.18 Around mid-night to 01 hours, the first batch of results was announced for 14 polling stations. He disclosed that the verification of results continued and between 04:00 and 05:00 hours on the 13th of August, 2021, the second batch of results was announced. He revealed that later, it took the 2nd Respondent's officials some time before announcing the next batch of results as they were still in the verification process. He explained that the people involved in the verification were the 2nd Respondent's

officials, including the Returning Officer and the District Election Officer (DEO).

7.19 Later in the evening, the third batch of results was announced, and, in this batch, the Petitioner was leading and the independent candidate, Mr. Obet Phiri, was second, while the 1st Respondent was third. Around mid-night, the fourth batch of results which revealed that the 1st Respondent had continued leading were announced after which there was confusion at the totaling centre as the supporters of the Petitioner and independent candidate complained that the 2nd Respondent's officials were delaying announcing the results.

7.20 It was his evidence that some of the supporters entered the totaling centre and chased the 2nd Respondent's official who was receiving results. The Police calmed the situation and later, he saw the independent candidate, Mr. Obet Phiri and the Petitioner arrive at the totaling centre. The two questioned the 2nd Respondent's officials on the results and demanded the GEN 20a forms and the records of proceedings so that they could compare with what they had.

7.21 As a result, the verification process with the Presiding Officers stopped and the 2nd Respondent's officials started verifying results with the 2 candidates. It was his testimony that he was not told the outcome of this verification and around 02:00 hours on 14th August, 2021, the Returning Officer communicated that the final results would be announced and declaration made at 09:00 hours.

7.22 However, the 2 candidates, together with their supporters, demanded that the results be announced because by then, they had finished the verification process. As a result, the Returning Officer agreed to announce results of 72 out of 73 polling stations and the 1st Respondent was leading. The confusion continued and Mr. Obet Phiri and the Petitioner demanded a recount of votes. That after the demand, the Returning Officer gave them the papers they demanded and they were told to find a specific polling station or area where there was a problem so that they could resolve it.

7.23 He disclosed that around 05:00 hours on 14th August, 2021, he left the totaling centre and went home. When he went back at 09:00 hours, he found the Petitioner and his team still going through the papers.

7.24 He disclosed that later, a UPND team went to conduct an audit which was concluded in the afternoon. After the audit, the auditor left and the Returning Officer started making the declarations, starting with Councilors. It was this witness' testimony that the declaration of the Member of Parliament was done around 15:00 hours on the 14th of August, 2021, with the 1st Respondent being declared duly elected MP for Chadiza.

7.25 After the declaration, he and other stakeholders were given declaration forms to sign and the form appears at page 5 of the 1st Respondent's bundle of documents. He testified that he signed this form and his signature appears as the last witness. That other witnesses were Benjamin Maiba of FODEP, Margret Ngulube of TIZ, Njobvu Felistus of UPF, Francis Makombwe of PF and Billy Daniel of ZANIS.

7.26 He refused to comment on the declaration form at page 2 of the Petitioner's bundle of documents, because he did not sign it on the 14th of August, 2021. That this document is dated 20th August, 2021 but by this date, he was already in Chipata as the declaration had been made on the 14th of August, 2021.

- 7.27 In cross-examination, he testified that the details on the two declaration forms he referred to are the same except the dates. He testified that the UPND agents were present at the totaling centre but they left between 13:00 and 15:00 hours after the audit.
- 7.28 He disclosed that when he went home before the announcement, only results for Prisons polling station, which had 30 registered voters, remained to be announced. When asked whether during his monitoring he had been to Chilenga polling station and seen the 1st Respondent, he stated that he had been there but had not seen the 1st Respondent. Further, that he never asked if the 1st Respondent had been there as he had nothing to do with him as his interest on that day was how elections were being conducted.
- 7.29 When challenged to state whether the elections were free and fair, he testified that according to what he observed on election day and at the totaling centre, the elections were free and fair.
- 7.30 When asked about what caused the delay in announcing results, his evidence was that the Presiding Officers were arriving late at the totaling centre. According to him, Mr. Obet Phiri, the Petitioner and their officials conducted a re-count but he never participated.

- 7.31 In further cross-examination by Mr. Lisimba, he testified that the declaration of results was on 14th August, 2021, and only the candidate for PF was present when the declaration was made.
- 7.32 The 1st Respondent, Jonathan Daka, testified as **RW6**. His testimony was that he was declared Member of Parliament for Chadiza Constituency on 14th August, 2021.
- 7.33 He disclosed that there are 20 wards in Chadiza Constituency and 73 polling stations. He was sponsored by PF, which has structures in all 20 wards. He revealed that 2 polling agents were assigned to each polling station throughout the Constituency.
- 7.34 He denied the assertion that he obtained 205 votes at Chamaseche polling station as he he was told by his polling agents and confirmed with officials from the 2nd Respondent at the totaling centre that he obtained 219 votes. He revealed that his village is Lavu Chigudulu in Kampini ward, where Chamaseche polling station is.
- 7.35 He denied the allegation that he ordered Mallon and others to assault Skeva Banda. It was his testimony that after voting at Chamaseche, he started his routine checks on his teams at polling

stations and the first team he visited was at Kampini Primary School located at Chanida border. On his way, he went to the nearby shops where he found 3 PF party officials namely, Mallon Zulu, Francis Makambwe and Kasongo in the company of a person he knew as Skeva. He greeted the 4 and left because he had a duty to visit several polling stations. As a result, he did not understand how he instructed the 3 PF officials to assault Skeva Banda when he left the 4 together.

7.36 It was his evidence that he learnt of Mr. Skeva's assault when he was served with this Petition. He disclosed that the list of PF polling agents in the Constituency appears at pages 1 to 4 of the 1st Respondent's bundle of documents. He also denied instructing his driver and Mr. Bazilia to beat Godfrey Phiri. He testified that he was never driven in a branded vehicle throughout his campaign period because he wanted people to differentiate between himself and the rest of the party officials. He disclosed that Mr. Bazilia Phiri was the PF District Party Secretary.

7.37 As regards the video clips submitted by the Petitioner, he testified that they do not depict any evidence that he instructed his driver and Mr. Bazilia Phiri to beat Godfrey Phiri. What he observed from

the video shows a person with a swollen face, who appeared drunk and was very inaudible.

7.38 The 1st Respondent denied distributing food personally or through Mr. Gunde at Chilenga polling station. He testified that between 13:00 and 14:00 hours, he was in Tikondane Ward doing his routine visit to polling stations. When referred to pictures relied upon by the Petitioner appearing at pages 15, 16 and 17 of the Petitioner's bundle of documents, he testified that he is not anywhere in those pictures. That the PF had many polling agents and that what he heard was that the polling agent for this polling station was Gunde.

7.39 He disclosed that on poll day, he wore a white T-shirt, Rosary around his neck, maroon trousers and brown shoes.

7.40 The 1st Respondent told the Court that he does not appear in the video, nor does the video show any person distributing food.

7.41 He denied owing ZMW60.00 to **PW9**. His testimony was that, in fact, even when he came out of Court on the day when **PW9** testified, he found her outside and she did not ask him about the

money. He denied buying bananas from Ineli Banda and added that he never visited Chilenga polling station on poll day.

7.42 He disclosed that the Petitioner won the election at Chilenga polling station by a huge margin and he came out second. He denied buying bananas and fritters from PW11 and told the Court that if he had done so, the Petitioner and his supporters, who were taking pictures and videos, could have captured him. He further refuted the allegation that he was almost beaten at Chilenga polling station on poll day.

7.43 He further denied convening a meeting for women's clubs and distributing DMMU mealie-meal. He stated that he never worked with Mr. George Phiri, the DC, during his entire period of campaigns. He added that Manje Ward hosts Manje polling station and the Petitioner won the election at Manje polling station.

7.44 He went on to state that he found the allegation that he distributed food in June very unfortunate because on 29th May, 2021, he was informed that his mother was unwell in Lusaka and throughout the month of June, he had no presence in the Constituency as he was nursing his mother. That when his sister realized that he was

taking long to go back to the Constituency because of nursing his sick mother, they decided to move his mother to Kitwe. That being the first born and breadwinner in the family, he could not run away from the responsibilities and had to compliment his sister on the Copperbelt in nursing his mother.

7.45 **RW6** testified that on 8th July, 2021, his mother passed away and he only returned to the Constituency on 13th July, 2021 after burial on 11th July, 2021. He disclosed that the month of June was pathetic for him as it created a lot of panic among his supporters due to his prolonged absence from his campaign schedules. That he found it disturbing for someone to claim that in June, he was distributing mealie-meal in Mangwe Ward as Mangwe Ward hosts Mangwe polling station and he never won at this polling station.

7.46 **RW6** denied the allegation that he was distributing bicycles on the 5th of August, 2021 and that he gave **PW8** one. He revealed that on this date, he was in Mwangazi and not at the BOMA. That moreover, he never distributed any bicycles in Chadiza Constituency.

7.47 This witness refuted the allegation that he worked with the 2nd Respondent in registering Mozambicans during voter registration and that this is the responsibility of officials from Ministry of Home Affairs and the 2nd Respondent

7.48 He added that in any case, when the voter registration was being conducted, he was not a PF candidate as he was only adopted in the second week of May, 2021, long after the voter registration had ended.

7.49 When referred to photos appearing at pages 20, 21 and 22 of the Petitioner's bundle of documents, alleging that he was distributing DMMU mealie-meal using his Mitsubishi Canter, he stated that the picture at page 20 shows his Canter but he does not see it carrying anything. That at page 21, the Canter is carrying goods but he cannot confirm what kind of goods it was carrying. He disclosed that during campaigns, his Canter was used for many activities one of which was delivering food such as mealie-meal, cooking oil, assorted relish and salt to various camps in the 20 wards. He added that at page 22, there are 2 bags of relief maize labeled DMMU but he cannot see his Canter next to the bags.

7.50 He testified that the declaration by the 2nd Respondent that he was the duly elected Member of Parliament was met with several objections from his competitors, who were given an opportunity by the 2nd Respondent at the totaling centre to verify all the results that came from various polling stations. That after failing to find any anomalies in the results, the Petitioner invited an external auditor from the UPND, who went and conducted an audit at the totaling centre on 14th August, 2021. He disclosed that he was present during the audit and the external auditor requested all the GEN 20a forms, record of proceedings and the record of usage of ballot papers that governs the whole electoral process for all the 73 polling stations. That these documents were given to him. RW6 revealed that after the audit, the auditor thanked the 2nd Respondent's officials manning the totaling centre for their professional conduct and requested them to proceed and declare the winner.

7.51 He disclosed that after this, the entire team from UPND went away, leaving the officials from the 2nd Respondent, PF staff and other monitors at the totaling centre. That what followed was a

declaration by the Returning Officer, and he was declared Member of Parliament for Chadiza Constituency.

7.52 When referred to a declaration of results form at page 5 of the 1st Respondent's bundle of documents, he stated that this document confirms the date he was declared winner as 14th August, 2021 and it was signed by all the monitors and the Returning Officer. When shown a similar declaration of results form at page 2 of the Petitioner's bundle of documents, he stated that this document is dated 20th August, 2021 but the date is incorrect as he was declared Member of Parliament on 14th August, 2021. On 20th August, 2021, he was in Lusaka preparing to commence his orientation at Parliament.

7.53 When cross-examined by Mr. Lungu, he denied leaving the totaling centre and congratulating the Petitioner for having won the election. He conceded that the auditor did not tell him any results.

7.54 He disclosed that Francis Makambwe was an agent at the totaling centre but denied that this is the same Francis that beat up Skeva Banda.

7.55 **RW6** reiterated that in the video produced by the Petitioner, he saw a person who appeared drunk, and he concluded that the person was drunk.

7.56 When referred to a picture appearing at page 16 of the Petitioner's bundle of documents, he denied standing behind the white vehicle when this picture was taken. He denied distributing food at Chilenga polling station. He further stated that he did not know Gunde in person but conceded that he was his polling agent. When shown a picture at page 37 of the Petitioner's bundle of documents and specifically the person in a red T-shirt, **RW6** said he could not confirm whether it was Gunde in the picture as he did not know Samuel Gunde Banda.

7.57 As regards the clothes he wore on poll day, he conceded that he did not have a picture of the same to show the Court. He conceded that he knew Gezani Phiri but stated that Gezani Phiri was not standing in the 2021 general elections. He further denied visiting Chilenga polling station on poll day but stated that he visited Kampini polling station, among others, and did not take any pictures because he did not anticipate that this matter would come to Court.

7.58 When referred to the picture of the 2 bags of DMMU mealie-meal at page 22 of the Petitioner's bundle of documents, he stated that the bottom looks brown but he could not confirm that the bags were on a tent. He testified that he could not confirm if the DC, Mr. George Phiri, was distributing mealie-meal for DMMU. Further, he denied visiting Reformed Church in Chadiza on 6th or 16th June, 2021.

7.59 When cross-examined by Mr. Lisimba, **RW6** confirmed having been adopted as candidate in May, 2021 and that he had meetings with stakeholders to map out campaigns.

7.60 As regards the process of registering voters, he testified that as a pre-requisite to register, one needed to be 18 years and above and possess a green NRC. He denied conniving with the 2nd Respondent to register Mozambican nationals as voters.

7.61 In re-examination, **RW6** testified that he could not confirm that the person named Godfrey Phiri, appearing in the picture at page 14 of the Petitioner's bundle of documents, was beaten by his cadres as the picture does not show any of his cadres. Further,

that the picture of the DMMU mealie-meal at page 22 does not show a tent but shows that the mealie-meal was on the ground.

8.0 THE 2ND RESPONDENT'S CASE

8.1 In support of its case, the 2nd Respondent called one witness **RW7, Kabange Musenga**, an Agricultural Officer employed in the Ministry of Agriculture. He worked as Returning Officer for Chadiza Constituency in the 12th August, 2021, general elections. He testified that prior to the actual elections, the 2nd Respondent conducted a voter registration exercise throughout the country and Zambian citizens went to various registration centres with their green NRCs if they were 18 years and above. He testified that the green NRC was being issued by the National Registration Office under the Ministry of Home Affairs.

8.2 It was **RW7's** evidence that on 12th August, 2021, he was at the totaling centre for Chadiza Constituency, which was stationed at Chadiza Boarding School. He revealed that he recognized the results declaration form appearing at page 5 of the 1st Respondent's bundle of documents dated 14th August, 2021 and confirmed that it is the one he used to declare the results. He added that the parties not included as witnesses on the

declaration were absent during the declaration. He told this Court that he had no explanation for the absence of some of the witnesses.

8.3 **RW7** disclosed that the total votes on the declaration were arrived at by totaling or adding the votes cast for the various candidates as received from each polling station.

8.4 When referred to the declaration of results form appearing at page 2 of the Petitioner's bundle of documents dated 20th August, 2021, he explained that the difference in dates with the other declaration arose because after the results were declared, some parties and stakeholders approached the District Electoral Officer (DEO) for a copy of this form. That the DEO gave permission to reprint the form from the Results Management Kit and when printing, the Kit automatically puts the date when the reprint is done. That the witnesses, therefore, do not appear on the reprint as it would have been done after the results were declared.

8.5 He confirmed that the results appearing on the GEN 20a form at page 1 of the Petitioner's bundle of documents are the results forwarded to him for Chamaseche polling station. He confirmed

that the 1st Respondent, of the PF, won the Chadiza Constituency parliamentary elections in accordance with the total results he received.

8.6 When cross-examined by Mr. Ngulube, **RW7** confirmed that the GEN 20a form appearing at page 1 of the Petitioner's bundle of documents relates to Chamaseche polling station. He confirmed that the 1st Respondent obtained 219 votes at Chamaseche polling station as stated on the GEN 20a form. That this GEN 20a form was given to the various parties and stakeholders present in the various polling stations because this is the instruction given to all Presiding Officers.

8.7 When cross-examined by Mr. Lungu, **RW7** confirmed that the 1st Respondent obtained 219 votes at Chamaseche polling station. When referred to the GEN 20a form for Chamaseche polling station, he confirmed that this document was signed on the 12th of August, 2021, the date of the elections and that there are no witnesses who signed it. He pointed out that for the GEN 20a forms, the witnesses or parties present are required to sign. That however, in some instances, these witnesses or stakeholders refuse or do not want to sign. That in a case where the parties do

not sign, the lack of signatures does not invalidate the results at the polling station.

8.8 It was his evidence that the 2nd Respondent put in place a mechanism to detect foreigners that may want to vote and this was by ensuring that for a person to register as a voter, they have a green NRC. Further, he denied the allegation that there were delays in announcing results. He clarified that a verification process had to be conducted once the results were taken to the totaling centre to ensure that the results brought to the totaling centre were the ones announced at the polling station.

8.9 He confirmed that there were parties that asked for a recount but that no recount was done because there was no process of recount between voting and announcement of results. He confirmed knowing Isaac Lungu but denied knowing him as a PF cadre.

8.10 In re-examination, **RW7** testified that Isaac Lungu was duly employed as Assistant Returning Officer Information Technology by the 2nd Respondent.

9.0 THE PETITIONER'S FINAL SUBMISSIONS

9.1 On the 15th of October, 2021, Mr. Lungu, on behalf of the Petitioner, filed final submissions. He began his submissions by giving the Petitioner's version of the evidence presented before Court. He referred me to **Article 73 (1) of the Constitution, Act No. 2 of 2016** as well as **Section 97 (2) of the Electoral Process Act, No. 35 of 2016** on election petitions. He added that the Petitioner is alive to the burden of proof that rests squarely on him as well as the standard of proof that the case must be proved to a fairly high degree of convincing clarity as held in the cases of **Michael Mabenga v. Sikota Wina and Others**⁽¹⁾

9.2 He submitted that it is not in dispute that Isaac Lungu was recruited by the 2nd Respondent and yet he is a well-known PF cadre. That the said Lungu worked in the 2nd Respondent's server room where he was receiving all the votes from all the polling stations.

9.3 That the testimony of **RW7** confirmed that all political parties chased Isaac Lungu from the totaling centre as a result. Further, that the record shows that the GEN 20a forms were tampered with as they were changed between the polling stations and the totaling

centre. Counsel submitted that the changing of the GEN 20a forms affected the result of the election, especially that the difference between the 1st Respondent and Petitioner was a minimal 42 votes.

9.4 That the record shows that the changes took place at Chamaseche polling station such that by the time the results were transferred to the totaling centre, the record reflected the changes as though the figures were the original ones and the same figures were carried forward up to the declaration stage.

9.5 In emphasizing the importance of the GEN 20a form, Counsel referred me to the case of Nkandu Luo v. Doreen Sefuke Mwamba and Attorney-General⁽²⁾ as well as Akashambatwa Mbikusita Lewanika and Others v. Fredrick Jacob Titus Chiluba.⁽³⁾ He agreed that the failure on the part of agents or other stakeholders to sign documents does not invalidate the results but that the failure by the Presiding Officer or Returning Officer to sign an important document like the GEN 20a or a declaration form should affect the results.

- 9.6 He urged this Court to interfere with the results of the Chadiza Constituency as a result.
- 9.7 Mr. Lungu contended that PF cadres voted on behalf of some voters almost the whole day on the pretext that the said voters were disabled in one way or another. That he agreed that disabled voters needed help but not up to 90% of the voters who went to vote at Chamaseche needed help.
- 9.8 As regards violence against Skeva Banda and Geoffrey Phiri, he referred me to the case of Richwell Siamunene v. Sialubalo Gift.⁽⁴⁾ That in both cases, the 1st Respondent was within the vicinity and ordered the beating of the two UPND supporters.
- 9.9 He went on to state that there is evidence on record that shows that the DC for Chadiza District, Mr. George Phiri assisted the 1st Respondent in distributing DMMU mealie-meal to voters in the Constituency using a government vehicle and the 1st Respondent's vehicle registration numbers GRZ 232CM and ALJ 3523, respectively. That the said activities from the DC were contrary to the provisions of **Regulation 15 (1) (k) and (l)** of the **Code of Conduct** and also violated the holdings in the cases of Giles

Chomba Yamba Yamba v. Kapembwa Simbao⁽⁵⁾ and Michael Mabenga v. Sikota Wina and Others⁽¹⁾ as it was an abuse of government resources.

9.10 That the evidence further shows that the 1st Respondent was involved in distribution of bicycles and **PW8**, Mathias Banda was a beneficiary of the illegal activity.

9.11 He added that apart from Isaac Lungu, Samuel Phiri, a well-known PF cadre was employed by the 2nd Respondent as an usher at the polling station.

9.12 He went on to talk about voter treating, stating that the evidence shows that the 1st Respondent bought food which he gave voters in the queue at Chilenga polling station. Counsel submitted that the evidence by the 1st Respondent on this issue, given by Gezani Phiri and Lazarus Banda, **RW3** and **PW4**, respectively, was manufactured or fabricated. That the question that begged an answer is why would Gezani Phiri, who was not even a candidate, buy food and allow voters to take part in the eating? That this was an afterthought and a fabricated story.

9.13 He added that the Petitioner agreed with the decision of the Court in Abiud Kawangu v. Elijah Muchima⁽⁶⁾ and Lewanika and Others v. Chiluba⁽³⁾ on the standard of proof but that, in the present case, the wrongs that were committed by the 1st and 2nd Respondents did not need to be widespread due to the fact that the difference of 42 votes could easily be manipulated even from one polling station. That at Chilenga polling station, a lot of voters ate food which the 1st Respondent purchased. He added that the evidence of **RW7** should be treated with caution as the said witness had an interest to serve as it was later discovered that he was a son of Bazilio Banda, the PF District Secretary.

9.14 He concluded his submissions by contending that the elections in Chadiza were not free and fair as the 2nd Respondent allowed some Mozambicans to vote in Zambia. That this evidence was not disputed by **RW7**, who stated that apart from just looking at the Zambian NRC and voter's card, there were no other security measures put in place to detect foreign voters.

10.0 THE 1ST RESPONDENT'S FINAL SUBMISSIONS

10.1 Mr. Ngulube, on behalf of the 1st Respondent, began his submissions by referring me to **Section 97 (2) of the Electoral Process Act, No. 35 of 2016.**

10.2 As regards the threshold to be met, he relied on **Doreen Sefuke Mwamba and Attorney-General.**⁽²⁾ He further referred me to the case of **Brelsford James Gondwe v. Catherine Namugala**⁽⁷⁾ on the burden of establishing the grounds alleged in an election petition.

10.3 He submitted that at trial, the Petitioner gave evidence in support of his Petition which was essentially hearsay having told the Court that his evidence was based on stories he heard from other people. That in addition, he called 15 witnesses to amplify his Petition but that these witnesses are partisan and aligned. He referred me to the case of **Steven Masumba v. Elliot Kamondo.**⁽⁸⁾

10.4 He submitted that one of the crucial and important documents that Petitioner and his witnesses tried to discredit was the GEN 20a form for Chamaseche polling station. That the common evidence that emerged was that the results at this polling station

were manipulated and that this evidence came from **PW1, PW4, PW5** and **PW6**. That **PW4, 5** and **6** were polling agents and monitors for the Petitioner based at Chamaseche polling station and all these witnesses were aligned to the Petitioner. That despite giving this evidence, when challenged to bring evidence to show that the figures at Chamaseche were manipulated or changed from 205 to 219 votes for the 1st Respondent, the witnesses failed to do so.

10.5 He contended that **PW1** testified that he did not dispute the results for Kalongwezi, Ambizi and Taferansoni-02 polling stations. That his contention was that these documents were not signed either by the Presiding Officers or the polling agents, as the case may be. He implored this Court to be guided by **Section 97 (4) of the Electoral Process Act** as well as the learned authors of **Halsbury's Laws of England, 5th Edition, Vol. 38A, paragraph 667** on the lack of signatures.

10.6 He added that the Petitioner, in his scheme to peddle the narrative that Chadiza parliamentary election was manipulated deliberately filed and produced a final declaration form of results appearing at page 2 of the 1st Respondent's bundle of documents. That this

document shows that it was generated on 20th August, 2021. That the said document purports to show that whilst it was signed by **RW7** as Returning Officer, none of the polling agents and monitors signed it. That to the contrary, evidence from **RW7** revealed that the final declaration form results was the one appearing at page 5 of the 1st Respondent's bundle of documents which was generated on 14th August, 2021, when the 1st Respondent was declared winner and that it was signed by polling agents and independent monitors, who included **RW5**.

10.7 As regards voter buying or treating at Chilenga polling station on the day of voting, he submitted that it was clear that the witnesses on this ground, namely **PW9, 10, 11 and 12**, were tutored and gave inconsistent testimonies as to what transpired on the material day.

10.8 That in addition, **PW12** testified that when people discovered that the 1st Respondent and his agents were buying food for would-be voters, they tried to beat him and the 1st Respondent ran away. That one would reckon that this was a significant event which the other witnesses would have talked about, but none did. Further, that the video and photographic evidence at pages 15, 16 and 17

of the Petitioner's bundle of documents do not show that either the 1st Respondent or his agents were involved in buying and distributing food to would-be voters. Further, that contrary to the suggestion that as a result of buying and distributing food, the 1st Respondent may have swayed the vote in his favour, the undisputable evidence on record, which was confirmed by PW10 in cross-examination, was that in fact it was the Petitioner who polled more votes at Chilenga polling station.

10.9 He added that even assuming that the evidence by the Petitioner was true, the evidence would fly in the teeth of **Section 97 (2)(a) of the Electoral Process Act**, which dictates that a corrupt practice, illegal practice or other misconduct committed by the candidate should have been so widespread as to prevent the majority of voters from electing the candidate of their choice. He relied on Mubita Mwangala v. Inonge Mutukwa Wina.⁽⁹⁾ He contended that the Petitioner failed to prove at trial that not only did the 1st Respondent or his election/polling agents participate in buying and distributing food to would-be voters at Chilenga polling station but also to show that any corrupt or illegal practice

was at a large scale or so wide-spread that it prevented the majority from voting for their preferred candidate.

10.10 On the allegation that the 1st Respondent gave out bicycles to would-be voters and one such beneficiary was Christopher Phiri, Counsel argued that the evidence of **PW8**, Mathias Banda was fabricated and not corroborated. That this witness failed to produce the bicycle he allegedly received from the 1st Respondent, which he claimed he still had. Further, that this witness confirmed that he voted from Ngala polling station and the record shows that the Petitioner won the polls at this polling station. Therefore, the issue of swaying the majority of voters does not arise.

10.11 As regards the allegation of using a GRZ motor vehicle to distribute DMMU bags of mealie-meal in the company of the DC, George Phiri, it was Mr. Ngulube's argument that **PW16** conceded that he did not take any pictures of this exercise. That although he claimed to have submitted a complaint with the Conflict Management Committee, he did not produce any proof of this complaint. Further, that no witness was brought to corroborate the allegation that on the 9th of August, 2021, the 1st Respondent was distributing DMMU-branded mealie-meal using a Canter

branded in PF colours. That therefore, the Petitioner's evidence should be approached with caution as it falls within the realm of hearsay.

10.12 Counsel added that the pictures relied upon do not show when they were taken, the actual brand of mealie-meal in the Canter truck or the actual distribution of the mealie-meal by the 1st Respondent to the entire Constituency. That in view of the above, it cannot be concluded that the 1st Respondent was involved in distributing DMMU mealie-meal to any part of the Constituency or at all.

10.13 Counsel also addressed the alleged beating of one Skeva Banda. It was his contention that the evidence of **PW2** and **PW3** raises more questions than answers. That this is because from the evidence, the record shows that the incident happened on 12th August, 2021, but the medical report shows that **PW2** was only attended to at the hospital on 14th August, 2021, which was 2 days later. That in cross-examination, **PW2** confirmed that no one had been summoned or arrested by the Police relating to the said incident. That the video recording on the issue does not prove that he was assaulted by agents of the 1st Respondent. He argued that

instead, **PW2** appears drunk and was probably assaulted by other drunk people. Mr. Ngulube submitted that there is no cogent evidence to link the 1st Respondent and his cadres to the alleged assault. He relied on the case of Nkandu Luo and Another v. Doreen Sefuke Mwamba⁽²⁾ on the need to show that **PW2** was assaulted by the election or polling agents of the 1st Respondent or that indeed the latter had knowledge and gave consent or approval to the alleged assault.

10.14 As regards the assault on Godfrey Phiri, Counsel submitted that if indeed the assailants were known, why were they not arrested after the matter was reported to the Police? That while the picture at page 14 of the Petitioner's bundle of documents may show **PW7** looking assaulted, it does not show when the photograph was taken nor link the alleged assault to the 1st Respondent and his polling agents. That further, there is no evidence to suggest that the alleged assault took place with the 1st Respondent's knowledge, consent or approval. Further, that even if it was assumed that the violence took place, it was not so widespread in the Constituency as to deter or prevent the majority of voters from voting for their preferred candidate.

10.15 On the Petitioner's allegation that a well-known PF member Samuel Phiri was employed by the 2nd Respondent as an usher at Ngala polling station, it was Mr. Ngulube's submission that no evidence was led to prove this fact. That the above also applies to the allegation against Isaac Lungu, who was employed by the 2nd Respondent. That the Petitioner did not lead any evidence to prove that this person was a PF member and was involved in the manipulation of votes as a result of his alleged access to the server at the totaling centre.

10.16 Mr. Ngulube contended that the allegation that a police officer was driving a white double cab motor vehicle belonging to the 1st Respondent was, like many others, an afterthought. That no witness was called by the Petitioner to support this allegation.

10.17 With respect to registration and subsequent voting by foreigners, counsel argued that again the Petitioner did not call any witness to support this allegation. That, however, **RW7** elaborated how voters were registered in Zambia. That in any case, the voter registration exercise took place between 9th November, 2020 and 20th December, 2021, well before the 1st Respondent was adopted to stand on the PF ticket.

10.18 Mr. Ngulube submitted that the 1st Respondent was not present at the meeting of women's clubs where mealie-meal was allegedly distributed. He contended that the allegation that the 1st Respondent called for the meeting was hearsay, which was not substantiated by any other evidence. He added that the Petitioner's witnesses did not produce the purported pre-marked ballot papers they were allegedly given at the meeting. Further, that no evidence was led that the DC was an election or polling agent of the 1st Respondent or that this incident was so widespread in the Constituency.

10.19 Counsel submitted that the Petitioner had failed to prove any of the allegations contained in the Petition. That the grounds advanced by the Petitioner to overturn the election show that it was borne out of the conviction that the 1st Respondent was guilty of electoral malpractices and infractions merely because the later won the elections by 42 votes. He prayed that this Petition be dismissed with costs to the Respondent.

11.0 THE PETITIONER'S SUBMISSIONS IN REPLY

11.1 The Petitioner did not file any submissions in reply.

12.0 CONSIDERATIONS, FINDINGS AND CONCLUSION

12.1 I have considered the Petition before me, the evidence adduced, the parties' submissions and authorities cited.

12.2 Before delving into the allegations presented before me, I find it necessary to discuss the law that guides this Court when considering whether to nullify an election of a Member of Parliament. This is **Section 97** of the **Electoral Process Act** alluded to by both parties. This section guides that-

"97 (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councilor 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 councilor 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.”

12.3 From the above, the Section guides that for an election in the case before me to be annulled, it should be proved that a corrupt practice, illegal practice or other misconduct was committed in connection with the election by the candidate or with the knowledge and consent or approval of the candidate or of that candidate’s election agent or polling agent, and that the majority of voters in the Constituency were or may have been prevented from electing the candidate whom they preferred. It follows that it is not enough to prove the corrupt or illegal practice or other misconduct but that as a result of such misconduct, the majority of voters in the Constituency were or may have been prevented from electing a candidate whom they preferred.

12.4 Other crucial matters to determine at this stage are the burden and standard of proof. In terms of the burden of proof, it should be noted that, like in all civil matters, the burden of proof of a fact lies on the person alleging it. In election petitions, the Constitutional Court in Abiud Kawangu v. Elijah Muchima,⁽⁶⁾

held that the burden of proof is on the petitioner to prove the allegations made in the petition against the respondent.

12.5 The standard of proof has equally been discussed in a number of cases that remain good law. These are Mabenga v. Wina,⁽¹⁾ Mazoka v. Mwanawasa⁽¹⁰⁾ and Kafuka Kafuka v. Mundia Ndalamei,⁽¹¹⁾ among others. In all these cases, the Courts have consistently held that the standard of proof in election petitions is higher than a balance of probabilities applied in civil cases but lower than beyond reasonable doubt applied in criminal cases. The allegations made in the petition must be proved to a fairly high degree of convincing clarity.

12.6 Having set out the tests required to be applied to the allegations in the case before me, I shall proceed to deal with the allegations raised by the Petitioner.

VOTE MANIPULATION AND TAMPERING WITH THE GEN 20a FORMS

12.7 The first allegation raised was that there was massive manipulation of votes and tampering with the GEN 20a forms where UPND polling agents were not allowed to sign the forms at Ambizi polling station, while the Presiding Officers did not sign the

said forms at Taferansoni stream-02 and Kalongwezi polling stations.

12.8 The evidence presented on this issue was by the Petitioner only.

He stated that the GEN 20a forms for Ambizi, Taferansoni and Kalongwezi were not signed as stated above. A review of the GEN 20a forms for Kalongwezi and Taferansoni polling stations appearing at pages 3 and 5 of the Petitioner's bundle of documents, respectively, shows that indeed they were not signed by the Presiding Officers. However, polling agents of the Petitioner from the UPND signed the GEN 20a forms for the two polling stations. PW1 in his evidence testified that polling agents are required to sign the GEN 20a forms to confirm the results of the poll. This evidence was buttressed by that of RW7, an official from the 2nd Respondent. Therefore, the signatures by the UPND polling agents on the GEN 20a forms for Kalongwezi and Taferansoni signify this confirmation.

12.9 The GEN 20a form for Ambizi, on the other hand, was signed by the Presiding Officer but not the agents. This shows that none of the polling agents or stakeholders witnessed this form. However, much as this may be so, there is no evidence from the Petitioner

or his witnesses showing how the lack of signatures of the polling agents affected the result or the validity of the result on this form. The Petitioner did not bring any evidence to show which GEN 20a forms were the correct ones.

12.10 I wish to state that the Petitioner told the Court that he was not present at these polling stations during voting or counting of votes. He disclosed that he based his allegations on information given to him by polling agents. Further, apart from him, none of his witnesses spoke about the voting or GEN 20a forms for Kalongwezi, Ambizi and Taferansoni. This means that the Petitioner's evidence on this issue is hearsay. I say this on the authority of Subramaniam v. Public Prosecutor⁽¹²⁾ where the court was of the view that evidence of a statement made to a witness by a person who is not himself called as a witness might or might not be hearsay. It was hearsay and inadmissible when the object of the evidence was to establish the truth of what was contained in the statement. The Petitioner was trying to establish the truth using information he received from the agents.

12.11 I must add that the learned authors of **Halsbury's Laws of England, 5th Edition, Volume 38A, Paragraph 667**, state as follows on the above subject:

"No election is to be declared invalid by reason of any act or omission by the Returning Officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate election rules if it appears to the tribunal having cognizance of the question that the election was so conducted substantially in accordance with the law as to election, and that the act or omission did not affect its result. The function of the Court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be preponderance of evidence supporting any conclusion that the result was affected."

12.12 In addition, and considering the law applicable in Zambia, **Section 97(4) of the Electoral Process Act**, referred to above has the following to say:

"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.”

12.13 Further, **Regulation 5(2) of the Code of Conduct**, which is the Schedule to the **Electoral Process Act No. 35 of 2016**, reads-

“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.”

12.14 The passages in the above three authorities are self-explanatory.

There ought to be more than just the failure to sign the GEN 20a form to nullify an election result. There should be evidence to show that the results were affected because of the failure or omission. The lack of signature is not enough to invalidate the result.

12.15 In the instant case, no lucid evidence was produced to show that the lapse in the signatures affected the result of the election at the affected polling stations. There is also no evidence that any complaint was raised at the time or immediately after the election on this subject. This shows that this allegation was an afterthought because if there was any irregularity which led to the

lack of signatures, a complaint or at least an effort to lodge a complaint would have been made much earlier.

12.16 In fact, it should be noted that the Petitioner, who was the only witness on this issue, conceded, in cross-examination, that he had no complaint about the figures for the results at Ambizi, Taferansoni and Kalongwezi polling stations. His only complaint was that the GEN 20a forms for the aforementioned polling stations were not signed by the Presiding Officers or polling agents, as the case may be. Further, he disclosed, in cross-examination, that where the UPND disputed the results, they opted not to sign the GEN 20a forms. He did not present any other evidence as the reason for disputing the results. In my view, this is where the above cited authorities come into play. The fact that the GEN 20a forms were not signed does not invalidate the results. There has to be tangible evidence to show what manipulation, as alleged, occurred and the manner in which it affected the result, which evidence the Petitioner did not produce.

12.17 My discourse above applies to the allegation that the votes at Chamaseche were manipulated. The 1st Respondent denied this allegation and stated that he was informed by his election agents

and confirmed with officials from the 2nd Respondent that he obtained 219 votes. He also called **RW1** and **RW2** as witnesses. These two witnesses stated that the 1st Respondent obtained 219 votes and they signed the GEN 20a form but that they were not given copies. They outlined the process of counting votes at Chamaseche polling station which process was repeated by **RW7**.

12.18 The Petitioner testified that he received information from his polling agents that the votes obtained by the 1st Respondent at Chamaseche polling station were 205 and not 219. That 14 votes were added to the 1st Respondent's votes. However, the UPND polling agents, being **PW4**, **PW5** and **PW6** testified but did not present any tangible evidence to prove this. **PW4**, **PW5** and **PW6** testified that they signed the GEN 20a form with the correct results but were not given the form. This evidence is similar to what **RW1** and **RW2** said. The point of departure is the alleged additional 14 votes given to the 1st Respondent. As the people alleging, the Petitioner did not present evidence to prove this addition and that the 1st Respondent only obtained 205 and not 219 votes.

12.19 The record of proceedings appearing at pages 14 to 18 of the 1st Respondent's bundle, which shows that the 1st Respondent obtained 219 votes at Chamaseche polling station, was not challenged by the Petitioner. In fact, the only GEN 20a form produced by the Petitioner, which appears at page 1 of his bundle, shows that the 1st Respondent obtained 219 votes and not 205 votes. As I have already found, despite not being signed by the polling agents, the results remain valid in the absence of evidence to the contrary. For such a serious allegation, this Court would have expected independent evidence from other stakeholders, who were at the polling station, to buttress this allegation or complain about it too.

12.20 I must state that the demeanor of **PW5** was evasive. She kept failing to answer questions put to her. As for **PW6**, he informed the Court that he signed the GEN 20a form but when asked to read the GEN 20a form at page 1 of the Petitioner's bundle, he informed the Court that he could not read. What was curious is that he did not even attempt to look at the document and the numbers he was being referred to. He added that he understood the GEN 20a form he signed through his friends, who explained

the contents to him. I, therefore, find the evidence of **PW6** unreliable. He appeared to have been coached on his testimony and could not confirm anything to the Court. In examination in chief, he was able to outline the figures which the Petitioner and 1st Respondent obtained at Chamaseche. However, suddenly, in cross-examination, he failed to even read numbers that appeared on the GEN 20a form he was referred to. Further, that he understood the Gen 20a form through friends.

12.21 Apart from the above, **PW4**, **PW5** and **PW6** were all UPND members. Therefore, their testimony requires to be treated with caution. I say this on the authority of Steven Masumba v. Elliot Kamondo⁽⁸⁾ where the Constitutional Court held that witnesses from a litigant's own political party are partisan witnesses who should be treated with caution and whose evidence requires corroboration in order to eliminate the danger of exaggeration and falsehood.

12.22 In my view, the evidence of **PW4**, **PW5** and **PW6** falls in this category. No evidence to corroborate their testimonies was presented in light of the denial by the 1st Respondent and his witnesses who bear no burden of proof. The Petitioner's witnesses

appeared coached on what to say. In examination in chief, they all remembered the votes obtained by the first three candidates appearing on the GEN 20a form. That is, those of the 1st Respondent, Obet Phiri (an independent candidate) and the Petitioner. However, when asked about the votes of the other three candidates who participated in the election, none of them remembered.

12.23 Further, they signed a GEN 20a form which contained their version of the correct results, which form was not provided in Court. In cross-examination, **PW4** stated that he asked for a copy of the GEN 20a form but was not given. He testified that he did not know that he was entitled to a copy. He revealed that he discussed the signed and unsigned GEN 20a form for Chamaseche with the Petitioner. Therefore, one wonders why the alleged signed one was not brought to Court.

12.24 **PW6**, on the other hand, testified that when they were trained, they were told that they were entitled to a copy of the GEN 20a form. However, despite this knowledge, there is no evidence to show that he complained to the 2nd Respondent about this. He claimed that the government in place was not receptive to people's

views. I find this excuse to be an afterthought as I believe a record of the complaint would carry more weight than sitting back because of what he perceived to have been a non-receptive government. In my view, documents produced contemporaneous with an alleged event tend to support that allegation. There is no independent evidence that was presented to prove that the 1st Respondent obtained 205 votes and not 219 votes at Chamaseche polling station.

12.25 The GEN 20a form produced in Court for Chamaseche was not witnessed by political parties' polling agents and stakeholders. However, in the absence of cogent evidence to invalidate the result, the provisions of **Regulation 5(2) of the Code of Conduct** apply to this situation too.

12.26 Apart from the above, there is no evidence that 90% of the voters at Chamaseche were assisted by the PF during voting. There is no single witness that testified that they were present at Chamaseche polling station and saw 90% of the voters being assisted by PF cadres. The name of the person who was assisting these 90% of the voters was not mentioned. In addition, no evidence was brought to show this Court how the Petitioner arrived at the 90%

figure. Further, of the alleged 90%, no single voter was called to come and testify on how they were assisted. Therefore, there is no evidence to prove this allegation. I find that it has not been proved to the required standard.

12.27 I accordingly find that there is no evidence showing any manipulation of results at Ambizi, Kalongwezi, Taferansoni and Chamaseche polling stations. The Petitioner has failed to prove the allegations brought, and I dismiss them.

12.28 In similar light, the Petitioner disputed the results for Chiyambi-stream-01 and Chadiza Primary School-stream-03 polling stations on grounds that the records of proceedings were not signed by the Presiding Officers. Again, the absence of signatures on the records of proceedings, as in the above allegations, is the only reason the results are disputed. There is no evidence to show that the results are incorrect and which ones are the correct results. There is no evidence that the results contained in the records of proceedings are wrong. In addition, there is no evidence that the lack of signatures by the Presiding Officers affected the result.

12.29 Relying on **Section 97(4)** above and in the absence of any sound evidence to the contrary, I find that the lack of signatures of the Presiding Officers on the record of proceedings for Chiyambi stream-01 and Chadiza Primary School stream-03 polling stations did not affect the result of the poll. I accordingly find that the Petitioner has failed to prove this allegation to the required standard elucidated above.

VOTE BUYING AND TREATING AT CHILENGA POLLING STATION

12.30 The Petitioner alleged that the 1st Respondent and his agents engaged in vote buying and treating at Chilenga polling station. The Petitioner stated that he did not see the 1st Respondent distribute food but that people who were present informed him about it. He agreed that the pictures at pages 15, 16 and 17 of his bundle of documents do not show the 1st Respondent or any agent distributing food. That neither does the picture at page 37 of the said bundle show Samuel Banda distributing food.

12.31 The 1st Respondent denied this allegation. He denied being at Chilenga polling station and distributing food on poll day. He called **RW3** and **RW4** who stated that the 1st Respondent was not

present at Chilenga polling station on the day of voting and that the one who bought food was Gezani Phiri. In examination in chief, **RW3** did not state that Gezani Phiri bought the food for his sisters. He said that after the food was bought, people went to get some and he and Gezani Phiri left. In cross examination, he stated that Gezani Phiri bought the food for his sisters.

12.32 **RW4** on the other hand testified that she is the sister to Gezani Phiri and that the food was for her and her sisters. She stated that Gezani Phiri bought this food between 10 and 11 hours and that other people followed him to get some food too. In cross-examination, she revealed that **RW3** and her young brother Mabvuto Phiri were with her and Gezani. That she had forgotten to mention that **RW3** was present.

12.33 The evidence of these two witnesses was incoherent. Further, it confirmed that some food was bought on that day. However, they stated that the food was bought by Gezani Phiri and that the 1st Respondent was not at Chilenga around 11 hours.

12.34 Despite this, the 1st Respondent bears no burden to prove. Therefore, I shall proceed to consider the Petitioner's evidence and

whether the allegation has been proved to the required standard regardless of what can be said about the 1st Respondent's case.

See: Masauso Zulu v. Avondale Housing Project.⁽¹³⁾

12.35 The evidence supporting this allegation was from **PW9** to **PW13**.

PW9 informed the Court that the 1st Respondent bought buns from her around 13:30 hours on the 12th of August, 2021 at Chilenga polling station. That he paid her ZMW100 and when people in the queue for voting saw this, they left the queue and went where he was. When the 1st Respondent saw people approaching, he left without paying the balance of ZMW60. When asked whether the 1st Respondent appears on the pictures at pages 15 to 17 of the Petitioner's bundle of documents, she answered in the negative but was quick to state that he was wearing a blue jacket.

12.36 Her evidence does not state who benefited from these buns. From her evidence, it appears the buns were bought and left with her. Further, she testified that the buns were worth ZMW162. However, in her testimony, she consistently talked about a balance of ZMW60 only and not ZMW62.

12.37 **PW10** testified that she voted around 12:00 hours and decided to sell bananas along the road next to the polling station. She explained that the 1st Respondent went to her and bought all her bananas worth ZMW40 and asked Sam Gunde to distribute to people in the queue for voting.

12.38 In cross-examination, she changed and said that the 1st Respondent gave money to '**his people**' to buy the bananas. When asked about the colour of the trousers the 1st Respondent wore, she instead told the Court the colour of the jacket as being blue. When asked why she rushed to talk about the jacket and not the trousers, she said she had made a mistake.

12.39 **PW11** testified that she was in the queue for voting on the 12th of August, 2021 at Chilenga polling station when she saw the 1st Respondent arrive with his team. That they started distributing fritters to people in the queue and when the fritters finished, they went to the roadside and bought sugar canes to be given to people in the queue and she too was given some. She added that she had a ZMW1 and decided to buy a banana and while there, the 1st Respondent bought bananas and she was given some. She then went back to the queue until she voted.

12.40 In cross-examination, it is curious that when asked about the colour of the shirt the 1st Respondent wore on the 12th of August, 2021, she was quick to point out that she saw his blue jacket. When asked about the trousers, she said it was blue. She agreed that there was a flower hedge and a borehole in between the queue and the roadside where food was being sold. She added that the 1st Respondent was with Samuel Banda but that she could not remember what he was wearing. She changed her testimony and said that Samuel Banda was the one carrying the food and distributing it.

12.41 This evidence is contradictory. In examination in chief, PW11 stated that she saw the 1st Respondent and his team distribute food to people in the queue. Later she changed and said it was Samuel Banda. Further, it is strange that she was in the queue when fritters were being distributed and also present when sugar cane and, later, bananas were being bought at the roadside. How possible is it that she was conveniently present at three places where food was being bought and distributed? In addition, she was quick to point out the blue jacket when she was asked about the colour of the 1st Respondent's shirt. Further, she testified that

she had a ZMW1 and wanted to buy a banana. It is interesting that she only decided to buy a banana at the time when the 1st Respondent was also buying bananas when she had been at the polling station before the 1st Respondent arrived.

12.42 Further, the video relied upon and exhibited as “YP5” to the affidavit in support of Petition shows, among other things, a person walking and being accused of distributing fritters to voters. However, the person accused does not have any fritters with him. In addition, the commentator in the video was not called so that the veracity of his evidence is tested. It should also be noted that my review of the video shows a distance of more than 50 metres between the queue for voting and the roadside where food was being sold. I, therefore, wonder how PW11 was able to clearly observe what was happening at the roadside whilst she was in the queue.

12.43 In my view, this witness’s evidence was rehearsed, just like that of PW9 and PW10.

12.44 PW12 stated that after the 1st Respondent bought the various foodstuffs, buns in particular, people wanted to beat him, so he

left. Her role was trying to help **PW9** get her balance of ZMW60 for the buns. She added that Sam Gunde Banda was the one distributing the food to people in the queue. What is curious about her evidence is that the testimony that people wanted to beat the 1st Respondent after he bought buns is very significant but only she talked about it. No other witness talked about it. Not even **PW9**.

12.45 **PW13** testified how the 1st Respondent bought food and Sam Banda was distributing fritters to the voters in the queue, and that he was also given some. Again, my observations on the video evidence apply here. There is no evidence of distribution of food in the queue or at the polling station by the 1st Respondent or Sam Banda.

12.46 The evidence of **PW9** to **PW12** appears rehearsed. It is curious that all of them would rather give the colour of the jacket that the 1st Respondent allegedly wore on the day of voting than the colour of his trousers or shirt. Even when asked specific questions to state the colour of the shirt or trousers, the witnesses gave the colour of the jacket.

12.47 It should be noted that the 1st Respondent denied knowing Samuel Gunde and being at Chilenga polling station on poll day. He said he was in Tikondane ward. The evidence brought by the Petitioner and his witnesses does not rebut this. There is no evidence of the blue jacket and the evidence of whether the food distributed by Samuel Gunde was with the knowledge and consent or approval of the 1st Respondent. I must be quick to point out that the Petitioner's witnesses referred to Samuel Gunde, Sam Gunde, Samuel Gunde Banda or Samuel Banda, in apparent reference to the same person, but without confirming to this Court whether they referred to one and the same person.

12.48 In addition, the Petitioner testified that the pictures at pages 15 to 17 of the Petitioner's bundle show the 1st Respondent distributing food. However, a review of these pictures does not show any person distributing food. If these pictures were taken at Chilenga polling station and show the 1st Respondent's vehicle parked and him and Sam Gunde or Samuel Banda distributing food, one wonders why the pictures do not show this. The picture painted is that there were different types of food bought at about 13:30 hours. However, the three pictures do not show this. The

picture at page 15, which shows people standing in a queue, does not show a single person eating maize, sugar cane, buns, bananas or fritters. Further, in one breath, the witnesses stated that the food was bought by the 1st Respondent while other witness stated that the 1st Respondent only produced the money. For the buns, PW9 testified that the 1st Respondent just bought the food and left when people started going to get the buns. However, PW12 testified that after he bought the buns, people wanted to beat him, so he left. This Court does not know which version to believe.

12.49 The witnesses have shown contradictions, untruthfulness and rehearsed evidence on material aspects. Their evidence therefore carries very little weight. **See: Masumba v. Kamondo,⁽⁸⁾** Further, despite these witnesses not being partisan, the mere fact that they are not does not make them credible. The issue of credibility is broad and includes the demeanour and the perception on truthfulness of the witness and consistency of one's testimony. **See: Kakoma v. Kundoti Mulonda,⁽¹⁴⁾**

12.50 The evidence remains hanging in so far as proving that the 1st Respondent was present at Chilenga distributing food or that with

his knowledge and consent or approval, Samuel Banda distributed food.

12.51 I wish to add that even if this Court were to find that there was voter treating at Chilenga stream-03 polling station, the question I ask myself is whether as a result of the treating the majority of voters were or may have been prevented from voting for a candidate whom they preferred. In answering this question, I seek solace in Mubita Mwangala v. Inonge Mutukwa Wina⁽⁹⁾ where the Supreme Court held that-

“In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct, it must be shown that a majority of voters in a Constituency were or may have been prevented from electing the candidate in that Constituency whom they preferred... it is clear to us that the corrupt practice or illegal practice or indeed any misconduct must affect the majority of the voters in a Constituency. In other words, the corrupt practice or illegal practice must be widespread in the Constituency to affect the majority of voters...”

12.52 Further, in Maluba v. Mwelwa and the Attorney-General,⁽¹⁵⁾ the Constitutional Court opined that the “majority” is the greater number of a part. That the word is used only with countable

nouns. That the numerical sense of “majority” has further been elaborated through the use of the term “widespread”, which means widely distributed or disseminated.

12.53 In the present case, the alleged treating happened at Chilenga polling station. This is 1 out of 73 polling stations with the Petitioner getting the most votes. Clearly, the alleged treating cannot be said to be widespread in the Constituency. In addition, the Petitioner obtained the highest votes at this polling station further showing that the majority were or may not have been prevented from voting for their preferred candidate.

12.54 I must add that the treating is alleged to have occurred about 13:00 hours and, by this time, several people had voted, that is, between 06:00 hours and the time of the alleged treating. The ones who voted before 13:00 hours and the ones who went to vote afterwards were not party to this treating, further casting reservations on whether the majority of voters were or may have been prevented from voting for their preferred candidate.

12.55 As I have stated above, I wish to point out that this Court should not lose sight of the higher standard of proof in election petitions

which requires a high degree of convincing clarity. Therefore, the highlighted issues raise questions in my mind and I find the evidence of **PW9** to **PW13** unreliable. I find that the Petitioner has not proved the allegation to the required standard and, even if he did, there is no evidence that the majority of voters were or may have been prevented from voting for their preferred candidate.

DISTRIBUTION OF BICYCLES TO CHRISTOPHER PHIRI

12.56 The Petitioner alleged that the 1st Respondent distributed bicycles and that one such beneficiary was Christopher Phiri. However, despite couching the allegation as stated above, the Petitioner called Mathias Banda, **PW8**, who told the Court that he was given a bicycle by the 1st Respondent in Matiele Village which hosts Ngala polling station.

12.57 The 1st Respondent denied this allegation and added that he never distributed bicycles in the Constituency.

12.58 The Petitioner's evidence does not prove this allegation. There is no evidence of the 1st Respondent giving out bicycles to Christopher Phiri or **PW8**. **PW8** did not bring the bicycle to Court as evidence. Further, **PW8** claimed to have informed the whole

village to vote for the 1st Respondent. One wonders how one person's benefit of a single bicycle would influence a whole village of non-beneficiaries to vote for a particular candidate. The recipients of the message from **PWS** were not called to come and testify to it.

12.59 Further, there is no evidence of the number of people in the village who were told to vote for the 1st Respondent. As stated in the Maluba case, majority is the greater number of a part. In this case, this evidence is lacking. I therefore hold the view that even if **PWS** was given a bicycle, there is no evidence that the majority of voters in the Constituency were or may have been prevented from voting for their preferred candidate. More so that the Petitioner got the most votes at Ngala polling station which is situated in Matiele Village.

12.60 I, therefore, find that the Petitioner has failed to prove this allegation and I dismiss it.

ABUSE OF GOVERNMENT RESOURCES

12.61 Under this head, the Petitioner alleged that the 1st Respondent, together with the DC, used a motor vehicle, registration no. GRZ

231CM to distribute DMMU-branded mealie-meal to voters in all polling stations. The Petitioner also alleged that the 1st Respondent's Canter was also used to distribute the mealie-meal. As regards the pictures at pages 18 and 19 of his bundle, the Petitioner conceded that the pictures show the DC and a vehicle but that he could not confirm from the pictures that the vehicle was a GRZ one and that mealie-meal was being distributed.

The 1st Respondent denied these allegations and stated that he never worked with the DC and that the DC was never his election agent.

12.62 Indeed, the pictures at pages 18 and 19 show 4 men standing. Only one of them was identified as the DC for Chadiza and another unidentified person is wearing a PF over coat. However, there is no vehicle with a GRZ number plate or any mealie-meal in sight or being distributed. The vehicle in sight is BAD 6862. It has no GRZ number plate. There is no proof that it belongs to the Ministry of Agriculture as alleged by the Petitioner. Further, there is no evidence of how this picture is connected to the 1st Respondent.

12.63 Further, the picture at page 20 shows a Canter belonging to the 1st Respondent. The next picture at page 21 shows the same Canter branded with the 1st Respondent's picture with bags at the back. However, it is not clear what these bags contain. Further, there is no sign of distribution of these bags. The last picture at page 22 shows two bags of DMMU-branded mealie-meal on the ground. The Petitioner sought to make this Court believe that these two bags are on a tent that appears in the Canter at page 21. However, my examination of the colour picture in the bundle of documents shows that the bags are on the ground and not on a tent. One can see some dry brown grass next to the bags, confirming that the bags are on the ground. Therefore, it is difficult and would amount to speculation to conclude that these bags of DMMU mealie-meal are the same ones that are in the Canter at page 21.

12.64 In addition, the 1st Respondent does not appear in the pictures and neither does the DC. There is no evidence that the DC is the agent of the 1st Respondent or that he was doing it with the knowledge and consent or approval of the 1st Respondent.

12.65 I say this as **Section 2 of the Electoral Process Act** defines an election and polling agent, respectively, as follows:

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

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

12.66 Further, there is no evidence that the bags in the 1st Respondent’s Canter are DMMU branded mealie meal. Therefore, there is no evidence linking the 1st Respondent to the DMMU mealie-meal.

12.67 As for the mealie-meal that was allegedly distributed in Manje Ward, which houses Manje polling station, the 1st Respondent denied this allegation and that he did not call for any meeting. **PW14** and **PW15** testified that the 1st Respondent was not present at the meeting where DMMU mealie-meal was being distributed. That the one present was the DC. As I have stated above, the DC is not an agent of the 1st Respondent. Further, there is no evidence that the DC distributed the DMMU mealie meal with the knowledge and consent or approval of the 1st Respondent. I say so because **PW14** and **PW15** testified that they had been told by the

chairlady of the club that the meeting had been called by the 1st Respondent. However, this chairlady was not called to testify. Therefore, **PW14** and **PW15**'s evidence linking the 1st Respondent on this issue is hearsay. See: **Subramaniam v. Public Prosecutor**⁽¹²⁾ referred to above. I accordingly find that there is no evidence linking the 1st Respondent to this allegation.

12.68 Further, no mealie-meal that was distributed was brought to Court. The number of people who attended the club meeting and who received the mealie-meal was not given to show the Court how widespread the alleged illegal activity was. As held in the **Maluba v. Mwelwa**⁽¹⁵⁾ case cited above, majority is the greater number of a part. The word is used only with countable nouns. Therefore, this Court cannot and should not speculate. In addition, the document marked X alluded to by **PW14** was not brought to Court. Therefore, there is no evidence to prove that at the club meeting **PW14** was given such a document and told to vote for the 1st Respondent. On the totality of it and as discussed above, I am of the view that the requirements of **Section 97 of the Electoral Process Act** have not been satisfied by the Petitioner.

12.69 As for the allegation that DMMU mealie-meal was distributed in Mangwe Ward, the 1st Respondent denied this allegation and stated that he never distributed any mealie meal at Mangwe. The Petitioner's evidence on this issue came from **PW16**. This witness's demeanor was unsteady and shaky. He kept looking either outside or at the ceiling. I had to remind him to look at the Court. Further, he stated that he is the UPND Youth Chairman, meaning that he is a partisan witness. There is no other witness that was called to corroborate his testimony. I therefore find his evidence unreliable in this regard. Further, **PW16** stated that he wrote to the District Conflict Management Committee over this allegation. However, no correspondence was brought to this effect. Like I said earlier, documents produced contemporaneous with an alleged event tend to support the allegation. Therefore, evidence of this complaint would have added weight.

12.70 In addition, this witness did not testify as to how many people had been given this mealie-meal apart from the bag allegedly given to the headman and the 4 bags given to him and the people he was with.

12.71 From the above, I am unable to conclude that the 1st Respondent or the DC, with the knowledge and consent or approval of the 1st Respondent, gave out DMMU mealie-meal at Mangwe ward. Again, even if it were so, Mangwe Ward is one out of 20 Wards and therefore it cannot be said that the majority of voters were or may have been prevented from voting for their preferred candidate as a result.

12.72 As regards the allegation that a Police Officer, was seen driving a motor vehicle registration no. GRZ 471 BX on 11th August, 2021, belonging to the 1st Respondent, the Petitioner did not adduce any evidence on this allegation. It appears he abandoned it. I shall therefore not belabour it.

VIOLENCE

12.73 The next allegation raised by the Petitioner was that Godfrey Phiri was beaten by the 1st Respondent and his agents. The evidence was from **PW7**, Godfrey Phiri himself. He testified that he was on his way to buy a cow and on the way, met the 1st Respondent, his driver and Bazilio. That the 1st Respondent ordered that he be beaten. The 1st Respondent denied the allegation. He denied meeting and beating or ordering the beating of **PW7**.

12.74 The Petitioner's version does not make sense. First of all, **PW7's** explanation as to why the 1st Respondent would order that he be beaten is interesting. He tried to explain this in cross-examination by saying that "*the 1st Respondent must have been told by the people he was with that that is Godfrey Phiri, who is in the opposition*". Obviously, the quoted text is speculative and cannot sit in the record of evidence. In addition, **PW7** was not the only person in the opposition at the time for him to be targeted. Further, the medical report at page 11 of the Petitioner's bundle shows that he was "beaten and assaulted by KNOWN person to him" not PERSONS. If he knew the person who beat and assaulted him, why was nobody arrested? Or why hasn't anyone been arrested post the election? I have difficulties believing **PW7's** testimony that a person who does not know him could simply call out for him when he was moving on a motor bike and order that he be beaten. The circumstances presented by **PW7** do not even explain how he was stopped when he was on a motor bike on his way to buy a cow.

12.75 I must add that the name of the 1st Respondent's driver was not mentioned. As regards Bazilio, I have not found such a name on

the list of polling agents appearing at pages 1 to 4 of the 1st Respondent's bundle of documents. In addition, the video exhibit "YP5" and pictures relied upon do not show PW7's assailants.

12.76 I find PW7's evidence untrue and unreliable. In any case, even if it were true, the evidence does not show how, through this isolated incidence, which appears not to have been witnessed by anybody, the majority of voters were or may have been prevented from voting for their preferred candidate.

12.77 The Petitioner brought another allegation that a UPND member, Skeva Banda (PW2), was beaten and that the incident was witnessed by PW3, Ailosi Phiri. Both these witnesses stated that they are members of the Petitioner's political party, the UPND. That they saw the 1st Respondent with Kasongo, Mallon, Francis Makambo, all of the PF, at Kampini Primary School.

12.78 The 1st Respondent denied this allegation and stated that he found the PF members with PW2 and left them together after talking to them for a short time.

12.79 The evidence of PW2 contradicted that of PW3. PW2 testified that when he left Kampini, he carried four friends, and, together, they

were five. **PW3**, on the other hand, stated that altogether, including **PW2**, they were four. Another contradiction was in cross-examination, where **PW2** testified that he went to the hospital 2 days after the incident, that is, on 14th August, 2021. **PW3**, on the other hand, testified that when the Police arrived at the scene, they immediately took **PW2** to the hospital.

12.80 In addition, **PW2** stated that he went to the hospital two days later because the Doctor at Katete District Hospital did not work on the 12th of August, 2021. However, he did not state how he knew this fact, seeing that he was in Chadiza while the hospital that endorsed his medical report form is in Katete. He also did not explain why he did not go to the hospital in Chadiza or Katete, (as preferred) the following day, the 13th of August, 2021, seeing that he told the Court that hospitals were open on this day. One wonders why a person, who claimed to have been hit with a block on the eye and suffered major injuries, would wait for 2 days before going to the hospital. In my view, apart from being contradictory, **PW2** and **PW3**'s testimonies are unreliable and require to be corroborated as both are partisan. No evidence has been brought to corroborate this as the medical report form

suggests that the injuries suffered may not have been commensurate to the scenario painted by **PW2** to the effect that he was heavily assaulted and needed medical attention immediately. Further, **PW2** and **PW3** testified that this matter was reported to the Police. However, there is no evidence of any report brought to Court.

12.81 In any case, there is no evidence that Kasongo, Mallon, Francis Makambo were polling or election agents of the 1st Respondent as defined under **Section 2 of the Electoral Process Act** referred to above or that the alleged assault was with the knowledge and consent or approval of the 1st Respondent.

12.82 From the above section, an election agent is one that appears on the nomination paper. No nomination paper was produced in the present case. For polling agents, the list at pages 2 of the 1st Respondent's bundle, under Kampini Ward, does not show any agent with the names of the alleged assailants. It may be argued that one Francis Makambwe signed the declaration of results form appearing at page 5 of the 1st Respondent's bundle. However, the 1st Respondent denied that this Francis was one of **PW2's** assailants. This evidence has not been challenged.

12.83 Further, both **PW2** and **PW3** conceded that when they saw the 1st Respondent with the alleged assailants, it was from a distance and they could not hear what was being discussed. The fact that the alleged assault happened a few minutes thereafter does not confirm that the 1st Respondent had knowledge and consent or approved the act. I, therefore, find no evidence that if the assault occurred then it was with the knowledge and consent or approval of the 1st Respondent.

12.84 In any case, even if I found that **PW2** and **PW7** were beaten by the aforementioned persons, the threshold under **Section 97(2)** has not been met. There is no evidence that the alleged violence was widespread. The violence is alleged to have been against two people in areas housing 2 polling stations out of 73. Further, no evidence was produced to show how the majority of voters were or may have been prevented from voting for a candidate of their choice. There was no evidence brought to show the number of people who witnessed the alleged violence to determine the extent to which the majority of voters were or might have been prevented from voting for a candidate they preferred.

12.85 I, therefore, find that the Petitioner has failed to prove the allegations of violence as well as meet the required standard of proof required in election petitions. I dismiss it accordingly.

EMPLOYMENT OF PF CADRES AS OFFICERS BY THE 2ND RESPONDENT

12.86 The Petitioner also alleged that a PF member, Samuel Phiri was employed by the 2nd Respondent as an Usher at Ngala polling station on voting day and another PF member, Isaac Lungu was employed to work on its servers at Chadiza totaling centre.

12.87 These allegations by the Petitioner, however, were not supported by any evidence. There was no proof to show that Samuel Phiri, firstly, worked as an Usher at Ngala polling station and secondly, that he was a PF cadre.

12.88 Likewise, there was no evidence to show that Isaac Lungu was a PF cadre. **RW7** testified that Isaac Lungu was an Assistant Returning Officer duly appointed by the 2nd Respondent. This evidence was not controverted. Therefore, the Petitioner, as the one who made the allegation needed to bring cogent evidence to prove otherwise. Even if Isaac Lungu was chased from the totaling centre, this does not prove that he was a PF cadre. Further, even

if he was, there is no evidence that by working on the computer at the totaling centre, he manipulated the result or that his working on the computer affected the result.

12.89 I therefore find that the Petitioner has equally failed to prove this allegation to the required standard and I dismiss it.

REGISTRATION OF, AND VOTING BY FOREIGNERS

12.90 The last allegation raised was that the 2nd Respondent, in conjunction with the 1st Respondent and his agents, registered a lot of foreign nationals as voters, particularly from Mozambique, who were allowed to vote in Zambia. The 1st Respondent denied this allegation and testified that the Ministry of Home Affairs issues NRCs and the 2nd Respondent registers voters. Further, that he was not a PF candidate at the time of registration of voters.

12.91 The Petitioner brought parts of a register of voters for Chanida and Chimbala polling stations as well as NRCs, voters' cards and Mozambican identity cards 'allegedly' belonging to two foreigners. I use the word 'allegedly' because the Petitioner did not call any person to speak to these documents in terms of who the actual owners are and whether they are Zambians or Mozambicans. I say

so because since the identity cards produced show two nationalities, it is difficult for this Court to discern which nationality the owners are. There is a possibility that they are Zambians with Mozambican identity cards or *vice versa*. The Petitioner needed to call the owners of these cards to speak to them or someone from the National Registration Office to speak to the authenticity of the NRCs. Without such evidence, this Court would be speculating in agreeing with the Petitioner that the identity cards belong to Mozambicans.

12.92 **RW7** testified that the 2nd Respondent registers voters based on age and possession of a green NRC, which the two voters, whose identity cards were produced, possessed. This evidence was never challenged. In any case, the Zambian and Mozambican names on the identity cards of the two individuals are different. There is no explanation as to why there is this difference and why this Court should believe that the identity cards belong to the same individuals, more so that the pictures are in black and white and not clear. The fact that there are these possibilities makes it difficult to find in favour of the Petitioner. If this court was to stretch it and find for the Petitioner, there is no evidence on how

the documents for the two alleged Mozambican voters affected the result as there is no independent proof, that they voted. The attached page from the voter register cannot prove this issue as there is no evidence of where it came from and who ticked against the two persons' names as having voted, for example.

12.93 Once again, I find that the Petitioner has failed to prove this allegation to the required standard and I dismiss it.

12.94 I wish to add that the Petitioner emphasised the fact that there was a difference of 42 votes between the 1st Respondent and himself in the entire Constituency. That as a result, the allegations show that 42 votes were lost through the Respondents malpractices. I do not agree with this notion. Firstly, the benchmark or standard of the law is not on the difference in votes and whether that number would have been affected by the malpractices. The benchmark, among other things, is that the majority of voters in the Constituency were or may have been prevented from voting for the candidate whom they preferred. This majority is for the entire Constituency, meaning that the malpractices must have been widespread.

12.95 In addition, the statistics in the present Petition show that the 1st Respondent obtained 9,396 votes, the Petitioner obtained 9,354, while an independent candidate, Obet Phiri, obtained 9,101 votes. Clearly, the Constituency seat was tightly contested, not only between the Petitioner and 1st Respondent but the independent candidate too as the difference in votes between the 1st Respondent and the independent candidate is 295 votes. If 9,101 people were able to vote for an independent candidate, it shows that a good number of voters had the liberty, freedom or independence to vote for whomever they preferred. The difference of 42 votes clearly does not reflect the Petitioner's contention.

12.96 Further, the voter turnout in the Constituency of over 69%, as shown in the record of proceedings also confirms the fact that the majority of voters were not prevented from voting on poll day.

12.97 I must add that the electoral system in Zambia, for parliamentary elections, is a simple majority or first past the post. **See: Articles 47 (2) and 68(2) of the Constitution (Amendment) Act No. 2 of 2016**, which are in the following terms:

“47(2) Elections to the National assembly shall be conducted under a first-past-the-post electoral system in accordance with Article 68.

68(2) The National Assembly shall consist of-

(a) One hundred and fifty-six members directly elected on the basis of a simple majority vote under the first-past-the-post system;

(b) ...”

12.98 From the above provisions in the Constitution, the candidate with the highest votes is declared winner regardless of the percentage. Therefore, the margin does not matter. The threshold remains that the allegations ought to be proved and the majority of voters in the constituency were or may have been prevented from voting for a candidate whom they preferred or that due to an act or omission by the 2nd Respondent, the result was affected.

12.99 It should be noted that **RW5** and **RW6** testified that the Petitioner called an auditor to audit the results at the totaling centre. This evidence was not challenged. In addition, the Petitioner did not challenge the evidence that after the audit, the auditor thanked the 2nd Respondent's officials and asked them to proceed to announce the results. Further, that after the audit, the Petitioner

and his supporters left. In my view, the above shows that the results announced at the totaling centre were verified and accepted by the Petitioner. If they were not verified and the audit found any anomalies, he would have seriously challenged this evidence more so that he believed in the difference of 42 votes.

12.100 I, therefore, dismiss the Petitioner's argument and reliance on the difference of 42 votes as the basis for moving away from the settled position of the law that the malpractices need to be widespread.

12.101 Before I conclude, I wish to address Mr. Lungu's submission that the evidence of **RW7** should be treated with caution as the said witness had an interest to serve as it was later discovered that he was the son of Bazilio Banda, the PF District Secretary. This issue just arose in the Petitioner's submissions. There was no evidence led by the Petitioner on it. If this was discovered after trial, Counsel cannot seek to bring it out in submissions as this amounts to giving evidence from the Bar. The Petitioner did not make the allegation or bring out evidence on the issue so that the Respondents are given an opportunity to respond to it. I,

accordingly, dismiss this submission as misleading and misconceived.

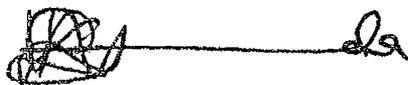
12.102 On the totality of the issues before me, I find that the Petitioner has failed to prove the allegations in this Petition against the Respondents to the required standard. I accordingly dismiss it.

12.103 In accordance with the provisions of **Section 108 of the Electoral Process Act**, I **HOLD** that the 1st Respondent, **JONATHAN DAKA**, was duly elected as Member of Parliament for Chadiza Constituency.

12.104 Due the fact that this is a constitutional matter and of public interest, I order that each party bears its own costs.

12.105 Leave to appeal is granted.

Delivered at Chipata this 17th day of November, 2021.



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K. E. Mwenda-Zimba
HIGH COURT JUDGE