

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT CHIPATA
(Constitutional Jurisdiction)

2021/HP/EP/0044

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

IN THE MATTER OF: SECTION 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

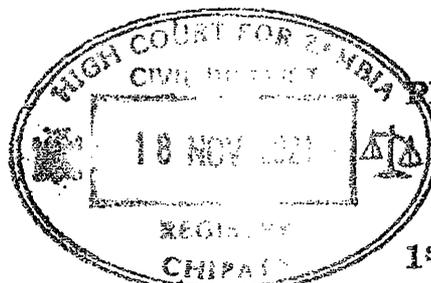
IN THE MATTER OF: KASENENGWA CONSTITUENCY
ELECTIONS HELD IN ZAMBIA ON 12TH
AUGUST, 2021

BETWEEN:

BEAUTY UNDI- PHIRI

AND

PHILIMON TWASA
ELECTORAL COMMISSION OF ZAMBIA



PETITIONER

1ST RESPONDENT
2ND RESPONDENT

BEFORE THE HONOURABLE MRS. JUSTICE M.C KOMBE

For the Petitioner:

Mr. M. Cheelo – Messrs MAK Partners

For the 1st Respondent:

*Mr. N. Yalenga- Messrs Nganga
Yalenga & Associates*

For the 2nd Respondent:

*Ms. T. Daka- Messrs Kalokoni &
Company*

J U D G M E N T

Cases referred to:

1. Attorney General v. Kakoma (1975) Z.R 212.

2. **Mutale Phiri v. The People (1995-1997) Z.R. 227.**
3. **Akashambatwa Mbikusita Lewanika and Others v. Chiluba (1998) Z.R. 79.**
4. **Chrispin Siingwa v. Stanley Kakabo (Appeal No. 7 of 2017).**
5. **Anderson Kambela Mazoka and Others v. Mwanawasa and Others [2005] Z.R 138.**
6. **Sithole v. State Lotteries Board (1975) Z.R. 105.**
7. **Austin Liato v. Sitwala (Selected Judgment No. 25 of 2016).**
8. **Giles Chomba Yambayamba v. Kapembwa Simbao and 2 others (Selected Judgment No. 6 of 2018).**
9. **Khalid Mohamed v. The Attorney General (1982) Z.R. 49 (S.C).**
10. **Breslford James Gondwe v. Catherine Namugala (SCZ Appeal No. 129 of 2012).**
11. **Robert Chiseke v. Naluwa Mwene (Appeal No. 12 of 2017).**
12. **Christopher Kalenga v. Annie Munshya and 2 Others [2013] ZMSC 27.**
13. **Mulondwe Muzungu and Elliot Kamondo (2010/EP/001 unreported).**
14. **Steven Masumba v. Elloit Kamondo (Selected Judgment No. 53 of 2017).**
15. **Subramanian v. The Public Prosecutor (1956) 1 WLR 956.**
16. **Charles Kakoma v. Kundoti Mulonda (Appeal No 5 of 2017).**
17. **Nkandu Luo (Prof and another v. Doreen Sefuke Mwamba and another (Selected Judgment No. 51 of 2018).**
18. **Mbolowa Sibulwa v. Kaliye Mandandi (Appeal No. 18 of 2016).**
19. **Samuel Mukwamataba Nayunda v. Geoffrey Lungwangwa (Appeal No. 15 of 2017).**
20. **Kapembwa v. Danny Maimbolwa and another (2005) Z.R 128).**
21. **Mwiya Mutapwe v. Shomeno Dominic (Appeal No. 19 of 2017).**
22. **Margaret Mwanakatwe v. Charlotte Scott and Attorney General (Selected Judgment No. 50 of 2018).**
23. **Michael Chilufya Sata v. Rupiah Bwezani Banda (SCZ/8/EP/2008).**
24. **Christabel Ng'ambi v. Prisca Kucheka and Electoral Commission of Zambia (Selected Judgment No. 2 of 2018).**

Legislations and other work referred to:

1. **Electoral Process Act No. 35 of 2016.**

2. **Electoral Process (General) Regulations Act of 2016.**
3. **The Constitution of Zambia (Amendment) Act No. 2 of 2016.**
4. **Black's Law Dictionary, 8th Edition.**
5. **Halsbury's Laws of England, 5th Edition and Vol. 38A.**
6. **Electoral Process (Code of Conduct) Regulations of 2016.**

On 27th August, 2021, the Petitioner **BEAUTY UNDI-PHIRI** filed an election petition against the 1st Respondent Philimon Twasa and the 2nd Respondent, Electoral Commission of Zambia (ECZ) contesting the results of the elections held on 12th August, 2021 with regard to the Kasenengwa Constituency Parliamentary seat. The Petitioner contested on the United Party for National Development (UPND) party ticket while the 1st Respondent contested on the Patriotic Front (PF) ticket.

In addition to the Petitioner and the 1st Respondent, according to the petition, the other persons who stood vying to be elected as Member of Parliament for Kasenengwa Constituency were Charles Banda – PAC, Levison Ziwa – Independent, Alice Kalima – Independent, Mawali Zulu – Independent, Mushanga Kapembwa – MMD, Timothy Nyirenda K – UNIP, Ingwe Nomsa – MDC, John Zulu – SP, Masauso Tembo – DP and Saili Phiri – EFF.

The Returning Officer Mr. Anthony Chupa declared the 1st Respondent duly elected Member of Parliament for Kasenengwa Constituency having

received Twelve Thousand Three Hundred and Twenty-eight (12,328) votes. The Petitioner was declared to have obtained Six Thousand Four Hundred and Eighty-Three (6,483) votes.

The Petitioner disputed the declaration by the Returning officer that the 1st Respondent had been duly elected because of a number of irregularities that she observed in the conduct of the 1st Respondent. The allegations levelled against the 1st Respondent were that:

- (i) *On 9th and 10th August, 2021, the 1st Respondent while working with the District Commissioner (DC) for Kasenengwa distributed bags of mealie meal to the electorate thereby influencing their way of voting. That the Petitioner had sent some of her supporters in the field and they managed to capture pictures and videos.*
- (ii) *Between 1st and 11th August, 2021, the Respondent gave out some items such as sugar, soap, mealie meal and cash to among other voters, Webster Banda, Joseph Banda, Juliet Moosa and many others.*
- (iii) *She and her team were blocked from campaigning in Kangombe village by Chief Madzimawe on 11th August, 2021 and that they were chased by the village indunas. The Patriotic Front team was also in the area when it was not their day but they refused to pave way for the Petitioner whose turn it was according to the ECZ*

calendar to conduct campaigns on 11th August, 2021 in Jim Village. That she personally informed the District Electoral Officer (DEO) who was in charge but no help was rendered.

- (iv) During the campaign, the 1st Respondent used a lot of hate speech towards the UPND Presidential candidate and herself. She heard the 1st Respondent tell the people who attended his meetings that Mr. Hakainde Hichilema sold the Zambian companies before and would sell the nation once he was voted into power.
- (v) She saw the 1st Respondent distributing face masks on 12th August, 2021 to voters and was heard saying the voters should vote for him. The 1st Respondent also gave out cash to voters such as Harrison Chongo, Kaifa Lungu, Isaiah Soko, Keziah Soko and many others.
- (vi) The 1st Respondent while working with an organization called Good Governance distributed money during the campaign period especially between 1st and 12th August, 2021 in Kwenje ward and asked the voters to go and eat the food prepared by Good Governance after voting.
- (vii) The 1st Respondent practiced vote buying during the door-to-door campaign by giving cash to the electorate. That the 1st Respondent also bought some iron sheets on 11th August 2021 for a church in

Mkowe ward, this act influenced the voters to vote for the 1st Respondent.

Against the 2nd Respondent, the Petitioner alleged that:

- (viii) The 2nd Respondent did not bring ballot boxes from four (4) polling stations until 48 hours after voting closed on the pretext that the 2nd Respondent forgot to bring the said ballot boxes to the totaling center. The 2nd Respondent did not also provide the GEN 20 form in the constituency which comprised of results from various polling stations making a constituency.*
- (ix) The Petitioner contended that the results announced by the 2nd Respondent's agent were not a true reflection of what the electorate voted in Kasenengwa Constituency of the Eastern Province.*
- (x) The servants and agents of the 2nd Respondent in complicity with some operatives of the 1st Respondent in the absence of the agents or accredited monitors from various political parties and islands of efficiency (civil) organizations were at polling station and totaling center systematically, deliberately and fraudulently inflating votes towards the 1st Respondent's votes by increasing them.*
- (xi) The 1st Respondent's agents and the 2nd Respondent's agents clandestinely involved themselves to contempt, illegal practice and or other conducts committed in relation to Kasenengwa*

Constituency General Elections held on 12th August, 2021 were against the spirit of the Republican Constitution, the Electoral Process Act No. 35 of 2016 and the Electoral Code of Conduct of 2016.

The Petitioner therefore, prayed that the Court would grant her the following remedies:

- (i) A declaration that the 1st Respondent herein was not validly elected as Member of Parliament for Kasenengwa constituency as such the election was null and void.*
- (ii) An order of recount, verifications and scrutiny of votes cast in the Parliamentary Elections from Kasenengwa Constituency on the 12th August, 2021 to ascertain the real winner.*
- (iii) An order that the ballot papers in relation to the Parliamentary Elections for Kasenengwa Constituency be recounted scrutinized and verified and any votes found to be invalid after that be added back to the total of the valid votes cast in favour of the affected candidate.*
- (iv) In the alternative, in the event that a recount and scrutinization is ordered and the resultant recount of the ballot cast shows that the Petitioner obtained more valid ballot cast for declaration as Member*

of Parliament for Kasenengwa, declaring the Petitioner the only duly elected Member of Parliament for Kasenengwa.

- (v) An order that 1st and 2nd Respondents bear the costs of this cause.*
- (vi) Any other reliefs the Court may deem fit.*

The 1st Respondent filed an Answer on 10th September, 2021 in which he acknowledged that the Petitioner was a candidate in the parliamentary election for the Kasenengwa constituency and that he was declared as winner by the Returning officer.

However, he denied that he was engaged in any irregularities or any electoral malpractice. Thus, he denied that between 9th and 10th August, 2021, he distributed bags of mealie meal in conjunction with the District Commissioner. That he became aware of the photos that the Petitioner had exhibited in her affidavit verifying facts when the same were posted in a WhatsApp group called Kasenengwa Hottest issues of which the Petitioner was a member by Davy Kapwata, a known UPND member. He added that the programme was in fact a hunger alleviation program under the Disaster Management and Mitigation Unit in the Office of the Vice President.

The 1st Respondent also denied that he distributed sugar, mealie meal, soap and cash to people mentioned as they were not known to him.

Furthermore, the 1st Respondent denied that Chief Madzimawe or his Indunas were his registered agents and that whatever conduct they engaged in was not with his instruction or knowledge.

In relation to the allegation that the 1st Respondent and his team refused to pave way for them to campaign, he averred that according to the campaign schedule, the Petitioner was supposed to be in Mpunza ward from 9th to 11th August and not in Kang'ombe village which was in Ngóngwe ward. In any case, on the said date, he was conducting road shows in Mboza, Makungwa and Ngóngwe wards and he never set foot in Jim village.

On the allegation contained in paragraph 10, the 1st Respondent averred that it was true that Mr. Hakainde Hichilema sold companies in the privatization programme on behalf of the Government of Zambia, a fact that Mr. Hichilema had acknowledged on numerous occasions. However, he denied that he engaged in hate speech directed at Mr. Hichilema and he therefore put the Petitioner to strict proof.

Regarding the allegation that he distributed face masks, he averred that he found voters were being turned away at Katinta polling station when he arrived to check on the progress on the basis that they had no face masks. That he accosted the 2nd Respondent's officials how and why the voters were being turned away. He was told that they had been instructed to

follow the Covid-19 guidelines and the official asked if he could assist them with face masks. He then handed over a box of 50 face masks to the officials to give to voters who had no masks.

He therefore denied that he distributed face masks directly to voters and that he distributed money to the electorates.

On the allegation involving the Good Governance organization, he averred that it had no connection with him and that at no time did it ever campaign for him. That the same was an entity which had been formed by well-wishers to advance the presidential campaign of the former President. He had not appointed it as his election agent and he had no knowledge about its activities.

The 1st Respondent also denied that he bought iron sheets for a church in Mkowe on 11th August, 2021. That on this last day, he spent the morning of that day with his campaign team in Mutenguleni where they had their main camp up to around 14:00 hours. Thereafter, he embarked on a road show passing through Makungwa, Mboza and Ng'ongwe wards and that this activity lasted up to 18:00 hours when the campaigns closed. He therefore denied that he was in Mkowe on 11th August, 2021.

On the allegation of the delay in bringing some ballot boxes from four polling stations, he admitted that there was a delay but he denied that it

was for over 48 hours. He added that the results from the said polling stations even if added to the Petitioner would not have changed the result as he would have still emerged victorious by a huge margin.

The 1st Respondent averred that he was validly elected as Member of Parliament for Kasenengwa and the results were a true reflection of that. He also denied that his agents conspired with the operatives of the 2nd Respondent at polling stations and the totaling center to systematically, deliberately and fraudulently inflate votes in his favour.

In this regard, he prayed that all the Petitioner's claims be denied and that this Court declares him as having been duly and lawfully elected Member of Parliament.

The 2nd Respondent also filed an ANSWER on 22nd September, 2021. The 2nd Respondent admitted that the Petitioner was a candidate for the Kasenengwa Constituency under the UPND; that the 1st Respondent was returned as duly elected Member of Parliament for Kasenengwa and that the Petitioner initiated these proceedings.

On the allegation that the 2nd Respondent delayed the bringing of ballot boxes, this allegation was denied and it averred that there was no inordinate delay in bringing ballot boxes to the totaling center. It also denied that it systematically, deliberately and fraudulently inflated votes

to increase votes for the 1st Respondent and that it was involved in contempt, illegal practices and any illegal practices before, during and after elections.

Thus, it was averred that it fulfilled its statutory mandate as required by the Electoral Process Act No. 35 of 2016 and the Electoral Code of Conduct. It was therefore the 2nd Respondent's prayer that the petition be dismissed.

Trial was scheduled to commence on 8th August, 2021 as per the Orders for Directions issued by the Court on 6th September, 2021. However, the Court was informed by counsel for the Petitioner that the Petitioner was indisposed. Trial thus commenced on 12th October, 2021 and ended on 13th October, 2021.

1. THE PETITIONER'S CASE

PW1 was **BEAUTY UNDI-PHIRI** aged thirty-eight (38) years old a Politician and Communications Expert of 794 Chalala of Shantumbu Road, Lusaka.

She testified that she filed a petition on 27th August, 2021 and an affidavit. She also filed Bundles of Pleadings and Bundles of Documents which she sought to rely on.

She told the Court that she wanted the Court to nullify the election for the Kasenengwa Parliamentary seat as she believed that the 1st Respondent was not duly elected. This was because there was malpractice in Kasenengwa Constituency as the 1st Respondent was involved in vote buying, giving out of mealie meal, cooking oil and money. He also coerced people who had no access to phones because there were no towers and that if they didn't vote for them, they would not access the mobile services.

She also stated that they were denied the right to campaign. That there was intimidation amongst their members and voters and the 2nd Respondent failed to inform them as people who were part of the elections process that there were certain areas that they needed people to be around to see that ballot boxes were picked or not picked.

She also testified that the effect of the malpractice was that it gave due advantage to the people to vote for the 1st Respondent as the people in Kasenengwa had no independent minds to choose a candidate of their choice. She added that during the voting day, masks were distributed to the voters who were being told to vote for the 1st Respondent, the PF candidate. However, she didn't know everyone who was involved in the distribution of masks because the constituency was quite massive but that there were people who witnessed that.

In cross examination, she stated that before she joined politics, she used to work for Bank of Zambia on a fulltime job as Acting Assistant Manager, Events and Hospitality. That it was a busy job but that every time she needed to go to Kasenengwa, she got leave. She only worked for two (2) years and that was the last two years before elections. She resigned from her job on 11th May, 2021.

The witness confirmed that initially she stood as an independent candidate but only switched to UPND when their preferred candidate died. Thus, she was not their first choice. She confirmed that the first nomination as an independent was on 12th June, 2021 and the one for the UPND was on 12th July, 2021. She also admitted that she filed as an Independent because her application under PF was not successful. She further confirmed that Philimon Twasa the 1st Respondent was the one who was nominated as a candidate by the Central Committee and Provincial Committee. The witness also confirmed that the 1st Respondent got 12,328 votes while she got 6,483 and was beaten by 5,845 votes.

The Petitioner was asked that the issue concerning the distribution of mealie meal was discussed in the WhatsApp group on 19th June, 2012, but that in her petition she had made reference to 9th and 10th August, 2021 as the dates when the 1st Respondent worked with the DC. She was further asked that the photo that appeared on the WhatsApp group was

the same one that she had exhibited as BUP (1a) and BUP (1b). In her answer, the Petitioner first confirmed that she was a member of a group called Kasenengwa Hottest issues and that on 19th June, 2021, the issue of distribution of mealie meal was discussed.

However, she denied that the photos that counsel had referred to were the same although she admitted that the photos showed the same people. She also admitted that the photo in the WhatsApp group was posted on 19th June, 2021.

When the witness was referred to paragraph 10 of the affidavit in support on the dates that appeared of 9th and 10th August, she stated that her averment in the petition that the incident happened on 9th and 10th August was not false. The witness also stated that the documents from page 2 in the 1st Respondent bundle of documents were delivery notes of mealie meal to the office of the DC and that it was the mealie meal that the 1st Respondent was distributing on 9th and 10th August, 2021.

The Petitioner denied that the distribution of mealie meal was a government programme because there was no hunger alleviation and that she didn't lie when she averred that the mealie meal was distributed on 9th and 10th August.

She also admitted that she didn't see the 1st Respondent give out money to Webster Banda, Joseph Banda, and Juliet Moosa as alleged in paragraph 9 of her petition as she was just told.

Asked if Chief Madzimawe was the 1st Respondent's agent, she answered in the affirmative although she stated that she had no evidence to show that he was the agent. The witness admitted that because of what happened in Jim village, she lost the election and that although she informed the DEO, she didn't have any evidence of the message that she sent to him.

The Petitioner admitted that she never heard the 1st Respondent say that Mr. Hichilema sold Zambian companies and that he would sell the nation once voted into power.

On the allegation that the 1st Respondent distributed face masks on polling day, she stated that there were eighty nine (89) polling stations in Kasenengwa but that it wasn't possible for her to have followed the 1st Respondent to all the polling stations as she just found him at two polling stations. She also confirmed that the people mentioned in paragraph 8 of the petition were given K5 in her presence.

When the witness was referred to paragraph 12 of the petition, she stated that she never saw the 1st Respondent work with Good Governance and

that she was not aware that it was an organization that campaigned for the former President.

In relation to paragraph 15 concerning the issue of distribution of iron sheets, she stated she didn't have any pictorial evidence to show that the 1st Respondent gave iron sheets and that she had not brought any evidence to show which church received the iron sheets. However, she insisted that the 1st Respondent donated the iron sheets but that she didn't see him. She denied that the 1st Respondent was at Mutenguleni the whole day on the 11th August, 2021 as she knew where he was after 16:00 hours. She confirmed that Mkowe was not in Mboza, Ng'ongwe and Makungwa and that she didn't see him give out cash in Mkowe.

She told the Court that she complained that she lost elections because ballot boxes only arrived 48 hours later and that if the ballot boxes had been brought within two hours, she would not have covered 5,845 which was the margin she lost by.

The Petitioner also admitted that the GEN 20 was not provided to the polling agents. If it had been provided, it would have changed everything in the sense that the results that were given in the GEN 20 to the polling agents would have been an exact reflection of what transpired on the ground as opposed to relying on one party to give them the results.

When the witness was referred to the Bundle of Documents, she agreed that, GEN 20 for Kasenengwa Constituency was given to the UPND agent who signed on the form. However, she stated that they were not given their copies. Asked if the polling agents were given copies of the GEN 20 forms it would have changed what the agents had signed for, she stated that if they had been given their copies by the 2nd Respondent, it would have been easy to tally the two if the numbers were correct and if they were not manipulated.

When she was asked by what margin the 1st Respondent's votes were clandestinely inflated according to her allegation, she stated that she didn't know as she only knew that they had been inflated because GEN 20 forms did not come from her. That she knew that if they had been furnished with the GEN 20 forms, she would have won the elections.

In continued cross examination by Ms. Daka, she stated that there was a failure by the 2nd Respondent to inform the people part of the electoral process whether ballot boxes had been picked or not. Asked if she had pleaded those facts in her petition, she stated that this allegation was in paragraph 14 of her petition.

She also told the Court that she did not have any evidence that ballot boxes were transported forty-eight (48) hours after voting had closed and

that she had no evidence that the results that were announced at the polling stations differed from what was announced at the totaling center.

When she was asked if any of the agents objected to any of the results announced at the polling station, she responded that there were others who objected but that she had no evidence of the objection because it was not put in writing.

There was no re-examination.

PW2 was **ABEL NGWENYA** aged thirty-eight (38) years old a Farmer and Electrician of Laban village, Chief Chikuwe in Kasenengwa District.

His evidence was that on 25th June, 2021 around 09:00 hours, he saw PF supporters distributing mealie meal weighing about 12.5kg per bag at the DC's office. He was surprised when he went there with his wife who also received a bag of mealie meal because there was no hunger in the area. He was informed by one of the PF supporters by the name of Stalich Mwanza from Chilemba village that the mealie meal was sent by the 1st Respondent so that people could vote for PF.

After the mealie meal was distributed, he personally took photos and uploaded on a page on Facebook called the Candidate and sent to other members of the UPND so that they could have evidence. The witness

identified the picture at pages 2 of the 1st Respondent's bundle of documents and at page 6 of the Petitioner's bundle of documents which showed the people who received the mealie meal at the office of the DC and the woman from Chimbeka village respectively.

After that, they used the mealie meal and they felt that 1st Respondent was more helpful to them and his family was convinced and decided to vote for PF.

PW2 told the Court that his preferred candidate was the Petitioner but he didn't vote for her because of the mealie meal that was distributed during campaigns. That the distribution of mealie meal which was done during the campaign disadvantaged the UPND.

In cross examination he told the Court that he was a staunch UPND supporter and he loved his party so much that at some point, he applied to be adopted as Council Chairperson but the party did not pick him. He confirmed that he was emotionally injured when his party lost the election. According to PW2, the Petitioner lost the election because of the mealie meal distribution on 25th June, 2021. He further stated that at the time of the distribution of the mealie meal, the UPND candidate was the late Hon. Titus Miti. He admitted that the 2nd nomination was conducted on

12th July, 2021 and the Petitioner filed and was nominated as a candidate for the Kasenengwa Parliamentary seat under the UPND ticket.

He told the Court that there was distribution of DMMU mealie meal at the DCs office but the 1st Respondent was not present and that the Office of the Vice President which was written on the mealie meal bag was part of the Government.

He also stated that despite being a staunch supporter of UPND, he was overwhelmed after being given a 12.5kg bag of mealie meal because his family which benefited from the mealie meal convinced him. Asked if the 1st Respondent convinced him to vote for him, he answered in the affirmative. However, he admitted that the 1st Respondent had not asked him to vote for him when he was given the 12.5kg bag of mealie meal. He added that he voted in Mkowe ward but that he didn't know who his family voted for because voting was secret and that it was not possible to know who his family voted for.

When he was asked if he expected the Court to believe him that he was so hopeless and helpless such that he was bought by the 12.5 kg bag of mealie meal that he was given, he didn't proffer any answer.

There was no re-examination.

PW3 was **GASTON PHIRI** aged forty-nine (49) years old a Farmer of Kangombe village Chief Madzimawe, Kasenengwa District.

PW3 told the Court that on 8th August, 2021, their Induna in their village told them that they should meet at the Chief's palace. The entire village met on 9th August, 2021 and the headman told them that the reason why they were called to the palace was to inform them that Chief Madzimawe had asked all the headmen to inform their subjects that they should not allow any meeting to be held by Mr. Hakainde Hichilema. He was surprised when he received this news.

That the next day around 14:00 hours, he saw a vehicle for Mr. Hakainde Hichilema that went for a meeting but the meeting was not held. This was because all the headmen left and they never welcomed him. However, an independent candidate by the name of Mr. Ziwa managed to hold a meeting which was attended by a very large number and it went on very well.

On 11th August around 16:00 hours, there was no meeting that was held in Kan'gombe village. The PF only distributed chitenges. When the witness was asked how many times the UPND managed to campaign, he responded that, that was the first trip and they were not allowed to hold a meeting. He also stated that all political parties were allowed to campaign except for UPND.

In cross examination, the witness confirmed that the 1st Respondent went to Kan'gombe village around 16:00 hours where he distributed T-shirts and chitenge for PF. He also stated that Mkowe and Kan'gombe were two different villages and that if someone told the Court that the 1st Respondent was in Mkowe and not Kan'gombe, the Court should believe him that the 1st Respondent was in Kan'gombe village.

The witness also stated that he never saw the 1st Respondent chase the Petitioner and her campaign team from Kangombe. He confirmed that it was Chief Madzimawe who asked his headmen not to allow the UPND to hold meetings.

There was no re-examination.

IREEN TEMBO aged forty-six (46) years old Farmer of Kasinje village of Chief Nzamane in Chipata District testified as **PW4**.

She testified that on 11th August, 2021 around 19:00 hours the Chairman for PF, Mr. Simon Lungu went to their Chairman's place and gave them K5 and told them that they should vote for the 1st Respondent so that he could be their MP. When she was given this money, she was with Irene Zulu, Alice Zulu and Loveness Chingande. She also stated that her preferred candidate was the Petitioner but she voted for the 1st Respondent from Kalungwezi polling station because they were given money.

Cross examined, she told the Court that she was a farmer and she had made K6, 000.00 in the last farming season. She also stated that the K5 confused her and that made her change her mind and so she voted for the 1st Respondent.

When she was referred to the Record of Proceedings at the Totaling Center Form at page 4 of the 2nd Respondent's bundle of documents, the witness admitted that at Kalungwizi polling station where she voted from, the one who won was Charles Banda from PAC who got 201 votes while the 1st Respondent got 177 votes. However, she stated that all that didn't matter because the 1st Respondent won the elections.

The witness further told the Court that the money was given to them by Simon Lungu and not the 1st Respondent. However, she knew that Simon Lungu was the 1st Respondent's agent because they used to move together.

When she was asked if her vote was cheap, the witness didn't respond but told the Court that she couldn't remember what she did with the K5 but she did not buy anything of value. She also stated that she was not aware that the 1st Respondent lost at Kalungwezi polling station because she didn't have a radio but she knew that he won as a Member of Parliament.

There was no re-examination.

PW5 was **LOVENESS CHINGANDE** aged sixty-one (61) years old a Farmer of Kasinje village of Chief Nzamane in Chipata District.

She testified that she was given K5, by the 1st Respondent through Simon Lungu, Chairman for the PF and that he told them to vote for the 1st Respondent because he was from the ruling party. However, her preferred candidate was the Petitioner who she identified in Court.

The witness further stated that Simon Lungu asked the whole village to queue up so that they could be given the money. However, she could not remember the time but confirmed that it was on 11th August, 2021.

In cross examination, she stated that the name of the person she wanted to vote for was Beauty and that she saw her about four times in their area during campaigns. The witness confirmed that the Petitioner was the daughter of Chief Gawa Undi but that she had never seen her do anything in the area as she just came during the campaign period. She further confirmed that she received only K5 from the 1st Respondent through his Chairman Simon Lungu but that she had not received the money personally from him.

There was no re-examination.

PW6 was **ALICE ZULU** aged fifty-five (55) years old a Farmer of Kasinje village of Chief Nzamane in Chipata District.

Her evidence mirrored that of PW4 and PW5. She stated that on 11th August, 2021 around 21:00 hours, Mr. Simon Lungu, the Chairman for PF went to Kasinje village and distributed money to all the women in the village and they were told to vote for the 1st Respondent because he was in the ruling party. The other people she saw who were given money were Irene, Engwase Zulu and the rest of the village.

She further stated that on 12th August, 2021, they voted for the 1st Respondent and he won the election. PW6 told the Court that she did not have any preferred candidate as she was just an ordinary person in the village.

The witness further stated that she saw the 1st Respondent three times in their area during campaigns. She also saw the other candidates like Charles Banda, Beauty Phiri who stood on the UPND ticket and Ziwa. That she saw the Petitioner three times during her campaign in Kasenengwa and that she saw 1st Respondent twice. She added that her preferred candidate was the 1st Respondent.

In cross examination the witness stated that she was a registered voter although she had not carried the voter's card with her. She admitted that

since she had not carried, it would be difficult for the Court to believe her. She also admitted that she wanted to vote for the 1st Respondent and that it was not the 1st Respondent who gave her K5.

There was no re-examination.

ENGWASE ZULU aged sixty-one (61) years old a Farmer of Kasinje village of Chief Nzamane in Chipata District testified as **PW7**.

The witness testified that it was on 10th August, 2021 around 16:00 hours, when Grace Phiri the wife to the Chairman, Gershom Miti informed them that they should go to her house. So, when it was 17:00 hours, they went to their home. All the women in the village gathered and they wondered why they had been called, because it was cold.

Later, the PF Chairman arrived and he apologized that he had a meeting. He then asked them to queue up and he gave those in front K5 each. As they were being given the K5, they were told to vote for the 1st Respondent as he was already in government and that certain things would change.

After the meeting, the next day they voted for the 1st Respondent who won the election. However, her preferred candidate was the Petitioner but that they were afraid as they had been told that the 1st Respondent was in government. So, she wanted to see what he would do for them.

In cross examination, the witness stated that she did not belong to any political party but she knew the people because they went to their village. PW7 confirmed that she voted for the 1st Respondent because she wanted to see what he would do for them.

There was no re-examination.

PW8 was **ZIDANA SAKALA** aged thirty-seven (37) years old a Farmer of Nyati village of Chief Nsholo in Kasenengwa District.

The witness testified that on 25th July, 2021, the 1st Respondent held a meeting at Kasuma Primary School and they were informed that the 1st Respondent had taken some steel bars and so they should vote for him. If they didn't vote for him, the telecommunication network would remain bad as the towers that had been constructed would not be completed.

The witness further stated that at the scene of the construction, there was a plan and foundation of the tower but the 1st Respondent only went there to add on to what was already there. When he was referred to page 20 of the Petitioner's bundle of documents, he stated that he did not see the 1st Respondent in the picture citing that he had problems with his sight but that he was able to identify the 1st Respondent in Court.

PW8 stated that the effect of the meeting was that people were happy that the tower would be completed and so they voted for 1st Respondent. He added that personally he was happy because he knew that the problem of network in Njati would end and as a result he voted for the 1st Respondent.

In cross examination the witness confirmed that on 25th July, 2021, the 1st Respondent held a meeting at Kasuma Primary School and that he brought steel bars for the construction of the tower. When he was referred to a document that was referred to earlier in his evidence, he confirmed that he knew how to count and that there were ten (10) people in the picture. However, he denied that that was the meeting he had referred to because construction by then had not started. He stated that he didn't talk about the picture that was taken on 25th July, 2021 but about the meeting that was held on 25th July, 2021. He confirmed that the tower at Kasuma was not a recent one as it had taken time. What the 1st Respondent did was to add some materials.

The witness thus told the Court that the picture had nothing to do with the meeting that was held. The witness further stated that he never attended any campaigns for the Petitioner but that he attended campaign meetings for Charles Banda and Ziwa. That Mr. Charles Banda promised the electorate that if they voted for him, he would drill boreholes, while Ziwa told them that if they voted for him, he would take water and

construct schools. The 1st Respondent promised them that he would finish the towers and build schools.

He confirmed that he was a registered voter, and that about thirteen people stood in Kasenengwa. According to him, the messages from all the thirteen contestants were appealing but the one which was most appealing was the one from the 1st Respondent because he talked about the issue of the poor network or the completion of the tower because communication was very important.

When the witness was referred to page 4 of the Petitioner's Bundle of Documents (4b) he stated that he didn't know if the tower he had referred to was part of the 24 towers that were being constructed according to the document. He admitted that he was not aware that the government was responsible for the construction of the towers as he was only interested in the steel bars that were brought at the meeting.

When he was asked who the 1st Respondent handed the steel bars to that were brought at the meeting, he stated that there were headmen who remained behind but he didn't know what happened afterwards because he left for Katete and only went back on 8th August, 2021. He also stated that he was not able to check on the progress of the construction because his village was far from Kasuma.

He also stated that his testimony was in relation to the meeting and not what was in the pictures. Furthermore, he stated that he had not been shown pictures of the meeting with the materials and that he didn't know who received the materials that were allegedly brought by the 1st Respondent to the meeting.

There was no re-examination.

PW9 was **MASAUISO MITI** aged thirty-seven (37) years old a Farmer of Chuma village of Chief Madzimawe, Kasenengwa District.

The witness testified that during campaigns and before the voting day, the PF set a camp at Chongo trading turn off. That whenever the 1st Respondent was going through the campaigns with his campaign team, he would stop over. Those who drank alcohol would then run to him in a group and he would give them money through the window and ask them to vote for him so that he could go to parliament. That he gave them money on three occasions. The first time he gave them money was on 7th August, 2021, the second time was 8th August, 2021 and the last time was either on 10th August or 11th August, 2021.

When he was asked to describe his state of mind when getting the money from 1st Respondent, he stated there was never a time he found them recklessly drunk.

He confirmed to the Court that on 12th August, 2021, he voted for 1st Respondent because he had asked them to vote for him after giving them money.

Cross examined; the witness confirmed that the 1st Respondent found them at the Chongo trading turn off as that was a place where he spent most of his time every day. He also stated that whilst at Chongo turn off, it wasn't possible to see the entire Chongo village. That the money they got from 1st Respondent would be used to buy beer, others bought drinks and others shared and others kept the money. He was in a group which used to buy alcohol. He admitted that in this regard, he would remain drinking beer and would not follow to see what was happening in the village and if the 1st Respondent would be giving out money in the village.

The witness also confirmed that they used to run after the 1st Respondent's vehicle every time they saw him so that he could give them money because his friends used to call him honourable and that when they did that, he would stop the vehicle. However, there was a time when he stopped on his own, came out on his own and went to where they stood. That they only asked the 1st Respondent once for money and that since they asked for money it was not wrong for him to have given them the money. That if he had done something wrong, he would not have received the money.

He added that they were about twenty (20) people who collected money from the 1st Respondent. He also confirmed that he was a registered voter and that he wouldn't know how many votes the 1st Respondent got to beat Petitioner. He also stated that he was a member of PF and it was normal for him to have voted for a PF candidate. That whenever he met the 1st Respondent, he used to tell them to vote for him and that other candidates used to ask him to vote for them.

He added that he used to run after the 1st Respondent out of love and because he expected to get something from him. And that he voted for the 1st Respondent because he loved him.

There was no re-examination and that marked the close of the Petitioner's case.

2. THE RESPONDENTS CASE

The 1st Respondent opened his case on 13th October, 2021 and called four (4) witnesses.

RW1 was **PHILIMON TWASA**, the 1st Respondent. He gave his age as forty-nine (49) years old a Businessman and Politician of Tawete village of Chief Madzimawe, Kasenengwa District.

The witness testified that he was the 1st Respondent in this Petition and that he had answered the allegations which were leveled against him by the Petitioner Beauty Phiri. He therefore asked that the documents which were filed be admitted in evidence.

The witness denied the allegations leveled against him in paragraph 7 of the petition as he stated that he never went to any single campaign trail with the DC for Kasenengwa. He also stated that he only learnt about the distribution of mealie meal by the DC on 19th June, 2021 through their WhatsApp Group called Kasenengwa Hottest Issues. He also denied that he heard anything about 9th and 10th August, 2021. All he knew was that the distribution of mealie meal was a government programme through government called DMMU.

The witness therefore told the Court that according to the information that he had, the pictures tendered as evidence appeared on a Facebook page called the Candidate and were posted on 19th June, 2021 on Kasenengwa Hottest Issues by a UPND officer called Davy Kapwata. He therefore found that the evidence of Abel Ngwenya contradicted that of the Petitioner.

When the witness was referred to the documents at pages 1 and 2 of 1st Respondent's Bundle of Documents, the witness stated that those were some of the members on Kasenengwa Hottest Issues and that the

Petitioner was one of them. Page 2 showed the picture that appeared on the 19th June, 2021 posted by Davy Kapwata.

In relation to paragraph 8 of the petition, the 1st Respondent stated that at no time did he ever distribute, soap, sugar, cooking oil to any of the people like Webster Banda, Joseph Banda and Juliet Moosa and that he didn't even know them. None of them even appeared in Court to testify.

When the witness was referred to paragraph 9, he denied the contents stating that Chief Madzimawe was never in his campaign team and he was never his election agent neither were the Indunas. That he only learnt about the Petitioner being chased by Indunas through the petition, prior to that, he had no knowledge whatsoever.

Asked if he recalled the evidence of Gaston Phiri, the witness stated that Gaston Phiri told the Court that he never met the Petitioner in Kang'ombe and that he never chased them because they were not there. He also stated that Gaston told the Court that they were in Kang'ombe village around 16:00 hours and that Kangombe village and Mkowe village were far apart. He added that according to Gaston Phiri he stated that the Indunas were not there to receive the Petitioner and not that the Petitioner was chased.

When he was asked about the aspect of not giving way in Jim village, the witness gave an account of how he spent his day. He stated that in the

morning, he went to their campaign center in Mutenguleni where he held a meeting with the campaign team before they dispersed to their various homes to go and vote. He was there up to past 14:00 hours. After he realized that they didn't have enough time to hold any meeting, they decided to hold a road show. Therefore, they went to Namayawe village in Makungwa ward and that he never went out. They drove through Msoro road via Pwata village in Mboza ward, then they turned and went back to their campaign center via Kangombe village around past 16:00 hours.

In Kang'ombe village, they didn't meet any campaign team from any political party. They arrived at their campaign center at 17:55 hours and the campaign closed at 18:00 hours. Therefore, he had no time to go to Jim village or even Mkowe. So the evidence that was given by Gaston that he was in Kangombe village was the correct account.

On the geographical location of Mkowe and Kangombe, the 1st Respondent stated that these two wards were very far apart and that it took almost an hour to get to the other ward. Between Ngongwe ward and Kwenche ward, there were two wards in between namely Mboza ward and Chiparamba ward. Therefore, it was not possible for one to be found in two different wards which were far apart at the same time. That Mr. Gaston Phiri was therefore right to have stated that at 16:00 hours he was in Ngongwe ward in Kangombe village doing a road show and distributing chitenge materials

and T-shirts. He denied that he was in Mkowe and there was no evidence that he was in Mkowe ward.

On the allegation relating to the use of hate speech, the witness denied that he ever uttered those words and that there was no evidence adduced in Court to prove that he said those words. Furthermore, the Petitioner never mentioned when or where he said those words.

Regarding the allegation that he distributed face masks, the 1st Respondent stated that on 12th August, 2021, he went to Katinta Primary School in Makingwa ward and he found very few people about eight people who were casting their vote. He engaged the 2nd Respondent's officials who were at the door and he asked them why there were no people. He was told that most of the people had voted in the morning and some were being turned away because they didn't have face masks. He wondered why they were doing that when the 2nd Respondent was supposed to give out face masks. He was told that they only had a few masks which had run out in the morning. He was then asked by officials if he could give them masks which they would distribute if he had some. The 1st Respondent then got a box of 50 masks which were supposed to be for his campaign team and gave it to the 2nd Respondent's officials. That's how they left the polling station.

The witness also stated that when he got to Kalungwizi polling station around 13:00 to 14:00 hours, he was approached by about five to seven people who greeted him. One of them wore a vest like those for the 2nd Respondent. He informed him that there were no face masks and people were being turned away. He told him that he didn't have any masks but the man insisted that he had seen a box his car. He told him that the box was empty as they had finished all the masks. When they opened, they found three or four masks and he gave them. After that he went and talked to the polling agent and he left.

He added that Kasenengwa had 89 polling stations and he only went to two polling stations in the afternoon when many people had voted. He didn't engage himself directly with the voters but with an official from the 2nd Respondent.

Furthermore, in the two polling stations he visited, he lost the votes. So, there was no way the masks would have influenced the voters at Katinta polling station which was in Makungwa ward. The witness made reference to the 2nd Respondent's bundle of documents and the supplementary bundle, in particular the GEN 20 form for Katinta polling station. This document showed that Charles Banda of PAC won with 171 votes and that a UPND representative signed the form. The witness also stated that

according to the Record of Proceedings at the Totaling Center, Charles Banda of PAC won the elections at Kalungwizi polling station.

The witness also confirmed that he never went on a campaign trail on 12th August, 2021 and neither did he give out money to Harrison Chongo, Lungu and all those who were mentioned in the petition. That none of the people that had been mentioned appeared in Court to testify and there was no evidence produced by the Petitioner that he gave out money to the said individuals.

In this regard, he stated that the allegations were false, as the giving out of masks to the 2nd Respondent did not influence any voters at all because he lost in those polling stations.

In answer to the allegation at paragraph 12, the 1st Respondent stated that throughout their campaigns, he never campaigned with Good Governance. If anything, he always picked up arguments with their coordinator, Mr. Zulu because he thought they were de-campaigning him. That he had no relationship with Good Governance, he never distributed money with them and he never had a meeting with them. He further stated that he never provided any food to any electorate and that there was no evidence to support the Petitioner's allegation and that she never produced any witnesses in Court.

On the issue concerning the delay in the announcement of the final result, he stated that he also got concerned and he remembered that he had accused the officials from the 2nd Respondent on two occasions. Their excuse was that they had transport problems and that the last ballot boxes were on their way to the totaling center.

He further stated that notwithstanding the delay, the first point of counting the votes was at the polling station and that the votes were certified by polling agents on the GEN 20 form. The parties would know the results through phone calls made by polling agents.

When the witness was referred to paragraph 13 of the petition that there was vote buying during the door-to-door campaign, the witness denied the allegation and stated that they never gave out money during the door-to-door campaign. Furthermore, that no evidence was adduced that they were involved in such vices.

In response to the evidence by Mr. Masauso Miti, the witness told the Court that he remembered that he stopped at Chongo turnoff about twice during campaigns. At one point their dancers were very hungry and so they stopped by the shops which were at the turn off to buy them food. While there, about fifteen to twenty drunk men approached him and demanded that he buys some food for them as well whilst others

demanded for money. He tried to avoid them but they were very persistent. At that point, he pointed to their campaign manager and they thronged the campaign manager who he presumed gave them something. He stated that he personally didn't give them anything.

He further added that another time, he drove past the turn off and since there was a turn, he slowed down. When the same group of men some of whom were wearing PF T-shirts but who were seemingly drunk saw his vehicle, they went to the window and demanded for money as they were his people. He realized that they were not going to leave him alone. He therefore opened the window just a bit because of Covid-19 and gave out a K50 to one of them and that's how they ran away. That they never stopped there and called people to the vehicle as he never liked stopping at trading centers. This even earned him a name which was prominent in Kasenengwa that he was very stingy; that he had a sore on his hand, he couldn't stretch his hand.

Concerning evidence from the women of Kasinje village and Mr. Simon Lungu, the 1st Respondent told the Court that he only learnt about that testimony in Court. He never ever at any single time gave money to their campaign team to distribute to people. Mr. Simon Lungu was PF Kasenengwa District Secretary and that he was not his campaign manager and was not in the frontline of his campaigns. That Mr. Lungu was at

District level therefore he could not have sent him to meet women at any single time. Besides there were internal issues in their camps over adoption process. He also added that they didn't have enough funding to give out money to people. That's why he was labelled a stingy man.

The 1st Respondent also denied that he bought steel at any single time because he didn't even know the type of steel, they used to construct a tower and he didn't even know who the contractors were. All he knew was that there was a government programme through Zambia Information and Communication Technology Agency (ZICTA) who were constructing towers across the country.

He further told the Court that he didn't know if an individual could buy materials for construction of a tower because he did not know who could have received the said materials. The 1st Respondent also testified that PW8 failed to produce proof that he was the one who procured those materials and that he donated those materials. She also failed to state who received those materials.

When he was asked about his admission of being at the tower site, he told the Court that he came across the site after having their meeting in Mboza and so they stopped there. He was excited as he had just come across the

site for the first time and in his campaign message, he used to talk about construction of towers by the PF government once voted into power.

He therefore stated that the picture at BUP 4a was the construction site at which they had made a stop-over with his campaign team in order to appreciate what was happening at the site out of curiosity. He denied that he addressed a meeting at that site. There was also no evidence that he donated steel or construction material at the site.

On the allegation that he colluded with the 2nd Respondent to manipulate and inflate figures, the 1st Respondent denied the allegation. He stated that the results were signed for right at the polling stations soon after vote counting as it could be evidenced from the GEN 20 forms. There was no evidence that showed that the total figures combined on GEN 20 were different from those announced by the Returning Officer.

For instance, the witness stated that the poll results on the GEN 20 at Katinta written as Makujwa on page 29 of the Supplementary bundle of documents, showed that Charles Banda had 171 votes and on page 4 of the 2nd Respondent's bundle of documents showed 171 votes on the Record of Proceedings at the Totaling Center. Furthermore, that the results for Zulu John of the Socialist Party showed that he got two votes and this corresponded with the votes at page 4.

He further stated that what he knew was that soon after voting, all party representatives and observers signed the GEN 20 forms to confirm that the results that had been counted and recorded were true. Therefore, it was not true that figures were inflated in his favour because the results on GEN 20 and those announced by Returning Officer corresponded and were a true reflection of each other.

The witness further added that the Returning Officer announced correct election results according to the way people voted and the results recorded. That the Returning Officer was right to declare him as duly elected. He therefore prayed that the Court dismisses the petition and uphold his election as duly elected member of Kasenengwa on PF.

In cross examination, the witness told the Court he had no problem with the manner in which the 2nd Respondent conducted the elections and that as far as he was concerned, they did a perfect job. He also admitted that he had election agents in all the 89 polling stations and that the agents were availed with GEN 20 forms. The witness confirmed that on page 1 of the 2nd Respondent Supplementary Bundle of Documents was a GEN 20(a) form. However, he didn't know who retained the GEN 20 (a) and GEN 20 (b) forms.

He also told the Court that the second name on the GEN 20(a) showed Phiri Beatrice of UPND. However, what he knew was that Beauty Undi stood on the UPND ticket but this name did not reflect on the GEN 20 form.

When the witness was referred to the GEN 20 form at page 5 and 1, he stated that they bore different names. He also stated that the GEN 20 form did not indicate that there were any representatives of the parties who signed the document.

On the document at page 6, he stated that the representative which signed was Good Governance Zambia which he had deposed to in his affidavit supported the former President. However, he didn't know who they had signed for; that three people had signed the document but he had not seen the signature for the representative of UPND.

At page 8 of the same Supplementary bundle, he stated that it showed that Beauty Undi stood as Independent when she stood on the UPND ticket. That on the same document, he did not see a representative from UPND who signed the form but that there were two representatives from PF. However, he didn't know if that was unusual as he had never used the GEN 20 form before.

On the document at page 10, he confirmed that he did not see who represented PF and UPND as what was indicated were just names. On page 11, the witness confirmed that he won elections at that polling station but he didn't know which polling agent signed the form as there were only signatures without names. This happened in Madzimawe Chiefdom where the witnesses told the Court that UPND were not allowed to campaign. He confirmed that he campaigned freely not because of corruption, but because of his good works.

When reference was made to the document at page 12, he stated that it showed that twelve candidates stood in that parliamentary election but that only one person witnessed. However, he didn't know whether that was normal or not.

On the document at page 16, the witness confirmed that there were signatures which represented independent candidates, two for UPND and two for GEARS. That no one represented the PF candidate but that he won over the UPND candidate.

On the document at page 17, he stated that he won at Chibamu School, and that the representative for PAC signed twice, while Elizabeth had no representative. That only three representatives signed on the form; that

the polling station was in Madizmawe chiefdom but he only heard one witness and not witnesses tell the Court that the UPND were chased.

On page 19, he stated that three independent candidates contested but that four representatives signed for the independent candidate. That he won at Katinta polling station against UPND and that no one signed on his behalf. He also confirmed to the Court that he had about 168 polling agents for all the polling stations. When he was asked if he found it strange that in some of the polling stations, he didn't have representatives, he responded that he was not shocked because he knew the history of those people. He was neither happy nor sad.

On the document at page 21 which showed that there was a Levison Ziwa who stood as an Independent and a Levsion Ziwa who signed as a witness, he told the Court that he could not tell if it was an anomaly because some of the names were common and that it would be possible that it could have been a coincidence especially if they shared a common name.

When the witness was referred to page 25 and asked how many times, he had seen Good Governance on the forms, he stated that the election was not a parliamentary election but a general election although the document was for a parliamentary election under Kasenengwa. He also told the Court that he didn't find it strange that GOZA which was advancing

interests of the former President always appeared on the documents. He denied that it was a confirmation that it used to advance his interests as alleged by the Petitioner.

The 1st Respondent also admitted that the alteration at page 26 had not been countersigned and that since that was not done, it was an anomaly. He also confirmed that the document was in his favour.

On the document at page 28, the witness stated that it had an alteration against the figure on his name but that this had as signature which had not been countersigned. He added that the documents were authored by the 2nd Respondent but that he didn't know if the documents were authored by the same person.

In relation to the document at page 35, the witness confirmed that no one witnessed it and it had no name. He admitted that GEN 20 was supposed to be witnessed.

On the issue that he was approached by seemingly drunk people at Chongo turn off, he denied that the group was given money by his campaign manager and that they bought food for them. What he recalled was that he told the group to see his campaign manager because he wanted to free himself from them and that he didn't mind if the campaign manager gave the group food but that he did mind if he gave them money. He added that

he didn't know what the campaign manager did with those people because he went back to the car which was parked twenty meters away from where the shop was.

He further stated that he didn't see his campaign manager give the people money but that he wouldn't dispute if anyone stated that the campaign manager gave those people money because he wasn't there. The witness added that whatever the campaign manager did was not under his knowledge but his directive. This meant that he sanctioned whatever the campaign manager did.

When the witness was asked if he knew that giving out money to electorate was malpractice, the witness responded that, it depended on the circumstances. If someone who was sick and hungry asked for money and they were given, it was not malpractice. He therefore stated that when Masauso's group approached them, they told them that they were hungry.

The 1st Respondent also confirmed that Chief Madzimawe was his Chief; that he didn't know him very well but that he got along with him very well like any other Ngoni Chief. He denied that the Chief ever gave him his motor vehicle not even his bicycle.

The 1st Respondent further told the Court that Good Governance used to de-campaign the PF because they used to receive messages that the

members of Good Governance were UPND and that was why he had a problem with them.

When the witness was referred to paragraph 13 of his affidavit in opposition, he admitted that he stopped over at the site of construction to see what was happening out of curiosity and not to inspect. He admitted that when he went to the site, he was in a PF regalia but he could not remember the dates but it was during campaign period. He also admitted that like anyone who campaigned, he promised the people that if they voted for PF the tower was going to be fixed.

The witness also told the Court that he would know the results through agents before they were announced. However, he denied that before the arrival of the delayed ballot boxes, he was trailing behind. He confirmed that the ballot boxes delayed because of transport issues and that he was equally frustrated. He denied that he worked with the 2nd Respondent and that he gave masks to the voters.

The 1st Respondent also stated that when he passed through Chongo turnoff again, on one occasion he got out of the vehicle when he was buying food and the other occasion he didn't. On these occasions he was doing door to door campaigns and not road shows. He admitted that he dealt

with the group of seemingly drunkards as they used to run to him and shout Honourable Honourable whenever they saw his vehicle.

The witness further testified that DMMU gave out mealie meal because it was a government programme but he denied that he distributed any mealie meal during the campaign whether alone or with the DC. He also added that he didn't know if there was a declaration of a disaster in Kasenengwa.

In re-examination the witness stated that while the Petitioner's counsel suggested during cross examination that he was trailing behind hence the delay in the arrival of the ballot boxes, he told the Court the results from the top polling stations with the highest votes could not have covered for the deficit the Petitioner suffered.

The witness also clarified that they were accosted by a team of young men who wanted to be given food as they were hungry. The 1st Respondent also stated that to the best of his knowledge as long as a GEN 20 form was signed by a Presiding Officer and two witnesses the document was valid.

The 1st Respondent also stated that according to Gaston Phiri, the Petitioner was not chased from Madzimawe Chiefdom neither was she chased from Kangombe village. Gaston's evidence was that she was not welcomed by the Indunas.

Furthermore, he testified that the cancellation was in relation to ballot papers that were rejected and that it was not in his favour because he didn't know how the rejected ballot papers would have been given to him.

RW2 was **ROGERS HARA** aged sixty-one (61) years old a Farmer of Kadami Farms, Chief Chisuwe in Kasenengwa District.

The witness testified that he belonged to the PF in Mkowe ward, Chikuwe branch. That what he knew about 1st Respondent was that he visited Mkowe about three to four times and he took him to six branches which were Chikuwe, Masamba, Mkowe, Malochi and Ntambo. When passing through these branches he would tell the voters about the development he would bring if they voted for him.

He further stated that on 11th August, 2021, whilst at the camp, party officials from Ntambo called them and asked them to go to Masamba and Ntambo around 01:00 hours. They were also informed that their friends had taken roofing sheets and cement. When they passed through Masamba School in Mkowe and asked the Headmaster, they were told that it was Mr. Charles Banda and Ziwa who had taken the roofing sheets there. The witness stated that the 1st Respondent never took anything to Mkowe apart from party regalia like chitenges and T-shirts.

He added that to his knowledge, Mr. Ziwa took the roofing sheets to Anderson village Church of Christ and Mr. Charles Banda and Ziwa took cement and iron sheets to the Church of Christ in Chikuwe.

In cross examination, the witness told the Court that he resigned from the UPND to join PF three to four months before voting. That he did so because he never used to get along with his fellow party officials and not that he stole money for fertilizer.

RW2 told the Court that the 1st Respondent was not the one who took the roofing sheets. However, he didn't know who took the roofing sheets as he was just told that it was Mr. Ziwa and Mr. Charles Banda.

In re-examination, he stated that he had come to Court to give evidence as Headman that it was not the 1st Respondent who took the roofing sheets but other people.

RW3 was **SIMON LUNGU** aged forty-two (42) years old a Farmer of Muchacha village, Chief Nzamane in Kasenengwa District.

The witness testified that he was the District Secretary for PF where the 1st Respondent stood as a candidate. That he knew Irene Tembo, Alice Zulu and Loveness because his village and their village were close.

He added that to his knowledge, Mr. Ziwa took the roofing sheets to Anderson village Church of Christ and Mr. Charles Banda and Ziwa took cement and iron sheets to the Church of Christ in Chikuwe.

In cross examination, the witness told the Court that he resigned from the UPND to join PF three to four months before voting. That he did so because he never used to get along with his fellow party officials and not that he stole money for fertilizer.

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The witness testified that he was the District Secretary for PF where the 1st Respondent stood as a candidate. That he knew Irene Tembo, Alice Zulu and Loveness because his village and their village were close.

He denied having given them money. He stated that his job as a District Secretary was to take down notes. So, on 11th August, 2021 around 18:00 hours after they had stopped campaigning, he was at their camp preparing food for polling agents for 12th August, 2021. That was the job he did on that day.

The witness confirmed to the Court that his wife was Sarah Jere and denied that he knew a Grace Phiri as she was not his wife and he had nothing to do with her. He also told the Court that he didn't know anything about women congregating at his home.

In cross examination, the witness told the Court that PW4, PW5, PW6 and PW7 knew him very well and that they would not mistake him for anyone else. He also stated that he had never differed with any of them. However, he never used to laugh with them but that he used to greet them because they were not enemies. The witness admitted that they were more advanced in age than he was and that he was confused why the four women told the Court that he had given them money. Therefore, the four women decided to frame him. He also told the Court that they were not biological sisters but were related to the same family. They had known him from the time he was a child and that they were good citizens.

RW3 also confirmed to the Court that on 11th August, he was with Sylvester, and that this person could vouch for him that they were together. He stated that on that day he left home around 06:00 hours. When the witness was asked when last he spoke with Alice, first, his response was that he had not spoken to her for a long time as they were in different political parties.

Later he changed and stated that he didn't understand the question properly as he thought the question related to the period before August. However, he admitted that he spoke to her the previous day around 15:00 hours as he wanted to get it from her why she mentioned his name when she came to Court. He added that he didn't use any bad words and he informed her that he would also go to Court. He also denied that he had threatened her.

Asked if he knew of any reason why the witnesses would lie against him, he told the Court that they had differed because they were in different political parties and that they supported the candidate who stood on PAC ticket and for President they supported UPND. What happened at their polling station was that the candidate who won was under PAC and the President who won was Mr. Hakainde Hichilema. However, what they expected was that all their candidates would win but that they had come to testify for a UPND candidate who they had rejected.

When asked who had told the Court the truth as there were four women who had spoken against him, he stated that even a single person could tell the truth. Just like Jesus Christ, he was alone and he was crucified.

In answer to a question whether he used to meet with the 1st Respondent during the campaign, he stated that the Provincial leadership was the one which used to give them tasks and that the 1st Respondent was at constituency level. He admitted that it was his duty as part of the leadership to sell their candidate.

In re-examination the witness confirmed that he knew the four women very well. That he congregated with PW6 at the same church and his wife and PW6 were in the same choir. He was with PW4, PW5 and PW7 in the same cooperative and that he was their leader.

SYLVESTER ZULU aged forty-eight (48) years old a Farmer of Mushekela village of Chief Madzimawe, Kasenengwa District testified as **RW4**.

The witness testified that he was the Constituency Chairperson for PF for Kasenengwa. That on 11th August, 2021 around 14:00 hours, the 1st Respondent left him, Wackson Zimba the Constituency Secretary, Dickson Tembo the District Chairperson and Simon Lungu the District Secretary at the camp. They remained to do the budget and bought food for the

polling agents. He and the District Chairperson left the camp after midnight using a motor bike but they left the other two at the camp.

When asked where Simon Lungu was between 14:00 hours and midnight, the witness stated that Simon Lungu was the one who was writing down the budget and making the programme. Asked if he knew Simon Lungu's family very well, he stated that he didn't know his wife's name. All he knew was that she was from Machacha village. He denied the allegation that RW3 distributed money in Kasinje village as he was with him.

In cross examination, the witness told the Court that it was normal for some people to accuse a person who did not wrong them. This would be done because of the politics so that they could have evidence.

He also confirmed that the 1st Respondent left them at 14:00 hours and Simon Lungu joined them at 08:00 hours. The witness denied that Simon Lungu joined them at 18:00 hours. He told the Court that he wanted the Court to believe that he was with Simon Lungu on 11th August because he was not alone, there were other people who could testify.

In re-examination, the witness stated that according to what was read out in Court, Simon Lungu stated that they started making preparations for food at 18:00 hours.

RW5 was **MUGABE MITI** aged fifty-five (48) years old a Farmer of Ndeledele village of Chief Nzamane, Kasenengwa District.

The witness testified that he was the Coordinator for PF in terms of clubs for women and that he was in charge of buying food for the entire camp in Mutenguleni.

He recalled on 11th August, 2021 in the morning they had a meeting with party members at the camp. At 14:00 hours, they started the road shows. The first place was Makungwa and Ngongwe. After that, they went back to the Camp where they held a meeting in relation to the food to be given to the polling agents on 12th August, 2021. The meeting finished at midnight and thereafter he slept. He confirmed to the Court that he was with Simon Lungu and Sylvester Zulu and that he spent a night with Simon Lungu at the camp. He added that he had never been to Simon's house because they had stayed at the camp for one month. He denied the allegation that between 17:00 hours and 23:00 hours on 11th August, 2021 Simon was distributing money and chitenges to the women of Kasinje because at that time they were together. That when they finished the road shows, they went back to the camp at 17:00 hours and he was at the camp from that time.

In cross examination, the witness told the Court that he saw Sylvester and Simon in the morning around 06:00 hours when they woke up because they used to sleep together at the camp. He also stated that the 1st Respondent never left them at the camp because they lived together.

In the morning they had a meeting to plan how they were going to conduct the road shows; that he never parted company with the 1st Respondent as they went together for the road shows with Sylvester and Simon. Therefore, a person who told the Court that the 1st Respondent left the camp at 14:00 hours lied.

He testified that Patrick from Lundazi was the campaign manager for the 1st Respondent but he denied that Patrick bought food for the people they found along the way. He also stated that he would not know if Patrick was the one who gave money to the drunkards because he was in another vehicle. All he knew was that T-shirts were given out and not money.

The witness admitted that he was asked to come to Court by the 1st Respondent but denied that he did so because he was a PF member. When asked that he came to testify in favour of the 1st Respondent, he denied and stated that he could not favour him.

There was no re-examination and the 1st Respondent closed his case.

The 2nd Respondent did not call any witness in support of their case but indicated to the Court that they would rely on the Answer, the affidavit in support and the bundles of documents that they had filed into Court.

3. SUBMISSIONS

The parties filed written submissions which I have considered and taken into account when arriving at this decision.

On behalf of the Petitioner, learned counsel Mr. M. Cheelo submitted on the allegation of the communication towers. He submitted that the 1st Respondent admitted in his affidavit in paragraph 13 that he was seen in the company of others inspecting the communication towers during the campaign period and that he was the one who was in the picture in BUP4a and BUP4b as this was a government program and all other candidates were free to go and inspect. He submitted that the 1st Respondent admitted in cross examination that it was one of his campaign messages that he would put up a communication tower.

Counsel argued that the 1st Respondent also admitted that the 2nd Respondent delayed in bringing in some ballot boxes from four polling stations and that it could therefore be concluded that the delay affected the outcome of the election results to the detriment of the Petitioner. He submitted that the 2nd Respondent conceded on this issue by refusing,

failing and or neglecting to call witnesses to rebut the evidence by both the Petitioner and the 1st Respondent.

On the allegation that the 1st Respondent was working with an Organization called Good Governance, it was submitted that the 1st Respondent admitted in cross examination that Good Governance appeared and signed as a witness in most of the GEN 20 forms produced by the 2nd Respondent for the Kasenengwa Parliamentary Election and that this was a confirmation that the entity truly worked with the 1st Respondent contrary to his response in cross examination that he never worked with the organization. It was submitted that the 2nd Respondent neglected to call any witness to come and refute the fact that the entity worked with the 1st Respondent.

On the issue of the distribution of face masks, Mr. Cheelo submitted that the 1st Respondent admitted having handed over a box of 50 masks to 2nd Respondent's officials to give to the voters who had no masks and that when quizzed in cross examination, the 1st Respondent admitted to having known that he was giving the masks to the 2nd Respondent official because the said official was wearing an 2nd Respondent apron contrary to section 89(1) (e) (i) of the Electoral Process Act. It was submitted that this confirmed the Petitioner's claims that the 1st Respondent and the 2nd Respondent worked together to the disadvantage of the Petitioner.

On the allegation that the 1st Respondent gave out cash to the voters during campaign, it was submitted that one of the Petitioner's witnesses Masautso Miti told the Court that he met with the 1st Respondent at Chongo turn off on at least two occasions that the 1st Respondent gave him and others money during the campaign period and this evidence was confirmed by the 1st Respondent in his defence during cross examination that he ordered and directed his campaign manager to give the seemingly drunk group of people some money.

Since the 1st Respondent told the Court that he ordered his campaign manager to deal with the seemingly drunk group and yet did not see whether he gave them money or not, the only cogent evidence before the Court was that of Masautso Miti which went unchallenged. Therefore, since it was an electoral malpractice contrary to section 81(1) (a), the Court should surely nullify the election on that basis as it that against the electoral regulations.

Regarding the purchase of the roofing sheets and cement in Mkowe during the campaign period, Mr. Cheelo submitted that the testimony by RW2 was a clear concoction as he did not perceive the events regarding the roofing sheets and must be disregarded by the Court. This was because he told the Court that the 1st Respondent did not know that the roofing sheets were bought by Mr. Charles Banda and Mr. Ziwa.

In relation to the evidence by RW3, Simon Lungu, it was submitted that four Petitioner's witnesses testified against him to the effect that he gave out money on the eve of the polling day and they benefited K5 each. That when asked in cross-examination, RW3 told the Court that he knew the four ladies very well and they knew him very well and that in fact he had known them from his childhood. He submitted that RW3 told the Court that the ladies made such a huge allegation against him because he no longer belonged to the party they belonged to.

Counsel contended that this piece of evidence brought by the four witnesses against RW3 went unchallenged.

Regarding the anomalies on the Gen 20 forms, counsel submitted that at page 1 of the 2nd Respondent's supplementary bundle was a GEN 20a form where the name for the UPND candidate reflected as Beatrice Phiri and when cross-examined the 1st Respondent stated that the correct candidate for UPND was Beauty as opposed to Beatrice. Counsel submitted that there was no explanation as to why such a mistake was occasioned at the instance of the 2nd Respondent.

It was also submitted that in re-examination, the 1st Respondent, Philimon Twasa stated that a GEN 20 form was valid if it was signed by the returning officer and witnessed by at least two people. Going by the 1st Respondent's

response, it therefore meant that the GEN 20a form at page 1 of the 2nd Respondent's supplementary bundle was not valid because it was not signed by the Returning Officer and therefore a suspicious document.

It was the Petitioner's submission that a careful examination of the GEN 20 form at page 6 of the 2nd Respondent's supplementary bundle of documents revealed that it was doctored because the witness who signed on behalf of Socialist Party (SP) was the same one who signed for People's Alliance for Change (PAC). Counsel submitted that this was a clear anomaly and worked to the advantage of the 1st Respondent especially that UPND was not represented.

It was counsel's further submission that the GEN 20 form at page 8 of the 2nd Respondent's supplementary bundle of documents showed that Phiri Beauty stood as an independent and the 2nd Respondent failed, refused and or neglected to call witnesses to come and give an explanation as to what happened. It was contended that this therefore meant that this document was among many other documents doctored and the Court should therefore decide in favour of the Petitioner.

Mr. Cheelo further referred the Court to the anomalies on the GEN 20 forms at pages 11, 12 and 14 and submitted that page 11 only contained party names and not the names of the people who signed. He explained

that page 12 was only witnessed by one person and the one at page 14 was signed by a witness who did not indicate the party she was representing. Counsel submitted that because of these irregularities they were not authentic and that the 2nd Respondent who was the author could not explain the same.

Furthermore, it was submitted that from the GEN 20 form at page 16 of the 2nd Respondent's supplementary bundle of documents, it was clear from the handwriting of the witnesses that the document was signed by one and the same person. It also showed that UPND signed twice and GEARS also witnessed twice and yet no explanation was offered by the 2nd Respondent as they did not call any witnesses.

Counsel submitted that the Gen 20 form at page 17 of the 2nd Respondent's supplementary bundle of documents was also suspicious because it was only witnessed by three people and two of them from the same party. That one witness Elizabeth, did not even indicate which party she was representing.

It was Counsel's further submission that on page 19 of the 2nd Respondent's supplementary bundle of documents were four (4) independent witnesses despite having had only three (3) independent candidates that contested the election. That on page 21 of the 2nd

Respondent's supplementary bundle of documents was a GEN 20a form which showed that the witness for one independent candidate in the name of Levison Ziwa was also Levison Ziwa insinuating that the person who signed for UPND and for PAC appeared to be the same even from the handwriting. That the 2nd Respondent failed to give an explanation as to this anomaly.

He further submitted that at page 24 of the 2nd Respondent's supplementary bundle of documents was a GEN 20a form wherein it was clear that it was written by one person. It is also clear from the record that UPPZ had no candidate contesting the election and yet there were three (3) witnesses representing UPPZ in the names of Phiri Ackson, Tembo Vincent and another Tembo Vincent. He urged the Court to note that the Tembo Vincent had different signatures and that no explanation was given by the 2nd Respondent.

It was further contended that on the GEN 20a form on page 25 of the 2nd Respondent's supplementary bundle of documents, Tembo William signed to represent UPPZ when UPPZ had no candidate in the 12th August, 2021, Kasenengwa Parliamentary election. It was submitted that it could therefore be concluded that the document was not authentic.

It was further submitted that the GEN 20a form at page 26 of the 2nd Respondent's supplementary bundle of documents had an alteration which was not counter-signed for by any of the stakeholders. Further that the GEN 20 form at page 28 of the 2nd Respondent's supplementary bundle of documents also had an alteration and counter-signed by only one person whose signature appeared to be that of the Returning Officer. Counsel submitted that the question that remained unanswered was why the other stakeholders who signed to witness did not counter-sign for the alteration and yet the author of the document offered no explanation.

It was argued further that at page 32 of the 2nd Respondent's supplementary bundle of documents was a GEN 20a form wherein there were four (4) witnesses who signed on behalf of the UPND and five (5) witnesses for Patriotic Front (PF). Socialist Party (SP) had four (4) witnesses yet GEARS had two (2) witnesses. It was submitted that this was clearly an irregularity as each party was supposed to have only (1) witness signing

Further, it was argued that at Page 35 and 37 of the 2nd Respondents supplementary bundle of documents were GEN 20b forms meant to be given to the polling agents representing different political parties. It was submitted that the forms were produced before Court by the 2nd Respondent who did not explain why they had them in their possession. This clearly demonstrated the veracity of the Petitioner's claim that her

agents were not given and availed with GEN 20b forms. Counsel added that the same forms were not witnessed by any of the representatives of various parties and that this therefore made them invalid documents. Counsel submitted that the 2nd Respondent again failed to disprove this allegation.

In conclusion, counsel submitted that it was clear that the Petitioner had proved her case to the required standard to have the Kasenengwa Parliamentary seat nullified due to the numerous malpractices and irregularities by both the 1st Respondent and the 2nd Respondent. Counsel submitted that it was therefore the Petitioner's prayer that the seat be nullified as prayed for in her petition and she be awarded costs against the 1st Respondent and the 2nd Respondent.

4. 1ST RESPONDENT'S SUBMISSIONS

Learned counsel for the 1st Respondent, Mr. N. Yalenga submitted according to the allegations in the petition and the evidence adduced to support the said allegations.

- (i) DISTRIBUTION OF MEALIE MEAL BY THE 1ST RESPONDENT IN CONJUNCTION WITH THE DISTRICT COMMISSIONER FOR KASENENGWA DISTRICT BETWEEN 9TH AND 10TH AUGUST, 2021.**

It was submitted on this allegation that it had been shown that this assertion was a lie as the pictures which appeared at BUP1a and b were in fact posted on a Facebook page called the Candidate sometime in June, 2021 and discussed in a WhatsApp group of which the Petitioner was a member. It was argued that in fact the Petitioner's own witness, Abel Ngwenya told the Court that he was the one who had taken the pictures sometime in July, 2021 and that he was just told that the 1st Respondent was distributing the mealie meal and asking for votes.

Counsel submitted that the demeanor and prevarication of the Petitioner and the conflicting statements between her and Abel Ngwenya were an issue for this Court to consider. Counsel called in aid the case of Attorney General v. Kakoma⁽¹⁾ and Mutale Phiri v. The People⁽²⁾ in support of this submission.

Mr. Yalenga urged the Court to find that the said pictures were in fact posted by one Davy Kapwata on Facebook on 19th June 2021 and that on a balance of a probabilities, it was Davy Kapwata and not Abel Ngwenya who had taken the pictures. Counsel submitted that the distribution of the mealie meal was a government programme and had nothing to do with the 1st Respondent.

(ii) **DISTRIBUTION OF SOAP, SUGAR, MEALIE MEAL AND CASH TO WEBSTER BANDA, JOSEPH BANDA, JULIET MOOSA AND MANY OTHERS**

Mr. N. Yalenga submitted that the record was clear that no evidence was brought to substantiate the allegations of giving soap, mealie meal and sugar and it was thus a moot point to belabor to submit on the same. The issue of the mealie meal had already been addressed.

On the issue of the distribution of cash, it was submitted that PW4, 5, 6 and 7 alleged that on the eve of elections, one Simon Lungu congregated the women folk of their village and proceeded to give them K5 each and urged them to vote for the 1st Respondent. Counsel submitted that in rebuttal Mr. Lungu was confused that the ladies he knew very well testified against him in the manner they did and was further surprised that they did not know his wife Sarah Jere and not Grace Phiri. It was submitted that Mr. Lungu when quizzed explained that the four witnesses were actually related and merely framed him because of political differences.

Mr. Yalenga submitted that for the evidence from the witnesses to have probative value, it must fall within the ambit of section 97(2)(a)(i) of the Electoral Process Act and all the witnesses testified that Mr. Twasa was not the one who gave them the money neither had he been in their village. It was argued that this left the question of whether Mr. Lungu was the 1st

Respondent's agent or that Mr. Twasa knew or approved of the acts of Mr. Simon Lungu. Counsel referred to the case of Akashambatwa Mbikusita Lewanika and others v. Fredrick Jacob Titus Chiluba ⁽³⁾ on the issue of a candidate's liability on account of acts of 3rd parties. Reliance was also placed on the Constitutional Court case of Chrispin Siingwa v. Stanley Kakubo Appeal No.7 of 2017⁽⁴⁾ on who an election agent was.

Counsel submitted that Mr. Simon Lungu was not an agent of Mr. Twasa as no evidence of him being one was laid before the Court.

It was further submitted regarding the evidence of PW9 from Chungu turn off that it was clear he and his gang of drunkards would accost the 1st Respondent and ask for money for beer whenever he made a stopover at the junction.

Counsel submitted that the question was whether the said acts were corrupt acts sufficient to nullify the election of the 1st Respondent. That even assuming the said acts were corrupt acts within the meaning of the Act which they submitted they were not, the Petitioner had to prove that they were widespread and influenced the majority of the voters to vote for the winner.

Counsel submitted that the results were 12,328 and 6,483 for the Petitioner and 1st Respondent respectively. That the margin of defeat could

not be attributed to the twenty (20) drunkards at Chongu junction being given money to buy beer.

(iii) THE PETITIONER WAS CHASED BY CHIEF MADZIMAWE ON 11TH AUGUST, 2021 AND BLOCKED BY THE PF IN JIM VILLAGE

Counsel submitted on this allegation that the Petitioner's own witness, PW3 informed the Court that the Chief did not in fact chase her but rather did not give her the sort of welcome that was given to the other candidates and that he never saw the 1st Respondent chasing the Petitioner. It was submitted that the Petitioner did not adduce evidence to show that the Chief was acting as an agent of the 1st Respondent and he could therefore not be held accountable for the Chief's actions.

Regarding the allegation of being in Jim village, it was submitted that the 1st Respondent had indicated that he was not in Jim village on that day but was elsewhere conducting his road show. That this evidence was corroborated by PW3 and contradicted that of the Petitioner.

Counsel submitted that the Petitioner in fact lied to the Court when she testified that the 1st Respondent was in that area and her own witness put him in a place far away which confirmed what the 1st Respondent pleaded in his answer.

(iv) USE OF HATE SPEECH

It was submitted on this allegation that there was no evidence that was led before the Court to substantiate this claim. That it was therefore a figment of the Petitioner's imagination as she admitted in cross examination that she never heard the 1st Respondent use hate speech against Mr. Hakainde Hichilema or at all.

(v) DISTRIBUTION OF FACE MASKS

It was submitted that the evidence from the Petitioner on this point was that out of 89 polling stations, she had observed the 1st Respondent giving out masks at two polling stations. The 1st Respondent confirmed giving out the said masks but denied that he had solicited for votes in exchange as he had given them to 2nd Respondent official he later came to realize was an usher.

Mr. Yalenga argued that without belaboring on the question of whether the 1st Respondent did or did not solicit for votes, the issue to be determined was whether the giving of masks influenced the majority of voters to vote for the 1st Respondent or prevented them to vote for a candidate of their choice. He submitted that no evidence was adduced to satisfy this requirement of the law.

(vi) CONNIVANCE WITH GOOD GOVERNANCE AND INSPECTION OF COMMUNITY TOWERS.

It was submitted that the Petitioner merely made this allegation without providing proof. That she confirmed in cross examination that she had not seen the 1st Respondent conniving with Good Governance.

On the allegation that the 1st Respondent was seen during construction of communication towers, it was submitted that the witness called, PW8 knew nothing about exhibit BUP. In fact he failed to identify the 1st Respondent from it. It was argued that PW8 was categorical in cross examination that the picture BUP4 had nothing to do with the meeting he attended concerning the towers.

It was submitted that PW8's evidence was that the 1st Respondent addressed a meeting at Kasuma Primary School on 25th July, 2021 where he delivered materials for the completion of the tower and urged the crowd that if they did not vote for PF, the problem of poor cellphone network would not be resolved.

It was counsel's contention that this was evidence of matters not pleaded and he urged the Court to expunge PW8's evidence. Counsel relied on the case of Anderson Kambela Mazoka and 2 Others v. Levy Patrick Mwanawasa (2005) ZR 138⁽⁵⁾ where the Supreme Court explained the function of pleadings in civil matters and consequences of leading evidence on matters not pleaded.

(vii) VOTE BUYING DURING DOOR TO DOOR CAMPAIGNS AND DONATION OF IRON SHEETS IN MKOWE

It was submitted that no evidence of the alleged door to door dishing out of cash was presented to the Court.

Counsel submitted that the 1st Respondent denied the allegation of donating iron sheets in Mkowe on 11th August, 2021 as he stated that he was nowhere near Mkowe but in Kang'ombe village holding his last road show before close of the campaigns. Counsel submitted that this evidence was in fact corroborated by the Petitioner's own witness, Gaston Phiri who told the Court that the 1st Respondent was in his village that day distributing party regalia and that his village and Mkowe were far apart from each other.

(viii) CONNIVANCE WITH THE 2ND RESPONDENT

It was submitted that the Petitioner claimed there had been connivance between the 1st and 2nd Respondent regarding:

- (a) Delay in delivering of ballot boxes.
- (b) Non-indorsement of Gen 20 a forms or non-representation of the same form.

Counsel submitted that the Petitioner attributed the delay in bringing of ballot boxes from four polling stations as to what led to the 1st Respondent

surpassing her in the totaling and eventually winning the election and that she did not indicate which were the affected polling stations. It was submitted that evidence had shown that even if she had been given all the votes of the top 10 wards with the highest voter turn-out, she would still not have made up the deficit. That it was further clear from the Record of Proceedings in the 2nd Respondent's bundle of documents that there was no polling stations where there were more than 600 voters, the highest turn out being at Mtaya-1 with 581 voters.

On the allegation that the Gen 20 forms were not signed by UPND witnesses and that they had errors, counsel referred the Court to Sections 70 and 71 as being instructive on the procedure to be adopted where a candidate disputed the declared results. No evidence had been produced before Court to show that the Petitioner had objected.

It was submitted that the absence of the UPND signatures on some Gen 20 form could not therefore invalidate the results as there were other witnesses who had signed.

It was further argued that the assertion that the Gen 20 appearing at page 24 of the 2nd Respondent's supplementary bundle of documents was signed by one and the same person was not well founded as it was evidence from the bar. Counsel submitted that an expert witness was not brought

to show how the handwriting was of the same person and further that the Petitioner's pleading did not allege that the Gen 20s were forged and this issued could not be raised in her submissions.

In conclusion, Mr. Yalenga submitted that the Petitioner had failed to discharge her burden of proof sufficiently for the Court to nullify the election of the 1st Respondent as Member of Parliament for Kasenengwa. The 1st Respondent prayed that the Court dismisses the petition as being frivolous and vexatious and falling far short of the standard required to be proved for an election result to be reversed with costs.

5. 2ND RESPONDENT'S SUBMISSIONS

Learned counsel for the 2nd Respondent, Ms. T. Daka began the submissions by referring to authorities on the standard of proof in election petitions. She therefore submitted that the Petitioner had not shown or adduced any evidence that the majority of voters in Kasenengwa Constituency were prevented from voting for their preferred candidate.

It was the 2nd Respondent's contention that the Petitioner mainly relied on things not perceived in her own personal knowledge and this was inadmissible as evidence before this Court.

Counsel divided the submissions into subheadings based on the allegation made by the Petitioner.

(i) DISTRIBUTION OF MEALIE MEAL, SUGAR, SOAP AND MONEY

It was submitted on this allegation that the Petitioner had not shown or adduced any evidence to show that the 2nd Respondent was involved in any act of distributing the alleged mealie meal, sugar, soap and money or that the 2nd Respondent was present at any of the alleged incidences.

(ii) USE OF HATE SPEECH

Counsel submitted on this allegation that the Petitioner had not shown or adduced any evidence before this Court to show that the 2nd Respondent was involved in the alleged use of hate speech against President Hakainde Hichilema as none of the witnesses testified that the 2nd Respondent was present at any of the alleged incidences.

(iii) DELAY OF BALLOT BOXES

It was submitted that when the Petitioner was cross examined about the alleged issue of the delay of ballot boxes from four (4) for over 48 hours, the Petitioner admitted that there was no evidence adduced before this Court to show that the ballot boxes from four (4) polling stations had delayed for over 48 hours.

When further cross examined over the issue of whether any of the polling agents had objected to the results in the polling stations, the Petitioner responded that they had in person but admitted that there was no evidence before the Court to show that any of her polling agents had objected to the results provided on the Gen 20 forms for the various polling stations.

Ms. Daka submitted that RW1 testified in this regard that there was a slight delay in the announcement of final results but that the delay was not for over 48 hours.

It was therefore submitted that PW1 had not proved or shown any evidence that there was a delay of ballot boxes from four polling stations arriving at the totaling station after 48 hours. Counsel submitted that this allegation was vague as the said four polling stations were not even mentioned and it was not clear which four polling stations the Petitioner was referring to.

Furthermore, on the allegation that the 2nd Respondent did not provide Gen 20 forms in the constituency which comprised of results from various polling stations making a constituency, it was submitted that this pleading was vague as the Petitioner was not clear which constituency was being referred to. It was submitted that the Petitioner had not adduced any evidence that Gen 20 forms were not provided as the Petitioner neglected

to call polling agents to testify on this allegation as witnesses to the proceedings to prove these pleaded facts.

(iv) COLLUSION WITH THE 2ND RESPONDENT AND ITS AGENTS

It was submitted that PW1 had not shown or adduced evidence to show that the 2nd Respondent committed any illegal practice, contempt and or other conducts in the Kasenengwa parliamentary elections and neglected to call any of the polling agents as witnesses.

Counsel submitted that RW1 testified that on 12th August 2021 he went to Katinta School at Makuwa ward where he engaged Electoral Commission of Zambia officials who sat by the door and gave one of the gentlemen he was with face masks that were less than 50 to give the lady by the door. RW1 also gave about three masks to a gentleman at Kalungwizi who wore a vest like an Electoral Commission officer whom he later learned was an usher.

Ms. Daka's submission was that the Petitioner did not adduce any evidence or show that the masks were given to the 2nd Respondent's election officers to induce or collude with the 1st Respondent to win the elections or solicit for the votes of the majority of voters.

The Court was further referred to Section 77 (1) (13) of the Electoral Process Act which provides that:

“A juristic person may apply to the Commission, in the prescribed manner, for accreditation to observe or monitor an election... (13) In this section “juristic person” includes an institution and organization registered under the Non-Governmental Organizations Act, 2009.

Counsel submitted that it was not the duty of the 2nd Respondent to refute alleged facts of the 1st Respondent working with Good Governance as the burden of proof to prove or show allegations of such a nature lay with the Petitioner.

In this regard she submitted that the Petitioner had not adduced any evidence that the 2nd Respondent worked with Good Governance Zambia or shown that the said Good Governance was not a juristic person. Ms. Daka submitted that the issue of the 2nd Respondent working with Good Governance Zambia was not in fact pleaded in the Petition.

It was further their submission that the Petitioner’s polling agents had a responsibility to object to the results and any alleged irregularities on the Gen 20 forms on pages 1, 8, 11, 14, 17, 21, 24, 25 and 32 before they were announced to the public by the presiding officer as required by Section 70 of the Electoral Process Act but they did not object. Counsel submitted that there was no evidence even from the polling agents to show that there

were objections that were made in person as alleged by the Petitioner. That the Petitioner had not even adduced any evidence that there was an appeal to a Returning officer against the decision of the presiding officer.

Counsel further referred the Court to the case of **Sithole v. State Lotteries Board** ⁽⁶⁾ on expert evidence. She submitted that the Petitioner was not a handwriting or signature expert to state that the document at page 6 of the 2nd Respondent's Supplementary Bundle of Documents was attested by the same person who signed on behalf of the Socialist Party (SP) and also who signed for the People's Alliance for Change (PAC). Counsel submitted the Petitioner could not therefore allege that page 16 of the Gen 20 form was signed by the same person.

It was further submitted that the Petitioner had not adduced any expert evidence to show that page 28 was counter-signed by the Returning Officer. Reliance was placed on Section 71 of the Electoral Process Act when she submitted that the Returning Officer does not counter-sign or sign the Gen 20 forms at this stage in the election proceedings.

It was further submitted that the absence of polling agents or election agents as witnesses on Gen 20 forms on pages 26 and 37 did not invalidate the proceedings as guided by Section 36 of the Electoral Process Act.

Counsel submitted that the Petitioner had not shown or adduced any evidence to show that the independent candidates on page 19 could not have been polling agents and/ or election agents as Section 35 of the Electoral Process Act permitted candidates to appoint four or more persons to be part of the proceedings, two as polling agents and two as election agents.

In conclusion, it was submitted that the Petitioner had not proved her case against the 2nd Respondent in accordance with the high standard of proof required in election petitions. She humbly requested this Court dismiss the election petition.

6. THE LAW

This court has the jurisdiction to hear and determine election petitions by virtue of Article 73 (1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016. This Article provides that:

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

(2) An election petition shall be heard within ninety days of the filing of the petition.'

Furthermore, Section 96 (1) of the Electoral Process Act No. 35 of 2016 (‘hereinafter referred to as the Act’) also empowers the High Court to hear matters pertaining to election petitions. The section provides that:

“A question which may arise as to whether-

- (a) a person has been validly appointed or nominated as a Member of Parliament;**
- (b) the seat of an elected or nominated Member of Parliament, mayor, council chairperson or councilor, has become vacant, other than a question arising from the election of a candidate as a Member of the Parliament; or**
- (c) a petition may be heard and determined by the High Court or tribunal upon application made by-**
 - (i) any person to whom the question relates; or**
 - (ii) the Attorney General;**

may be determined by the High Court or a tribunal, as the case maybe.’

Section 97 (2) (a) provides for instances where an election of a candidate may be declared void. It provides that:

‘(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 noncompliance with the provisions of the 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.

A reading of the above provisions of Section 97 (2) (a) of the Act reveals that the election of a candidate as *inter alia*, Member of Parliament can only be nullified if the person challenging the election of the candidate proves to the satisfaction of the court that:

(i) The candidate in question personally committed a corrupt or illegal practice or other misconduct in relation to the election or;

- (ii) That the corrupt or illegal practice or misconduct was committed by another person with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent.
- (iii) As a result of that corrupt or illegal practice or misconduct the majority of the voters in the constituency, district or ward were or may have been prevented from voting for a candidate whom they preferred.

The Constitutional Court in the case of Austin Liato v. Sitwala Sitwala ⁽⁷⁾ therefore stated that:

“In other words, it is not sufficient for a petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice.”

On the other hand, the key elements of Section 97 (2) (b) are that:

- (i) There must be non-compliance with the provisions of the Act relating to the conduct of an election and it must appear to the court or tribunal that the electoral principles as laid by the law have not been adhered to; and,
- (ii) The non-compliance must affect the result of the election.

What the foregoing means is that since the Electoral Commission of Zambia is mandated by the Constitution of Zambia under Article 229 (2) (b) and the Act to conduct elections, it must fulfil this function by ensuring that the requirements of the Act are respected and observed in the electoral process.

The Constitutional Court in the case of Giles Chomba Yambayamba v. Kapembwa Simbao and two others⁽⁸⁾ stated that Section 97(2) (b) therefore concerns non-compliance to the provisions of the Act by the ECZ the body charged with the conduct of elections under Article 229 (2) (b) of the Constitution and not the candidates to an election or their agents.

Section 97(3) provides for the defences which may be invoked by the candidate and it reads as follows:

97. (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.

The Constitutional Court in the case of *Giles Chomba Yambayamba* stated that subsection (3) was contingent upon the petitioner meeting the threshold in subsection (2) (a) and thus it didn't create a stand-alone ground upon which an election could be annulled.

On the burden of proof, in every judicial proceeding the question of the burden of proof and the standard of proof is and should always be determined at the outset.

It is trite law that he who alleges must prove. In the case of Khalid Mohamed v. The Attorney General⁽⁹⁾ Ngulube DCJ (as he then was) held that:

'An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to

me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponents defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanity or for some reason or the other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed.'

The Supreme Court in the case of Bresford James Gondwe v. Catherine Namugala⁽¹⁰⁾ also stated that:

"The burden of establishing any one of the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle that he who alleges must prove."

To what standard must such burden be discharged? Section 97 (2) (a) which sets out the grounds on which an election petition can be voided provides that the election petition should be proved to the satisfaction of the court.

Therefore, the applicable standard of proof in election petitions has been held to be higher than the balance of probabilities but less than the standard of proof in criminal cases which is beyond all reasonable doubt. Thus, in the case of *Akashambatwa Mbikusita Lewanika and three others v. Fredrick Jacob Titus Chiluba* the Supreme Court held that:

‘Parliamentary election petitions are required to be proven to a standard higher than on a mere balance of probability... the issues raised are required to be established to a fairly high degree of convincing clarity.’

This was echoed in the case of *Anderson Kambela Mazoka & Two others v. Levy Patrick Mwanawasa* when the Supreme Court held *inter alia* that:

‘As regards burden of proof the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.’

More recently, the Constitutional Court has reiterated in a plethora of cases including the case of Robert Chiseke v. Naluwa Mwene⁽¹¹⁾ the threshold for nullifying an election of a Member of Parliament where a corrupt practice, illegal practice or other misconduct has been alleged in an election petition. It stated in the said case that:

“In addition to the above requirements under Section 92 (2) (a) of the Act, a petitioner ought to prove to a fairly high degree of convincing clarity all the allegations made against the candidate or his election or polling agent.

What is clear from the above exposition of the law is that by virtue of Section 97 (2) (a), the election of a candidate can be avoided based on the conduct of the candidate or the candidate’s election or polling agent with the candidate’s knowledge and consent or approval. However, it is not

sufficient just to prove the corrupt or illegal act to a fairly high degree of convincing clarity. There is a more stringent requirement of proof beyond the proof of one or two corrupt or illegal acts. The Petitioner must also prove that as a result of the corrupt or illegal practice, the majority of the voter's in the constituency, ward or district were prevented from voting for their preferred candidate.

This action has been commenced under the Act and the Petitioner has alleged that the 1st Respondent was involved *inter alia* in bribery and corruption, intimidation and use of hate speech and against the 2nd Respondent that there was non-compliance with the provisions of the law.

The burden of proof therefore rests on the Petitioner to prove the above allegations set out in the petition with cogent evidence to a fairly high degree of convincing clarity and that as a consequence of the alleged acts of the 1st Respondent and his agents, the majority of the voters in the constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.

The Petitioner also has to prove that as a result of the alleged non-compliance by the 2nd Respondent, the result of the election was affected.

7. FINDINGS

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7. FINDINGS

Before I proceed to make findings on the evidence adduced in relation to the allegations made by the Petitioner, I wish to state from the outset that at the end of the Petitioner and Respondents respective cases, it became apparent that the credibility of the witnesses had to be considered in order to assess the weight to attach to their evidence. This is inevitable because in an election petition witnesses for both parties would be partisan with an interest to serve. I am persuaded by what Kaoma J. stated in the case of Christopher Kalunga v. Annie Munshya and two others⁽¹²⁾ where she stated that:

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

In this regard, I have adopted the pattern followed by Musonda J. in the case of Mulondwe Muzungu v. Elliot Kamondo⁽¹³⁾ in categorizing the witnesses which I also find persuasive. I have accordingly put the witnesses in the following categories:

- (i) Witnesses who were supporters of the Petitioners or the 1st Respondent. These may have their own interest to serve as they are partisan;**
- (ii) Witnesses who were performing a function in the course of duty and were non-partisan and;**
- (iii) Witnesses who were supporters of the candidate but gave evidence which was not supportive of the candidate. If they are truthful their evidence could be more cogent.**

From the evidence on record, it is not in dispute that the Petitioner, the 1st Respondent and ten (10) other candidates contested the Parliamentary seat for the Kasenengwa Constituency in the last elections that were held on the 12th August, 2021. The results declared showed that the 1st Respondent was in first position with 12,328 votes while the Petitioner was in second position with 6,483 votes. The Returning Officer declared the 1st Respondent as winner.

However, what is in dispute is the allegation by the Petitioner that the 1st Respondent was not validly elected as Member of Parliament. Therefore she seeks this Court to nullify the election of the 1st Respondent on the following grounds:

(a) Bribery and Corruption.

(b) Blocked from campaigning in Kan'gombe village by Chief Madzimawe and not given way to campaign in Jim village.

- (c) Use of Hate speech.
- (d) Construction and inspection of communication towers during the campaign period.
- (e) Delay in bringing ballot boxes from four polling stations and failure to provide Gen 20 forms.
- (f) Anomalies on Gen 20 Forms.
- (g) Inflation of votes by the 1st Respondent in cohort with the 2nd Respondent's Agents.

(i) **BRIBERY AND CORRUPTION**

When it comes to the law, bribery at elections under the Black's Law Dictionary is defined as:

'The offence committed by one who gives or promises or offers money or any valuable inducement to an elector in order to corruptly induce the latter to vote in a particular way or to abstain from voting or as a reward to the voter for having voted in a particular way or abstained from voting.'

The allegations on bribery and corruption are premised on Section 81(1)

(a) of the Electoral Process Act which provides that:

"(1) a person shall not, either directly or indirectly, by oneself or with any other person-corruptly-

(a) Give, lend, procure, offer, promise or agree to give, lend procure or offer any money to a voter or to any other person on behalf of a voter in order to induce that voter to vote or refrain from voting or corruptly to do any such act as aforesaid on account of such voter having voted or refrained from voting at any election."

Furthermore, Section 89(1) (e) provides that:

"A person shall not-

(e) On any polling day, at the entrance to or within a polling station, or in any public place or in any private place within four hundred meters from the entrance to such polling station

- (i) canvass for votes;**
- (ii) solicit the vote of any person;**
- (iii) induce any person not to vote; or**
- (iv) induce any person not to vote for a particular candidate;**

Under the regulations, Regulation 15(1) (h) (iii) of the Schedule to the Act provides as follows:

"A person shall not-

- (i) "Offer any inducement, reward or bribe to any person in consideration of such person—**
- (ii) voting or not voting"**

What is common from these provisions is that the person who receives is induced to vote or restrained from voting.

I have carefully analyzed the evidence adduced in this regard in the light of the above provisions.

The Petitioner in her petition has in paragraphs 7, 8, 11, 12 and 13 made allegations of bribery and corruption on the part of the 1st Respondent.

These are that:

7. On 9th and 10th August, 2021, the 1st Respondent while working with the District Commissioner (DC) for Kasenengwa distributed bags of mealie meal to the electorate thereby influencing their way of voting. That the Petitioner had sent some of her supporters in the field and they managed to capture pictures and videos.
8. Between 1st and 11th August, 2021, the Respondent gave out some items such as sugar, soap, mealie meal and cash to among other voters, Webster Banda, Joseph Banda, Juliet Moosa and many others.
11. She saw the 1st Respondent distributing face masks on 12th August, 2021 to voters and was heard saying the voters should vote for him. The 1st Respondent also gave out cash to voters such as Harrison Chongo, Kaifa Lungu, Isaiah Soko, Keziah Soko and many others.
12. The 1st Respondent while working with an organization called Good Governance distributed money during the campaign period

especially between 1st and 12th August, 2021 in Kwenje ward and asked the voters to go and eat the food prepared by Good Governance after voting.

13. The 1st Respondent practiced vote buying during the door-to-door campaign by giving cash to the electorate. That the 1st Respondent also bought some iron sheets on 11th August 2021 for a church in Mkowe ward this act influenced the voters to vote for the 1st Respondent.

To begin with, although the Petitioner relied on the allegations contained in the petition, no evidence was adduced in support of the allegation in paragraph 12. I find that this allegation has not proved and it is therefore dismissed.

The first allegation is that on 9th and 10th August, 2021, the 1st Respondent while working with the District Commissioner (DC) for Kasenengwa distributed bags of mealie meal to the electorate thereby influenced their way of voting.

The witness who spoke to this allegation was PW2 Abel Ngwenya who stated that on 25th June, 2021 around 09:00 hours, PF supporters were distributing 12.5 kg mealie meal at the DCs office and that he was informed by Stalich Mwanza that the mealie meal had been sent by the 1st

Respondent. He stated that he took photos of the distribution and he uploaded the photos on a Facebook page called the Candidate so that UPND members could have evidence. He identified these photos in the Petitioner's bundle of documents at pages 2 and 6.

The 1st Respondent denied the allegation and in his evidence in rebuttal he stated that he never campaigned with the DC and that he only learnt about the distribution of mealie meal by the DC on 19th June, 2021 through a WhatsApp group called Kasenengwa Hottest issues. He also denied that he heard about any distribution of mealie on the 9th and 10th August, 2021. All he knew was that the distribution of mealie meal was a government programme under the DMMU.

I have carefully considered this evidence. From the evidence that has been adduced, there seems to be no dispute that mealie meal was being distributed in Kasenengwa constituency.

Now what is in contention is whether the 1st Respondent while working with the DC was the one distributing the mealie meal.

To begin with, according to the petition, the 1st Respondent is alleged to have distributed the mealie meal with the help of the DC between 9th and 10th August, 2021. The evidence that was adduced in Court by PW2 was that the distribution was done on 25th June, 2021 and that he was the one

who uploaded the photos on Facebook media platform called the Candidate.

While the Petitioner in her evidence stated that the picture at BUP (1a) showed that the DC was distributing mealie meal on 9th August, 2021, it is very clear that her evidence contradicts and is at variance with what PW2 told the Court that the DC and the 1st Respondent distributed mealie meal on 25th June, 2021.

In this regard, I find that the evidence that the Petitioner has adduced does not speak to the events of 9th and 10th August, 2021 when the distribution of the mealie meal by the 1st Respondent is alleged to have been made as the evidence by PW2 is at variance with what is contained in the petition. I have doubts in my mind that PW2 was being truthful, especially that by categorization he is a partisan witness whose evidence I have to treat with caution especially that he stated that he is a staunch UPND member who loves his party very much. The likelihood of him peddling falsehoods is high.

In addition, I have carefully considered BUP (1) (1b) in the Petitioner's bundle of documents which is a picture of a man carrying eight bags of mealie meal on a bicycle and two women walking behind him. At page 2 of the 1st Respondent's bundle of documents is a picture of a man carrying

eight bags of mealie meal and a woman dressed in the attire as the one on BUP(1b) walking behind the bicycle. This picture appeared on the media WhatsApp platform called The Candidate and was posted on the Kasenengwa Hottest Issues on 19th June, 2021.

This picture at page 2 actually rebuts what PW2 told the Court that he was the one who took the pictures on 25th June, 2021 and posted on the Facebook page called Candidate because as at 19th June, 2021 a photo with the same people uploaded from the Candidate Facebook page was posted on the Kasenengwa WhatsApp group by Davy Kapwata on 19th June.

In this regard, I don't see how the same photo could have been taken on 25th June, 2021 and posted on the Candidate page when it had already been posted as at 19th June, 2021 on the Candidate page as shown by the WhatsApp message.

It is because of the foregoing that I find that PW2 was not being truthful as he was not the one who posted the picture on the Candidate Facebook page on 25th June, 2021. In the case of Steven Masumba v. Elloit Kamondo⁽¹⁴⁾ the Constitutional Court stated that:

“Once a witness or complainant has been shown to be untruthful in material aspects, his or her evidence can carry very little weight.”

In view of the foregoing, I attach very little weight to the evidence of PW2. I therefore have to consider if there is other evidence which supports his evidence that the 1st Respondent was the one distributing mealie meal to the electorate while working with the DC.

PW2 further stated that he was told by a person called Stalich that the mealie meal that was being distributed at the DC's office had been sent by the 1st Respondent. This person Stalich was not called as a witness to come and attest to what PW2 told the Court. What I discern from his evidence is that PW2 was trying to link the 1st Respondent to the distribution of the mealie meal hence his evidence that he was told by Stalich that the mealie meal had been sent by the 1st Respondent.

However, in the case of Subramanian v. The Public Prosecutor⁽¹⁵⁾ it was stated that:

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

Based on the above case, it is clear that what PW2 stated does not fall within the exception on hearsay and was tendered in to establish the truth of what is contained in the statement. I find that this piece of evidence falls

in the realm of hearsay and it is not admissible. I have therefore not considered it.

Now, apart from PW2's evidence, is there any other evidence to show that the 1st Respondent was distributing mealie meal with the help of the DC? The only evidence which relates to the distribution of mealie meal in Kasenengwa Constituency is the evidence by the 1st Respondent himself who stated that the distribution of mealie meal was being done by DMMU under the office of the Vice President.

To this end, he produced delivery notes which appear at pages 3 to 11 of the bundle of documents which indicate that the Office of the Vice President and the DMMU delivered a number of mealie meal bags to the District Administration Office between 25th February, 2021 and 2nd May, 2021.

Can it be said that the DC's office was distributing DMMU mealie meal while working with the 1st Respondent targeting the electorate? There is no evidence that has been adduced to show that the 1st Respondent was working with the DC in the distribution of mealie meal. So while PW2 whose evidence I have found to be unreliable sought to link the 1st Respondent to the distribution of mealie meal, there is no such evidence.

In the light of this evidence in rebuttal and for the reasons I have given above, I am inclined to accept the 1st Respondent's assertion and I find that the distribution of mealie meal was a government programme by the DMMU through the office of the DC and not that the distribution was being done by the 1st Respondent.

Based on the reasons that I have highlighted above, I find that the Petitioner has failed to prove the allegation under paragraph 7 of the petition to a fairly high degree of convincing clarity that the 1st Respondent on 9th and 10th August, 2021 while working with the District Commissioner distributed mealie meal to the electorate. This allegation is dismissed as it lacks merit.

The other allegation is that the 1st Respondent between 1st and 11th August, 2021 gave out some items such as sugar, soap, mealie meal and cash to among others voters Webster Banda, Joseph Banda, Juliet Moosa and many others.

It is clear that no evidence was adduced to show that the 1st Respondent distributed sugar, soap and mealie meal to voters. This first limb of the allegation is dismissed as it has not been proved.

The Petitioner in her evidence merely stated that the 1st Respondent gave out money. The voters mentioned in paragraph 8 being Webster Banda,

Joseph Banda, Juliet Moosa were not called as witnesses. However, four witnesses from Kasinje village were called to address the allegation that money was given out. These are PW4 Irene Tembo, PW5 Loveness Chingande, PW6 Alice Zulu and PW7 Engwase Zulu.

In essence, their testimony was that they were given K5 by Simon Lungu during the night of 11th August, 2021 and that he told them that they should vote for the 1st Respondent since he was in the ruling party.

In his evidence in rebuttal, the 1st Respondent denied this allegation and stated that he had heard about it from Court. He thus called Simon Lungu, RW3 the person who is said to have given the four witnesses the K5. Simon Lungu denied the allegation that he gave them K5 and stated that although he knew the witnesses who had testified against him, he was nowhere near the place where they stated he was. In short he raised an alibi.

He told the Court that around 18:00 hours on 11th August, 2021 after the campaigns closed, he was at the camp with the other party officials like Sylvester Zulu preparing food for the polling agents for 12th August, 2021.

Sylvester Zulu who testified as RW4 also told the Court that on 11th August, 2021, Simon Lungu was with them at the camp as he was the one writing down the budget for the food for the polling agents. He left Simon Lungu and the others at the camp around midnight.

The evidence of RW5 Mugabe Miti was also similar to the others as he also told the Court that he was with Simon Lungu and Sylvester Zulu at the camp on 11th August, 2021 and that they all slept there. He also denied that Simon Lungu around 17:00 and 23:00 hours was distributing money and chitenges to the Kasinje women.

It seems to me perfectly plain that there are contending versions as far as this allegation of bribery is concerned. Whereas as the Petitioner contends that the 1st Respondent gave K5 to the women from Kasinje village through Simon Lungu, the 1st Respondent has denied this allegation and contends that the said Simon Lungu was at the camp and not in Kasinje village at the material time and also that he never gave money to his team to give to people. He also contends that Simon Lungu was the District Secretary for Kasenengwa and he was not his campaign manager; that he was not in the front line of his campaign at District level.

In terms of categorization, the four witnesses don't appear to be partisan witnesses although they told the Court that they had their own preferred candidate and RW4 stated that they were supporting the candidate for PAC at Parliamentary level and Mr. Hakainde Hichilema at Presidential level. Be that as it may, the Constitutional Court in the case of **Charles Kakoma v. Kundoti Mulonda**⁽¹⁶⁾ stated that:

“The mere fact that a witness is not partisan does not mean that such a witness is credible. The issue of credibility is broad and includes demeanour and perception on truthfulness of the witness and consistency of one’s testimony.”

I am therefore guided by the foregoing when evaluating the evidence of PW4, 5, 6 and 7.

RW4, 5 and 6 on the other hand belong to the PF party and so in terms of categorization, they are partisan witnesses whose evidence requires corroboration as was stated in the case of *Steven Masumba v. Elliot Kamondo* that:

“Evidence of a partisan witness should be treated with caution and requires corroboration from an independent source in order to eliminate the dangers of exaggeration and falsehood.”

That said, RW3 has denied that he gave out money to the women from Kasinje village and his evidence was supported by RW4 and RW5 that he was at the camp at the material time. When RW3 was asked in cross examination if there was any reason why the witnesses would have lied against him, he stated that the reason was because they belonged to another political party.

Can it be said the evidence of the Petitioner’s witnesses was more credible than that of the 1st Respondent’s witnesses? As a trier of facts, the

credibility of a witness is always under microscope. I therefore paid particular attention to the demeanour of the witnesses as this was significantly important in revealing insight into their credibility.

I closely examined the demeanour of PW4, 5, 6, and 7 who are elderly women aged 46, 61, 55 and 61 respectively. They were all steady and focused. They didn't strike me as witnesses who had come to Court and fabricated a story against RW3 that he had given them K5 during the night of 11th August, 2021. In point of fact, RW3 admitted that he knew them very well and that they were good citizens.

So while PW7 told the Court that they were given the money on 10th August as opposed to 11th August as stated by PW4, 5 and 6, PW7 clarified that the following morning after 10th August, they went to vote. The discrepancy in the actual date is immaterial as it can be shown from her evidence that the following day was the voting day.

It is important at this point for me to dispel the misapprehension regarding the testimony of PW7 as I noted from the evidence of RW3 and also the submissions by the 1st Respondent that RW3 was surprised that the witnesses didn't know that his wife was Sara Jere and not Grace Phiri. What is clear from the record is that PW7 stated that the person who summoned them to attend a meeting was Grace Phiri, the wife to their

Chairman Gershom Miti. She didn't state that RW3's wife was the one who called them for the meeting. That line of submission is therefore misconceived.

Getting back to the issue, while RW3 and RW4 in their evidence stated that the four women had a motive to falsely implicate RW3 because of their political differences, it was never suggested to them in cross examination that they had falsely implicated him because of their political differences. In short, their evidence was not challenged that their motive was to falsely implicate RW3.

Additionally, it was never suggested to these witnesses in cross examination that it could not have been possible for Simon Lungu RW3 to have given them the money because he was at the camp preparing the budget and food for the polling agents to eat on voting day. The Petitioner called four witnesses to support this allegation, if at the time when these witnesses were testifying it was known that RW3 was not at Kasinje village at the material time, questions in that line should have been asked to challenge the witnesses and discredit their evidence.

However, the cross examination focused more on whether the K5 was actually given by the 1st Respondent and not that they were not given the

K5 by Simon Lungu. This therefore raises doubt in my mind whether it was true RW3 was somewhere else at the camp.

In terms of demeanour, RW3's demeanour was not impressive. I observed him as a person who was anxious, not in the sense that he was failing to overcome the fear of being in a witness stand or the stressful circumstances of a courtroom but indicative of a person who was worried about something. This observation was confirmed by his admission that he had actually called one of the witnesses to find out why she had come to Court and testified against him. If at all he wasn't the one who gave out the K5, he should have waited for his time in Court so that he could also tell his side of the story rather than call the witness. This to me was conduct of a person who was not innocent.

Regarding the content of the evidence, PW4, 5, 6 and 7 put RW3 at Kasinje village the night before the elections but he denied this allegation and stated that he was at the main camp preparing food for the polling agents. RW4 and RW5 also stated the same thing that they were together at the camp. However, their evidence lacked specifics in terms of the locality and distance between their main camp and Kasinje village.

It is therefore difficult for this Court to appreciate their evidence as it is not clear to the Court whether it was not possible for him to have moved from the main camp and gone to Kasinje village.

Just to add on to the foregoing, RW3 in examination in chief at first merely denied the allegation that he didn't give the women money until his lawyer asked him to provide further details. Even with that, there were no specifics that were given as he just told the Court that he was at the main camp preparing food for the polling agents.

Although the onus is on the Petitioner to prove her case, I note that in light of the evidence from four witnesses, RW3 could have at least mentioned who he was with at the main camp which in my view was very important. It was only when he was asked in cross examination that he stated that he was with RW4 at the camp.

Apart from the failure to provide details which has made me doubt the truthfulness of the RW3 evidence, there were inconsistencies and contradictions in the evidence of RW3, 4 and 5. Granted, they were more than two witnesses who were called to counter the evidence of the four women and that their evidence would therefore not be free from inconsistencies and contradictions. However, the contradictions in the 1st Respondent's witnesses were such that this Court cannot gloss over them.

In short they were significant and went to the root of assessing whether the witnesses were being truthful or not.

For instance, RW4 told the Court that the 1st Respondent left him, RW3 and two other people at the camp around 14:00 hours and they remained to prepare the budget and to buy food for the polling agents. That they stayed at the camp until midnight.

On the other hand, RW5 stated that after the morning meeting, he, the 1st Respondent, RW3 and RW4 left the camp and went together for the road show. They only came back after 17:00 hours and that was when they started preparing food for the polling agents. And that anybody who told the Court that the 1st Respondent left them at the camp at 14:00 hours would not be telling the truth. This evidence clearly contradicts the evidence of RW4.

In addition, when RW3 was asked in cross examination what time he got to the camp on 11th August, 2021, he stated that he left home at 06:00 hours. And yet RW5 told the Court that he first saw RW3 and RW4 at the camp at 06:00 hours when they woke up because they used to sleep together at the camp.

It is clear from the above that RW3 and RW4's evidence was contradicted in a material aspect by the evidence of RW5. These contradictions amongst

the three witnesses on how the events unfolded has cast a doubt in my mind whether the witnesses were being truthful that RW3 was with them at the main camp at the time when it is alleged that he gave out the money.

The foregoing is exacerbated by the fact by categorization, RW3, 4 and 5 are all partisan witnesses whose evidence I have treated with caution as they have an interest to serve. As I have already stated, their evidence therefore required corroboration. However, there was no other independent evidence to support their evidence.

So, having analyzed the above, I find that the inconsistencies in the evidence of RW3, 4 and 5 and the unimpressive demeanour of RW3, stemmed from the fact that these witnesses were not telling the truth that RW3 was at the camp at the material time. I therefore do not accept their evidence.

On the other, I find that the evidence as recounted by the Petitioner's witnesses to be reliable. As I have mentioned they were consistent in their evidence. In fact, RW3 himself corroborated the evidence of PW7 who told the Court that he delayed to come to the meeting and when he did, he apologized for the delay stating that he was attending a meeting. RW3 in his evidence together with that of RW4 and RW5 stated that they were in a meeting which ended quite late.

The view I hold is that this piece of information could not have come to the knowledge of PW7 unless the person who went to Kasinje village where they had congregated told her that he was in a meeting. I therefore find that this corroborated the evidence that RW3 was indeed at Kasinje village on the night of 11th August, 2021 and he distributed the K5s.

For the reasons that I have taken time to highlight above, I am inclined to accept the evidence of PW4, 5, 6 and 7 as I find it to be more credible than that of RW3, 4 and 5. It has been proved with convincing clarity and I find that RW3 Simon Lungu gave out K5 to PW4, 5, 6 and 7 on 11th August, 2021 at Kasinje village so that they could vote for the 1st Respondent.

That matter does not end here. The next question I have to determine is whether RW3 was the 1st Respondent's agent or what he did was done with the 1st Respondent's knowledge, consent or approval.

This is important because as counsel for the 1st Respondent submitted, for the evidence of PW4, 5, 6 and 7 to have probative value, it must fall within Section 97(2) (a) (ii) of the Act. For the avoidance of doubt, this section provides that:

'(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;'

Based on the above provision, it is evident that what has to be proved on an allegation of corrupt practice is that it was committed by the candidate or with the knowledge and consent or approval or of that candidate's election or polling agent. So the law only recognizes this category of persons.

Based on the evidence adduced, all the witnesses told the Court that they were given the K5 by RW3 so that they vote for the 1st Respondent and not that the 1st Respondent was the one who gave them the money. Additionally, no evidence was adduced to show that RW3 gave out the money with the knowledge, consent or approval of the 1st Respondent or by the 1st Respondent's election agent or polling agent as none of the witnesses stated that the 1st Respondent was present when they received the money.

So while the PW5 stated that he used to see the 1st Respondent move with RW3, and it was suggested through the cross examination of RW3 that he

was expected as a member of PF to campaign for the 1st Respondent, what it means is that the 1st Respondent cannot be made answerable for the acts of RW3 just because they belong to the same political party: I am ably guided by what was stated by the Constitutional Court in the case of **Nkandu Luo and another v. Doreen Sefuke Mwamba and another**⁽¹⁷⁾ which relied on the case of *Lewanika v. Chiluba* and held that:

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

The above case authority clearly encapsulates the import of Section 97(2) (a) of the Act. There is no evidence that RW3 was the 1st Respondent’s appointed election agent as defined by Section 2 of the Act that:

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

Regulation 55 (1) also provides that:

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

The Constitutional Court in the *Chrispin Siingwa v. Stanley Kakubo* case which was cited by counsel for the 1st Respondent declined to stretch the meaning of agent beyond what is clearly provided for in the law. It stated that:

“We also agree with Mr. Chungu that not only is it untenable for us to stretch the meaning of agent beyond what the law clearly provides, but for us to do so would also entail ascribing fault to candidates for electoral malpractices committed by persons who are not appointed by the candidate as election agents. The fact that the Legislature was specific on the definition of election agent was meant in our considered view to avoid endless permutations of who an agent is in particular circumstances.

In view of the foregoing, I find that the Petitioner has failed to show that the action by RW3, Simon Lungu was done with the 1st Respondent's knowledge, consent or approval or that he was the agent of the 1st Respondent as clearly defined in the law. RW3's conduct cannot therefore lie at the feet of the 1st Respondent.

Even assuming I found that it was done with the 1st Respondent's knowledge, there is no evidence that what RW3 did was widespread and as such the majority of the voters in the constituency were prevented from voting for their candidate of their choice as a result of the K5 that was given out. I say this because the K5 was given out at Kasinje village the

night before the election and it is unclear as to how many people benefitted from the same.

All that was stated by the witnesses was that there were a lot of people who were given. However, the Constitutional Court in the case of Mbololwa Sibulwa v. Kaliye Mandandi⁽¹⁸⁾ stated that:

“The term ‘there were a lot of people from the different villages at the meeting’ is relative and could mean different things to different people. Therefore, the finding by the trial Judge that the character assassination against the appellant by both the respondent and the 2nd petitioner in the court below was widespread cannot be said to have been supported by the evidence on record and was thus not proved to the required standard.”

For these reasons that I have highlighted above, I find that the Petitioner has failed to prove this allegation under paragraph 8 to a fairly high degree of convincing clarity that the 1st Respondent distributed money to voters. This allegation of corrupt practices is dismissed.

The other allegation is that the 1st Respondent practiced vote buying during the door-to-door campaign by giving cash to the electorate. That the 1st Respondent also bought some iron sheets on 11th August 2021 for a church in Mkowe ward and that this act influenced the voters to vote for the 1st Respondent.

There are two limbs to this allegation. I will start with the first limb which is the giving of cash during the door-to-door campaign.

The witness who was called to support this allegation was PW9, Masauso Miti. His evidence was that the 1st Respondent used to stop over at Chongo turn off trading area where he used to spend most of his time with his friend's drinking alcohol. That they would then run to him and ask for money; after giving them the money, he would ask them to vote for him so that he goes to Parliament. He added that once given the money, he would remain at the turn off drinking alcohol and would not follow to see what would be happening in Chongo village and if the 1st Respondent would give out money in the village.

In his evidence in rebuttal, the 1st Respondent stated that he stopped at Chongo turn off twice during the campaigns. At one point their dancers were hungry and so they stopped over to buy them food. While there, a group of fifteen to twenty people approached him and demanded that he buys them food whilst others demanded for money. He tried to avoid them but they were persistent. As a result, he asked his campaign manager to deal with them. He presumed that he gave them something.

The other time he stopped over, he didn't come out of the vehicle and his vehicle was thronged by a group of men, some of whom wore PF T-Shirts.

That they went to the window of the vehicle and demanded for money since they were his people. Realizing that they were not going to leave him alone, he opened the window a little bit because it was during Covid 19 period and he gave out a K50 to one of them and that's how they ran away.

I have carefully considered the evidence adduced and the submissions made by the parties.

There seems to be no dispute and I find as a fact that:

- (i) The 1st Respondent stopped over at Chongo turnoff trading twice during the campaign period and that PW9 was in the group of about twenty men who used to spend their time drinking alcohol at the trading area.
- (ii) The 1st Respondent gave out K50 through the window to this group.

What is in dispute is whether the 1st Respondent gave out this K50 to PW9 and his friends in order to induce them to vote for him or because they asked for money from him after they thronged his vehicle.

According to PW9 he stated that he is a member of the PF and whenever the 1st Respondent stopped at the turnoff, they would run to his vehicle and ask for money. They would use this money to buy alcohol and others

would buy drinks. In his evidence in chief, he repeated this twice. He also stated that after giving them the money, he asked them to vote for him so that he goes to Parliament.

He also admitted in cross examination that they would run to his vehicle out of love and because they expected something from him and that because he loved him, he voted for him. It was also his evidence that after being given this money, he would remain at the turn off and not follow the 1st Respondent to see what he would be doing in the village.

The evidence by PW9 that he is a PF member is in tandem with the explanation given by the 1st Respondent that when he stopped at the turnoff twice, a group of men some of whom would be wearing PF T-shirts would throng his vehicle and ask for money from him. Due to their persistence, he was forced to give them K50.

Furthermore, he stated that when he was stopped at the turnoff the first time, he was not aware that his campaign manager gave out money to the group because he left and walked to the vehicle. So, while counsel for the Petitioner submitted that the 1st Respondent's campaign manager gave PW9 and his friends, PW9 did not state that the money was given by the campaign manager but by the 1st Respondent.

In this regard, I find the following facts as proved:

- (i) PW9 and his friends used to run after the 1st Respondent's vehicle and ask for money from him.
- (ii) The 1st Respondent and not the campaign manager gave out K50 to PW9 and his friends who were PF- supporters after they asked for money.
- (iii) PW9 did not see the 1st Respondent give out money to the people in Chongo village during the door- to- door campaign as he would remain at the turnoff and it was not possible for him to see what would be happening in the village.

In making a determination on the question in dispute, it is important to state again that the standard of proof is to a fairly high degree of convincing clarity. Therefore, due to the nature of the allegation of bribery, there should be clarity in the evidence that the money was given out to PW9 and his friends and the motive by the 1st Respondent was to induce them so that they could vote for him.

PW9 stated that he used to be in a group of about twenty (20) people. However, he is the only person who spoke on this allegation that the 1st Respondent used to give them money and would ask them to vote for him so that he goes to Parliament.

There is no other supporting evidence and therefore I find his confession that the 1st Respondent used to ask him to vote for him not to be conclusive when considered in the light of the explanation given by the 1st Respondent that when he would stop over at the turnoff, a group of young men seemingly drunk would throng his vehicle and demand for money.

I have made a finding based on PW9's own evidence and that of the 1st Respondent that PW9 used to run after the 1st Respondent's vehicle to ask for money and that it was not wrong for the 1st Respondent to have given them the money as he was just helping them. That if he had done something wrong, he would not have collected the money.

On the part of the 1st Respondent, he stated that PW9 and his friends were very persistence and as a way of keeping them away he gave out the K50. This evidence was not challenged by the Petitioner and it is in line with what PW9 stated that they would run after his vehicle and demand for money.

Given the foregoing, I find that the motive for giving out the K50 was because PW9 and his friends had asked for money after they thronged his vehicle and since they were persistent, he gave out the money not to bribe them but to keep them away.

I am fortified by this finding because PW9 stated that he voted for the 1st Respondent as a PF member and that it was normal for him to have voted for him and that he did that because he loved him.

Based on the forgoing, I find that the Petitioner has failed to prove that the 1st Respondent gave out money to induce PW9 to vote for him.

No other evidence was adduced on this allegation that the 1st Respondent practiced vote buying during the door-to-door campaign.

In any event, even assuming that I found that the K50 which was given by the 1st Respondent was meant to induce PW9 to vote for him, there was no evidence that was adduced that this act was widespread and the majority of the voters in Kasenengwa constituency were prevented from voting for their candidate of their choice. As I have stated, there was no evidence that that the 1st Respondent practiced vote buying during the door to door campaign.

The net result is that the Petitioner has failed to prove the first limb of the allegation in paragraph 13 to a fairly high degree of convincing clarity that the 1st Respondent practiced vote buying during the door- to- door campaign.

The second limb of the allegation is that the 1st Respondent bought some iron sheets on 11th August, 2021 for a church in Mkowe ward, this act influenced the voters to vote for the 1st Respondent.

In her evidence, the Petitioner told the Court that the 1st Respondent donated iron sheets to a church although she had no pictorial evidence to show that he did so and also which church received the iron sheets. However, she admitted that she didn't see the 1st Respondent donate the iron sheets although she knew he was in Mkowe.

In his evidence in rebuttal, the 1st Respondent denied that he was in Mkowe on the material day donating roofing sheets as he was in Kang'ombe village where he was doing a road show. Another witness who responded to this allegation was RW2 Rodgers Hara who told the Court that the 1st Respondent was not the one who took the iron sheets but he was told that it was Mr. Charles Banda and Mr. Ziwa.

I have carefully analyzed this evidence in relation to the allegation and the submissions by the parties. What is apparent from the evidence is that the Petitioner did not see the 1st Respondent donate the iron sheets to a church in Mkowe although she insisted that he was in Mkowe. However, she did not adduce any evidence to prove that he was in Mkowe donating iron sheets to a church because even her own witness PW3 stated that the

1st Respondent was in Kan'gombe village where he was giving out party regalia.

Furthermore, the name of the church and who received the iron sheets have not been proved. I am at a loss as to how the Petitioner expects this Court to find in her favour when she does not even know the church the 1st Respondent allegedly donated the iron sheets to. I find her evidence to be unreliable.

I should pause here and point out that the evidence by RW2 that the iron sheets were donated by Mr. Charles Banda and Mr. Ziwa is purely hearsay as he did not perceive with his own eyes that these were the people who donated the iron sheets and not the 1st Respondent. I have therefore disregarded his evidence.

That notwithstanding, on the authority of the case of *Khalid Mohammed* that a plaintiff must prove her case and if she fails to do so the mere failure of the opponents defence does not entitle her to judgment. So, the fact that I have disregarded RW2's evidence does not mean that the Petitioner is entitled to judgment. It was incumbent on the Petitioner to prove the allegation to the required standard by adducing cogent evidence to support the allegation.

In the absence of any evidence and given the foregoing, I find that the Petitioner has failed to prove the second limb of the allegation in paragraph 13 to a fairly high degree of convincing clarity that the 1st Respondent donated iron sheets to a church in Mkowe. This allegation is therefore dismissed.

The last allegation is that the 1st Respondent distributed face masks and gave out cash on polling day. It is contended by the Petitioner that this contravenes Section 89 (1) (e) (i) of the Act which provides that:

“A person shall not on any polling day at the entrance to or within a polling station or in any public place or in any private place within four hundred meters from the entrance to such polling station canvass for votes, solicit the vote of any person.”

The allegation on this ground is that the Petitioner saw the 1st Respondent distributing face masks on 12th August, 2021 to voters and was heard saying the voters should vote for him. The 1st Respondent also gave out cash to voters such as Harrison Chongo, Kaifa Lungu, Isaiah Soko, Keziah Soko and many others.

In her evidence, the Petitioner told the Court that on voting day, masks were distributed to the voters who were being told to vote for the 1st Respondent. However, she didn't know everyone who was involved in the

distribution of the masks because the constituency was quite massive but that there were people who witnessed that.

Even though the Petitioner stated that there were people who witnessed the distribution of masks, no witness was called to Court regarding this allegation.

The 1st Respondent on the other hand denied this allegation and stated that he did not personally distribute masks on the polling day. He explained that when he visited two polling stations, that is Katinta and Kalungwizi, he found that voters were being turned away because they didn't have masks on. Therefore, the 2nd Respondent's officials requested for masks from him and he gave them what had remained from the masks that his campaign team was using.

I note that the Petitioner in her petition averred that she saw the 1st Respondent distribute masks to the voters on polling day, in her evidence, she didn't substantiate this allegation by indicating at which polling stations she saw the 1st Respondent distributing face masks what was said when the face masks were being distributed and how many people benefitted from these face masks. As I have already alluded to, no witnesses testified on this allegation that they found the 1st Respondent

distributing face masks to voters and that these voters were being told to vote for the 1st Respondent contrary to Section 89 (i) (e) of the Act.

So what the Petitioner should have done was to show a relationship between the distribution of face masks and the elections. I am guided by what the Constitutional Court stated in the case of Samuel Mukwamataba Nayunda v. Geoffrey Lungwagwa⁽¹⁹⁾ where the facts alleged that the Respondent had been distributing mealie meal 400 meters away from the polling station. The Constitutional Court stated that:

“The Appellant’s evidence did not show that when the Respondent visited the polling station, he was canvassing for votes, soliciting for any person’s vote, inducing any person not to vote or inducing any person not to vote for a particular candidate.”

In his Answer and evidence, the 1st Respondent denied this allegation that he personally was involved in the distribution of face masks and he explained the circumstances under which he handed over the face masks to the 2nd Respondent’s officials. The Petitioner did not bring any witnesses to dispute the explanation from the 1st Respondent which was clearly indicated in the Answer and his evidence was not significantly challenged.

For the reasons I have given above, I find that the Petitioner has failed to prove that the 1st Respondent distributed face masks to the voters on

polling day and that the voters were being told to vote for him. In the absence of any other evidence to the contrary, I accept the explanation by the 1st Respondent as it is plausible.

For this reason, I find as a fact that the 1st Respondent didn't engage directly with the voters but handed over the face masks to the officials from the 2nd Respondent at Katinta and Kalungwizi polling stations so that they could distribute to the voters who didn't have and not that he canvassing or soliciting for votes on the polling day.

In any event, even if I were to find that he was the one who distributed the face masks with the intention of soliciting for votes, there is no evidence that he did so in all the polling stations and that therefore it was widespread. From the evidence that was adduced and which was not challenged, the face masks were given out at two polling stations, Katinta and Kalungwizi polling stations in the afternoon when most of the voters had voted. It is not in dispute that there are eighty nine (89) polling stations in Kasenengwa Constituency. However, there is no evidence that the majority of the voters were prevented from voting for a candidate of their own choice.

For the reasons I have highlighted above, I find that the Petitioner has failed to discharge the burden of proof to a fairly high degree of convincing

clarity that the 1st Respondent distributed face masks on 12th August, 2021 to voters and that he told the voters to vote for him. This allegation has no merit and it is dismissed.

The second limb of the allegation is that the 1st Respondent gave out cash to voters such as Harrison Chongo, Kaifa Lungu, Isaiah Soko and many others. However, these witnesses were not called to testify that they received cash from the 1st Respondent on polling day. So while the Petitioner stated that she witnessed this, her evidence was devoid of any details as to what happened. No other witnesses were called to prove this allegation.

In the premise, I find that this allegation has not been proved and it is dismissed.

The net result is that, I find that the Petitioner has failed to prove to this Court that the 1st Respondent contravened Section 81(1) (a) and Section 89 (1) (e) (i) relating to bribery and corruption on all the allegations that have been raised on this ground.

(ii) BLOCKED FROM CAMPAIGNING IN KANG'OMBE VILLAGE BY CHIEF MADZIMAWE AND NOT GIVEN WAY TO CAMPAIGN IN JIM VILLAGE

It is alleged under paragraph 9 of the petition that the Petitioner and her team were blocked from campaigning in Kang'ombe village by Chief

Madzimawe on 11th August, 2021 and they were chased by the Indunas. However, the PF team was also in the area when it was not their day but they refused to pave way for the Petitioner whose turn it was according to the 2nd Respondent's calendar to campaign on 11th August, 2021 in Jim village. That she personally informed the DEO who was in charge but no help was rendered.

In her evidence, the Petitioner stated that she didn't have any evidence that Chief Madzimawe was the 1st Respondent's agent but she knew that he was the 1st Respondent's agent. The Petitioner also stated that because of what happened in Jim village, she lost the election and that although she informed the DEO, she didn't have any evidence of the message that she sent to him.

Another witness who addressed this allegation was PW3 Gaston Phiri who told the Court that he was informed by the headman that Chief Madzimawe had issued instructions to the subjects that they would not allow any meeting to be held by Mr. Hakainde Hichilema. So when Mr. Hakainde Hichilema went for a meeting the following day, the headmen left and they never welcomed him. However, an independent candidate by the name of Mr. Ziwa managed to hold a meeting which was attended by a large number of people.

He also stated that on 11th August, 2021 around 16:00 hours, no meeting was held in Kan'gombe village but the PF only distributed chitenges and that he never saw the 1st Respondent chase the Petitioner's team from Kang'ombe village.

In his Answer, the 1st Respondent denied that Chief Madzimawe or his Indunas were his registered agents and whatever conduct they engaged in was not with his instruction or knowledge.

The 1st Respondent also averred that according to the campaign schedule, the Petitioner was supposed to be in Mpunza ward from 9th to 11th August and not in Kang'ombe village which was in Ngongwe ward. In any case he never set foot in Jim village as he was conducting road shows in Mboza, Makungwa and Ngongwe wards.

In his evidence in rebuttal, the 1st Respondent basically repeated what is contained in his Answer and stated that Chief Madzimawe and his Indunas were not his election agents. That he only learnt about the allegation through the petition.

The 1st Respondent also stated that what PW3 Gaston Phiri told the Court was the position as he didn't chase the Petitioner from Kang'ombe village. He also stated that they didn't meet any campaign team from any political

party in Kang'ombe village and that there was no time for them to go to Jim village.

The first limb of the allegation is that Chief Madzimawe blocked the Petitioner and her team from campaigning on 11th August, 2021.

Section 83 (1) (c) of the Act provides that:

“A person shall not directly or indirectly, by oneself or through any other person—

(a) Do or threaten to do anything to the disadvantage of any person in order to induce or compel any person—

(i) to register or not to register as a voter;

(ii) to vote or not to vote;

(iii) to vote or not to vote for any registered political party or candidate;

(iv) to support or not to support any political registered party or candidate; or

Furthermore Regulation 14 of the Electoral Process (Code of Conduct)

Regulations 2016 provides that:

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

‘Traditional leaders’ under Section 2 of the Act are defined as:

“A paramount chief, senior chief, chief or village headman.”

What is clear from the foregoing is that traditional leaders are proscribed by law not to exert undue influence on their subjects so as to disadvantage any person during campaigns.

In the present case, it is alleged that Chief Madzimawe blocked the Petitioner and her team from campaigning on 11th August, 2021 and that the headman told their subjects that Chief Madzimawe had issued an instruction to the subjects not to allow Mr. Hakainde Hichilema to hold any meetings in the village.

When I consider the evidence of PW3, he stated that he was told by the headman that the headman had been instructed by the Chief to inform the subjects not to allow Hakainde Hichilema to hold a meeting in the village.

To begin with, PW3 was not the one who personally received the alleged instruction from Chief Madzimawe but the headman. However, the headman was not called by the Petitioner to state what instruction he received from the Chief.

Since the allegation puts Chief Madzimawe at the center of this allegation, what I discern from PW3's evidence is that the import is to prove the truthfulness of that allegation that the Chief had actually issued the instruction.

However, on the authority of *Subramanian v. The Public Prosecutor* which I have already alluded to, it is clear that what PW6 stated does not fall within the exception on hearsay and was tendered in for its content value. I find that his evidence is purely hearsay on this score and it is inadmissible because he was just informed by the headman and the headman was not called as a witness. I have therefore not considered it.

PW3 went on further and stated that when Mr. Hakainde Hichilema arrived to conduct a meeting, the Headmen didn't welcome him as they left and that he didn't see the 1st Respondent chase the Petitioner.

As I have stated, the allegation is that Chief Madzimawe issued the instruction. There is no evidence that Chief Madzimawe or his Indunas were registered agents for the 1st Respondent or that whatever was done was with the 1st Respondent's knowledge, consent or approval. Section 2 of the Act and Regulation 55 are very clear on who an agent is.

For this reason, I find that the Petitioner cannot attribute whatever was allegedly done by Chief Madzimawe to the 1st Respondent. This limb of the allegation has not been proved to the required standard and it is dismissed.

The second limb is that the PF team did not give way to the Petitioner whose turn it was to conduct campaigns in Jim village on 11th August,

2021 in accordance with 2nd Respondent's calendar. I have considered BUP 3 which is in the Petitioner's bundle of documents. According to this calendar, the UPND, the party on which ticket the Petitioner stood was supposed to be in Mpunza ward.

The 1st Respondent in his Answer to the petition averred that Kang'ombe village is in Ngongwe ward. This was not disputed by the Petitioner. In his evidence, he stated that he didn't meet any campaign team in Kan'gombe village and that they only distributed T-shirts in the village. This evidence was supported by the evidence of the Petitioner's witness PW3 who told the Court that the 1st Respondent did not chase the Petitioner in Kangombe village and that the 1st Respondent just distributed T-shirts.

In view of this uncontroverted evidence, I am inclined to accept the evidence of the 1st Respondent and I find that the 1st Respondent did not chase the Petitioner in Kan'gombe village and did not refuse to pave way for her and her team in Kan'gombe village.

Furthermore, apart from the evidence by the Petitioner that the 1st Respondent did not give way to her in Jim village and that she complained to the DEO, there was no other evidence that was adduced to support this allegation as she did not adduce the message of complaint she sent to the DEO. It is actually surprising that she didn't adduce this piece of evidence

when most of the exhibits produced in her affidavit are pictures of the alleged malpractices.

The 1st Respondent denied this allegation that he was in Jim village and he told the Court that he was conducting road shows in Makungwa, Mboza and Ngongwe wards and he had no time to time to go to Jim village. This evidence was not challenged by the Petitioner. I have therefore accepted it in the absence of any cogent evidence to the contrary and I find that the 1st Respondent was not in Jim village.

Given the foregoing, I find that the Petitioner has failed to prove this allegation to a fairly high degree of convincing clarity that she was blocked to conduct campaigns in Jim village by the 1st Respondent. This allegation is therefore dismissed.

(iii) USE OF HATE SPEECH

The Petitioner also alleged that the 1st Respondent used a lot of hate speech towards the UPND Presidential Candidate Mr. Hakainde Hichilema by saying that he sold Zambian companies before and would sell the nation once voted into power. However, when she was cross examined by counsel for the 1st Respondent, she admitted that she never heard the 1st Respondent utter those words.

No other witness was called to testify on this allegation. In this vein, I find that the Petitioner has failed to prove this allegation under paragraph (iv) of the petition to a fairly high degree of convincing clarity. This allegation is accordingly dismissed.

(iv) CONSTRUCTION AND INSPECTION OF COMMUNICATION TOWERS DURING THE CAMPAIGN PERIOD

There was no averment on this allegation in the petition. It only appeared under paragraph 9 of the affidavit in support of the petition. According to the Petitioner, she deposed that the PF candidate was seen in the company of others during the construction of the communication towers during the campaign period. Pictures were exhibited as **BUP 4a** and **BUP 4b**.

In her evidence, the Petitioner stated that the 1st Respondent coerced people who had no access to phones because there were no communication towers and that if they didn't vote for him, they would not have access to mobile services.

A witness who addressed this allegation was Zindana Sakala PW8. Counsel for the 1st Respondent has argued that the evidence of PW8 was not pleaded and should therefore be expunged from the record. The Supreme Court has guided on the approach to be taken on unpleaded issues. In the case of Kapembwa v. Danny Maimbolwa and Another⁽²⁰⁾ it was stated that:

“Where a defence not pleaded is let in evidence and not objected to by the other side, the rule is not one that excludes from consideration of the court the relevant subject matter for decision simply on the ground that it had not been pleaded. It leaves the party in mercy and the court will deal with him as is just.”

It went further and stated in the case *Anderson Mazoka and Others v. Levy Patrick Mwanawasa* that:

“In case where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the court will attach to the evidence of unpleaded issues.”

The record is very clear that there was no objection to the testimony that was given by this witness when he appeared in Court. It was incumbent upon counsel for the 1st Respondent the moment he became aware to timely object to the evidence of this witness and not at this stage. Since there was no objection, as a Court, I am not precluded to consider it and I shall evaluate the weight to attach to it.

PW8's evidence was that the 1st Respondent held a meeting on 25th July, 2021 at Kasuma Primary School where he informed them that he had bought some steel bars for the construction of the towers. If they didn't vote for him the communication was going to remain bad.

The 1st Respondent in his affidavit in opposition admitted that he was in the company of others inspecting the towers during the campaign period. However, he deposed that the same inspection was for fact finding purposes in order to tout the good works that the former government was doing and that at no time did he use the said visit to offer bribes or engage in electoral malpractice. He added that the Petitioner was free to visit the construction site if she so wished.

In his evidence in rebuttal, the 1st Respondent denied that he bought steel bars for the construction of communication towers as he didn't even know the type of material that was required for the construction of the towers. He further stated that what he knew about the towers was that it was a government project through ZICTA which was constructing towers across the country.

On his admission that he was at the construction site, the 1st Respondent explained that after they had a meeting at Mboza, he came across a construction site. He therefore became excited because in his campaign message, he used to talk about the construction of communication towers by the PF government once voted into power.

I have carefully considered the evidence that has been adduced in support of the allegation and the evidence in rebuttal.

The evidence from PW8 is that the 1st Respondent informed them at a meeting that he bought steel bars for the construction of communication towers. The 1st Respondent has denied this allegation and he contends that he doesn't know what material is used for the construction of communication towers. For me, that is not really the issue because one does not need to be expert in a certain field to be able to make a donation of construction material.

Be that as it may, from the evidence it is not in dispute that communication towers were being constructed in the constituency as shown by exhibit **BUP4**. What is in dispute is whether the 1st Respondent was the one who was responsible for the construction of these communication towers.

What I have to determine therefore is whether PW8's evidence is sufficient enough to meet the standard that the 1st Respondent bought steel bars for the construction of the communication towers during the campaign period.

Apart from the assertion by PW8, there is no other evidence that the 1st Respondent bought steel bars which he presented to the people who attended the meeting at Kasuma Primary School. It is surprising that the Petitioner herself did not allude to this allegation in her evidence neither

did she make such an averment in her petition but in her affidavit in support.

If the Petitioner was equipped with this knowledge, this should have been clearly indicated in the petition especially that PW8 in cross examination stated that exhibit BUP4b in the affidavit in support was not connected to his evidence that the 1st Respondent held a meeting at which he presented the steel bars.

If that is the case, this means that the allegation that the 1st Respondent bought steel bars should have been specifically indicated in the petition and the affidavit so as to give credence to PW8's evidence. As it is, this was not done. As I have already mentioned when considering the submissions by counsel, after assessing the evidence of PW8, I attach very little weight to it.

Furthermore, the Petitioner didn't produce any documentary evidence to show that the 1st Respondent bought the materials and who received those materials when they were presented at the meeting.

In this modern day technology, the use of pictorial evidence is a routine evidentiary technique as photographs have a special power of persuasion. Therefore, it would have been prudent for the Petitioner to have produced

pictorial evidence to make a stronger case especially that there was just one witness who addressed this allegation.

In addition, the Petitioner through BUP4a and BUP4b contends that it is proof that the 1st Respondent was the one responsible for the construction of the towers. I have carefully analyzed these pictures and also considered the evidence in rebuttal.

According to the 1st Respondent, BUP4a was the construction site at which he made a stopover to appreciate what was happening at the site out of curiosity. In this picture there are three people looking at a construction placard on which is written **“Construction of 24 Communication Towers”**. This in my view confirms what the 1st Respondent stated in his evidence that he stopped over to see what was happening at the site.

BUP4b is a picture showing people looking at a construction site and that four of them are wearing PF regalia. The view I hold is that if the 1st Respondent was the one who had initiated the project and was thus inspecting the works being carried on, it would have made logical sense if there were people working on site to give information on the progress of the works.

In any event, PW8 stated in cross examination that he didn't know anything about BUP4a and BUP4b and that was not what he had come to

testify on as his evidence was about the meeting that took place. And if his evidence is anything to go by, he stated that the construction of the tower started a long time ago.

Moreover, the person who took the pictures was not called as a witness so that he could shed more light on what was happening at the construction site.

Therefore, to make an averment based on these pictures that the 1st Respondent was inspecting construction site which he had initiated in the absence of any other evidence is inviting this Court to hypothesize. That is not the role of the Court.

Cogent oral and documentary evidence should have been adduced to prove that the 1st Respondent was directly privy to the conception, planning and execution of the project for the construction of the communication towers in the light of the 1st Respondent's assertion that he just made a stopover out of curiosity and that the Petitioner was also free to do so if she so wished.

In the absence of any evidence to the contrary, I have accepted the 1st Respondent's explanation which I consider to be plausible. In this regard, I find as a fact that the 1st Respondent made a stopover at the construction

site of the communication towers to see what was happening out of curiosity and not that he was inspecting the construction site.

As I have already alluded to, the Petitioner has to prove to a fairly high degree of convincing clarity that the 1st Respondent was inspecting the progress of the construction works which he had initiated during the campaign period. However, she has failed to do so and therefore this allegation is dismissed.

I shall now proceed to consider the allegations against the 2nd Respondent.

(v) DELAY IN BRINGING BALLOT BOXES FROM FOUR POLLING STATIONS AND FAILURE TO PROVIDE GEN20 FORMS

These allegations are contained in paragraph 14 of the petition and are against the 2nd Respondent. As I have already alluded to, the Constitution under Article 229 (2) (b) and the Electoral Process Act expressly gives the 2nd Respondent the function to conduct elections. The 2nd Respondent thus must fulfil this function by ensuring that the requirements of the Act are respected and observed in the electoral process.

In her evidence, the Petitioner in cross examination stated that she complained that she lost the elections because ballot boxes only arrived forty-eight (48) hours later and that if the ballot boxes had been brought

within two hours, she would not have covered 5,845 which was the margin by which she lost.

It was also her evidence that the GEN 20 forms were not provided to the polling agents. If they had been provided, it would have changed everything in the sense that the results that were given in the GEN 20 forms to the polling agents would have been an exact reflection of what transpired on the ground as opposed to relying on one party to give them the results. That since the polling agents were not given their copies, they were not able to tally the two numbers and to know if they were correct or manipulated. In short, that since the GEN 20 forms were not availed, it affected her ability to know the correct results.

In his evidence in rebuttal, the 1st Respondent stated that he also got concerned on the delay in the announcement of the result and that he remembered that he had accused the officials from the 2nd Respondent on two occasions. Their excuse was that they had transport problems.

The 2nd Respondent did not call any witnesses but relied on the answer filed and also the affidavit in opposition. In relation to this allegation, it was averred that there was no inordinate delay in bringing ballot boxes to the Totalling center and denied that it failed to provide GEN 20 forms.

I have given due consideration to the above evidence. What I discern from the answers filed by the 1st Respondent and 2nd Respondent and also the evidence of the 1st Respondent is that there is no dispute that there was a delay in bringing ballot boxes from four polling stations. What is in dispute is that there was a delay of over forty eight (48) hours.

Based on the Petitioner's evidence, she contends that she lost because of the delay and it was suggested through cross examination of the 1st Respondent that there was a delay because he was trailing behind.

I have difficulties in appreciating the position taken by the Petitioner because she has not provided any evidence to show which four polling stations were affected by this delay. Furthermore, she admitted in cross examination that she had no evidence that the ballot boxes were transported forty-eight (48) hours after voting had closed. There is a lack of clarity in her evidence. Equally there is no evidence that was adduced that before the ballot boxes finally arrived, the 1st Respondent was trailing behind in those four polling stations.

All these allegations needed to be proved with cogent evidence by the Petitioner and not left to the conjecture of the Court. As I have already alluded to, this is not the role of the Court and I decline to do so. So while the 2nd Respondent did not call any witness on this aspect but merely

relied on the answer and affidavit in opposition, it assumed its right to be heard. Witnesses were just not called to rebut the allegations against it.

That notwithstanding, it was incumbent upon the Petitioner to prove to the satisfaction of the Court that the 2nd Respondent's delay was deliberate and was intended to benefit the 1st Respondent. I am guided by what the Constitutional Court stated in the case of Mwiya Mutapwe v. Shomeno Dominic⁽²¹⁾ that:

“Although the Appellant did not file an answer to the petition and therefore did not actually adduce any evidence in his defence before the Tribunal, the Respondent nonetheless still bore the burden to prove his allegations against the Appellant to the required standard of convincing clarity if the judgment was to be entered in his favour.”

Furthermore, the Constitutional Court in the case of *Chrispin Siingwa v. Stanley Kakubo* held that:

“The burden of proof lies with the petitioner. Where the trial court finds his evidence unconvincing or where it does not prove the allegation to the required high standard, it matters not the evidence proffered by the other party, the case will fail.”

Since no evidence was adduced, I find that the Petitioner has failed to prove this allegation to the required standard and also to prove that the

delay affected the result of the elections. This allegation is therefore dismissed.

The other allegation is that the 2nd Respondent did not provide the Petitioner's polling agents with GEN 20 forms. As I have mentioned, the 2nd Respondent has the mandate to conduct elections by ensuring that the requirements of the Act are respected and observed in the electoral process.

As was stated by the Constitutional Court in the *Nkandu Luo* case, a key requirement in the conduct of elections by the 2nd Respondent is the provision of election materials. To this end, Regulation 29(1) (b) of the Electoral Process (General) Regulations provides that:

“(1) A returning officer shall, in respect of the taking of a poll in a polling station within the returning officers constituency, district or ward—

(b) provide each presiding officer with such number of ballot boxes, ballot papers, official seals, official marks, the voters roll relating to the polling station and such other things as may be necessary for the taking of the poll;”

What is clear from the Petitioner's evidence is that none of the Petitioner's polling agents were called as witnesses to testify on this allegation. In addition, it is not clear to this Court at which polling stations these GEN

20 forms were not provided as no evidence was adduced to prove this allegation. I find that the Petitioner's evidence that this was not done when she didn't adduce any evidence that she perceived this with her own eyes when she visited the polling stations that GEN 20 forms is unreliable.

The Constitutional Court in the *Nkandu Luo* case again when dealing with a similar allegation stated that:

"A person challenging the election of a candidate on the basis of Section 97(2) (b) must demonstrate with cogent evidence that there was non-compliance with the provisions of the Act relating to the conduct of an election and that the non-compliance affected the result of the election.

Given the foregoing, if it is the Petitioner's contention that her polling agents were not provided with the GEN 20 forms, she was supposed to adduce evidence to also show that the failure to do so by the 2nd Respondent affected the result in relation to her and that it did not affect the 1st Respondent equally.

I am fortified in holding this view by what the Supreme Court stated in the case of *Mazoka and others v. Mwanawasa* where it was stated that non-compliance with any provisions of the law that does not operate in favour of one candidate but affects all candidates equally cannot form the basis for the avoidance of an election.

It is for this reason that I find that this allegation has not been proved to the required standard and it is accordingly dismissed.

(vi) ANOMALIES ON GEN 20 FORMS

Before I consider the last allegation, I have noted that the Petitioner has submitted at great length having latched on the alleged anomalies on the GEN 20 forms which were produced by the 2nd Respondent in the Supplementary bundle of documents.

To begin with, and by way of background, I wish to state that the Petitioner did not plead that there were anomalies on the GEN 20 forms and no evidence was led to prove the same. However, the 1st Respondent (RW1) during cross examination, was asked if he had any problems with the manner in which the 2nd Respondent conducted the elections and his answer was in the negative.

Counsel for the Petitioner then referred RW1 to the GEN 20a forms at pages 1,6,8,11,12,14,16, 17,19,21,24,25,26,28,32 and GEN 20b forms at pages 35 and 37 of the 2nd Respondent's Supplementary bundle of documents. The witness confirmed that some of the forms had not been signed by the party representatives. The other forms were alleged to have been witnessed by more than one person when only one person was supposed to witness and others had alterations which were not counter

signed. The witness maintained that he had no problem with the manner in which elections were conducted.

In his submissions, counsel for the Petitioner contends that the irregularities on the Gen 20 forms were either doctored or not authentic and worked in favour of the 1st Respondent and that the 2nd Respondent had neglected to explain the said irregularities.

Mr. Yalenga argued that if the Petitioner contended that the Gen 20 forms had errors, Sections 70 and 71 were instructive as to the procedure to be adopted where a candidate disputed the declared results. That no evidence had been produced before Court to show that the Petitioner had objected.

He contends that the assertion that the Gen 20 form appearing at page 24 of the 2nd Respondent's Supplementary bundle of documents was signed by one and the same person was not founded as it was evidence from the bar. It was argued that an expert witness was not brought to show how the handwriting was of the same person and further that the Petitioner's pleading did not allege that the Gen 20 forms were forged; that this issue could not be raised in her submissions.

The 2nd Respondent did not call any evidence in rebuttal to this answer to the purported anomalies. It was however argued by the 2nd Respondent in the submissions that the Petitioner's polling agents had a responsibility to

object to the results any alleged irregularities on the Gen 20 forms before the results were announced as required by Section 70 of the Act. Counsel argued that the Petitioner did not object and no evidence was placed before Court to show that they objected in person.

It was further argued regarding the forms that were alleged to have been signed by the same person that the Petitioner was not a handwriting or signature expert to allege that the forms were signed by the same person.

I have carefully considered the evidence that was given by the 1st Respondent in cross examination and also the submissions by the Petitioner which shows that the focus centered on the purported anomalies in the GEN 20 forms that were produced by the 2nd Respondent. I have also considered the submissions tendered in by the Respondents.

What seems to run through the submissions filed by the Petitioner is that they are challenging the documents filed by the 2nd Respondent in the Supplementary bundle of documents as not being authentic and stained with irregularities.

The 1st Respondent contends that the issue of the Gen 20 forms being irregular and forged was not pleaded and should therefore not be in the submissions. I do agree with counsel for the 1st Respondent that the issue that the GEN 20 forms were irregular and not authentic was not pleaded

by the Petitioner. What the Petitioner pleaded was that the polling agents were not provided with GEN 20 forms.

That notwithstanding, as I have alluded to, during cross examination of RW1, suggestions were made by the Petitioner's counsel after the witness told the Court that there was nothing wrong with the way the 2nd Respondent conducted the elections. At that point, RW1 was taken through some of the GEN 20 forms which had been produced by the 2nd Respondent suggesting that there were some irregularities in the forms that the 2nd Respondent had produced.

Both counsel for the Respondents did not object to the answers that were given and what was gracing the Court record. As I have already alluded to, on the authority of *Kapembwa v. Danny Maimbolwa and another* and *Anderson Mazoka and others v. Levy Patrick Mwanawasa*, I am not precluded from considering a matter not pleaded that was let in evidence. The resolution will therefore depend on the weight to be attached to the issue not pleaded.

I will in this regard proceed to consider the issues raised even though they were just brought out through cross examination of the 1st Respondent. I consider them to be important in the spirit of promoting transparency and building confidence in the electoral system as they relate to the conduct of

elections which is the mandate of the 2nd Respondent. I am fortified by what the Supreme Court stated in the case of *Lewanika v. Chiluba* that:

“The flaws of all types which we have established of course did not reflect well with those managing the electoral process. Many of them can and should be addressed in order to enhance our democratic profile and in order to engender greater confidence in the electoral process.”

The Constitutional Court in the *Giles Chomba Yamba Yamba* and *Nkandu Luo* cases endorsed these views stating that elections provided a means for the governed to express their will as to who was to govern them. Then those managing the electoral process must as far as possible work on and eliminate any flaws in the process.

The Petitioner contends that there are anomalies regarding the Gen 20 forms one of which is that the Gen 20 form at page 1 was not signed by the Returning Officer and that some were not signed by the election or polling agents whilst other Gen 20 forms were witnessed by one person and indicated party names and not the people who signed.

At page 26 one GEN 20 had alterations and it is argued that it was not counter signed by the stakeholders and at page 28, it was counter signed by the Returning officer. Regarding the Gen 20 form at page 32, it was argued that more than one witness signed on behalf of the parties represented when each party was only supposed to have one witness signing. That page 19 shows that there were four (4) Independent

witnesses despite having only three Independent Candidates that contested the election.

The Petitioner has also argued that her name at page 1 of the 2nd Respondent's Supplementary bundle of documents was indicated as Beatrice Phiri and not Beauty Phiri. It was also argued that the on the Gen 20 form at page 8 Beauty Phiri's name appeared as an Independent Candidate.

Similarly, the form at page 21 shows that the witness for an Independent Candidate in the name of Levison Ziwa was also Levison Ziwa and the person who signed for PAC and UPND appeared to be the same person.

Regarding the form at page 24, it was argued that it was clearly written by one person because UPPZ had no candidate during the 12th August election yet there were three witnesses representing UPPZ in the names of Phiri Ackson, Tembo Vincent and another Tembo Vincent. It is contended that Tembo Vincent had different signatures.

The law is very clear when it comes to anomalies or irregularities during the electoral process.

Regulation 49(2) of the Electoral Process (General) Regulations provides as follows:

“The presiding officer shall announce how the votes have been cast for each candidate in Form GEN20 set out in the Schedule, and how many have been rejected in the polling station and may require if present, election agents or monitors to counter sign the results, except that failure to counter sign the election results does not render the results invalid.”(Emphasis added)

Similarly, Regulation 5(2) of the Code of Conduct provides as follows:

“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”.
(Underlined for emphasis)

From Regulations 49(2) and 5(2) above, it is clear that an election or polling agent is required to counter sign the results duly announced but that failure to counter sign the election results by the election or polling agent shall not render the results invalid.

The Constitutional Court in interpreting Regulation 5(2) in the case of *Giles Chomba Yamba Yamba* stated that:

“It is clear that if for some reason, an election or polling agent does not append their signature to GEN12 form, the provision states that there will be no effect in the results. We venture to say the ideal situation of course is that all people required to sign for the election results should sign to enhance transparency in the electoral process.”

The Regulations are instructive that failure by a polling or election agent to counter sign the results does not make the results invalid.

The Constitutional Court guided in the same case that whilst failure to append a signature on the results will have no effect on the results, the ideal situation is that all people required to sign should do so in order to enhance transparency in the electoral process.

Furthermore, **Section 97(2)(b)** of the Act provides that the election of a candidate shall be void if proved to the satisfaction of the Court that there was non-compliance with the provisions of the Act and that such non-compliance affected the result of the election. The said provision provides as follows:

“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—

(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;”

However, Section 97(4) of the Act provides that:

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

Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.”

Section 97(4) of the Act is mirrored in what is stated by the learned authors of Halsbury’s Laws of England, 5th Edition, and Vol 38A at paragraph 667 as follows:

“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 elections, and that the act or omission did not affect its results. The function of the court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the result was affected.”

It is clear from Section 97(4) and the learned authors of the Halsbury’s Laws of England that an election cannot be declared invalid by reason of any act or omission by an election officer in breach of their official duty if it appears to the Court that the election was so conducted substantially in accordance with the law as to elections. That in exercising its jurisdiction, the Court must have regard to the consequences of declaring an election

void and that there must be on a preponderance of evidence supporting any conclusion that the result was affected.

In the same vein, the Constitutional Court in the case of Margaret Mwanakatwe v. Charlotte Scott⁽²²⁾ held that:

“In order for non-compliance with the law to result in the invalidation of an election under section 97(2) (b), it must be established that the non-compliance affected the result of the election and must be attributable to the ECZ as the conductor of elections.”

Based on authorities that I have referred to above, it is clear that an election or polling agent is supposed to counter sign the election results duly announced or declared but the failure to countersign does not render the results invalid.

It is clear that there were omissions by some of the election officers. The question I ask is this: Did these anomalies affect the results of the Petitioner to warrant nullification?

Based on what is on record, out of the whole constituency, these errors and anomalies were noted from about seventeen (17) isolated polling stations out of eighty-nine (89) polling stations. Although that was the case, they did not relate to the figures or votes recorded.

In view of the exposition of the law that I have alluded to, what the Petitioner was supposed to have done was to show how the non-

compliance affected the result. However, the Petitioner did not adduce any evidence to show that the said anomalies or errors affected the number of votes recorded in her favor or that the votes recorded were different from what was recorded by the Returning Officer on the Record of Proceedings at the Totaling Center.

The Constitutional Court in the case of *Giles Chomba Yamba Yamba* guided as follows when it stated at page J71 that:

“In the instant case, no cogent evidence is available on the record to the effect that the lapse affected the result of the election.”

What the foregoing means is that if the anomalies that the Petitioner brought out through the cross examination of the 1st Respondent had affected the result, cogent evidence should have been adduced. However, there was no cogent evidence that was led before this Court to the effect of this.

I should add at this point that under Regulation 50 of the Electoral Process (General) Regulations, the Returning Officer after receiving the votes counted at the polling station in the constituency is supposed to total the votes for each candidate and then immediately announce the results of each candidate in form GEN 20.

I have perused the Record of Proceedings at the Totaling of Votes for Kasenengwa Constituency which was produced in the 2nd Respondent's bundle of documents. I have not seen any discrepancies in the figures or votes received by the Petitioner as recorded on the GEN 20 form which have the alleged anomalies and also the votes recorded on the Record of Proceedings.

This to me explains why the Petitioner did not raise this issue in the petition and did not adduce any cogent evidence before Court to show how the result was affected.

Before I conclude on this issue, I would like to address the issue regarding the GEN 20 form on which the Petitioner's name was indicated as 'Beatrice Phiri' and not 'Beauty Phiri'. Section 121 of the Act provides for validation of certain documents as follows:

"A misnomer or inaccurate description of a person or place in a register, nomination paper, notice or other document required for the purposes of this Act shall not affect the full operation of the document with respect to that person or place in any case where the description of the person or place is such as to be commonly understood". (Underlining mine for emphasis only).

Based on the foregoing provision, it is clear that a misnomer or inaccurate description of a person or place in a register, nomination paper, notice or other document required for the purpose of the Act shall not affect the full operation of the document with respect to that person or place.

The error regarding the Petitioner's name on the Gen 20 form was made only at Chipembere polling station and the Petitioner did not dispute the number of votes recorded against her name. I find in this regard that the misnomer is such as to be commonly understood as she was the only UPND candidate contesting in the constituency and no evidence was adduced to show that the misnomer affected the election result.

On the allegation that same persons signed on some Gen 20 forms, I have difficulties in making such a conclusion in the absence of any expert evidence called by the Petitioner. I am fortified in this regard by the case of ***Sithole v. State Lotteries Board*** already referred to by the 2nd Respondent. In the absence of any handwriting expert to point out the similarities or differences in the specimens of handwritings referred to, I find that the Petitioner has failed to discharge the burden to its requisite standard of a fairly high degree of convincing clarity.

So while I accept that these errors were attributed to the 2nd Respondent as the institution with the mandate to conduct elections in accordance with the law, there is no evidence that has been adduced to show that these anomalies affected the results of the election.

The Constitutional Court in the case of ***Nkandu Luo*** stated that:

“We must, however, be quick to point out that not every electoral infraction on the part of the 2nd Appellant’s officials attract the ultimate sanction of annulment of an election.”

In view of the foregoing, I find that the Petitioner has not provided any cogent evidence before this Court to show that the said anomalies on the Gen 20 forms affected the results to warrant the nullification of election as contended by counsel.

(vii) INFLATION OF VOTES BY THE 1ST RESPONDENT IN COHORT WITH THE 2ND RESPONDENT’S AGENTS

On this allegation which is contained in paragraph 17 of the petition, the Petitioner contends that the agents of the 2nd Respondent in complicity with some operatives of the 1st Respondent in the absence of the agents or accredited monitors were at polling stations and totaling centers systematically, deliberately and fraudulently inflating votes towards the 1st Respondent by increasing them.

It is also further contended that the 1st Respondent’s agents and 2nd Respondent’s agents clandestinely involved themselves to contempt and illegal practices in relation to the Kasenengwa Parliamentary Elections.

It is quite apparent from the record that the Petitioner did not speak to this allegation and she did not also call any witnesses to prove the allegation which I consider to be very serious. This is because she contends

that the Respondents fraudulently inflated results in favour of the 1st Respondent.

Having failed to adduce any cogent evidence, I find that the allegation has not been proved to the required standard and it is dismissed.

(viii) CONCLUSION

On the totality of the evidence adduced before me and in view of the findings that I have made on the allegations that have been made against the 1st and 2nd Respondent, I find and hold that the Petitioner has failed to prove her case against the Respondents to the required standard of a fairly high degree of convincing clarity. I therefore decline to grant the declaratory order sought in the petition that the 1st Respondent was not duly elected Member of Parliament for Kasenengwa Constituency.

I have also noted that the Petitioner prayed that the Court would grant her an order of recount, verification and scrutiny of votes cast in the Parliamentary Elections from Kasenengwa Constituency on the 12th August, 2021 to ascertain the real winner.

It is imperative to note that the Supreme Court in the case of Michael Chilufya Sata v. Rupiah Bwezani Banda⁽²³⁾ gave guidance on the

procedure to be adopted in an election petition where one seeks an Order for recount of votes. It stated:

“An order for a recount is interlocutory, made only on the basis of cogent evidence justifying the making of such an order.”

Additionally, the Constitutional Court most recently guided in the case of **Christabel Ng’imbu v. Prisca Kucheka and ECZ⁽²⁴⁾** regarding an order for recount that:

“The applicable procedure for a vote recount is settled. Only where a Petitioner files a formal application can the Court order a vote re-count.”

What is clear from the above cited authorities is that an order for a recount of votes can be made by the Court where there is cogent evidence justifying the making of such an order. An order for recount of votes is therefore not a relief but merely helps the Court in arriving at its decision as to which candidate should have been declared duly elected. For this reason, it is only when the Petitioner files an interlocutory summons, supported by an affidavit that the Court can order a vote re-count.

While the Petitioner in this case sought an Order for recount, no formal application was made before this Court. For this reason and the fact that the Petitioner has failed to prove her case, the Petitioner’s request for an order of recount is misconceived.

The Petitioner also sought an order for verification and scrutiny of results. Section 76 of the Act provides for correction of mistakes by an electoral officer and reads as follows:

“The Commission may correct a mistake committed by an electoral officer in the tabulation of results within seven days after the declaration of the results.”

The above cited provision empowers the Commission to verify results through correction of mistakes made in the tabulation of the results within seven (7) days after the declaration of the results.

Further, Regulation 53(3) and (4) of the Electoral Process (General) Regulations Act of 2016 sets out the procedure for verification of ballot papers by the Returning officer as follows:

“53 (3) The returning officer conducting a verification in accordance with sub-regulation (2) shall—

- (a) open the envelopes containing the unused ballot papers together with their counterfoils and the spoilt ballot papers and the envelopes delivered to the returning officer in respect of each polling station in the constituency;**
- (b) in respect of each polling station, compare the ballot papers contained in the ballot boxes as recorded under regulation 45 and with the total number of unused and spoiled ballot papers contained in an envelope for that polling station;**
- (c) re-seal all the envelopes with their respective contents; and**

(d) place ballot paper account forms for that constituency, district or ward in one envelope and seal that envelope.

(3) The returning officer shall prepare and deliver to the Commission a report on the verification of the ballot paper accounts in Form GEN 24 set out in the Schedule, and shall permit the candidates, monitors, observers and election agents present at the verification to make a copy of the report.”

The Constitutional Court stated in the *Christabel Ng'imbu* case also stated that:

“As regards the issue whether or not the learned trial Judge should have ordered verification of the votes cast, our short response is that this argument is misconceived and flawed as under section 76 of the Act, it is the ECZ and not the High Court which is empowered to conduct vote’s verification.”

What is evident from the foregoing authorities is that the exercise of verification of votes is vested in the Electoral Commission of Zambia and is not the preserve of the High Court.

In view of the foregoing, I find that the Petitioner’s prayer for verification and scrutiny of results is misconceived as she has also failed to prove her case.

In the result, the Petitioner having failed to prove her case that there were electoral malpractices and also non-compliance with the provisions of the Law, I declare that the 1st Respondent **PHILIMON TWASA** was duly elected Member of Parliament for Kasenengwa Constituency in Kasenengwa District. The petition is accordingly dismissed.

In relation to costs, I am guided by the principle in the case of *Lewanika v. Chiluba* where it was stated that it was clearly in the proper functioning of our democracy that challenges to elections which are permitted under the Constitution should not be inhibited by unwarranted condemnation in costs. In this regard, I make no order as to costs.

Leave to appeal is granted.

DELIVERED AT CHIPATA THIS 18TH DAY OF NOVEMBER, 2021.



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M. C. KOMBE
JUDGE

