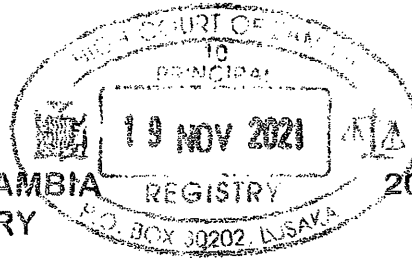


*Respondents*



IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA

2021/HP/EP/0010

*(Constitutional Jurisdiction)*

IN THE MATTER OF:

ARTICLE 73 (1) OF THE CONSTITUTION  
OF ZAMBIA, CHAPTER 1 OF THE LAWS  
OF ZAMBIA AS AMENDED BY ACT NO. 2  
OF 2016

AND

IN THE MATTER OF:

SECTION 97(2) OF THE ELECTORAL  
PROCESS ACT NUMBER 35 OF 2016

AND

IN THE MATTER OF:

SECTIONS 81, 83, 98, 99, 100(2), 106  
AND 108 OF THE ELECTORAL  
PROCESS ACT NUMBER 35 OF 2016

AND

IN THE MATTER OF:

THE PARLIAMENTARY ELECTION FOR  
MANDEVU CONSTITUENCY OF THE  
DISTRICT OF LUSAKA HELD ON THE  
12<sup>TH</sup> DAY OF AUGUST, 2021

*BETWEEN:*

**AARON MULOPE**

**PETITIONER**

AND

**CHRISTOPHER SHAKAFUSWA**  
**ELECTORAL COMMISSION OF ZAMBIA**

**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**

**BEFORE: THE HONOURABLE MR. JUSTICE D. MULENGA THIS 19<sup>TH</sup>  
DAY OF NOVEMBER, 2021.**

For the Petitioner : Mr. M. Moono, Mrs. T. Mulima and Miss  
R. Choowa of Messrs L.J. Michaels  
Legal Practitioners

For the 1<sup>st</sup> Respondent : Mr. M. Zulu, Mr. J. Zimba, Mr. Bota  
and Miss. M. Phiri of Messrs Makebi  
Zulu and Associates

For the 2<sup>nd</sup> Respondent : Mr. P. Chulu of Messrs Kalokoni and  
Company

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**JUDGMENT**

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Cases referred to:

1. Webster Chipili v David Nyirenda SCZ Appeal No. 35 of 2003
2. Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa &  
Electoral Commission of Zambia (2005) ZR 138 (SC)
3. Attorney General v Kakoma (1975) ZR 216
4. Giles Chomba Yambayamba v Kapembwa Simbao & 2 Others  
Selected Judgment No. 6 of 2018
5. Constantine Line v Imperial Smelting Corporation [1942] AC 154  
at page 72
6. Lewanika v Chiluba & Others SCZ Judgment No. 14 of 1998
7. Khalid Mohamed v Attorney General (1982) ZR 49

8. Chrispin Siingwa v Stanley Kakubo Appeal No.7 of 2017
9. Seaford Court Estates Limited v Asher (1949) 2 KB 481
10. Nkandu Luo (Prof) and Electoral Commission of Zambia v Doreen Sefuke Mwamba & The Attorney General Selected Judgment No. 51 of 2019
11. Austin Liato v Sitwala Sitwala (2018) ZMC 258
12. Abuid Kawangu v Elijah Muchima Appeal No. 8 of 2017
13. Steven Masumba v Elliot Kamondo Selected Judgment No. 53 of 2017
14. Sunday Chitungu v Rodgers Mwewa & The Attorney General Appeal No. 4 of 2017
15. Richwell Siamunene v Gift Sialubalo Selected Judgment No. 58 of 2017
16. Mwiya Mutapwe v Dominic Shomeno Appeal No. 19 of 2017
17. Banatib Issa Taligola v Electoral Commission and Wasugoya Bob Fred Election Petition No. 15 of 2006
18. Col Rtd Dr. Kizza Besigye v Yoweri Museveni Kaguta and Electoral Commission Election Petition No. 1 of 2006
19. Col Rtd Dr. Kizza Besigye v Yoweri Museveni Kaguta and Electoral Commission Election Petition No. 1 of 2001
20. Margaret Mwanakatwe v Charlotte Scott & The Attorney General Selected Judgment No. 50 of 2018
21. Dean Musale v Romeo Kangombe 2019/CC/A002
22. Nana Addo Dankwa Akufo Addo & 2 Others v John Dramani Mahama & 2 Others Writ No. J1/6/2013
23. Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others Election Petition No. 12 of 2013

24. Christabel Ngimbu v Prisca Chisengo Kucheka & Electoral  
Commission of Zambia Selected Judgment No. 2 of 2018

Legislation referred to:

1. Constitution of Zambia (Amendment) Act No. 2 of 2016
2. Electoral Process Act No. 35 of 2016
3. Electronic Communications and Transactions Act No. 4 of 2021

1.0 INTRODUCTION

- 1.1 Aaron Mulope petitioned this Court, challenging the declaration of Christopher Shakafuswa by the Electoral Commission of Zambia, as duly elected Member of Parliament for Mandevu Constituency after the General Elections held on 12<sup>th</sup> August, 2021 (Aaron Mulope is hereinafter referred to only as the Petitioner, Christopher Shakafuswa as the 1<sup>st</sup> Respondent and Electoral Commission of Zambia, the 2<sup>nd</sup> Respondent).

2.0 BACKGROUND

- 2.1 The Petitioner herein participated as a candidate in the parliamentary election for the Mandevu Constituency of the Lusaka District, of the Lusaka Province of the Republic of Zambia which was held on 12<sup>th</sup> August, 2021, on the United Party for National Development (UPND) ticket.



2.2 The Petitioner polled 37, 644 votes and the 1<sup>st</sup> Respondent contesting on the Patriotic Front (PF) ticket polled 56, 527, thereby resulting in a difference of 18,883 votes between the two candidates. Other candidates who participated namely Victor Mwale from the Democratic Party (DP) polled 1, 322 votes, Henry Kalolo from Socialist Party (SP) 979 votes, Joshua Mulenga from Movement for Multi-Party Democracy (MMD) 750 votes, Mary Kabachi from Zambia United for Sustainable Development (ZUSD) 544 votes, Ray M Phiri from United National Independence Party (UNIP) 548 votes, Nicholas Chabala an independent candidate 543 votes and Godfrey Chanda from People's Alliance for Change (PAC) 445 votes.

2.3 Consequently, the 2<sup>nd</sup> Respondent declared the 1<sup>st</sup> Respondent as duly elected Member of Parliament for Mandevu Constituency and the Petitioner being dissatisfied with the said declaration, filed into Court a Petition with an Affidavit Verifying Petition on 25<sup>th</sup> August, 2021.

### 3.0 GROUNDS FOR THE PETITION

3.1 The grounds for the petition can be summarized as follows:

3.2 That the campaigns and elections were characterized by undue influence in the form of violence and intimidation of would be voters by the 1<sup>st</sup> Respondent's campaign team in Mulungushi

Ward 21, Ngwerere Ward 22, Justine Kabwe Ward 24 and Roma Ward 20 of Mandevu Constituency.

- 3.3 That there was alteration of votes by PF members on the polling day in Chaisa Ward of Mandevu Constituency.
- 3.4 That the 1<sup>st</sup> Respondent engaged in bribery in form of distribution of money to would be voters on 11<sup>th</sup> August, 2021 and distributing mealie meal in Ngwerere Ward on 24<sup>th</sup> July, 2021 in a bid to solicit for votes.
- 3.5 That the 1<sup>st</sup> Respondent engaged in electoral misconduct by virtue of the PF secretary General Davis Mwila holding a rally and road show on 26<sup>th</sup> July, 2021, in Raphael Chota Ward 25 when the campaign ban imposed by the 2<sup>nd</sup> Respondent was still in effect.
- 3.6 That the environment in the conduct of elections at a polling station in Chaisa Ward was not conducive as the same experienced unexpected power interruption, during the totaling of figures at the Mandevu Constituency totaling center some GEN 20 forms were not accounted for as they could not be traced, there was transposition of numbers when entering figures and the 1<sup>st</sup> Respondent's campaign team beat up UPND members at the totaling center.

3.7 The Petitioner contended that from the foregoing non-compliance with the provisions of the Electoral Process Act No. 35 of 2016 relating to the conduct of elections and counting of votes, the outcome of the election in the 1<sup>st</sup> Respondent's favour was influenced to the detriment of the Petitioner. The election results were not a true reflection of how the electorate would have voted in Mandevu Constituency had there been a level, free and fair electoral environment as they were prevented from electing their preferred candidate.

#### 4.0 RELIEF SOUGHT BY THE PETITIONER

- 4.1. (a) A declaration that the 2<sup>nd</sup> Respondent did not conduct the elections with due diligence and care.
- 4.2. (b) A declaration that the election of the 1<sup>st</sup> Respondent as Member of Parliament for Mandevu Constituency is null and void
- 4.3. (c) A declaration that the illegal practices committed by the Patriotic Front Party and/ or its agents, so affected the election result in Mandevu Constituency and that the same be nullified.
- 4.4. (d) An Order for the ballot papers relating to Mandevu Constituency parliamentary elections be scrutinized, verified and recounted.
- 4.5. (e) An order for costs
- 4.5. (f) Any other relief the Court may deem fit

## 5.0 1<sup>ST</sup> RESPONDENT'S ANSWER

- 5.1 The 1<sup>st</sup> Respondent filed into Court an Answer and Affidavit in support of the same on 7<sup>th</sup> September, 2021.
- 5.2 The 1<sup>st</sup> Respondent contended that he was duly elected as Member of Parliament for Mandevu Constituency and would demonstrate at trial that votes were freely cast by the people of the constituency, as no unlawful means were used to get the said votes.
- 5.3 The 1<sup>st</sup> Respondent denied the contents of paragraph 7 (i-vi) of the petition and added that he did not witness the said acts of undue influence or violence, neither did he incite any of his agents nor take part in the said acts either directly or indirectly. The 1<sup>st</sup> Respondent contended that the Petitioner would be put to strict proof to show how he was involved in the alleged acts by the purported PF members.
- 5.4 The 1<sup>st</sup> Respondent also contended that he did not have any involvement either directly or indirectly in the alleged illegalities of alteration of votes.
- 5.5 The 1<sup>st</sup> Respondent denied the allegation that some GEN 20 forms were not accounted for. He added that it was the 2<sup>nd</sup> Respondent's practice during the elections not to announce

results until all parties agreed with the figures recorded on the GEN 20 forms, which were signed by all representatives.

- 5.6 The 1<sup>st</sup> Respondent denied allegations of bribery and stated that on 24<sup>th</sup> July, 2021, he was at Kantambala and Mandevu big markets with the then Republican President distributing face masks and hand sanitizers. He did not at any point distribute bags of mealie meal to would be voters.
- 5.7 The 1<sup>st</sup> Respondent also denied allegations of misconduct and stated that on 26<sup>th</sup> July, 2021, the PF Secretary General did not hold any road show, but a meeting for party officials in Raphael Chota Ward. At the time of the said meeting, the 2<sup>nd</sup> Respondent had lifted the campaign ban and parties were allowed to conduct campaign activities.
- 5.8 The 1<sup>st</sup> Respondent denied allegations relating to the non-conducive environment at the totaling center. He contended that the allegations of power interruption at a polling station in Chaisa Ward were never brought to his attention, and was not involved either directly or indirectly in the alleged acts of beating up polling agents and the Petitioner's constituency manager at the totaling centre.
- 5.9 The 1<sup>st</sup> Respondent contended that there was compliance with the Electoral Process Act and the Electoral Code of Conduct.

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

6.1 The 2<sup>nd</sup> Respondent filed an Answer and Affidavit in Support on 24<sup>th</sup> September, 2021.

6.2 In its Answer, the 2<sup>nd</sup> Respondent contended that it is an autonomous Constitutional body mandated to organize and conduct elections in Zambia.

6.3 In relation to the Petitioner's allegations of undue influence, the 2<sup>nd</sup> Respondent contended that the same were within the peculiar knowledge of the Petitioner.

6.4 As regards the allegation of alteration of votes, the 2<sup>nd</sup> Respondent denied the same and stated that the Petitioner did not specify the polling station affected by the alleged illegal practices as Chaisa Ward in Mandevu Constituency has several polling stations.

6.5 The 2<sup>nd</sup> Respondent denied the allegation of GEN 20 forms not being accounted for and stated that the Petitioner did not specify which constituency totaling centre was being referred to in relation to the same.

6.6 The 2<sup>nd</sup> Respondent contended that the allegations of bribery and other misconduct were within the peculiar knowledge of the Petitioner.

6.7 In relation to the allegations of a non-conducive environment at the totaling centre, the 2<sup>nd</sup> Respondent denied the same and stated that the Petitioner did not specify the polling station allegedly affected by power interruption. Further, all the GEN 20 forms in the polling stations in Chaisa Ward were validated and authenticated.

6.8 The 2<sup>nd</sup> Respondent contended that the elections of 12<sup>th</sup> August, 2021 were free and fair and it complied with the Electoral Process Act of 2016. The 2<sup>nd</sup> Respondent also contended that the election results it announced were a true and fair reflection of the electorate's votes in Mandevu Constituency.

## 7.0 THE PETITIONER'S CASE

7.1 The Petitioner herein did not testify, however, he called twenty (20) witnesses hereinafter referred to only as PW1 to PW20. The 1<sup>st</sup> Respondent called five witnesses and the 2<sup>nd</sup> Respondent called one witness, hereinafter referred to only as RW1 to RW5 and RW6 respectively.

## 8.0 UNDUE INFLUENCE

- (i) *The Petitioner alleged that the campaign and elections were characterized by violence and on 19<sup>th</sup> May, 2021, Frank Kaonga a UPND polling agent at Mulungushi Ward 21 in Mandevu Constituency was assaulted by about 100 PF cadres from the 1<sup>st</sup> Respondent's campaign team, as they were conducting door to door campaigns in Olympia.*

8.1 One of the witnesses who spoke to this allegation was Frank Kaonga, hereinafter referred to only as PW2. The gist of PW2's testimony was that he was a polling agent and polling station manager at Chipata Police Polling Station on 12<sup>th</sup> August, 2021. On the said morning he saw the 1<sup>st</sup> Respondent in the company of Mr. James Kalenga, Machende, Martin and Katiti. The said Machende, Martin and Katiti (Katman) for unknown reasons then pounced on him and started beating him up. After being beaten, police officers picked him and took him to Emmasdale Police Station. At that point, the 1<sup>st</sup> Respondent and the named PF Cadres were nowhere to be seen.

8.2 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW2 admitted that the events he narrated took place on 12<sup>th</sup> August, 2021. However, he only reported the matter to the police on 16<sup>th</sup> August, 2021, four days after the incident. He



admitted that as per police occurrence book, he was in police custody from the 12<sup>th</sup> to 16<sup>th</sup> August, 2021. PW2 stated that he had a medical report which he obtained on 19<sup>th</sup> August, 2021, but could not remember the day he visited the hospital.

8.3 Still in cross-examination, when referred to page 2 of Petitioner's Supplementary Bundle of Documents, PW2 admitted that the said medical report bears his names and states that he visited the hospital on 19<sup>th</sup> May, 2021. PW2 also admitted that the Petitioner in the petition stated that on 19<sup>th</sup> May, 2021, PW2 was assaulted by about 100 PF cadres. He stated that it was a true statement as given by the Petitioner that he was assaulted on 19<sup>th</sup> May, 2021 by about 100 people from Roma Ward in relation to the illegal allocation of plots. PW2 denied being issued any medical report on 19<sup>th</sup> May, 2021, and insisted that the medical report was issued on 19<sup>th</sup> August, 2021. PW2 admitted that he had only produced one medical report before Court. He however, insisted that he was assaulted on 12<sup>th</sup> August, 2021 and only went to the hospital on 19<sup>th</sup> August, 2021.

8.4 Further in cross-examination, PW2 stated that he voted from Chipata Community Polling Station. When referred to the list of polling stations at pages 1 to 10 of the 1<sup>st</sup> Respondent's Bundle of Documents, he admitted that the said polling station did not

exist. PW2 also admitted that he had no proof before Court that he was a polling agent.

8.5 PW2 refuted the assertion that the reason he was taken to Emmasdale Police Station was because there was an allegation against him of trying to bribe police officers. PW2 denied knowledge of being apprehended for giving money to people who queued up to vote. He admitted that he was not rescued by the police officers but apprehended, however, he did not commit any wrong. PW2 admitted that his party leaders signed for his police bond after four days of being in custody, though he did not know what offence he was charged with.

8.6 PW2 maintained having seen the 1<sup>st</sup> Respondent at the named polling station on 12<sup>th</sup> August, 2021 but that he was not the one who assaulted him. He reiterated that he was assaulted by Katiti, Martin and Machende. PW2 stated that he is the UPND ward secretary for Raphael Chota ward and he admitted that he was trying to champion the interests of UPND.

8.7 PW3 was Innocent Simwinde who averred that on 12<sup>th</sup> August, 2021 he was a polling agent at Chipata Community Centre. When he saw the 1<sup>st</sup> Respondent and his supporters going after Kaonga (PW2), he was gripped with fear and went inside the polling station.

8.9 According to PW3, he did not witness what happened thereafter. It was the testimony of PW3 that he is a marketeer at Chipata bus stop and used to see the 1<sup>st</sup> Respondent campaigning in Raphael Chota ward. The 1<sup>st</sup> Respondent was telling marketers to vote for PF and he was giving out money. At one time, the 1<sup>st</sup> Respondent approached him but he informed him that he was not affiliated to any political party.

8.10 PW3 averred that on 18<sup>th</sup> June, 2021 around 20:30 hours, he saw the 1<sup>st</sup> Respondent in his vehicle with Nelson Changwe (alias "Katman"), Machende, Martin, Chisanga and others he did not know. The aforementioned individuals informed him that the 1<sup>st</sup> Respondent wanted to see him. They attacked him with a catapult, grabbed him and started beating him up in the presence of the 1<sup>st</sup> Respondent. They took him to unknown destination and he only regained consciousness at midnight when he realized he was at Chipata Clinic.

8.11 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW3 admitted that there is no mention of the date of 18<sup>th</sup> June, 2021 in the petition, neither the events he spoke about relating to that date. PW3 further admitted that page 2 of petitioners' supplementary list and bundle of documents which is a medical report in relation to PW2, appears to be dated 19<sup>th</sup> August, 2021 and not 12<sup>th</sup> August, 2021.

8.12 PW3 denied being aware that the 1<sup>st</sup> Respondent was unwell from 17<sup>th</sup> to 30<sup>th</sup> June, 2021. When referred to pages 13 to 15 of the 1<sup>st</sup> Respondent's Bundle of Documents, PW3 admitted that the said document has the 1<sup>st</sup> Respondent's name written on it and states that he was diagnosed with covid-19. The document goes further to state that the 1<sup>st</sup> Respondent was an outpatient and in isolation. PW3 maintained that he was a polling agent at Chipata Community Centre. When referred to pages 1 to 10 of the 1<sup>st</sup> Respondent's Bundle of Documents he admitted that the said polling station is not on the list of polling stations as it is non-existent.

8.13 PW3 admitted that he had not produced before Court any identity card showing that he was accredited by ECZ as a polling agent and in the absence of the same, it is difficult to know whether he was actually a polling agent.

8.14 Further in cross-examination PW3 admitted that he is a UPND member and was before Court to protect the interests of the UPND, but would not do anything to protect that interest. His role at all times is to speak in favour of the UPND. He denied having any pre-trial meeting to discuss the evidence to be given. He added that he was just phoned and informed about the petition hearing but could not reveal who called him as a witness. PW3 admitted that he had not produced any medical report to show that he was assaulted. He however denied lying

before Court. PW3 admitted that the 1<sup>st</sup> Respondent won the elections and he was not happy about the same.

8.15 PW9 one Simon Mwansa, narrated that on 18<sup>th</sup> June, 2021 he was at the market clad in a UPND t-shirt. Chisanga who is nicknamed "Mandevu" approached him and asked why he was wearing a UPND t-shirt. Chisanga informed him that the 1<sup>st</sup> Respondent would visit the market and did not want to see any UPND regalia or red attires. According to PW9, he removed the t-shirt and wore it inside out, as he was gripped with fear.

8.16 PW9 averred that he saw the 1<sup>st</sup> Respondent with some youths in a PF branded vehicle. The 1<sup>st</sup> Respondent pointed at him and two people namely Bwalya and Nelson Changwe alias Machende and Katman respectively, disembarked from the vehicle. They started insulting and chasing him, Bwalya then hacked him with a machete on the hand. He ran for his life and escaped. The following day, he went to the police station but was informed that medical report form had run out.

8.17 In cross examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW9 confirmed that he was narrating events of 18<sup>th</sup> June, 2021. He admitted that the petition does not make mention of his name or the 18<sup>th</sup> June, 2021. He admitted that he did not name the police station he went to and there is no medical report

relating to his alleged assault. PW9 admitted that the document at page 15 of 1<sup>st</sup> Respondent's bundle of documents dated 13<sup>th</sup> September, 2021, shows that the 1<sup>st</sup> Respondent had Covid-19 from 16<sup>th</sup> June, 2021 and was in isolation for 14 days including 18<sup>th</sup> June, 2021.

8.18 PW1 (Alex Mwansa) in relation to the allegation of violence during campaigns and elections testified that he was the district electoral officer working with the Electoral Commission of Zambia (2<sup>nd</sup> Respondent). He was in charge of executing the electoral plan for Lusaka district, and supervising seven returning officers responsible for the seven constituencies of Lusaka. PW1 told the Court that a week before elections, the Petitioner brought the issue of violence to his attention on three or four occasions. The Petitioner called him and informed him that his supporters were beaten by the 1<sup>st</sup> Respondent's supporters.

8.19 According to PW1, the Petitioner on the fourth occasion sent him a photo via whatsapp, of his supporter who had allegedly been beaten by the 1<sup>st</sup> Respondent's supporters. The said supporter in the photo was lying on the ground with a few bruises

8.20 PW1 averred that he received another report from the 1<sup>st</sup> Respondent (PF candidate) who was in the company of the UPND

candidate (Petitioner) at Nakatindi Hall, alleging that his supporters were subjected to beatings and intimidation by the UPND candidate and his supporters. He requested the 1<sup>st</sup> Respondent to put the complaint in writing, but he did not do so.

8.21 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW1 stated that there were reports of violence which could have affected the voting pattern, however, he did not receive any written report. He admitted that reports that are forwarded to the 2<sup>nd</sup> Respondent's conflict management committee have to be in writing, and he did not receive any written complaint from the Petitioner or any person as regards the Mandevu Constituency.

8.22 PW1 admitted that to date, his office has not received any complaint and he has no evidence of violence pre voting, during voting and after voting. He admitted that he did not witness any violence. He denied verifying any report of violence as the complaint was not reduced in writing. He confirmed that in the absence of a formal report, there was nothing to verify.

(ii) *The Petitioner alleged that the violence which characterized the campaign and elections was recorded in Ngwerere Ward 22 in May, 2021. One Boyd Khondowe a member of the*

*Petitioner's campaign team, and a ward councilor candidate together with some youths was attacked by PF cadres from the 1<sup>st</sup> Respondent's campaign team. His personal motor vehicle registration number BAP 6779 was damaged, and assault was occasioned on him as the Petitioner's campaign team was putting up posters in the ward.*

8.23 The evidence on record as adduced by one Boyd Khondowe (PW6) was that on 31<sup>st</sup> May, 2021, while he was putting up flyers and posters with his team including Emmerson and James Kamuti in Pendera Road, Luangwa Compound, Mandevu Constituency, they reached Chimwansa junction where they saw a huge crowd of about 50 to 100 PF cadres clad in PF regalia. As a UPND candidate in that ward, he thought it was prudent to negotiate with the PF cadres to allow him put up the flyers and posters.

8.24 PW6 averred that to his surprise, the PF cadres started hitting them in the presence of the 1<sup>st</sup> Respondent and the Mandevu ward 22 PF Councillor one Adrian Banda. The PF cadres charged towards his vehicle with stones, consequently, the UPND team scampered. He tried to negotiate with the PF cadres but they abducted him and took him behind the Church, where they beat him up with chains. He managed to escape and ran to Garden



police post. His vehicle a grey Toyota runx registration number BAP 6779, was damaged and towed to Garden police post. The case was then referred to Emmasdale Police Station. According to PW6, he sustained general body pains and bruises and was issued a medical report. PW6 averred that he visited Chipata Level One Hospital where he was treated.

8.25 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW6 stated that he was narrating the events of 31<sup>st</sup> May, 2021 and he visited Emmasdale Police Station on that day. PW6 admitted that the petition did not make any mention of him being beaten with chains, neither are the names of the 1<sup>st</sup> Respondent or agents mentioned in relation to his assault. He admitted that in his testimony in examination in chief, he did not state that he was beaten by the 1<sup>st</sup> Respondent. He admitted that the matter was still with the police and the 1<sup>st</sup> Respondent has never been arrested in connection with the same.

8.26 Still in cross-examination, PW6 admitted that he gave a statement to the police and mentioned that he saw the 1<sup>st</sup> Respondent. He denied being aware that the 1<sup>st</sup> Respondent only campaigned on Tuesdays, Thursdays and Saturdays as per the 2<sup>nd</sup> Respondent's campaign timetable. PW6 denied knowing that on the stated date, the 1<sup>st</sup> Respondent was not even in the area mentioned.

8.27 PW6 refuted having gone to the totaling center on 14<sup>th</sup> August, 2021 with his colleagues who slapped the 2<sup>nd</sup> Respondent's information technology officer. He denied being aware that a UPND member slapped a police officer at the totaling center. PW6 maintained that he went to the hospital on 31<sup>st</sup> May, 2021 and not any other day. He however stated that if a document revealed that he visited the hospital on a different date, the document would still be accurate because he also visited the hospital the following day.

8.28 PW6 admitted that he would not dispute if he was told that there are about 195 polling stations in Mandevu. He voted from white Mwale 1 polling station, 611 ballots were cast at that polling station, the 1<sup>st</sup> Respondent got 371 votes and the Petitioner got 192. PW6 admitted that he was not happy that his candidate did not win. PW6 admitted that the incident he narrated did not occur in White Mwale. He denied that the majority of voters voted on 12<sup>th</sup> August, 2021. He stated that he did not know the voter turn-out but was competent to say that majority did not vote.

8.29 PW7 was James Kamuti, he testified that on 31<sup>st</sup> May, 2021, he was putting up posters with PW6 and others in Ngwerere Ward 22. Surprisingly, they just saw some PF cadres in PF regalia and PW6 advised them not to speak to the said cadres to avoid

confrontations. PW6 disembarked from his vehicle, and the PF cadres asked him why he was putting up posters.

8.30 According to PW7, PW6's response was that it was campaign period and every political party was campaigning. PW7 told the Court that, he then saw the 1<sup>st</sup> Respondent slap PW6 and PF cadres started beating PW6. The PF cadres proceeded to PW6's vehicle with stones and machetes and damaged the same. PW6's team then scampered to avoid being beaten. He sought refuge at a nearby school then reported the incident at Garden Police Station.

8.31 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW7 confirmed that PW6 petitioned his loss before the local government's tribunal and lost the petition. He denied being aware that PW6 did not mention anything about being slapped by 1<sup>st</sup> Respondent. PW7 denied giving a false testimony. PW7 stated that he voted from Ngwerere primary school but admitted that the said school is not listed anywhere as a polling station. PW7 confirmed that he was unhappy that his candidate the Petitioner lost the elections.

(iii) *The Petitioner alleged that after filing of nominations on or about 22<sup>nd</sup> July, 2021, Fred Matuvu Maliwe a member of the Petitioner's campaign team was attacked using stones by well-*

*known PF cadres of the 1<sup>st</sup> Respondent's campaign team as they were leaving the nomination centre in Justine Kabwe Ward 24 of Mandevu Constituency.*

8.32 Fred Maliwe (PW4) testified that on 22<sup>nd</sup> July, 2021 he was sticking UPND posters in Justin Kabwe Ward and he proceeded to Mpulungu Ward 26. In Mpulungu ward 26, he saw the 1<sup>st</sup> Respondent and his supporters including Douglas and Tuta in a vehicle, throwing stones in his direction. A stone hit him on the eye, and he reported the incident at Central Police Station where he was issued a police report. According to PW4, he went to University Teaching Hospital (UTH) where an x-ray was done and he was sutured. He explained that the police report produced before Court is not signed because he did not return it to the police station, for fear of being beaten.

8.33 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW4 admitted that he was narrating events of 22<sup>nd</sup> July, 2021 in Mpulungu Ward 26. He admitted that there was no allegation in the petition relating to Mpulungu Ward 26. PW4 denied knowing what a signature looks like. He admitted that he would not dispute if he was told that there was no signature from a medical doctor on the police report. PW4 admitted that the document from the hospital does not indicate that it was written at UTH. He denied having told the police and medical personnel

that he was assaulted by unknown people. He however admitted that the said document indicated that he was assaulted by unknown people.

8.34 PW4 denied being aware that the 1<sup>st</sup> Respondent was in Raphael Chota Ward the whole day on 22<sup>nd</sup> July, 2021. He stated that he did not report the 1<sup>st</sup> Respondent to the police as he was scared of being beaten. He maintained that he did not know the Mandevu Member of Parliament, but would not dispute if he was told that it is the 1<sup>st</sup> Respondent. PW4 admitted that he was not happy that the 1<sup>st</sup> Respondent won the elections.

(iv) *The Petitioner alleged that in July, 2021 his campaign team experienced disruptions during meetings, due to PF cadres from the 1<sup>st</sup> Respondent's campaign team throwing stones at them in Roma Ward 20. Further on or about 21<sup>st</sup> July, 2021 a UPND youth Steven Mapalo belonging to the Petitioner's campaign team was badly beaten by PF cadres as he was found putting up the Petitioner's posters. He sustained a broken jaw and is currently admitted at Chipata Clinic.*

8.35 The Petitioner did not call any evidence whatsoever to prove this allegation.

- (v) *The Petitioner also alleged that on the polling day, a UPND youth who was part of the Petitioner's campaign team was abducted by well-known PF cadres from the 1<sup>st</sup> Respondent's campaign team and he has not been seen to date. This caused fear and intimidation to would-be voters.*

8.36 The Petitioner did not call any evidence in relation to the allegation of abduction of a UPND youth who was part of his campaign team.

8.37 The only witnesses who spoke about fear and intimidation on the polling day were PW8 and PW10. PW8 was Doubt Chibale, he averred that on 12<sup>th</sup> August, 2021, he was a polling agent at Matayela Polling Station. Around 11:30 to 12:00 hours Christopher Shakafuswa the 1<sup>st</sup> Respondent herein went to the said polling station with a group of people displaying the symbol of a fist and telling people to vote for PF. There was confusion and the voting process was suspended. The 1<sup>st</sup> Respondent then asked who was stopping the voters from voting.

8.38 According to PW8, the presiding officer approached him and told him that the 1<sup>st</sup> Respondent was an Honourable Member of Parliament and should be allowed to do as he pleased. PW8

averred that he was gripped with fear, just like the other people on the queue waiting to vote but went back to their homes

8.39 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW8 averred that he narrated events of 12<sup>th</sup> August, 2021 at Matayela temporal shelter polling station. He stated that the number of people who voted at Mataila were 672, the petitioner got 282 votes and 1<sup>st</sup> Respondent got 354. He stated that he was both a voter and a polling agent for UPND.

8.40 According to PW8 the number of registered voters at that polling station was between 996 and 998. He admitted that only about 336 people did not vote. He admitted that in Mandevu Constituency, the 1<sup>st</sup> Respondent got 56, 527 votes while the Petitioner got 37, 644 and the difference is 18, 883 votes. PW8 maintained that the Member of Parliament for Mandevu Constituency is not known. PW8 admitted that the results were declared by the returning officer Clifford Chirwa as per the declaration Form. According to the said document, the winner was the 1<sup>st</sup> Respondent, however PW8 was not happy about the said victory.

8.41 PW10 was Judah Njekwa, he averred that on 12<sup>th</sup> August, 2021 he was an election monitor at Matayela Polling Station. Around 12:00 hours, he saw the 1<sup>st</sup> Respondent with a group of people showing a PF symbol. They went inside the polling station, and

he asked the presiding officer why the said group entered the polling station in such an inappropriate manner. Before the presiding officer could respond, the 1<sup>st</sup> Respondent asked him who he was to have the audacity of questioning the presiding officer. The people who were with the 1<sup>st</sup> Respondent then started capturing what was happening, proceeded to vote and they left.

8.42 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW10 admitted that his names and events narrated in examination in chief did not appear in the petition. He admitted that he did not report the incident to the police.

(vi) *The Petitioner alleged that a UPND youth Joram Leta a member of the Petitioner's campaign team was murdered on 20<sup>th</sup> July, 2021 by PF cadres from the 1<sup>st</sup> Respondent's campaign team for not adhering to orders of no posters in their purported strongholds in Mulungushi Ward 21.*

8.43 PW5 was Gift Phiri, he told the Court that he witnessed the death of his elder brother Joram Leta. PW5 narrated that he and his fellow UPND youths including Joram Leta, Kalufyanya and Opalana were erecting the President's billboard at Mandevu junction round about on 19<sup>th</sup> July, 2021. Suddenly PF cadres in PF regalia among them Katman, Machende and Martin



approached them. The said PF cadres were chased by his UPND team and they ran away. After erecting the billboard, the UPND team proceeded to their meeting camp. However, before they could settle down to eat, they saw an angry mob of PF cadres including Katman, Machende and Martin clad in PF overalls and armed with knives, machetes and catapults.

8.44 According to PW5, when they saw the angry mob, they ran into the market. His elder brother Joram ran using another route and was pursued by the PF cadres, he was swept to the ground by Machette. Joram fell down and was hacked with a machete. According to PW5, a PF branded motor vehicle registration number ACL parked at a distance from the scene. The 1<sup>st</sup> Respondent was in the vehicle with cadres who disembarked to join the PF cadres who were beating his elder brother. Around 19:00 hours, he went back to the scene to look for his elder brother, but was informed that he had been taken to the University Teaching Hospital.

8.45 On that night, the search for his brother proved futile after visiting UTH, Emmasdale and Matero Police Stations. In the morning of 20<sup>th</sup> July, 2021 he went to Chingwere Clinic but only found his elder brother's shoes on the bed side and was informed that he had been referred to UTH around 23:00 hours on 19<sup>th</sup> July, 2021. Upon arrival at UTH, he and his uncle were only asked to identify his elder brother's body in the mortuary.

8.46 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW5 admitted that he was unable to read. He denied being aware that the 1<sup>st</sup> Respondent was not mentioned in the allegations relating to death of Joram Leta. PW5 admitted that the murder of Joram Leta is a police case and he gave a statement to the police in which he did not mention the 1<sup>st</sup> Respondent. He denied being aware that no name was mentioned in the petition as it was only stated that Joram was attacked by PF cadres.

8.47 PW5 stated that he registered as a voter at Chipata Community polling station. He however denied being aware that such polling station did not exist. He admitted that he voted for the candidate of his choice and most people in his area voted, hence the voter turnout was very good. PW5 admitted that the majority voted for the 1<sup>st</sup> Respondent Christopher Shakafuswa.

8.48 PW5 admitted that he was narrating the events of 19<sup>th</sup> July, 2021 which happened around 14:00 hours. He however denied being aware that on 19<sup>th</sup> July, 2021 from 9:00 to 19:00 hours the 1<sup>st</sup> Respondent was in Chongwe. He maintained that he saw the 1<sup>st</sup> Respondent on the said date. He denied having knowledge that Machette, Katman and Martin were not the 1<sup>st</sup> Respondent's agents. PW5 admitted that he did not report the incident to the 2<sup>nd</sup> Respondent's complaints management committee.

8.49 Further in cross-examination, PW5 admitted that it was the UPND cadres who chased the PF cadres. He admitted that he campaigned for the Petitioner and he is not happy that he lost.

(vii) *Lastly under the heading of undue influence, the Petitioner alleged that his branded campaign vehicle was not allowed to move freely within Mandevu Constituency throughout the stipulated campaign period, whilst the 1<sup>st</sup> Respondent's campaign team was allowed to move freely.*

8.50 The Petitioner despite making the aforesaid allegation did not proffer any evidence in relation to the same.

## 9.0 ALTERATION OF VOTES TALLY

The Petitioner alleged that the polling day was characterized by illegal practices as the police caught PF members changing election results figures in Chaisa Ward in Mandevu contrary to the Electoral Code of Conduct.

9.1 The Petitioner did not lead any evidence whatsoever to prove his allegation.

## 10.0 BRIBERY

- (i) *The Petitioner alleged that on the eve of the election day, the 1<sup>st</sup> Respondent was distributing money to would-be voters in Mandevu Constituency, in a bid to solicit for votes contrary to the Electoral Process Act and the Electoral Code of Conduct.*

10.01 The evidence as adduced by PW11(Muliana Muhau) was that on 11<sup>th</sup> August, 2021 around 18:00 hours, PF members informed him that there was a meeting at the residence of Mr. Tamba a PF councilor for Raphael Chota ward. He went with his friend one Kondwani N'gona. When they arrived at the said meeting, they found the 1<sup>st</sup> Respondent who gave them k170.00 and asked them to vote for him on 12<sup>th</sup> August, 2021.

10.02 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW11 stated that he did not belong to any political party. He admitted that he did not report the issue of being given K170.00 to any relevant authority. He stated that the PF members who informed him about the meeting were going door to door. PW11 maintained that there were a lot of people at Mr. Tamba's house and the 1<sup>st</sup> Respondent addressed them while clad in black t-shirt. He denied being aware that on 11<sup>th</sup> August, 2021, the 1<sup>st</sup> Respondent was at Mulungushi Conference Center attending a virtual rally.

- 10.03 PW11 stated that he was informed about the petition hearing by the UPND candidate. He denied being aware that Mr. Tamba and the 1<sup>st</sup> Respondent did not get along. He stated that he is the one who informed his friend Kondwani about the hearing of the petition but they both got to Court individually as he used a bus.
- 10.04 PW12 (Kondwani Ng'ona) testified that on 11<sup>th</sup> August, 2021, he was with his friend PW11 when PF cadres informed them that there was a meeting at Mr. Tamba's residence. When they got to the said house, they found a crowd being addressed by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent urged them to vote for him and gave them K170.00 each.
- 10.05 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW12 admitted that the allegation of bribery in the petition did not mention his name or that of PW11, or make any mention of the amount of K170.00. PW12 admitted that he did not report having received K170.00 to the police. He maintained that he came to Court on his own and he used a bus. He denied being coached on what to say in Court.
- 10.06 PW12 stated that the PF cadres who informed him about the meeting found him with PW11 along the road as they were coming from Chipata market. PW12 stated that if PW11 had told the Court that the cadres found him at his house, then

PW11 was also being truthful. He maintained that he could not estimate the number of people who attended the meeting. He stated that he just knew that there was a petition hearing without being told by anyone. He admitted that he was invited to testify as a witness by the Petitioner.

10.07 PW12 stated that he was in Court on a Tuesday following the proceedings but he did not know who testified on that day. He denied being aware that there was actually no hearing on the Tuesday he was referring to. He also denied any knowledge that the 1<sup>st</sup> Respondent was at a virtual rally on 11<sup>th</sup> August, 2021. He admitted that he was aware that campaigns closed at 18:00 hours on 11<sup>th</sup> August, 2021. He denied being aware that Mr. Tamba was campaigning against the 1<sup>st</sup> Respondent. He admitted that it was not possible for Mr. Tamba to organize a campaign meeting for the 1<sup>st</sup> Respondent when campaign period had closed.

(ii) *The Petitioner also alleged that on 24<sup>th</sup> July, 2021, the 1<sup>st</sup> Respondent was distributing bags of mealie meal to would be voters in a bid to solicit for votes in Ngwerere Ward.*

10.08 The Petitioner did not lead any form of evidence to prove this allegation.

## 11.0 OTHER MISCONDUCT

- 11.01 *The Petitioner alleged that there was misconduct for instance on 15<sup>th</sup> June, 2021, the 2<sup>nd</sup> Respondent imposed a campaign ban on PF and UPND in Lusaka. Despite the ban being in effect, the PF Secretary General Davies Mwila held a rally and road show in Raphael Chota Ward 25 in Mandevu Constituency on 26<sup>th</sup> July, 2021, thereby disregarding the ban and violating the 2<sup>nd</sup> Respondent's exercise of lawful authority. Consequently, an unfair advantage was created for the 1<sup>st</sup> Respondent over all the other contesting candidates.*
- 11.02 PW19 was Jane Kachinga, she averred that on 26<sup>th</sup> July, 2021 she saw the 1<sup>st</sup> Respondent with Davies Mwila going round campaigning. They were in a green vehicle that had speakers on it. She was shocked because the 1<sup>st</sup> Respondent was campaigning during the campaign ban.
- 11.03 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW19 confirmed that the campaign was on 26<sup>th</sup> July, 2021. She denied having knowledge that the campaign ban was lifted at the time. She denied reporting the incident to the police.

11.04 PW20 was Pethias Kaswende, he averred that 1<sup>st</sup> Respondent was campaigning during the ban and he attended roads shows or rallies.

11.05 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW20 averred that he could not remember the exact dates when he saw the 1<sup>st</sup> Respondent campaigning. He admitted that he did not know the exact dates when the campaign ban was imposed or lifted. He admitted that he had not shown the Court any photos he took of the 1<sup>st</sup> Respondent campaigning during the ban. He admitted that he did not report the 1<sup>st</sup> Respondent to the police.

## 12.0 NON CONDUCTIVE ENVIRONMENT AT THE TALLING CENTER

- (i) *The Petitioner alleged that there was a non-conductive environment and in Chaisa Ward, one of the polling stations experienced power interruption and only one lamp was the source of lighting. The 2<sup>nd</sup> Respondent's official was the only able to see clearly the stamp at the back of the ballot paper, marks or ticks on ballot papers. This was contrary to the Electoral Process Act, as agents, monitors and observers must be able to see clearly in order to authenticate or validate the*



*results. The situation at the polling stations was not a conducive environment to account for ballots.*

12.01      The Petitioner did not lead any evidence to prove the said allegation.

(ii)      *The Petitioner alleged that during the entering of figures by the 2<sup>nd</sup> Respondent at the totaling center, UPND's polling agents raised concerns with regard to the transposition of numbers. Whilst waiting for a clarification from the 2<sup>nd</sup> Respondent, a huge crowd of PF cadres from the 1<sup>st</sup> Respondent's campaign team stormed the building, beat up the polling agents and the Petitioner's constituency manager who lost his front teeth, as well as the ward secretary for Ngwerere Ward.*

(iii)      *The Petitioner also alleged that during the totaling of figures at the Constituency Totaling Center, some copies of the GEN 20 forms were not accounted for as they could not be traced.*

12.02      The evidence as adduced by PW14 (Vincent Chongo) was that he was an elections monitor accredited by the 2<sup>nd</sup> Respondent. On 14<sup>th</sup> August, 2021, he went to the Mandevu Constituency totaling center as election results

were being tallied. When he entered the totaling center at Olympia Africa, the Returning officer Clifford Chirwa started announcing the results, however the said results were different from those on UPND's GEN 20 Forms. When the Returning officer was queried by a UPND councilor, his response was that the results announced were as recorded by the 2<sup>nd</sup> Respondent.

12.03 The Returning officer was advised to stop announcing poll results until the same were corrected, but the returning officer insisted that he should proceed. While the Returning officer was having a conversation with the councilor, he just saw the 1<sup>st</sup> Respondent entering the totaling center with Adrian Banda, the PF councilor for Roma ward and their cadres Joe, Mika and Luka Chisanga. The said group of people including the 1<sup>st</sup> Respondent started beating everyone who did not belong to PF.

12.04 PW14 stated that one of the PF cadres held him by the neck, another one slapped him, Joe hit him with a fist and they used paper spray on the crowd. According to PW14, He lost his front tooth when he was hit and now has a gap between his teeth. They started dragging him outside while the 1<sup>st</sup> Respondent and the police did not take any action. According to PW14, he was only rescued by some Zambia army

personnel who put him in their vehicle together with Kalimukwa and Nkhata and took him to the clinic.

12.05 At Chipata clinic, the nurses attended to him together with his friend Kalimukwa Kalimukwa who sustained an injured arm. They were referred to Emmasdale Police Station to obtain medical reports and they later proceeded to UTH for x-rays. After the x-ray, he was informed that his tooth was broken. On Monday 16<sup>th</sup> August, 2021, he visited Thorn Park Dental Clinic where his tooth was extracted.

12.06 According to PW14 there was violence in Mandevu, consequently, the presiding officer announced that presidential results for Mandevu constituency could not be announced as they had not been retrieved due to confusion. PW14 told the Court that PF cadres kicked and tampered with ballot papers and the incident at the totaling center was captured on video by one Ackim Daka.

12.07 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW14 admitted that he belongs to UPND and went to the totaling center in the afternoon to monitor the counting of votes. He stated that his letter of accreditation got lost during the fracas at totaling center. He admitted that each monitor had a specific role to play. PW14 denied being aware that the fracas was perpetuated

by UPND members when they slapped the 2<sup>nd</sup> Respondent's Information technology officer as well as a police officer.

12.08 PW14 admitted that he was beaten by Joe and other PF members, the said Joe was apprehended and released on police bond but he did not have a copy of the police bond or charge before Court. PW14 maintained that ballot papers were stolen but he did not report that matter to the police. He stated that he did not know if the 1<sup>st</sup> Respondent was ever arrested for assault.

12.09 In cross-examination by Learned Counsel for the 2<sup>nd</sup> Respondent, RW14 maintained that he narrated events that happened at totaling center. He reiterated that he was an election monitor but denied having basic knowledge on the conduct of elections. He admitted that he was aware that the 2<sup>nd</sup> Respondent is the only body mandated to conduct elections, facilitate voting and declare the winner. He denied being aware that the 2<sup>nd</sup> Respondent declared a winner. PW14 denied being aware that there is formal procedure of objecting to the conduct of elections. He admitted that he understood that his role as a monitor was to observe the electoral process.

12.10 PW14 admitted that his role was not to act as a polling agent or act on behalf of any party. He admitted that he is

a UPND member and believes in its values. He admitted that his interest was for the UPND candidate to win and it would make him happy if the Petitioner succeeded in this matter. PW14 also admitted that he noticed that the results announced by the returning officer were different from those that polling agents had, and he rose to the challenge to inform the returning officer and stop him from announcing results. It was his belief that his conduct was consistent with that of an election monitor.

12.11 PW15 one Kalimukwa Kalimukwa, testified that he was an election monitor from a non-governmental organization called Gear Initiative and he was monitoring in Mandevu. On 14<sup>th</sup> August, 2021 in the afternoon, he was at Mandevu totaling center when the councilor from Roma ward one Luka raised a complaint with the returning officer. The complaint was that the number of votes scooped by the said Luka in the election, were given to the PF councilor, however, the returning officer did not pay any particular attention to the complaint. At that moment, the 1<sup>st</sup> Respondent in the company of other PF members stormed the totaling center.

12.12 The 1<sup>st</sup> Respondent instructed the other PF members to beat up whoever did not comply with the directives of the returning officer. PW14 was among those that were beaten

and paper sprayed in the eyes. The three injured persons including himself, PW14 and Mr. Nkhata were rushed to Chipata first level hospital using a police vehicle. After being treated at the hospital, he was referred to UTH for an x ray. He was issued with a medical report and x-ray was done.

12.13

In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW15 stated that the argument over the council votes ensued around 15:00 to 16:00 hours. He admitted that Luka was a UPND Candidate for councillorship, he however denied that the argument was initiated by UPND members. He maintained that the 1<sup>st</sup> Respondent was at the totaling center when the confusion ensued. PW15 admitted that the documents at page 37 to 40 bear his names but do not have the names of the medical doctor, neither do they have a stamp from Chipata Level One Hospital or UTH.

12.14

PW15 admitted that he did not produce any receipt from UTH before Court. In comparison to the document at page 36, PW15 admitted that the same has Vincent Chongo's name on it, the names of the medical doctor and his findings, as well as a stamp from dental clinic. PW15 denied having spoken to PW14 before taking the stand. He

maintained that the 1<sup>st</sup> Respondent instructed that whoever did not comply should be beaten.

12.15 PW15 denied the assertion that the reason he was beaten was that he had a confrontation with the returning officer whose conduct he was not happy with. He maintained that he was taken to the hospital by the police. He denied being aware that PW14 told the Court that they were taken to the hospital by Zambia army officers. According to PW15, they used a taxi provided by the Petitioner from Chipata clinic to Emmasdale police, and UTH. He did not agree with the testimony of PW14 that they used his friend's vehicle because they did not have money. He insisted that the 1<sup>st</sup> Respondent instructed that he in particular should be beaten. According to PW15, despite the failure to arrest the 1<sup>st</sup> Respondent, he reported him to the Police.

12.16 In cross-examination by Learned Counsel for the 2<sup>nd</sup> Respondent, PW15 maintained that he was appointed as an election monitor. He admitted that the 2<sup>nd</sup> Respondent facilitates the voting, is mandated to count the votes cast, and has power to declare a winner. He also admitted that the 2<sup>nd</sup> Respondent counted the votes cast but no winner for Mandevu constituency was announced. He admitted that there is a formal procedure for registering electoral complaints with the 2<sup>nd</sup> Respondent.

12.17 PW15 stated that his accreditation letter was not before Court as the same got lost during the fracas. He admitted that he was sponsored by a non-governmental organization called Gear Initiative, but his letter of sponsorship was not before Court. He admitted that he was aware that when any official document is lost, it has to be reported to the police, however, there was no police report for the lost documents before Court. He maintained that he went to the hospital with people who were beaten during the fracas but he did not know if they were UPND cadres. He denied being aware that PW14 had informed the Court that he is a UPND cadre.

12.18 PW16 was Obrey Nkhata, he averred that on 14<sup>th</sup> August, 2021 he was at the totaling center in Mandevu constituency, where he saw the 1<sup>st</sup> Respondent with his group seated outside, while his fellow UPND members were inside. The environment was calm as they were waiting for results. In the afternoon, he realized that the presiding officer Mr. Chirwa was delaying to announce results and they confronted him. The PF members also got concerned as they suspected bribery on the part of UPND members. At that point, the 1<sup>st</sup> Respondent was seated at the back inside the totaling center.



12.19 According to PW16, they just wanted the returning officer to announce results quickly as they had been at the totaling center for two nights. There was an exchange of words and he just saw another group of PF cadres, other than those who were with the 1<sup>st</sup> Respondent. The UPND cadres were outnumbered and there was confusion. PW16 told the Court that only accredited individuals were allowed to enter the totaling center and were given cards, therefore he queried the second group of PF cadres on how they entered the totaling center when they were not accredited. The said PF cadres started beating them up by punching, kicking and slapping. He was also paper sprayed in the eyes.

12.20 PW16 averred that he did not know the name of the person who paper sprayed him but could identify him. He knew that the person who sprayed him was a PF cadre because they had exchanged words. He tried to escape to the convenience room, but the police officers were not helpful. After forty minutes when the situation had calmed down and the second group of PF cadres had left, he was informed that the campaign manager (PW14) and Mr. Kalimukwa (PW15) had been injured during the fracas.

12.21 All those injured including himself were advised to go to the hospital by the constituency manager. Police officers

were requested to escort them to the hospital and they were taken to Chipata level one hospital. PW14 and PW15 were advised to proceed to UTH. According to PW16 while he was being attended to a Chipata Level One Hospital, he received a phone call from a UPND Councillor one Mr. Tayali informing him that there was another problem at the totaling center as GEN 20 forms were missing.

12.22 It was the testimony of PW16 that he requested the said Tayali to send a vehicle to pick him up and take him home where he had kept some photocopies of the GEN 20 forms in case of any eventualities. He gave the said forms to Tayali and was informed that they had been dribbled because the election results indicated that the said Councilor Tayali had won the elections with only a difference of five (5) votes.

12.23 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW16 averred that he arrived at the totaling center in the morning where he found the 1<sup>st</sup> Respondent who was wearing a sleeveless coat. He admitted that he was aware that PW15 told the Court that confusion arose because there was transposition of election results. He denied having heard the 1<sup>st</sup> Respondent say anything at the totaling center. He admitted that he did not produce any medical report or go to any police station.

He admitted that he had not seen any PF membership card from the person who paper sprayed him.

12.24 In cross-examination by Learned Counsel for the 2<sup>nd</sup> Respondent, PW16 admitted that he was testifying on behalf of the petitioner. He admitted that there was confusion at the totaling center, however, no letter was written by UPND to the returning officer concerning the same.

12.25 PW17 was Ackim Daka. The gist of PW17's testimony was that after the elections, he was contracted by Chundu Media as a journalist. On 14<sup>th</sup>, August, 2021 he was capturing videos at the totaling center in Mandevu Constituency. Around 15:00 hours, results for Roma ward were being announced, however, the Returning officer Mr. Chirwa announced incorrect results. UPND members queried the returning officer about the results which were different from the ones on the GEN 20 forms. The Returning officer conceded that there was a mistake and the same would be rectified.

12.26 PW17 told the Court that he decided to interview the returning officer. During the interview, a PF member one Joe who is Ngwerere youth chairman grabbed him. According to PW17 he inquired what wrong he had done

and he produced his accreditation identity (ID) card, however, Joe responded that the ID card was useless and he would kill him.

12.27 PW17 averred that Joe grabbed the phone he was using to capture videos and smashed it against the wall. When he demanded that Joe should replace his phone, the said Joe threatened to call his boss.

12.28 PW17 told the Court that after five minutes, the 1<sup>st</sup> Respondent arrived at the totaling center with some PF cadres who ran inside the totaling center. The 1<sup>st</sup> Respondent was in a black sleeveless weather coat, he queried what the confusion was all about, and asked him why he was being troublesome.

12.29 PW17 averred that the 1<sup>st</sup> Respondent instructed that he should be dealt with, two people who were with the 1<sup>st</sup> Respondent pushed him into a corner and started beating him, however some UPND members went to rescue him. As he was recuperating outside, he noticed that there was confusion inside and someone was being dragged outside. He had earlier interviewed the said person who informed him that he was Vincent Chongo (PW14) and was campaign manager for the Petitioner. He got another phone and captured the incident of Vincent Chongo being

dragged and beaten. According to PW17 when Chongo was being dragged out, the 1<sup>st</sup> Respondent also went outside.

12.30 PW17 told the Court that he saw Joe, Mika and others beating up Chongo. When the video at page 41 of the Petitioners supplementary bundle of documents was played in Court, PW17 pointed at an individual in a black attire as the person named Joe he was referring to. He narrated that as Vincent was being dragged outside and beaten, other PF members were removing ballot boxes. PW17 also pointed at an individual who he stated was the 1<sup>st</sup> Respondent and dressed in all black.

12.31 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW17 stated that he is not affiliated to any political party. He admitted that in the video, he did not see the 1<sup>st</sup> Respondent coming out of the totalling centre as he had earlier testified. He admitted that Joe is not a party to the petition and there is no medical report or accreditation from Chundu Media produced before Court.

12.32 PW17 admitted that the 1<sup>st</sup> Respondent has never been arrested for threatening him. He stated that he did not know what Chongo did inside the totalling center for him to be apprehended by the Police. He admitted that he did

not know Joe's PF membership number or the date he joined PF. He admitted having seen in the video he captured, a police officer chasing a man, however, he did not know if the police were rescuing Vincent Chongo (PW14) or apprehending him. He stated that he was not aware that Vincent Chongo slapped the 2<sup>nd</sup> Respondent's official inside the totaling center.

12.33 In cross-examination by Learned Counsel for the 2<sup>nd</sup> Respondent, PW17 maintained that he went to totaling center as media personnel. He admitted that there was no documentary proof of the media company that sponsored him. He admitted that the video was captured using his personal phone and not any media company's equipment. He acknowledged that he worked for Phalesa Real Estate Company but has not been recalled, he denied the suggestion that he was dismissed for his political affiliations with the UPND. He reputed their being an article in the papers that he was fired for taking part in political activities.

12.34 PW17 agreed that on 19<sup>th</sup> May, 2021, when UPND was filing nominations, he was wearing a UPND t-shirt but could not remember if he was holding a poster saying "*Zambia Loves HHP*". He stated that he could not remember if a picture was taken of him in the midst of UPND members wearing UPND

shirts written 'I support UPND' and the same was posted on his facebook page. PW17 denied lying to the Court. He however admitted that he has been posting UPND membership cards for sale on his facebook page. He denied being Vice Information Publication Secretary (IPS) for Mandevu UPND youths.

12.35 PW18 was Pamela Kanyembo Mukuka, and she averred that she was an election observer at the totaling center in Mandevu. While inside the totaling center on 14<sup>th</sup> August, 2021, the 2<sup>nd</sup> Respondent's returning officer Mr. Chirwa announced results that were different from those on the GEN 20 forms.

12.36 According to PW18, the returning officer announced 185 for the Petitioner and 335 for the 1<sup>st</sup> Respondent, however on the GEN 20 forms 335 votes were for the Petitioner and 185 for the 1<sup>st</sup> Respondent. UPND members including the Petitioner approached the returning officer, confusion ensued, and the same necessitated her to capture the episode on video, the same is at pages 42 and 43 of the Petitioners Supplementary Bundle of Documents. According to PW18 ballot boxes were taken outside and people were beaten by PF members.

12.37 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW18 stated that she did not belong to any political party and was accredited under an organization called IAAF. According to PW18, the confusion was between 12:00 to 14:00 hours when parliamentary results were being announced. PW18 stated that she would not know if other witnesses testified that council results were being announced. She denied that UPND cadres caused confusion, she however admitted that UPND members confronted the returning office but retorted that UPND cadres slapped the 2<sup>nd</sup> Respondent's official and a police officer.

12.38 PW18 testified that the results for the Petitioner and the Respondent were interchanged and the 2<sup>nd</sup> Respondent failed to perform its function. She admitted that she had not produced any document to prove that she was an election observer. She admitted that she wrote a report to IAAF that results were interchanged, however, the said report is not before Court. According to PW18, the returning officer did not indicate the name of the polling station where the results were interchanged.

12.39 PW18 admitted that the document indicating that 185 votes is not in the 1<sup>st</sup> Respondent's bundle of documents. She stated that 335 votes for 1<sup>st</sup> Respondent and 137 for



the Petitioner is what is indicated on page 7 of 1<sup>st</sup> Respondent's bundle of documents. She also admitted that the Petition does not contain any allegation to the effect that the Petitioner was given 185 votes.

12.40 PW18 admitted that she had not produced any medical report in relation to her allegation of being beaten. She also confirmed that the GEN 20 forms are not before Court. She admitted that she did not tell the Court the make of the phone she used to take the video and the exact time the video was captured or whether the said video has her initials. PW18 acknowledged that she had not told the Court whether the videos were altered.

12.41 PW18 admitted that she shared the video on a group and did not know the number of people on the group or what they did with the video. She admitted that both videos were short clips, however, the first video was not produced in full. She admitted that she was called as a witness by the Petitioner but was not coached on what to say.

12.42 In cross-examination by Learned Counsel for the 2<sup>nd</sup> Respondent, RW18 said that she was at the totaling center as an observer, however, there was no documentary proof to that effect. She admitted that in the video at page 42, the people who were pointing fingers at ICZ officials

and the police officers did not have any Identity Cards. She confirmed that ECZ officials were being protected by the police and papers were on the table without any tampering. She admitted that in the video, one cannot see any ballot boxes being taken outside. She admitted that the video is a short portion of what she captured.

12.43 PW1 (Alex Mwansa) testified generally as he was the District Elections officer for Lusaka District. He averred that his observation at Olympia Africa totalling center on two occasions when he interviewed the police officers and the returning officer was that there was commotion. As a result of the commotion, the totaling process was delayed for about three hours. The confusion arose because there was a cloud of suspicion among the stakeholders, specifically, the PF and UPND candidates. According to the report he got from the police officers, PF candidates stormed the totaling center with a view of dislodging their colleagues who were tampering with the process.

12.44 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, PW1 maintained that he was district electoral officer. He admitted that he had not provided any name of the police officer before this Court. He admitted that the commotion was between UPND and PF, but was not in position to confirm if the commotion was caused by

PF or UPND. PW1 agreed that he was not present at the totaling center when the incident happened and he had not given the Court the date of occurrence.

12.45 PW1 confirmed that the 1<sup>st</sup> Respondent Christopher Shakafuswa was declared winner, however, he could not comment on whether what the 2<sup>nd</sup> Respondent announced was a clear reflection of the wishes of the people of Mandevu Constituency. PW1 could also not comment on whether the results announced for Mandevu Constituency were true and correct as final authentication is done by the Electoral Commission of Zambia.

12.46 PW1 admitted that results at district level are provisional. He stated that he was not sure if the provisional results in issue were confirmed, however, he had not heard anything to the contrary regarding the same. He confirmed that the elected MP for Mandevu is the 1<sup>st</sup> Respondent Christopher Shakafuswa. PW1 stated that the voter turnout was fairly satisfactory and was about 60%. He acknowledged that the majority of the voters voted in the 12<sup>th</sup> August, 2021 elections and the numbers for Mandevu show that the majority voted for the 1<sup>st</sup> Respondent.

12.47 PW1 stated that he was at the totaling center at 23:00 hours and 03:00 hours, by then polling stations had closed

and people had voted. The commotion at the totaling center was around 22:00 hours and could not have affected the voting pattern.

### 13.0 1<sup>ST</sup> RESPONDENT'S CASE

13.01 In response to the allegation that the campaign and elections were characterised by violence at the instance of the 1<sup>st</sup> Respondent and his campaign team, Christopher Shakafuswa, the first witness (RW1) for his case averred that he was a PF candidate for the Mandevu parliamentary election. After obtaining the party adoption certificate, he proceeded to file in his nomination on 17<sup>th</sup> May, 2021 at the Olympic Africa Center in Mandevu Constituency.

13.02 RW1 explained that he started engaging the electorate to annotate the PF manifesto. He met different stakeholders including the church, elderly, youth and differently abled persons. The meetings were interactive in order to listen to various challenges of the people, which gave him an opportunity to sell himself to the people.

13.03 Regarding the allegation of assault on Frank Kaonga, RW1, averred that the same is a malicious allegation which he just learnt about through this petition. Neither he nor his election agent Cephas Lusale Kanyanta were involved in the alleged assault.

13.04 RW1 averred that the testimony of PW3 Innocent Simwinde was a malicious allegation because around 18<sup>th</sup> June, 2021, he was battling for his life. He fell ill and phoned Professor Victor Mukonka of Zambia National Health Public Institute (ZNHPI) to send a team to test him for Covid-19. On 16<sup>th</sup> June, 2021, he was visited at home by health officials who tested him and informed him that he had tested covid-19 positive. The following day, Dr. Paul Zulu examined him and advised that he takes further tests and a chest x-ray. He went to CFB medical center where he saw Dr. Titus Fernando, who requested for a malaria test and chest x-ray. After the tests, he went back home.

13.05 RW1 told the Court that the doctor placed him on self-isolation for 14 days and he was isolated at home in his bedroom, therefore, the allegations of him moving around during that period were not true, and it was not possible for him to have been present when PW3 was allegedly beaten in his presence. He averred that the letter from ZNHPI confirms that he was covid-19 positive and in isolation for 14 days. Further that the document and receipt from CFB signed by Dr. Titus Fernando confirms that he was being treated during the alleged period.

13.06 RW1 explained that the document from CFB was generated on 23<sup>rd</sup> September, 2021 because when he was served with the petition, he went to CFB to request for a letter confirming that he had been treated on 17<sup>th</sup> June, 2021 for being covid-19 positive. He stated that he was issued with a receipt at CFB on 17<sup>th</sup> June, 2021. Further, the letter from ZNHPI dated 13<sup>th</sup> September, 2021 states that he tested covid-19 positive on 16<sup>th</sup> June, 2021.

13.07 In relation to the allegation of the attack on Boyd Khondowe, RW1 averred that the same is a malicious allegation as he has no knowledge of the same, neither was he involved. The said Boyd Khondowe (PW6) lied before Court when he testified that he was present and just watching. PW7 also lied when he stated that he slapped PW6.

13.08 In relation to allegation of the attack on Fred Matuvu Maliwe, RW1 averred that the second re-nomination which arose as a result of the death of a parliamentary candidate was on 12<sup>th</sup> July and not 22<sup>nd</sup> July, 2021, therefore he denied the said allegation as he was not involved in violent activities. Neither was his election or polling agent.

13.09 RW1 denied any knowledge or involvement either directly or through his agents in the allegation of hitting PW4 with

a stone on the eye, he denied knowledge of the same as he was not involved in any stoning. According to RW1, PW4 did not produce any evidence from a medical institution or police report to prove his allegation.

13.10 In response to the allegation of disruption of meetings and assault of Steven Mapalo, RW1 averred that he only learnt about that allegation through the petition. RW1 added that neither he nor his agents were directly or indirectly involved in the alleged assault.

13.11 With respect to the allegation of a UPND youth being abducted, RW1 averred that he learnt about the said allegation through this petition and has no knowledge of the same. Neither was he involved in the same directly or indirectly.

13.12 RW1 averred that the allegation of PW10 that he was displaying the PF symbol on polling day at Matayela is not true. He went to Matayela Polling Station in the company of his wife, a Zambia National Broadcasting Corporation (ZNBC) crew and Councillor Adrian Banda of Ngwerere Ward. The ZNBC crew through the said Adrian Banda requested to cover him as he cast his vote. He and his spouse proceeded to vote around 12:30 hours, he was then interviewed by the ZNBC crew outside the polling

station. According to RW1, the turnout was huge at Matayela Polling Station. He never interacted with any voters on the queue and there was no confusion at the said polling station.

13.13 As regards to the allegation of murder of Joram Leta, RW1 averred that up to date he is not facing any assault or murder charges. He has never been arrested in relation to the said allegation, as he was neither involved nor present when the incident happened. His election agent was also not involved.

13.14 In response to the allegation that the Petitioner was not allowed to move around, RW1 averred that it was not his duty to provide safe passage to the Petitioner, as that was duty of the police and he did not make any attempt to block the Petitioner from campaigning.

13.15 In relation to the allegation of alteration of votes in Chaisa Ward, RW1 averred that to his knowledge, nothing of the sort happened in Chaisa ward and the petitioner did not lead any evidence relating to change of results.

13.16 In response to the allegation of distributing money to would be voters, RW1 denied the same because on 11<sup>th</sup> August, 2021 he was with the Former Republican President



Dr. Edgar Lungu who visited Katambalala market and Mandevu big market. He arrived at 11:00 hours and they toured Katambalala market where they distributed face masks and hand sanitizers to marketers. They later proceeded to Mandevu big market up to 14:30 hours, when Former Republican President then proceeded to Matero Constituency, and RW1 proceeded home to refresh.

13.17 RW1 averred that the evidence of PW11 and PW12 relating to being given K170.00 was malicious. According to the 1<sup>st</sup> RW1, he and the said Tamba are not in good books as he was de-campaigning him, there was no way he could have been at his house. At 18:00 hours on 11<sup>th</sup> August, 2021, he was at Government Complex attending the PF virtual rally addressed by the Former President Dr. Edgar Lungu from 16:45 hours to slightly before 18:00 hours. The same was televised on many television stations.

13.18 RW1 denied the allegation of distributing mealie meal in Ngwerere Ward on 24<sup>th</sup> July, 2021. He averred that neither he nor his election agent were involved in distribution of mealie meal.

13.19 As regards the allegation of campaigning on 26<sup>th</sup> July, 2021 in Raphael Chota Ward during the campaign ban, RW1 averred that the 2<sup>nd</sup> Respondent lifted the ban on

campaigns and the PF Secretary General was in Mandevu Constituency to meet PF party officials who hold positions at ward and constituency level. The said meeting was at Lusaka City Council, Chipata Site Office in Raphael Chota Ward, and was not a rally but an in-house meeting. According to RW1, the 2<sup>nd</sup> Respondent had announced partial lifting of the ban on 28<sup>th</sup> June, 2021 and the said ban was finally lifted on or before 20<sup>th</sup> July, 2021.

13.20 In response to allegation of power interruption at a polling station in Chaisa Ward, RW1 averred that the said allegation was never brought to his attention. Neither was he involved in the disruption of power. He added that the 2<sup>nd</sup> Respondent is in a better position to explain what might have transpired.

13.21 In responding to the allegation of transposition of numbers, his campaign team storming the building and beating polling agents, the Petitioner's constituency manager and ward secretary, RW1 averred that he was not present when the allegations of changing results happened at totaling center. RW1 averred that the three videos played in Court do not depict him inside the totaling center when fracas was happening.

13.22 His election agent was equally not present during the fracas. According to RW1, in the video, it can be seen that he was just arriving at the totaling center when the police were removing the people who were causing confusion. RW1 averred that no polling agent is allowed at the totaling center.

13.23 RW1 averred that the testimonies of PW14, PW15, PW16 and PW17 stating that he was inside the totaling center at time of fracas were false as can be seen in the video. According to RW1, the Petitioner's witnesses stated that the fracas was as a result of announcement of wrong results for local government in Roma ward, and not parliamentary results. RW1 averred that he never uttered any words directing that whoever did not comply should be beaten, as he was not present when fracas ensued.

13.24 RW1 averred that the allegations of PW18 that the returning officer announced results meant for the Petitioner as having been polled by him were false. According to RW1, PW18 failed to tell the Court which polling station or ward the said results came from and she failed to produce the said GEN 20 form that contained those results.

13.25 In response to the allegation of GEN 20 forms not being accounted for, RW1 averred that there was no allegation of missing GEN 20 forms for the parliamentary election. He was only declared winner after all parties were satisfied that the election results were the will of the people of Mandevu Constituency and all GEN 20 forms at the polling stations were signed by polling agents from different political parties, after which results were sent to the totaling center for subsequent declaration of the winner.

13.26 In cross-examination by Learned Counsel for the 2<sup>nd</sup> Respondent, RW1 admitted that the 2<sup>nd</sup> Respondent is the only public body with mandate to count votes and declare a winner. He admitted that counting and declaration of a winner can be done even without polling agents and observers. RW1 admitted that the 2<sup>nd</sup> Respondent has conflict management committees that resolve electoral disputes. RW1 denied knowledge of any complaint being made to the 2<sup>nd</sup> Respondent's conflict management committee. He admitted that had all the allegations made in petition been brought to the attention of 2<sup>nd</sup> Respondent's conflict management committee, they would have been resolved. RW1 maintained that neither he nor his election agent were involved in causing the death of Joram Leta, the said incident was not reported to 2<sup>nd</sup> Respondent's conflict management committee.

- 13.27 In cross-examination by Learned Counsel for the Petitioner, RW1 admitted that he did not produce before Court a certificate of covid-19 positive results. He admitted that the document from CFB states that he was diagnosed covid-19 positive, however, he did not do the covid-19 test at CFB, the same was done at his home. He admitted that page 2 of the 1<sup>st</sup> Respondent's Bundle of Documents is a receipt from CFB for a lab test and x-ray.
- 13.28 RW1 admitted that the document from CFB was signed by Dr. Titus Fernando who attended to him on 17<sup>th</sup> June, 2021. He maintained that it would not be true for anyone to suggest that he was not attended to by Dr. Fernando. RW1 admitted that the contents of the said document are true as he was clinically stable, and not requiring hospital admission. He denied lying to the Court when he stated that he was battling for his life. He admitted that the physician referred to in the document from ZNPHI is not mentioned, but he was attended to by Dr. Paul Zulu.
- 13.29 Further in cross-examination, RW1 admitted that he went to Matayela Polling Station in the company of his wife and the ZNBC crew. When he got there, he entered the polling station with the ZNBC crew, and joined the voting queue. RW1 admitted that on 11<sup>th</sup> August, 2021 he was

distributing face masks and hand sanitizers. He admitted that he held the position of deputy mayor for Lusaka and ceased to hold the same when the council and parliament were dissolved. He admitted that by 11<sup>th</sup> August, 2021, he was no longer deputy mayor and did not hold any public office.

13.30 RW1 admitted that he attended to the distribution of face masks on 11<sup>th</sup> August, 2021 only as PF candidate for Mandevu constituency. He admitted that he was in the company of Former President Dr. Edgar Lungu and Disaster Management and Mitigation Unit (DMMU) officials. The exercise was mobile and no crowd gathered at a particular area. He admitted that if anyone stated that there was a large crowd, they would be lying. RW1 denied campaigning during the campaign ban. He admitted that the document at page 14 of petitioner's supplementary bundle of documents is a print out of a public facebook page, however the page is not managed by himself. He admitted that the document contains a picture of himself and states that he was at Mandevu on 17<sup>th</sup> June, 2021.

13.31 He admitted that page 26 is a printout of Lukas Tompwe's facebook page which states that Tompwe was with Joseph Tamba and 23 others, and is dated 20<sup>th</sup> July, 2021. He admitted that the said document says that he was

distributing face masks in Ngwerere Ward and has images of himself distributing facemasks to people in a vehicle.

13.32 RW1 admitted that on 15<sup>th</sup> June, 2021 the 2<sup>nd</sup> Respondent banned UPND and PF from campaigning. He denied that the 2<sup>nd</sup> Respondent imposed restrictions on the number of people in a campaign group. He could not confirm whether the 2<sup>nd</sup> Respondent had restricted door to door campaigns to only three members of a political party.

13.33 In re-examination, RW1 averred that it is in public domain that the third wave of covid-19 was intense, and he equally feared for his life having tested positive on 16<sup>th</sup> June, 2021. He took it as a matter between life and death. He averred that it is common practice that a covid-19 certificate is only issued for travelling purposes, and he did not see any need to obtain the same.

13.34 RW2 one Adrian Banda, averred that on 12<sup>th</sup> August, 2021, he received a phone call from ZNBC media team requesting to cover the 1<sup>st</sup> Respondent when casting his vote. He informed the 1<sup>st</sup> Respondent who gave consent to the same. He took the ZNBC crew to Matayela Polling Station where the 1<sup>st</sup> Respondent and his wife were going to cast their votes.

13.35 The 1<sup>st</sup> Respondent joined the voting queue inside the Polling station and eventually cast his vote. After voting, the ZNBC crew interviewed the 1<sup>st</sup> Respondent from outside, and they left the polling station. RW2 averred that he did not know anything about the allegation concerning the 1<sup>st</sup> Respondent displaying a PF party symbol.

13.36 RW3 Joseph Katongo averred that he is the councilor for Kabanana ward 27. RW3 told the Court that on 24<sup>th</sup> July, 2021, the 1<sup>st</sup> Respondent was in Kabanana ward 27 doing a door to door campaign and distributing flyers. Around 14:00 to 15:00 hours they proceeded to Raphael Chota Ward to receive their colleagues from National Democratic Party (NDC) who they had a meeting with. Around 18:00 hours they dispersed. He was with the 1<sup>st</sup> Respondent the whole day and his ward is very far from Ngwerere Ward, he added that no mealie meal was distributed.

13.37 In cross-examination by Learned Counsel for the Petitioner, RW3 maintained that Kabanana Ward and Ngwerere Ward are very far apart. He stated that the walking distance from Kabanana to Ngwerere Ward is about 30 to 45 minutes.



13.38 RW4 one Joseph Chikonde averred that he is the 1<sup>st</sup> Respondent's close friend and they spent almost the whole day together on 11<sup>th</sup> August, 2021. They received the Former Republican President Dr. Edgar Chagwa Lungu around 11:00 hours as he was distributing face masks in Mandevu, after he left around 14:00 hours, they proceeded to the 1<sup>st</sup> Respondent's house in Ngwerere. After 16:00 hours, they proceeded to Government Complex where they were, until around 17:55 hours when the function ended. They saw off the Former Head of State and due to traffic, they left Government Complex past 19:00 hours and went to 1<sup>st</sup> Respondent's house.

13.39 In cross-examination by Learned Counsel for the Petitioner, RW4 stated that he was not aware that RW1 did not mention being with him on 11<sup>th</sup> August, 2021 or any other day. He made no comment when it was put to him that RW1 had told the Court that he left Government Complex before 18:00 hours. RW4 admitted that the 1<sup>st</sup> Respondent is his close friend who usually assists him with his business financially.

13.40 RW5 one Vincent Katongo Mutale, averred that on 14<sup>th</sup> August, 2021 he was with Councilor Ruth Phiri, Lukas Tompwe and Mr. Kaseya at Olympia Africa which was the totaling center for Mandevu. As they were standing outside

during the break of announcing results by the 2<sup>nd</sup> Respondent around 14:00 hours, they heard noise inside and rushed there to check what was happening. They found PW14 (Vincent Chongo) and his UPND colleagues shouting at the ECZ officials accusing them of having changed council results for Roma Ward 20. Tempers flared among UPND members and they started banging on tables. In the process, PW14 could not contain his anger and slapped an ECZ official who was entering data.

13.41 RW5 averred that police officers moved in quickly to protect the lives of ECZ officials, ballot boxes and equipment. Police officers started pushing everyone to go outside, in the process, UPND members were kicking ballot boxes. As he was outside, he then saw the 1<sup>st</sup> Respondent arriving through the gate and walking towards the building.

13.42 In cross-examination by Learned Counsel for the Petitioner, RW5 admitted that Lukas Tompwe was not listed on the 1<sup>st</sup> Respondent's nomination paper, however, he was an accredited PF official representing the party, just like himself and Kaseya. His role was to witness the announcing of results at the totaling center.

13.43 RW5 denied being part of 1<sup>st</sup> Respondent's campaign team, he however admitted that he contributed to the victory of 1<sup>st</sup> Respondent by playing his role. He maintained that PW14 slapped the 2<sup>nd</sup> Respondent's official, but he did not know if PW14 was arrested for slapping the said official. RW5 stated that he did not see anyone recording videos, therefore, he would not disagree if he was told that people were recording videos and none of the videos show PW14 slapping an ECZ official. RW5 maintained that he saw the 1<sup>st</sup> Respondent arriving alone at the totaling center around 14:00 hours when they were pushed out of the building by police officers.

#### 14.0 2<sup>ND</sup> RESPONDENT'S CASE

14.01 RW6, one Clifford Chirwa testified that he was returning officer for Mandevu constituency and was appointed in April, 2021. Prior to that he worked as supervisor during the voter registration exercise in Mandevu Constituency.

14.02 RW6 averred that he underwent training for nominations and conducted the nominations in May, 2021. After that he was tasked with recruitment of poll staff in Mandevu Constituency. He underwent training as returning officer in July, 2021 and was appointed to train the poll staff.

14.03 He averred that on 11<sup>th</sup> August, they received non security accessories like pens, markers, ballot boxes and security documents in form of ballot papers among others at the totaling center. He averred that Mandevu Constituency has eight (8) wards and all presiding officers for the 195 polling stations were required to report to the Mandevu Constituency Totaling Center for deployment. He and his five assistants were stationed at the totaling center, their role was to ensure that elections took place as planned.

14.04 RW6 averred that most of the polling stations officially closed at 18:00 hours on 12<sup>th</sup> August, 2021, but voting continued due to long queues. On 13<sup>th</sup> August, 2021, at 04:00 hours, they received some results from the presiding officers. Presiding officers presented four forms namely ballot paper account form, the record of proceedings at the count, the statement of rejected ballot papers and the announcement (GEN 20) form, together with ballot boxes. They would check the information on all the four forms and then submit the same to the technical support officer whose role was to enter the results in the electronic system.

14.05 RW6, averred that after the results were entered in the system, considering that all polling stations had

stakeholder representatives like polling agents who also had results from the polling stations, the same results were announced. Around noon, they did an update of the total provisional results received as updated by the technical support officer who issued a printout. They did not have any problems with the updates of presidential, parliamentary and mayoral results. According to RW6, he announced local government results for Justine Kabwe ward and declared the winner because all the results for that ward were complete.

14.06 He faced a challenge when he proceeded to announce results for Roma Ward. He discovered that the results for UPND's Luka Phiri who had polled 289 votes were swapped with PF's Maxwell Mwango's votes of 249, when the technical support officer was keying in the results.

14.07 RW6 averred that the UPND candidate with two officials approached him and presented his case in anger on suspicion that the 2<sup>nd</sup> Respondent was jeopardizing the results. When he looked at the results, he confirmed that there was a mistake as the GEN 20 form from the polling station showed that the UPND candidate got 289 votes. RW6 requested for time to look for their original GEN 20 form from the polling station to make a comparison, and since results were provisional, they could easily be

changed. At that point, because of the tension, he was compelled to contact the district electoral officer(PW1) who advised that the original GEN 20 form should be compared with the UPND candidate's photocopy, and if there was a mistake, results should be reversed.

14.08 More UPND officials were now pointing fingers at the 2<sup>nd</sup> Respondent's officials and accusing them. There was commotion on the table and the police officers were trying to protect the 2<sup>nd</sup> Respondent's officials. Suddenly, the technical support officer was slapped by a UPND official and the police officers advised the 2<sup>nd</sup> Respondent's officials to sit on the floor for safety. Calm was restored after forty (40) minutes, security was enhanced and they re-organised the table. Around 18:00, hours senior UPND officials approached them over the swap and in the presence of the police officers, despite their papers being scattered, they looked for the original GEN 20 form which was found on 14<sup>th</sup> August, 2021. UPND officials were informed, comparison was made and it was confirmed that there was a swap. Corrected results were entered into the system and the issue was resolved.

14.09 During the process, there was a delay of about six hours. On 15<sup>th</sup> August, 2021, pressure mounted for them to submit presidential results. The district electoral officer

(PW1) and provincial electoral officer advised them to concentrate on presidential results as Mandevu constituency was the only constituency that had not submitted the same. They got results from 191 out of 195 polling stations but could not transmit incomplete results, as some presiding officers had sealed results together with ballot papers in ballot boxes which could not be opened at totaling center.

14.10 On 16<sup>th</sup> August, 2021, they sought guidance from PW1 over parliamentary results who advised them to look at the margin between the highest scoring candidate and the runner up. They looked at margin which was about 15,000 votes. The number of voters in the remaining four stations was 5000, and because the margin was huge, the remaining votes could not affect the results. PW1 advised that the winner should be declared.

14.11 The Petitioner however insisted that GEN 20 forms should be compared with the 2<sup>nd</sup> Respondent's record of proceedings and a reconciliation exercise was done for about 35 polling stations. Eventually, all stakeholders including the Petitioner agreed that results could now be announced. He walked outside with all the stakeholders, announced the results and declared Christopher Shakafuswa of PT who is the 1<sup>st</sup> Respondent as duly elected

Member of Parliament for Mandevu Constituency. The announcement form has provision for witnesses to sign but only the 1<sup>st</sup> Respondent's agent signed the same, the rest of the stakeholders declined to sign.

14.12 In cross-examination by Learned Counsel for the 1<sup>st</sup> Respondent, RW6 averred that Mandevu Constituency had 162,000 registered voters and 101,000 actually voted. RW6 stated that no complaint was brought to his attention relating to alteration of parliamentary results. He admitted that the swap was for local government results and not parliamentary results. He admitted that a UPND member slapped the 2<sup>nd</sup> Respondent's technical support officer. RW6 admitted that he submitted the incident report to the 2<sup>nd</sup> Respondent in which he mentioned that the technical support officer was slapped. He admitted that the 2<sup>nd</sup> Respondent followed the electoral procedure, save for the mistake by the technical officer.

14.13 He admitted that the error of swapping results was corrected. He confirmed having declared the 1<sup>st</sup> Respondent as duly elected Member of Parliament for Mandevu Constituency. He admitted that the environment at the totaling center was conducive before the swapping of results, the problem only arose when UPND members confronted the 2<sup>nd</sup> Respondent's officials. He confirmed



that the announcement form confirms results of votes cast for Mandevu Constituency.

14.14 In cross-examination by Learned Counsel for the Petitioner, RW6 averred that the confusion at the totaling center was on 13<sup>th</sup> August, 2021. He admitted that he prepared an incident report, but the same was not before Court. He admitted that the police obtained a statement from the technical support officer who was slapped, however, the police report was not before Court. He admitted that he received a written complaint from the Petitioner on the conduct of the elections and he authored a letter acknowledging receipt of the same.

14.15 RW6, admitted that he was aware of what happened to would be voters at Kalanga 2 polling station. RW6 averred that he was not aware that the 1<sup>st</sup> Respondent provided transport to voters at Kalanga polling station from Rapheal Chota Ward to Ngwerere. He admitted that the 2<sup>nd</sup> Respondent did not provide transport for voters who were turned away in Raphael Chota Ward.

14.16 RW6, admitted that the 2<sup>nd</sup> Respondent wants the Court to uphold the election of the 1<sup>st</sup> Respondent. RW6 maintained that the technical support officer was right next to him when he was slapped but he cannot identify the person

who slapped him. He admitted that a printout was made of corrected results for the local government elections, however the said printout was not before Court. He admitted that page 11 of the 1<sup>st</sup> Respondent's bundle of documents states that the declaration of the 1<sup>st</sup> Respondent as duly elected Member of Parliament was made on 19<sup>th</sup> August, 2021.

- 14.17 RW6, admitted that there was no document before Court to prove that he was instructed to focus on presidential election results by the district electoral officer (PW1). He admitted that some important documents like announcement forms were sealed in ballot boxes by about four presiding officers hence part of the delay in announcing results, however the said documents were later retrieved. He admitted that no documentary proof of the reconciliation exercise done with the Petitioner was before Court. He denied lying to the Court about the exercise as the same was done in presence of both the Petitioner and 1<sup>st</sup> Respondent. He maintained that the Petitioner agreed that they should proceed to announce final results, however, there is no documentary proof before Court. He denied that the final results were different from results on GEN 20 forms.

14.18 RW6 admitted that nine candidates from various political parties participated in the parliamentary election, however, only one witness the PF agent Cephas Lusale Kanyanta signed in witness box on the declaration form, none of the witnesses from other political parties endorsed the declaration form.

14.19 In re-examination, RW6 averred that the Kalanga polling station issue was a delimitation problem during registration. Voters names were appearing in Ngwerere and not Raphael Chota ward so they had to go and vote from Ngwerere.

#### 15.0 PETITIONER'S SUBMISSIONS

15.01 The Petitioner through his Learned Advocates filed written submissions on 26<sup>th</sup> October, 2021.

15.02 In the said submissions, it was argued that guidance on what amounts to a corrupt or illegal practice was given in the case of *Webster Chipili v David Nyirenda*<sup>1</sup> where it was stated that:-

“In Regulation 51, the offence of bribery is criminalized and so is the offence of treating under Regulation 53. If such is proved to the satisfaction of the trial Court, the

relevant Section of the Electoral Act under which an election can be avoided is Section 18 (2) (a)...

The offences of bribery and treating come under Part iv of the Electoral (General) Regulations, under the sub-heading "Corrupt and illegal practices and election offences." So, we can safely say that bribery and treating are corrupt or illegal offences under Section 51 and 53 in relation to an election, which if allowed to take root during political campaigns are capable of swaying the electorate away from a candidate of their choice."

15.03 It was submitted that the act of distribution of money by the 1<sup>st</sup> Respondent amounted to a corrupt practice. It was argued that the evidence of PW11 and PW12 was not objected to and should therefore be considered as per the guidance of the Supreme Court in the case of *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others*<sup>2</sup> where it was held that:-

"A Judge is not precluded from considering a matter that is not pleaded, if such a matter is let into the evidence without objection."

15.04 It was further argued that in refuting the allegation of bribery in form of distribution of money, RW4 was called as a witness by the 1<sup>st</sup> Respondent. The said RW4 is a witness with an interest of his own to serve as his testimony was that the 1<sup>st</sup> Respondent frequently helps his business by providing financial support. It was submitted by the Petitioner that RW4's evidence was not corroborated.

15.05 The Petitioner also submitted that in refuting the bribery allegation, RW1 testified that he could not have been at Mr. Tamba's residence because they do not get along, however, page 26 of the Petitioner's Supplementary Bundle of Documents has a facebook post-dated 20<sup>th</sup> July, 2021 posted by one Lukas Pompwe. In that post, the said Lukas Pompwe was said to be with Mr. Tamba and others during a campaign activity. The Petitioner argued that RW1 in cross-examination testified that Lukas Pompwe is his close ally and supporter, therefore RW1 lied when he claimed that he does not get along with Tamba. Reference was made to the case of Attorney General v Kakoma<sup>3</sup> where it was held that:-

"A Court is entitled to make findings of fact where the parties advance directly conflicting stories, and the Court must make those findings on the evidence

before it and having seen and heard the witnesses giving that evidence.”

- 15.06 In relation to undue influence, the Petitioner submitted that the evidence of PW2, PW3, PW4, PW5, PW6, PW7 and PW9 was that they were attacked by people in the company of the 1<sup>st</sup> Respondent on separate incidents. The said persons were named as Martin, Bwalya alias Machende, Chisanga and Nelson Changwe alias Katman or Katiti.
- 15.07 The Petitioner argued that the violent attacks on the aforementioned witnesses were done by and with the knowledge and consent of the 1<sup>st</sup> Respondent as the said attackers were de facto agents of the 1<sup>st</sup> Respondent.
- 15.08 It was submitted by the Petitioner that the 1<sup>st</sup> Respondent completely and negligently disregarded the suspension of political party events, campaigns and rallies by the 2<sup>nd</sup> Respondent by continuing to campaign thereby gaining unfair advantage over the Petitioner and other candidates. The 1<sup>st</sup> Respondent's disregard of the guidelines set by the 2<sup>nd</sup> Respondent consequentially had a big impact on the election result.
- 15.09 The Petitioner also submitted that the 1<sup>st</sup> Respondent was campaigning on polling day, at a polling station contrary

to section 89(1) (e) of the Electoral Process Act No. 35 of 2016 which provides that:-

“89. (1) 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 metres 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”

15.10 It was submitted that the 1<sup>st</sup> Respondent's conduct at the polling station as per evidence of PW8 and PW10 caused fear in would be voters who opted to leave the polling station. This had a negative impact on the electorates' right to freely elect a candidate of their choice.

15.11 The Petitioner further submitted that it was the 2<sup>nd</sup> Respondent's duty to ensure that the elections were conducted in accordance with the principles laid down in the Electoral Process Act No. 35 of 2016 and the Code of Conduct. Reference was made to the case of *Giles Chomba Yamba Yamba v Kapembwa Simbao and Others*<sup>1</sup>.

- 15.12 It was argued that the 2<sup>nd</sup> Respondent failed to discharge its duty in ensuring that there was a transparent and credible electoral process because the 2<sup>nd</sup> Respondent had actual knowledge that the 1<sup>st</sup> Respondent's campaigns were not conducted in compliance with the Electoral Process Act, but did not investigate the allegations made by the Petitioner.
- 15.13 The Petitioner further submitted that the 2<sup>nd</sup> Respondent failed to ensure that the ballot boxes were properly handled as RW6 failed to provide evidence that the same were sealed in the presence of stakeholders as per rules and regulations.
- 15.14 It was submitted that according to RW6, the 1<sup>st</sup> Respondent was declared as duly elected Member of Parliament for Mandevu Constituency on 16<sup>th</sup> August, 2021. However, the declaration form is dated 19<sup>th</sup> August, 2021. The said discrepancy goes to the credibility of RW6 as a witness and shows that the electoral process was not credible.
- 15.15 The Petitioner also submitted that RW6's testimony was that the 2<sup>nd</sup> Respondent prefers the Court to uphold the declaration of the 1<sup>st</sup> Respondent as winner of the election. This exhibits biasness by an independent government



agency which is expected to be impartial and not have an interest to serve.

15.16 It was submitted that the 2<sup>nd</sup> Respondent conducted the elections in a negligent manner and commotion would not have occurred at the totaling center if the 2<sup>nd</sup> Respondent discharged its duties by restricting access as per their rules and regulations.

15.17 The Petitioner argued that Regulation 3 (1) (d) of the Electoral Code of Conduct provides that:-

“The Commission shall, where reasonable and practicable to do so censure acts done by leaders of political parties, candidates, supporters, and Government and its organs, which are aimed at jeopardizing elections or done in contravention of this Code.”

15.18 However, the Presiding Officer failed to censure the 1<sup>st</sup> Respondent over his actions at the polling station that jeopardised the elections as testified by PW10 and PW11. The 2<sup>nd</sup> Respondent also failed to ensure that the Petitioner had an equal opportunity to conduct his campaigns, by allowing the 1<sup>st</sup> Respondent to campaign during the ban.

15.19 Lastly, the Petitioner submitted that the electoral malpractices were widespread and affected the majority of voters in different wards of Mandevu Constituency who did not elect their candidate of choice. The election of the 1<sup>st</sup> Respondent should therefore be declared null and void.

#### 16.0 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS

16.01 The 1<sup>st</sup> Respondent through his learned Counsel filed final submissions on 5<sup>th</sup> November, 2021, wherein he referred to the learned authors of *Phipson on Evidence*, 17<sup>th</sup> Edition paragraph 6.06 at page 151, the English Court of appeal case of *Constantine Line v Imperial Smelting Corporation*<sup>5</sup> and the case of *Lewanika v Chiluba & Others*<sup>6</sup>. The cited authorities underscore the long established principle of law that the burden of proof lies on the Petitioner to prove his allegations against the 1<sup>st</sup> Respondent and in doing so he cannot be assisted by the 1<sup>st</sup> Respondent.

16.02 The 1<sup>st</sup> Respondent as regards the burden of proof emphasised and relied on the case of *Khalid Mohamed v The Attorney General*<sup>7</sup>, where it 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 opponent's defence does not entitle him to judgment.

I would not accept a proposition that even if a plaintiff's case has collapsed of its initiation or for some reason or other, judgment should nevertheless, be given to him on the ground that a defence set up by the opponent has also collapsed, quite clearly a defendant in such circumstances would not even need a defence.

16.03 It was submitted on behalf of the 1<sup>st</sup> Respondent that in election petition cases, the Petitioner has a burden to prove his allegations to a fairly high degree of convincing clarity as it was emphasised in the case of *Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Electoral Commission of Zambia (supra)*.

16.04 In respect to the Petitioner's allegations against the 1<sup>st</sup> Respondent of corrupt practices, illegal practice or other misconduct in connection to the election in issue, the 1<sup>st</sup> Respondent referred to Section 97 (2), (a), (b) (c) of the Electoral Process Act No. 35 of 2016 and submitted that a candidate in an election, under the Electoral Process Act, cannot be liable for any acts of alleged members of a Political Party or any other persons who are not the

candidate's agent as defined under Section 2 of the Electoral Act.

16.05 The 1<sup>st</sup> Respondent argued that he noted from the Petitioner's final submissions that he endeavoured to offer a wider interpretation of the meaning of the word 'Agent'. To the contrary, guidance was given in the case of *Chrispin Siingwa v Stanley Kakubo*<sup>8</sup> where the Constitutional Court held that:-

Regulation 55 (1) of the Electoral General Process (General) Regulations is clear in its provisions and requirement is that an election agent must be specifically appointed and named in a candidate's nomination paper.

16.06 The 1<sup>st</sup> Respondent submitted that it is therefore not correct for the Petitioner to hold those he merely suspected the purported perpetrators of the alleged misconduct to be agents of the 1<sup>st</sup> Respondent.

16.07 According to the 1<sup>st</sup> Respondent, this Court is bound by the interpretation of who an Agent is, as envisaged by Section 2 of the Electoral Process Act. He relied on the English case of *Seaford Court Estates Limited v Asher*<sup>9</sup>, where Lord Denning observed at page 499 that: 'a judge must not alter

that of which (a statute) is woven, but he can and must iron the creases'.

16.08 The 1<sup>st</sup> Respondent urged this Court to adhere to Section 2 of the Electoral Process Act and Regulation 55 of the Electoral General Process (General) Regulations, as there are no creases which require ironing in the law.

16.09 It is submitted that for this Court to nullify the election of the 1<sup>st</sup> Respondent, it has to be convinced above a balance of probabilities with a fairly high degree of convincing clarity that:-

- (i) There has been a breach of the Electoral Code of Conduct in this particular election which can be called a misconduct,
- (ii) The misconduct must be committed by the 1<sup>st</sup> Respondent, or
- (iii) The misconduct must be committed with the knowledge or approval of the 1<sup>st</sup> Respondent's agent,
- (iv) As a result of the misconduct, the majority of the voters in constituency may have been prevented from electing their preferred candidate.

16.10 It was submitted further that it is insufficient for a Petitioner in an election petition to only prove that a Respondent or his agents committed an illegal practice or misconduct without proving that such act(s) was widespread and the majority of voters were prevented from voting for their preferred candidate, reliance was placed on the case *Nkandu Luo (Prof) and Electoral Commission of Zambia v Doreen Mwamba & The Attorney General*<sup>10</sup>. The 1<sup>st</sup> Respondent argued that the evidence of PW1 the District Elections Officer for Lusaka, Mr. Alex Mwansa shows that about 60 per cent of the registered voters in Mandevu Constituency turned out to vote.

16.11 Cardinal to the 1<sup>st</sup> Respondent's submissions is the position of the law in Section 97(2) (b) of the Electoral Process Act and the plethora of decisions of superior courts, among them *Austin Liato v Sitwala Sitwala*<sup>11</sup>, where it was guided that:-

It is not sufficient for a Petitioner to prove only that the 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 wide spread and prevented or may have prevented the majority of the

voter in the constituency, district or ward from electing a candidate of their choice.

- 16.12 In a nutshell, the 1<sup>st</sup> Respondent's final submission is that the Petitioner lamentably failed to prove his allegations to a fairly high degree of convincing clarity and to demonstrate that the proven electoral offences if at all committed by the 1<sup>st</sup> Respondent or his election or polling agents were so widespread that the majority of voters in the constituency were or may have been prevented from electing the candidate whom they preferred.

#### 17.0 2<sup>ND</sup> RESPONDENT'S SUBMISSIONS

- 17.01 The 2<sup>nd</sup> Respondent filed its submission out of time with Leave of Court on 8<sup>th</sup> November, 2021.

- 17.02 The gist of the 2<sup>nd</sup> Respondent's submission is as was held in the case of *Webster Chipili v David Nyirenda* (supra) that:-

Where elections are tripartite elections, embracing three elections in one mammoth elections, political campaign that were mounted by the Parliamentary Candidates coincided with those of Presidential and local government candidates

and that in this kind of scenario, it has to be shown by evidence in what way the appellant alone benefited to the exclusion of the Presidential and Local government candidates of the MMD from the distribution of the relief maize and sale of subsidized maize meal.

17.03 It was submitted therefore, that in a tripartite election it is not enough to simply show that a party committed an election malpractice but it has to be proved that the perpetrator benefited to the exclusion of the Presidential and Local government candidates. However, in casu, the Petitioner failed to prove this to the requisite standard of proof in election petitions.

17.04 The 2<sup>nd</sup> Respondent reiterated the principle enunciated in the *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa (supra)* also cited by the Petitioner and the 1<sup>st</sup> Respondent, to the effect that for the Petitioner to succeed, it is not enough to say that the Respondents have completely failed to produce a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and electoral flaws were such that the majority of voters were prevented from electing the



candidate whom they preferred or that the election was so flawed, that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters. It was submitted that the Petitioner failed to prove to the required standard the principle in *Anderson Kambela Mazoka* case.

- 17.05 In respect to the Petitioner's allegation of non-conducive environment at the totaling centre, the 2<sup>nd</sup> Respondent, submitted that it is the only body mandated with the task to conduct elections in Zambia under Article 229 of the Constitution of Zambia, (amendment) Act, No.2 of 2016. Therefore, it was argued that even in the absence of polling agents, Election monitors and observers, the 2<sup>nd</sup> Respondent has power to conduct elections, announce the results and declare the winner. The 2<sup>nd</sup> Respondent also based its submissions on Section 36(2) of the Electoral Process Act No. 35 of 2016, which provides that the absence of an election or polling agent from a gazetted or prescribed place where an electoral proceeding is being conducted shall not invalidate those proceedings.

## 18.0 EVALUATION OF EVIDENCE AND FINDINGS OF FACT

18.01 From the outset, I must state here that I will address each of the Petitioner's allegation seriatim. I must emphasize that the burden of proof is on the Petitioner to prove his case against the Respondents to the required standard of a fairly high degree of convincing clarity. I am guided by the case of *Abuid Kawangu v Elijah Muchima*<sup>12</sup>, where the Constitutional Court held that:-

"The standard remains higher and distinct from that required in an ordinary civil matter but lower than the standard of beyond reasonable doubt required in criminal matters. As the Supreme Court opined in the case of *Lewanika and Others v Chiluba and Others* that parliamentary election petitions are required to be proved to a standard higher than on a mere balance of probabilities and issues raised to be established to a fairly high degree of convincing clarity."

18.02 In evaluation of evidence before me I must state that this petition is anchored on Section 97(2) of the Electoral Process Act No. 35 of 2016, which provides that:-

"97 (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall

be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that

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

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred." (underlined for emphasis only)

18.03 Further, Section 83 of the aforecited law, outlines "undue influence" and provides that:-

"83(1) A person shall not directly or indirectly, by oneself or through any other person-

(a) Make use of or threaten to make use of any force, violence or restraint upon any other person..."

1) The Petitioner's position is that the 1<sup>st</sup> Respondent was involved in undue influence such that at his instance the campaign and elections were characterised by violence and on 19<sup>th</sup> May 2021, Frank Kaonga a UPND polling agent at Mpulungu Ward 21 in Mandevu Constituency was assaulted by about 100 PF cadres from the 1<sup>st</sup> Respondent's campaign team, as they were conducting door to door campaigns in Olympia. The 1<sup>st</sup> Respondent's position on the other hand is that neither he nor his election or polling agents were involved in any violence.

18.04 Whereas the Petitioner in his petition alleges that PW2 (Frank Kaonga) being one of his campaign team members was beaten by about 100 PF cadres, while conducting door to door campaign, distributing campaign material and fliers in Olympia, on 19<sup>th</sup> May 2020. PW2's evidence however, was that he was a polling agent and was beaten up by Machende, Martin and Katiti alias Kalman in the presence of the 1<sup>st</sup> Respondent at Chipata Community polling station on 12<sup>th</sup> August, 2021.

18.05 PW2's evidence being in sharp contrast with the allegation set out in the petition notwithstanding, when he was taken to task in cross-examination as regards the actual date he was allegedly beaten, he went on a journey of conflicting

statements by admitting that he was beaten up on 19<sup>th</sup> May, 2021 by about 100 people over the illegal allocation of plots in Roma Ward. He also admitted that the Medical report produced in relation to his alleged assault is dated 19<sup>th</sup> May, 2021.

18.06 PW2 later changed his statement and averred that he was beaten up on 12<sup>th</sup> August, 2021 but could not remember the day that he visited the hospital. He admitted in cross-examination that he was not actually rescued by the Police as he tried to put it in examination in Chief, but that he was actually detained by the Police for four days and was only released on Police bond when his UPND leaders signed for the same. PW2 refuted the assertion that he was detained for dishing out money to the people who were on the voting queue and attempting to bribe Police officers. He told the Court that he did not know the offence with which he was charged.

18.07 PW2, when pushed further in cross-examination admitted that he was the UPND Ward Secretary for Raphael Chota Ward and was championing the interest of UPND.

18.08 In a quest to corroborate the allegation that PW2 was beaten by the 1<sup>st</sup> Respondent's team on 12<sup>th</sup> August, 2021. PW3 testified that he was also a polling agent at Chipata

Community polling station and allegedly saw the 1<sup>st</sup> Respondent going after PW2. PW3 introduced another allegation that he was also beaten on 18<sup>th</sup> June, 2021 in the presence of the 1<sup>st</sup> Respondent.

18.09 In cross-examination, PW3 admitted that he did not show proof that he was a polling agent and when referred to pages 13 and 14 in the 1<sup>st</sup> Respondent's Bundle of documents, PW3 agreed that according to the said document, the 1<sup>st</sup> Respondent was diagnosed Covid-19 positive on 16<sup>th</sup> June, 2021 and was in isolation for 14 days including 18<sup>th</sup> June, 2021.

18.10 PW3 admitted in cross-examination that he had no medical report to prove allegations of being beaten. He admitted also that being a UPND member, he was not happy that the 1<sup>st</sup> Respondent emerged victorious as elected Member of Parliament for Mandevu Constituency.

18.11 The other witness who spoke to the allegation of violence at the instance of Machende and Katman in the presence of the 1<sup>st</sup> Respondent on 18<sup>th</sup> June, 2021 is PW9 (Simon Mwansa). However, just like PW3, he admitted in cross-examination that there was no such an allegation in the petition in relation to 18<sup>th</sup> June, 2021. Further, he had no Police Medical Report to prove his allegation of assault.

PW9 also admitted that according to the documents at pages 13 and 15 of the 1st Respondent's Bundle of Documents, the 1<sup>st</sup> Respondent was in isolation for 14 days after testing Covid-19 positive.

18.12 I critically applied my mind to the submissions of the Petitioner's Learned Counsel in respect to the allegation of undue influence. It was submitted that the evidence of PW2, PW3, PW4, PW5, PW6, PW7 and PW9 was that they were attacked by people in the presence of the 1<sup>st</sup> Respondent, though on separate incidents. To sum up, PW2 alleged that he was beaten up by Martin, Machende and Katiti who were in the company of the 1<sup>st</sup> Respondent. PW3 alleged that on 18<sup>th</sup> June, 2021 he was beaten up by Nelson Changwe alias Katman, Machende, Martin, Chisanga and others he could not remember but in the presence of the 1<sup>st</sup> Respondent. PW4 alleged that he was stoned by persons who were with the 1<sup>st</sup> Respondent on 22<sup>nd</sup> July, 2021.

18.13 PW5 alleged that he was with his brother one Joram Leta when they were chased by PF supporters who were armed with knives, catapults and pangas. PW5 testified that he saw his brother being beaten to death by a mob but was able to identify Katman, Machende and Martin who were with the 1<sup>st</sup> Respondent in the car at the scene.

18.14 PW6 and PW7 alleged that they were attacked on 31<sup>st</sup> May, 2021 by PF cadres in company of the 1<sup>st</sup> Respondent and PW9 was allegedly attacked on 18<sup>th</sup> June, 2021 by Bwalya alias Machende, Nelson Changwe alias Katman or Katiti; again in the presence of the 1<sup>st</sup> Respondent.

18.15 Learned Counsel for the Petitioner submitted therefore that the record will show that witnesses testified about being attacked by the same persons in the company of the 1<sup>st</sup> Respondent at different places, different times and different wards, the said attacks were done by and with the knowledge and consent of the 1<sup>st</sup> Respondent.

18.16 According to the Petitioner's submission the alleged attackers were de facto agents of the 1<sup>st</sup> Respondent.

18.17 The evidence of PW2 and PW3 sends out a red flag considering that both witnesses are UPND members with their own interest to serve. Guidance was given by the Constitutional Court in the case of *Steven Masumba v Elliot Kamondo*<sup>13</sup> where it was held that:-

The evidence of partisan witnesses should be treated with caution and requires corroboration from an independent



source to eliminate the danger of exaggeration and falsehood.

18.18 In casu, both PW2 and PW3 are partisan witnesses whose evidence was not corroborated by any independent source. They both admitted in cross-examination of being UPND members who were not happy about the election victory of the 1<sup>st</sup> Respondent.

18.19 Further, there is the evidence of PW1 one Alex Mwansa, the District Elections officer for Lusaka. He denied receiving any written report of violence from the Petitioner or any other person, consequently, the 2<sup>nd</sup> Respondent's conflict Management Committee did not have any record of reports of violence in Mandevu Constituency.

18.19 In addition, the credibility of PW2 PW3 and PW9 was seriously brought into question. Both PW2 and PW3 admitted in cross-examination that they could not prove that they were polling agents. PW3 and PW9 admitted that the events they narrated of 18<sup>th</sup> June, 2021 were not mentioned anywhere in the petition. I am mindful of the submissions of the Petitioner's Learned Counsel on the issue of un-pleaded allegation which is allowed to glance the record without objection. He referred to the case of

Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (supra) where it was held that:-

A Judge is not precluded from considering a matter that is not pleaded, if such matter is let into the evidence without object.

18.20 Indeed the above cited precedent is the law. However, the crux of the matter is that what is pleaded in relation to the alleged assault of PW2 is different from the evidence adduced therefore contradictory.

18.21 In any case, the 1<sup>st</sup> Respondent responded to the allegation to the effect that during the period 18<sup>th</sup> June, 2021 he had tested Cov-19 positive and was in isolation at his home.

18.22 I believe the evidence of the 1<sup>st</sup> Respondent because his explanation as regards the documents at pages 13, 14 and 15 of his Bundles of Documents was not shaken in cross-examination. He lucidly explained the reason the payment receipt from CFB Medical Centre is dated 17<sup>th</sup> June, 2021 and the "To whom it may concern" documents are dated 13<sup>th</sup> September, 2021.

18.23 He explained that at the time he was attended to at CFB Medical Centre, and issued with payment Receipt dated

17<sup>th</sup> June, 2021, he did not have the allegations herein in contemplation, however, when he was served with the within Petition, he proceeded to obtain the documents dated 13<sup>th</sup> September, 2021 at pages 13 and 15 of his Bundles of Documents. I find this to be an honest explanation by the 1<sup>st</sup> Respondent.

18.24 I am guided by the case of *Steven Masumba v Elliot Kamondo (supra)* where it was held that:-

Once a witness is found to be untruthful in material respects, his or her evidence carries very little weight as this goes to the credibility of such a witness.

18.25 In casu, it is the considered position of this Court that the evidence of PW2 (Frank Kaonga) is highly questionable. The allegation in the petition as also observed by the 1<sup>st</sup> Respondent in his final submissions, states that he was assaulted while conducting door to door campaign and distributing campaign material and fliers in Olympia, on 19<sup>th</sup> May, 2021. The Medical Report produced in relation to the alleged assault appear to be dated 19<sup>th</sup> May, 2021. Further, PW2 admitted in cross-examination that he was actually assaulted on the said date in relation to the illegal allocation of plots in Roma Ward.

18.26 I have also seriously considered the issues of whether or not the 1<sup>st</sup> Respondent could be said to have consented to the alleged assault of PW2, PW3 and PW9 by the named persons and I have found the same to be in the negative because the said witnesses were not only discredited in cross-examination but also that the 1<sup>st</sup> Respondent's defence of alibi (by reason of being in isolation) was not negated by the Petitioner.

18.27 Clearly, the evidence adduced by PW2, PW3 and PW9 does not in any way prove that the illegal acts of violence alleged by the Petitioner were committed by the 1<sup>st</sup> Respondent or with his knowledge, consent or approval or his appointed election or polling agent. Further, the said evidence does not prove that as a consequence of the alleged violence, the majority of voters in Mandevu Constituency were, or may have been prevented from electing their preferred candidate.

2) *The Petitioner alleged also that the violence which characterized the campaign and elections was recorded in Ngwerere Ward 22 in May 2021. One Boyd Khondowe, a member of the Petitioner's campaign team, and a Ward Councillor candidate together with some youths was attacked by PF cadres from the 1<sup>st</sup> Respondent's campaign team. His personal motor vehicle registration No. BAP*

*6779 was damaged, and assault was occasioned on him as the Petitioner's campaign team was putting up posters in the Ward*

18.28 I must reiterate here that in order for an election to be nullified under section 97(2) of the Electoral Process Act No. 35 of 2016, the Petitioner must prove that the misconduct or illegal practice was committed by the 1<sup>st</sup> Respondent, or with the consent, knowledge or approval of the 1<sup>st</sup> Respondent or his election/polling agent. I am guided by the case of *Sunday Chitungu v Rodgers Mwewa and The Attorney General*<sup>14</sup> where the Constitutional Court held that:-

“Under the Electoral Process Act, an allegation of misconduct is proved only where it is shown that it was done by the candidate or their election or polling agent or by someone else but with the candidate or their agent's knowledge and consent or approval. To warrant nullification, the Court must also find that by virtue of the illegal act, the majority were prevented or were likely to have been prevented from electing a candidate of their choice.”

18.29 I am further guided by the case of *Chrispin Siingwa v Stanley Kakubo* (supra) where it was held that:-

“Regulation 55 (1) of the Electoral Process (General) Regulations is succinct and is in line with the definition of an election agent in section 2 of the Electoral Process Act. This is that an election agent is one who is specifically appointed and named as such in the candidate’s nomination paper. The fact that the Legislature was specific on the definition of election agent was meant to avoid endless permutations of who an agent is in particular circumstances.”

18.30 The import of the aforecited precedent is that not every member of a political party is a candidate’s appointed agent. More so that in a General Election there are many candidates from each participating Political Party. The law therefore, limits the individuals whose actions or omissions may affect a candidate.

18.31. The evidence on record as adduced by PW6 is that on 31<sup>st</sup> May, 2021, he was attacked and beaten with chains, by PF cadres in the presence of the 1<sup>st</sup> Respondent. The said cadres also damaged his motor vehicle. In cross-examination, PW6 admitted that he did not mention

anything about being beaten by the 1<sup>st</sup> Respondent in examination in chief. He further admitted that he reported the matter to the police, but the 1<sup>st</sup> Respondent has never been arrested in connection with the same.

18.32 Still in cross-examination, PW6 admitted that the only day he went to the hospital was 31<sup>st</sup> May, 2021, however when referred to his medical report and receipt from Chipata Level One Hospital dated 1<sup>st</sup> June, 2021, he changed his statement and stated that he also went to the hospital on 1<sup>st</sup> June, 2021. He also admitted that he was not happy that the Petitioner lost the elections.

18.33 PW7 in an attempt to corroborate PW6's testimony averred that he saw the 1<sup>st</sup> Respondent slap PW6. In cross-examination, PW7 stated that he was not aware that PW6 in his own testimony had not mentioned anything about being slapped by the 1<sup>st</sup> Respondent. PW7 admitted that PW6 petitioned his loss as UPND ward councilor candidate, he however lost the petition before the Local Government Election Tribunal.

18.34 It is the considered position of this Court that the credibility of PW7 as a witness is brought into serious question, considering that the person who was allegedly slapped by the 1<sup>st</sup> Respondent, did not mention anything

about being slapped. How can in the natural sequence of things be that a person who was slapped could say nothing about it, and a third party should be the one to tell the Court that he saw the said person being slapped? Clearly the evidence of PW7 cannot be believed.

18.35 It cannot be denied that there were a series of violent clashes between UPND and PF supporters in Lusaka Province and the same led to the campaign ban by the 2<sup>nd</sup> Respondent. A clear analysis of the evidence from PW6 and PW7 shows that indeed PW6 was a victim of an attack which resulted in the damage of his motor vehicle registration number BAP 6779 as per exhibit "AM9".

18.36 However, there is no evidence whatsoever connecting the violence to the 1<sup>st</sup> Respondent or his election/polling agent. Further, there is no evidence that the violence was at the instance of other people but with the consent, knowledge or approval of the 1<sup>st</sup> Respondent or his election/polling agent. I come to this conclusion because the evidence of PW6 and PW7 notwithstanding, the said evidence was discredited in cross-examination, and cannot be relied on. There is also no evidence that by virtue of the said illegal act, the majority of the voters were prevented or were likely to have been prevented from electing a candidate of their choice.



18.37 In fact, PW6 admitted in cross-examination that he voted from White Mwale - 1 polling station where the total number of ballots cast was 611. The 1<sup>st</sup> Respondent got 371 votes and the Petitioner got 192 votes. Despite declining to confirm that the majority of the voters voted, clearly from the figures, the majority voters at the polling station that PW6 voted from cast their ballot in favour of the 1<sup>st</sup> Respondent as their preferred candidate.

18.38 I find and hold that the Petitioner has failed to prove his allegation of undue influence in form of violence during the campaigns in Ngwerere Ward 22 in May, 2021 as the same cannot be linked to the 1<sup>st</sup> Respondent and or his appointed agents.

3) *Turning to the Petitioner's allegation that after filing of nominations on or about 22<sup>nd</sup> July, 2021, Fred Matuvu Maliwe a member of the petitioner's campaign team was attacked using stones by well-known PF cadres of the 1<sup>st</sup> Respondent's campaign team as they were leaving the nomination centre in Justine Kabwe Ward 24 of Mandevu Constituency.*

18.39 In considering the evidence of PW4,(Fred Matavu Maliwe) I am guided by the case of *Chrispin Siingwa v Stanley Kakubo (supra)* where the Constitutional Court held that:-

“The threshold in section 97(2) (a) of the Electoral Process Act must be satisfied on the basis of credible and cogent evidence. This entails that the Petitioner must prove at a fairly high degree of convincing clarity, all the allegations and that the majority of the voters were influenced in their choice of preferred candidate.”

18.40 The import of the aforecited precedent is that in order to nullify an election under section 97 (2) (a), the Petitioner must adduce credible and cogent evidence.

18.41 In casu, the allegation in the petition is that on 22<sup>nd</sup> July, 2021 after filing of nominations, PW4 was attacked with stones in Justine Kabwe Ward 24. To the contrary, the evidence on record from PW4 is that he was attacked with stones in Mpulungu Ward 26 by the 1<sup>st</sup> Respondent and his supporters. A stone hit him on the eye and he proceeded to UTH where he was sutured after an x-ray.

18.42 In cross-examination, PW4 admitted that the purported medical report relating to his assault was not signed by

any medical doctor. He also admitted that the document produced at page 31 of the Petitioner's supplementary bundle of documents does not state that the same was authored at UTH. He also admitted that the said document states that he was assaulted by unknown people. PW4 admitted that he never reported the 1<sup>st</sup> Respondent to the police and was not happy that the 1<sup>st</sup> Respondent won the elections.

- 18.43 It is the considered position of this Court that the evidence of PW4 is not credible and cogent as it was visibly shaken in cross-examination. I agree with Learned Counsel for the 1<sup>st</sup> Respondent's submission that it is not logical for PW4 to allege that he was attacked by the 1<sup>st</sup> Respondent when in fact, in the document purportedly authored by medical personnel from UTH, he reported that he was attacked by unknown people. Not only that but also that, in the absence of a stamp from a medical institution on the said document, it is very difficult to ascertain whether the document was authored by medical personnel or any other person out there. The other discrepancy in PW4's evidence is that he was attacked in Mpulungu Ward 26 which is totally different from Justine Kabwe Ward 24 mentioned in the petition.

18.44 Further, the 1<sup>st</sup> Respondent testified that the re-nomination after the death of a parliamentary candidate was actually on 12<sup>th</sup> July, 2021 and not 22<sup>nd</sup> July, 2021 as alleged by the Petitioner. The 1<sup>st</sup> Respondent's evidence was not challenged in cross-examination. The evidence of PW4 does not meet the threshold under section 97 (2) (a) to prove the allegations of violence on the part of the 1<sup>st</sup> Respondent, as the alleged violence has not in any way been connected or linked to the 1<sup>st</sup> Respondent or his appointed agents. This allegation has failed.

- 4) *The Petitioner alleged that in July, 2021 his campaign team experienced disruptions during the meetings, due to PF cadres from the 1<sup>st</sup> Respondent's campaign team throwing stones at them in Roma Ward 20. Further on or about 21<sup>st</sup> July, 2021 a UPND Youth Steven Mapalo belonging to the Petitioner's campaign team was badly beaten by PF cadres as he was found putting up the Petitioner's posters. He sustained a broken jaw and was admitted in Chipata Clinic.*

18.45 The Petitioner did not lead or call any evidence to prove this allegation thereby failing to discharge his burden of proof to the requisite standard.

18.46 The Petitioner's other allegation is that on polling day, the 1<sup>st</sup> Respondent instilled fear and intimidation in would be voters at Matayela Polling Station. The 1<sup>st</sup> Respondent's position is that no one was intimidated and he did not display any PF symbol, hence the voter turn-out was huge.

18.47 I am alive to the provisions of Section 83 (1) of the Electoral Process Act to the effect that:-

"83. (1) a person shall not directly or indirectly, by oneself or through any other person

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

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

18.48 PW8 testified that on polling day (12<sup>th</sup> August, 2021) when the 1<sup>st</sup> Respondent entered the polling station with some people, he was displaying the PF symbol of a fist and caused confusion among the voters, consequently some voters were intimidated and left the queue. PW10 re-stated PW8's evidence.

18.49 In cross-examination, however, PW8 admitted that he was a UPND polling agent and was not happy that the 1<sup>st</sup> Respondent won the elections. In the case of Richwell

*Siamunene v Gift Sialubalo*<sup>15</sup>, the Constitutional Court held that:-

"It is incumbent on the Petitioner to place before Court independent evidence to corroborate and strengthen the testimony of partisan witnesses. This is not only because of the reduced weight attached to their evidence but also of the higher standard of proof required."

18.50 The import of the aforecited precedent is that the Petitioner needs not only call independent evidence to support the evidence of partisan witnesses but also that it should be cogent evidence.

18.51 It is the considered position of this Court that PW8 is undeniably a partisan witness from the UPND who went to the extreme of denying that he did not know the Mandevu Constituency Member of Parliament, when referred to the declaration form, he then stated that the 1<sup>st</sup> Respondent is the Mandevu Member of Parliament, but he is not happy about the same. Surely, the issue of who is the Member of Parliament for Mandevu is a matter in public domain and the very reason PW8 was testifying in Court. Blatantly denying knowledge of who the Member of Parliament, just goes to PW8's credibility as a witness. PW8's evidence was

not corroborated by any other independent evidence, apart from PW10's testimony.

18.52 In the case of *Mwiya Mutapwe v Dominic Shomeno*<sup>16</sup>, the Constitutional Court held that:-

"The issue of credibility of a witness is broad and includes the demeanour and perception on truthfulness of the witness and consistency of one's testimony."

18.53 PW8's testimony was not consistent, despite testifying in examination in chief that some voters were frightened and left the voting queue, he admitted in cross-examination that the number of registered voters at Matayela Polling Station was 996, out of which 672 ballots were cast whereby the 1<sup>st</sup> Respondent polled 354 votes while the Petitioner polled 282. PW8 also admitted that only 336 people did not vote (*Ref to pages 8 of 1<sup>st</sup> Respondent's Bundle of Documents*).

18.54 It is evident from the figures to conclude that the majority which is 69.48% of the voters at Matayela Polling Station cast their votes in favour of their preferred candidate. The Petitioner's allegation that there was fear and intimidation at the named polling station has no limb to stand on considering that even his own witness PW1 confirmed that the voter turn-out in the general elections was very good.

18.55 Further, it is inconceivable for the Petitioner to expect this Court to believe that the 1<sup>st</sup> Respondent was displaying a PF party symbol at a polling station, on polling day in full view of the ZNBC crew, knowing fully well that the same is a public broadcaster which was recording the 1<sup>st</sup> Respondent as he cast his vote. RW2 one Adrian Banda testified that he went to the polling station with the ZNBC and was not aware about any display of the PF party symbol by the 1<sup>st</sup> Respondent. RW2 was not even cross-examined by the Petitioner.

18.56 Having critically analysed all the evidence adduced in relation to Petitioners allegation that voters were intimidated, I have come to the inescapable conclusion that the Petitioner has not met the threshold required under section 97(2) (a) of the Electoral Process Act No. 35 of 2016 to prove his allegation as there is no credible evidence in relation to the same.

The Petitioner despite alleging that a UPND youth was abducted did not even bother to call any evidence relating to the same, the Petitioner approached the allegation with laxity despite being aware that election petitions are very important matters of public concern.



5) *The Petitioner also alleged that a UPND youth Yoram Leta a member of the Petitioner's campaign team was murdered on 20<sup>th</sup> July, 2021 by PF cadres from the 1<sup>st</sup> Respondent's campaign team for not adhering to order of no posters in their purported stronghold in Mulungushi Ward 21.*

18.57 I must state here that only one witness was called by the Petitioner to support the allegation that one Joram Leta a UPND member was murdered on 19<sup>th</sup> July, 2021 by PF cadres who were members of the 1<sup>st</sup> Respondent's campaign team, in Mulungushi Ward 21.

18.58. The evidence as adduced by PW5 was that he and his elder brother, the deceased Joram Leta were part of a group of UPND youths who were erecting a billboard at Mandevu junction on 19<sup>th</sup> July, 2021. They were confronted by a group of PF cadres among them Katman, Machende and Martin, but they managed to repulse them. When the UPND youths retreated to their meeting camp, for a meal, they were again confronted by a larger group PF cadres including Katman, Machette and Martin. The said PF cadres were armed with knives and machetes and the UPND youths scampered in different directions.

18.59 According to PW5, Joram Leta was pursued by the PF cadres and was beaten while he helplessly watched from a distance. He also allegedly saw the 1<sup>st</sup> Respondent parked at the scene in a PF branded motor vehicle with registration number ACL. The following day when he visited UTH in search of his brother, he was just asked to identify Joram Leta's body.

18.60 In cross-examination however, PW5 admitted that he is a UPND member who is not happy that the Petitioner lost the elections. He also admitted that he gave a statement to the police and did not mention the 1<sup>st</sup> Respondent, consequently the 1<sup>st</sup> Respondent has never been arrested for murder. PW5 also admitted that he never reported the incident to the 2<sup>nd</sup> Respondent's conflict management committee.

18.61 The issue for determination herein is whether the 1<sup>st</sup> Respondent is in any way linked to the illegal act, whether the illegal act was done with the consent, knowledge, or approval of the 1<sup>st</sup> Respondent or his election/polling agents, and whether the illegal act prevented the majority of voters from voting for their preferred candidate. I am guided by the case of *Nkandu Luo (Prof) and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the*

Attorney General (supra) where the Constitutional Court held that:-

"In order for a Petitioner to successfully have an election annulled pursuant section 97(2) (a) there is a threshold to surmount. The first requirement is for the Petitioner to prove to the satisfaction of the Court that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent.

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

18.62 In casu, it must be noted that PW5 is not only the brother to the deceased but also a UPND member, and therefore his evidence must be treated with utmost caution. I am persuaded by the Ugandan case of *Banatib Issa Taligola v*

Electoral Commission and Wasugoya Bob Fred<sup>17</sup> where it was stated that:-

"The Court is acutely aware that in election contests of this nature, witnesses most of them motivated by the desire to score victory against their opponents deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain."

18.63 PW5 explained that when the alleged PF cadres were chased by UPND cadres at Mandevu junction, they sought reinforcement and launched an attack on the UPND cadres who were at their meeting camp, and in the process beat up Joram Leta. PW5 was very specific when he mentioned names of Machette, Martin and Katman as being among the PF cadres that beat up the deceased UPND member. In an effort to place the 1<sup>st</sup> Respondent at the scene, PW5 averred that he saw the 1<sup>st</sup> Respondent in a PF branded motor vehicle with registration number ACL.

18.64 In cross-examination however, PW5 admitted that when he gave a statement to the police, he did not mention the 1<sup>st</sup> Respondent. He also admitted that the 1<sup>st</sup> Respondent has never been arrested in connection with the allegation of murder relating to Joram Leta.

18.65 It cannot be denied that UPND and PF cadres engaged in violent clashes in Lusaka Province and were temporarily banned by the 2<sup>nd</sup> Respondent from campaigning. That notwithstanding, it must be appreciated that not every member of a political party is a candidate's agent. I am guided by the case of *Lewanika v Chiluba* (supra) where the Supreme Court stated 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."

18.66 In casu, the Petitioner has not brought forth any evidence to prove that the alleged PF cadres Machette, Martin and Katman who were in PF regalia and allegedly beat up Joram Leta, were the appointed election or polling agents of the 1<sup>st</sup> Respondent. It is the considered position of this Court that the alleged acts of violence of the said PF cadres cannot therefore be attributed to the 1<sup>st</sup> Respondent as they were not his appointed agents.

18.67 The Petitioner has also not proved that the 1<sup>st</sup> Respondent was in any way connected to the beating and alleged

murder of Joram Leta, or that the same was done with the consent, approval or knowledge of the 1<sup>st</sup> Respondent or his appointed agent.

18.68 This position was succinctly put in the case of *Richwell Siamunene v Gift Sialubalo* (supra) where the Constitutional Court held that:-

“When section 83 is read with section 97, it is clear that the violence or threat of violence must be perpetrated by the candidate or with the candidate's knowledge and approval or consent or that of his election or polling agent. In order for the candidate to be liable for the illegal practice or misconduct, it must be shown to be that of his official agent, there must be proof to the required standard that he had both knowledge of it and approved or consented to it, or that his election or polling agent had knowledge and consented to or approved to it.”

18.69 I must acknowledge that the testimony of PW5 about the assault of Joram Leta resulting in his death is very sad and disheartening. It is apparent from the evidence on record that the sad incident happened in the broad day light and in the open. Nonetheless, what is absurd is that only PW5

testified to this allegation which is in the ordinary course of things is expected to have been witnessed by many people. In addition, PW5 was at great pains in cross-examination to explain how he identified the 1<sup>st</sup> respondent as having been with the named persons who allegedly assaulted the said Jeram Leta.

18.70 PW5's evidence is that he saw the 1<sup>st</sup> Respondent near the scene where the deceased Joram Leta was assaulted. That the 1<sup>st</sup> Respondent was in a PF branded motor vehicle with a number plate ACL 2021. PW5 appeared lost when it was put to him that there was no such number plate during the 2021 election campaign period. I find the evidence of PW5 to have been greatly discredited in cross-examination and the same is manifestly unreliable in respect to placing the 1<sup>st</sup> Respondent at the centre of the brutal violence against the person of Jeram Leta.

18.71 Further, the Petitioner has also not proved that the alleged incident of violence on 19<sup>th</sup> July, 2021 was widespread. The word "widespread" was defined to mean "widely distributed and disseminated" in the case of *Sunday Chitungo Maluba v Rodgers Mwewa and the Attorney General* (supra).

18.72 In fact in cross-examination, PW5 admitted that voter turnout was good at the polling station he voted from and he voted for his preferred candidate. PW5 also admitted that the majority of the voters also voted for their preferred candidate who is the 1<sup>st</sup> Respondent.

18.73 It is the considered position of this Court that out of the eight wards in Mandevu Constituency, the alleged violence which resulted in the death of Joram Leta happened in only one ward namely Mulungushi Ward 21 and cannot be said to have been widespread, neither can it be said that the majority of voters in that ward were prevented from voting for the candidate of their choice. The Petitioner has therefore failed to prove his allegation against the 1<sup>st</sup> Respondent in relation to the violent act leading to the death of Joram Leta in Mulungushi Ward 21.

6) *The Petitioner under the heading "Undue Influence" further alleged that his branded campaign vehicles was not allowed to move freely within Mandevu Constituency throughout the stipulated campaign period, whilst the 1<sup>st</sup> Respondent's team was allowed to move freely.*

*Additionally under the heading "alteration of votes" he alleged that the Polling Day was characterized by illegni*



*practices as Police caught PF members changing election result figures in Chaisa Ward in Mandevu, contrary to the Electoral Code of Conduct.*

18.74 Whereas, the 1<sup>st</sup> Respondent addressed these two allegations in his testimony, the Petitioner did not lead any evidence to establish and prove the same. The fact that the burden of proof lies on the Petitioner to prove his allegations at a fairly high degree of convincing clarity, these allegations have failed as the Petitioner has lamentably failed to discharge the said burden.

7) *Under bribery, the Petitioner alleged that on the eve of the election day, the 1<sup>st</sup> Respondent was distributing money to would-be voters in Mandevu Constituency, in a bid to solicit for votes contrary to the Electoral Process Act and the Electoral Code of Conduct.*

18.75 I must state here that section 81 of the Electoral Process Act No. 35 of 2016 provides that:-

*"81. (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 or for the*

benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election."

18.76 I am also persuaded by the Ugandan case of Col Rtd Dr. Kizza Besigye v Museveni Yoweri Kaguta and Electoral Commission<sup>18</sup> where the Supreme Court of Uganda held that:-

"The offence of Electoral bribery is not committed unless the gift, money or other consideration is given to or received by a person who is proved to be a registered voter."

18.77 In another case of Col Rtd Kizza Besige v Museveni Yoweri Kaguta<sup>19</sup>, it was stated that:-

"...the mere distribution of money to agents or their supporters did not amount to bribery unless the corrupt motive and status of the receiver of the money as a voter were established..."

It is therefore not enough for a Petitioner or any person to merely allege that agents gave money to voters, a high degree of specificity is required. The agent must be

named, the receiver of the money must be named and he/she must be a voter, the purpose of the money must be to influence his vote."

18.78 The import of the aforesaid cases is that in order for distribution of money to amount to bribery, the corrupt motive of soliciting for votes and the status of the receiver as a registered voter must be proved.

18.79 The evidence as adduced by both PW11 and PW12 is that on 11<sup>th</sup> August, 2021 around 18:00 hours, the 1<sup>st</sup> Respondent gave them K170.00 each at the residence of the former PF councilor for Raphael Chota Ward, one Mr. Tamba. Despite PW11 stating in cross-examination, that he was a registered voter and voted from National Housing Authority, no evidence was led by the Petitioner to prove that indeed PW11 was a registered voter as no voter's card was produced before Court.

18.80 Further PW12's evidence was full of inconsistencies and his demeanour appeared to be that of a witness who had been coached on what to say to avoid contradicting PW11's testimony. In cross-examination PW12 on several occasions evaded the question of approximating the number of people at the meeting. PW12 contradicted

PW11's testimony by stating that the alleged PF members who informed them about the meeting, met them along the road as they walked from Chipata market, when PW11 had earlier told the Court that the PF members were moving door to door and found them at his house.

18.81 PW12 was at pains to answer the question of who invited him as a witness. PW12 contradicted himself when he admitted that he was invited as a witness by the Petitioner but had never told the Petitioner that he received K170.00 from the 1<sup>st</sup> Respondent. PW12 then later changed his statement and stated that he knew about the hearing of the petition as he followed the proceedings on Tuesday, 28<sup>th</sup> September, 2021. However, there were no proceedings whatsoever in relation to this petition on the stated date. All these inconsistencies just point to the credibility of PW12 as a witness.

18.82 The evidence of the 1<sup>st</sup> Respondent on the other hand was that on 11<sup>th</sup> August, 2021 he was distributing face masks and hand sanitizer with the Former Republican President Dr. Edgar Lungu. He later proceeded to Government Complex for a PF virtual rally which was held till slightly before 18:00 hours. His evidence was confirmed by 1<sup>st</sup> RW4 who maintained that they only left Government Complex around 19:00 hours due to heavy built up of traffic.

18.83 Having critically analysed all the evidence on record, I find that the evidence of RW4 is more credible as he remained unshaken in cross-examination. Further that the PF virtual rally was beamed by many TV stations therefore, the 1<sup>st</sup> Respondent's alibi is a matter which is easily verifiable or confirmable. It is inconceivable for the Petitioner to expect this Court to believe that the 1<sup>st</sup> Respondent was campaigning and giving out money around 18:00 hours when campaigns had closed by that time on 11<sup>th</sup> August, 2021. PW11 and PW12's evidence is not cogent, more so that the alleged incident of bribery was not reported to the police or the 2<sup>nd</sup> Respondent's electoral conflict Management Committee

18.84 The Petitioner has not met the requisite threshold of discharging the burden of proof in connection with the elements in Section 97 (2) of the Electoral process Act No. 35 of 2016. The allegation of bribery on 11<sup>th</sup> August, 2021, in form of giving out money by the 1<sup>st</sup> Respondent or vide his election or polling agents, has failed.

8) *The Petitioner alleged that on 24<sup>th</sup> July, 2021, the 1<sup>st</sup> Respondent was distributing bags of mealie meal to would-be voters in a bid to solicit for votes in Ngwerere Ward.*

18.85 Plainly without belaboring, I must out rightly state here that due to the Petitioner's glare lack of evidence as he did not call any witness to speak to this allegation, the bribery allegation in form of distribution of mealie meal cannot stand, it has also failed.

- 9) *The Petitioner alleged that there was misconduct for instance on 15<sup>th</sup> June, 2021, the 2<sup>nd</sup> Respondent imposed a campaign ban on PF and UPND in Lusaka. Despite the ban being in effect, the PF Secretary General Davies Mwila held a rally and road show in Raphael Chota Ward 25 in Mandevu Constituency on 26<sup>th</sup> July, 2021, thereby disregarding the ban and violating the 2<sup>nd</sup> Respondent's exercise of lawful authority. Consequently, an unfair advantage was created for the 1<sup>st</sup> Respondent over all the other contesting candidates.*

18.86 The Petitioner called PW19 and PW20, namely Jane Kachinga and Pethias Kaswende respectively. PW19 and PW20, testified that they saw the 1<sup>st</sup> Respondent campaigning during the ban. PW19, specifically cited 26<sup>th</sup> July, 2021 as the date when he saw the 1<sup>st</sup> Respondent conducting political campaigns. PW20 was not sure of the

date but maintained that the 1<sup>st</sup> Respondent campaigned during the ban.

18.87 In response to the allegation, RW1 averred that by 26<sup>th</sup> July, 2021, the 2<sup>nd</sup> Respondent had already lifted the ban on campaigns in Lusaka District against both the PF and UPND.

18.88 I have no doubt that the date when partial and full lifting of the ban on political campaigns were made, is in public domain as the 2<sup>nd</sup> Respondent used to hold press briefings and the same were publicized by many media platforms. Nonetheless, the Petitioner did not produce documentary evidence to prove that 26<sup>th</sup> July, 2021 fell within the period of the ban of political campaigns. That notwithstanding, the issue of conducting political campaigns during the ban is a matter which should have been reported to the 2<sup>nd</sup> Respondent in a formalized manner and the same should have been dealt with if at all by the Conflict Management Committee. Further, the Petitioner has not demonstrated how the alleged conduct of the 1<sup>st</sup> Respondent of campaign during the ban prevented or was likely to have prevented the majority of prospective voters from electing a candidate of their choice.

18.89 The Petitioner has failed to prove his allegation of misconduct at the instance of the 1<sup>st</sup> Respondent as regards campaigning on 26<sup>th</sup> July 2021, the period under the ban by the 2<sup>nd</sup> Respondent.

10) The Petitioner made an allegation that:-

- (i) *There was a non-conducive environment and in Chaisa Ward, one of the polling stations experienced power interruption and only one lamp was the source of lighting. The 2<sup>nd</sup> Respondent's official was the only one able to see the stamp at the back of the ballot paper, marks or ticks on the ballot papers. This was contrary to the Electoral Process Act, as Agents, Monitors and Observers must be able to see clearly in order to authenticate or validate the results. The situation at the polling stations was not conducive environment to account for ballots.*

18.90 Whereas the Respondent (RW1) gave a response to this allegation that the said allegation was never brought to his attention and that he was never involved in the disruption of the power. The Petitioner did not lead any evidence to



establish and prove the said allegation. The Petitioner has therefore, failed to prove his allegation.

11) *The Petitioner made two allegations that are interrelated which are:-*

(i) *That during the entering of figures by the 2<sup>nd</sup> Respondent at the totalling Center, UPND's polling agents raised concern with regard to the transposition of numbers whilst waiting for a clarification from the 2<sup>nd</sup> Respondent, a huge crowd of PF cadres from the 1<sup>st</sup> Respondent's campaign team stormed the building, beat up the polling agents and Petitioner's Constituency Manager who lost his front teeth as well as the Ward Secretary for Ngwerere Ward, and*

(ii) *That during the totalling of figures at the Constituency Totalling Center, some copies of the Gen 20 forms were not accounted for as they could not be traced.*

18.91 I will consider these allegations at the same time.

In relation to the allegations of a non-conducive environment at the totaling center, I must state here that there are so many inconsistencies in the evidence of PW14, PW15, PW16, PW17 and PW18 on what led to the

commotion at the Mandevu totaling center on 14<sup>th</sup> August, 2021.

18.92 The evidence of PW14, PW15, and PW17 was that the returning officer announced different results from those on the GEN 20 forms in relation to local government elections in Roma Ward 20. The votes for UPND aspiring councilor one Luka were transposed and given to the PF aspiring councilor.

18.93 PW16's evidence was that the commotion arose as a result of the delay in announcing results by the returning officer and the UPND members confronted him over the same. PW18 on the other hand testified that the returning officer was announcing parliamentary results and the 185 votes polled by the 1<sup>st</sup> Respondent were given to the Petitioner who had actually polled 335 votes.

18.94 Further according to PW15, when a complaint was raised with the returning officer over the results, he did not pay any attention to the complaint. PW17 on the other hand also testified that the returning officer conceded that there was a mistake and the same would be rectified.

18.95 PW14, PW15 and PW16 further contradicted themselves when PW14 testified that they were taken to Chipata level

One Hospital by Zambia Army Officers, while PW15 and PW16 stated that they were taken to the said hospital by Zambia police officers. PW14 also stated that from Chipata Level One Hospital to UTH, they used his friend's vehicle as they did not have any money, PW15 on the hand stated in cross-examination that they used a taxi provided by the Petitioner.

18.96 In relation to where the 1<sup>st</sup> Respondent was at the time of the fracas PW15 and PW17 alleged that the 1<sup>st</sup> Respondent instructed PF members to beat them up. PW16 to the contrary stated that the 1<sup>st</sup> Respondent was seated at the back, in cross-examination, PW16 admitted that he did not hear the 1<sup>st</sup> Respondent uttering any word.

18.97 Surely with all the aforesaid inconsistencies, the evidence of PW14, PW15, PW16, PW17 and PW18 is highly questionable as it goes to their credibility and should be approached with caution. Without doubt, PW14 and PW17 are partisan witnesses representing the interest of UPND. PW17's evidence of being a media personnel from Chundu Media was manifestly discredited in cross-examination when he admitted that on 19<sup>th</sup> May, 2021 the day of nominations, he was wearing a UPND t-shirt but could not remember if the same was labelled 'Zambia Loves HH'.

18.98 PW17 also admitted that he had been selling UPND membership cards on his facebook page. PW15, PW17 and PW18 did not produce any accreditation letters of sponsorship from the institutions that allegedly sponsored them and it leaves a doubt as to whether they were sponsored by any independent organization.

18.99 Further concerning the video recorded by PW17, despite him testifying that the 1<sup>st</sup> Respondent was inside the totaling center at the time of the commotion and only went outside when PW14 was allegedly being dragged outside, PW17 admitted in cross-examination that the video does not depict the 1<sup>st</sup> Respondent coming out of the totaling center as he had earlier testified. The said video clearly depicts the 1<sup>st</sup> Respondent walking towards the building from outside and this resonates well with his own testimony and that of RW5 that he only arrived at the totaling center when the people causing confusion were being pushed outside by the police officers.

18.100 In relation to the two videos allegedly recorded by PW18, in support of the allegation that PF members beat up people and caused commotion, PW18 admitted that the videos were a short version of what she recorded and she did not know if the same were tampered with. The only question that lingers on the mind of this Court is what

portions of the video were edited and what was sought to be concealed from this Court. I am alive to the provisions of section 9(3) of the Electronic Communications and Transactions Act No.4 of 2021 which are to the effect that:-

"9(3) In any legal proceedings, when assessing the evidential weight of a data message, regard shall be had to -

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained..."

18.101 Based on the foregoing provision of the law, it is the considered position of this Court that very little weight can be attached to the videos at pages 42 and 43 produced by PW18 as the reliability in the manner in which the same were generated, stored and the integrity maintained is highly questionable. In any case the same video evidence exonerated the 1<sup>st</sup> Respondent as it depicts him outside the Totaling Hall and away from the fracas.

18.102 Further, PW14 mentioned having been beaten by Joe, Mika and Luka Chisanga. PW18 also mentioned the said Joe and Mika as PF members, however, there is no evidence before

this Court to the effect that they were the 1<sup>st</sup> Respondent's appointed agents. In cross-examination of RW5, the Petitioner tried to suggest that Lukas Chisanga was an agent of the 1<sup>st</sup> Respondent, however, RW5 maintained that he was just an accredited party official from the PF. There is further no evidence on record that the incident of violence was widespread and affected the majority of voters in Mandevu from casting their vote in favour of their preferred candidate.

18.103 It is the considered position of this Court that the Petitioner has not brought forth any credible and cogent evidence to prove that the illegal act of violence at the totaling center was committed by the 1<sup>st</sup> Respondent or that the same was committed with the knowledge and consent or approval of the 1<sup>st</sup> Respondent or his duly appointed election/polling agent, considering that not every alleged member of the Patriotic Front (PF) is the 1<sup>st</sup> Respondent's appointed agent.

18.104 It is also the considered position of the Court that the said incident of violence which happened at the Mandevu Constituency Totaling Center could not have in any way prevented the majority of the voters in the constituency from electing their preferred candidate, because the center was not a polling station and voting had already closed at

the time. This was confirmed by PW1 who stated that the same could not have affected the voting pattern.

18.105 I therefore find and hold that the Petitioner has failed to prove his allegation that the 1<sup>st</sup> Respondent's campaign team stormed the totaling center and beat up polling agents, the Petitioner's constituency manager who lost his front teeth and the Ngwerere Ward Secretary and that the same affected the outcome of the elections in Mandevu Constituency.

18.106 As regards the Petitioner's allegation that during totalling of figures some copies of the Gen 20 forms were not accounted for as they could not be traced. I must state here that when the conduct of elections is brought into question, section 97(2) (b) of the Electoral Process Act No. 35 of 2016 comes into play. The same provides that:-

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

(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."

18.107 I am guided by the case of *Giles Chomba Yambayamba v Kapembwa Simbao and 2 Others*(supra) where the Constitutional Court held that:-

"It is unequivocal that section 97(2) (b) relates to non-compliance with the law in the 'conduct of elections'. It calls for annulment of elections in the event that there has been non-compliance with the principles laid down in the Electoral Process Act in as far as the conduct of elections is concerned. The question then arises who has conduct of the elections? The answer in our view lies in Article 229(2) (b) of the Constitution of Zambia. It reads: 'The Electoral Commission shall... (b) conduct elections and referenda...'



Thus the Constitution expressly gives the function to conduct elections to the Electoral Commission of Zambia. ECZ must fulfill its function by ensuring that the requirements of the Electoral Process Act are respected and observed in the electoral process. Section 97(2)(b) therefore concerns non-compliance to the provisions of the Act, by ECZ the body charged with the conduct of elections...and not the candidates to an election or their agents."

- 18.108 The above guidance was re-affirmed in the cases of *Margaret Mwanakatwe v Charlotte Scott and the Attorney General*<sup>20</sup> and *Dean Musale v Romeo Kangombe*<sup>21</sup>.
- 18.109 The import of the aforecited precedents is that as per section 97(2)(b) the non-compliance in the conduct of elections relates to the Electoral Commission of Zambia and the said non-compliance should affect the election results.
- 18.110 In relation to the allegation that GEN 20 forms were not accounted for as they could not be traced, the only evidence relating to the same as adduced by PW16 was that on 14<sup>th</sup> August, 2021, he received a phone call from one

Councillor Tayali informing him that there was a problem at the totaling center as GEN 20 forms were missing. He then proceeded to his house to collect photocopies he had made of the GEN 20 forms and availed the same to Tayali.

18.111 The Petitioner did not lead any specific evidence to show which GEN 20 forms were being referred to or the polling stations the said GEN 20 forms emanated from. It is the considered position of this Court that it is not the duty of this Court to speculate and make assumptions on which GEN 20 forms were allegedly not accounted for.

18.112 In the absence of any cogent evidence to substantiate the allegation, I find and hold that the Petitioner has failed to prove the said allegation

18.113 In relation to the allegation of transposition of figures in the election results, PW14, PW15 and PW17 stated that the results that were interchanged related to local government election in Roma Ward. PW18 contradicted the other witness by stating that the results that were interchanged related to the parliamentary election, however, when taken to task in cross-examination, she could not state which polling station the said results emanated from and could not point at the figures she mentioned in the 1<sup>st</sup> Respondent's Bundle of Documents

18.114 PW6 averred that there was a single incident relating to the local government election results for Roma ward. An error was made by the 2<sup>nd</sup> Respondent's technical support officer when he entered the results in the system. 289 votes were given to the PF aspiring councilor and 249 to the UPND councilor when the GEN 20 form reflected that the PF councilor had polled 249 votes while the UPND aspiring councilor had polled 289. According to RW6, the said error was resolved and rectified in the system. In cross-examination however, PW6 admitted that there was no proof before Court that the said error was corrected.

18.115 Section 97(4) of the Electoral Process Act No. 35 of 2016 provides that:-

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

- 18.116 I am persuaded by the Ghanaian case of *Nana Addo Dankwa Akufo Addo and Others v John Dramani Mahma and 2 Others*<sup>22</sup> where the Supreme Court of Ghana stated that:-  
“Elections ought not to be held void by reasons of transgressions of the law without any corrupt motive by the returning officer or his subordinate, and where the Court is satisfied that the election was, notwithstanding those transgressions, a real election and was conducted under the existing election law.”
- 18.117 Having analysed the evidence and the law, it is the cogitated conclusion of this Court that the mistake relating to interchanging of results for local government elections occasioned by the electoral officer cannot be the basis for annulling the Mandevu Constituency parliamentary election as the same did not affect the parliamentary results. The Petitioner has not led any evidence to prove that apart from the said omission in the local government election results, the election was not substantially conducted in accordance with the law.
- 18.118 I draw comfort in the Kenyan case of *Karanja Kabage v Joseph Kiuna Kariambegu Nganga and 2 Others*<sup>23</sup>, where it was observed that:-

"An election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner. In determining the question of validity of the election of a candidate, the Court is bound to examine the entire process up to the declaration of results...The concept of free and fair elections is expressed not only on voting day but throughout the election process. Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament"

- 18.119 In casu, there is no evidence whatsoever that the electoral process was flawed throughout from the registration of voters to the declaration of the duly elected member of Parliament for Mandevu Constituency, or that the elections were not free and fair. As per the declaration form the 1<sup>st</sup> Respondent was declared duly elected with a landslide victory of 56, 527 votes leaving a huge margin of 18, 883 between the Petitioner who got 37, 644 votes. In cross-examination of RW6, the Petitioner tried to suggest that the representatives from the other political parties declined to sign the declaration form because they did not agree with the results

18.120 I must state here that Regulation 5(2) of the Electoral Code of Conduct of 2016 provides that:-

“5(2) An election agent or polling agent shall counter sign the election results duly announced or declared by a presiding officer or returning officer, as the case may be, except that failure to countersign the election results by such election agent or polling agent shall not render the results invalid.”

18.121 In casu the returning officer as per declaration form at page 11 of the 1<sup>st</sup> Respondent's Bundle of document's declared that the 1<sup>st</sup> Respondent Christopher Shakafuswa is the duly elected Member of Parliament for Mandevu Constituency as he polled Fifty-Six Thousand Five Hundred Twenty Seven(56,527) votes. The fact that the declaration form was only witnessed by the 1<sup>st</sup> Respondent's election agent, and the other party representatives did not sign does not change the results or invalidate the same. Those are minor flaws which the latin adage describes as “aquila non capit muscas” meaning that the eagle does not catch flies, Elections are not affected by minor flaws

19.0 The petitioner prayed for an order that ballot papers relating to Mandevu Constituency Parliamentary elections be scrutinized, verified and recounted.

19.01 Under Section 99 of the electoral process Act No. 35 of 2016, there are only two reliefs that may be sought in an election petition that is:-

- (a) a declaration that the election was void or
- (b) A declaration that any candidate was duly elected.

19.02 I opine that the Petitioner's prayer for an order that ballot papers relating to Mandevu Constituency Parliamentary elections be scrutinized, verified and recounted is not supported by any law. Section 47 of the Electoral Process (general) Regulations, Statutory Instrument No. 63 of 2016, provides that:-

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

19.03 Further Section 76 of the Electoral Process Act No. 35 of 2016 provides that:-

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.

19.04 The import of the above cited law is that an application for verification, scrutiny and recount of ballot papers cannot be entertained at this stage. This is what was held to be the position of the law in the case of *Christabel Ngimbu v Prisca Chisengo Kucheka & Electoral Commission of Zambia*<sup>24</sup> that an order for a recount is interlocutory and made only on the basis of cogent evidence justifying the making of such an order. Clearly, the relief sought by the Petition cannot be granted at this stage.

## 20.0 CONCLUSION

20.01 Throughout this petition one issue protrudes, that the standard of proof which the Petitioner is required to discharge, is to establish the issues raised in the Petition to a fairly high degree of convincing clarity. In his quest to establish the issues aforesaid, the Petitioner must be



mindful to connect the allegations to the 1<sup>st</sup> Respondent and his election and or polling agents as provided for in Section 97 (2) of the Electoral Process Act No. 35 of 2016. It is therefore, not enough for the Petitioner in an election petition to simply say "I saw the 1<sup>st</sup> Respondent committing electoral malpractices".

20.02

In this era and time of modern technology, gadgets are readily available to capture any moment either by video or audio recording.

20.03

In casu, the Petitioner failed to call tangible and cogent evidence connecting the 1<sup>st</sup> Respondent by himself or his election or polling agents or with his consent to the alleged commission of the electoral malpractices. Section 97 (2) of the Electoral Process Act, No. 35 of 2016 and Regulation 55 (1) of the Electoral General Process (General) Regulation are unambiguous. I therefore agree with the submissions of Learned Counsel for the 1<sup>st</sup> Respondent relying on the English case of *Seaford Court Estates Ltd v Asher* (supra) that it is not the role of a judge to alter that which a statute has woven, but he can and must iron the creases. It is the role of this Court therefore, to give effect to the electoral law as was intended by the framers of the same.

20.04

It is the considered position of this Court that the election is issue cannot be said to be so flawed to call for

annulment. Mandevu Constituency having had about 162,000 registered voters and 101, 297 actual voters clearly shows that the people of Mandevu Constituency expressed their true and free choice, and the majority voted for their candidate of choice who is the 1<sup>st</sup> Respondent herein.

20.05 I therefore find and hold that the 1<sup>st</sup> Respondent **Christopher Shakafuswa** was duly elected as Member of Parliament for **Mandevu Constituency** as the Petitioner has failed to prove his allegations to the required standard of proof.

The Petition is accordingly dismissed.

Each party shall bear their own costs.

Leave to appeal is granted.

**DELIVERED AT LUSAKA THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021.**

  
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Hon. Justice D. Mulenga  
HIGH COURT JUDGE