

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

2021/HP/EP/009

IN THE MATTER OF: A PARLIAMENTARY ELECTION PETITION
FOR MSANZALA CONSTITUENCY SITUATE
IN THE LUSANGAZI DISTRICT OF THE
EASTERN PROVINCE OF THE REPUBLIC
OF ZAMBIA HELD ON THURSDAY, 12TH
AUGUST, 2021.

IN THE MATTER OF: ARTICLE 47, 68 AND 73 OF THE
CONSTITUTION CHAPTER 1 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: SECTION 97, 98, 83 AND 99(b), OF THE
ELECTORAL PROCESS ACT, ACT NO. 35
OF 2016

IN THE MATTER OF: ELECTORAL (CODE OF CONDUCT)
REGULATIONS 2011 STATUTORY
INSTRUMENT No. 52 of 2011

IN THE MATTER OF: THE ELECTORAL COMMISSION OF
ZAMBIA ACT NO. 25 OF 2016

BETWEEN

MARGRET ZULU (FEMALE)
AND

PETITIONER

ELIAS DAKA (MALE)

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

Before the Hon. Mr. Justice M.D. Bowa on 22nd of November 2021

For the Petitioner:

Mr. L. Mwanabo of Messrs. LM Chambers

For the 1st Respondent:

*Mr. P. Songolo with Ms. K. Bukali of Messrs.
Philisong and Partners*

For the 2nd Respondent:

Mr. A. M. Musoka of Messrs. Nari Advocates

JUDGMENT

Cases referred to:

1. *Mubika Mabika vs. Pouiso Njeulu* SC Appeal No. 11 of 2007
2. *Jonathan Kapapi vs. Newton Samakayi*, CCZ Appeal No. 13/2017
3. *Mubita Mwangula vs. Inonga Mutukwa Wina*, SCZ Appeal No. 80 of 2007
1. *Nkanda Luo and the Electoral Commission of Zambia vs. Doreen Sefuke
Mwamba and the Attorney General*, Selected Judgment No. 51 of 2018

5. *Austin Liato vs. Sitwala Switala*, Selected Judgment No. 23 of 2018
6. *Akashambatwa Mbikusitu Lewanika & 4 others vs. Fredrick Titus Jacob Chiluba* (1998) ZR 79
7. *Brelsford James Gondwe vs Cathrine Namugala* Appeal No. 175 Of 2012
8. *Constantine Line vs. Imperial Smelting Corporation* [1941] 2 ALL E.R 165
9. *Khalid Mohammed vs. The Attorney General* (1982) Z.R. 49
10. *Anderson Mazoka and 2 Others vs. Levy Mwanawasa & 2 others.* (2005) Z.R 183.
11. *Mabenga vs. Wina & Others* (SCZ 15 of 2003) [2003] ZMSC 75 (23 September 2003);
12. *Kamanga vs. Attorney-General and Another* SCZ Judgment No. 31 OF 2008
13. *Mbololwa Subulwa vs. Kaliye Mandandi* selected Judgment No. 26 of 2018
14. *Alhaji Waziri Ibrahim vs. Alhaji Shehu Shagari and Others*
15. *Zulu vs. Avondale Housing Project* (1982) Z.R 172
16. *Levison Mumba vs. Peter Daka* SCZ Appeal No. 31 of 2003
17. *Subramanian vs. The DPP* (1956) 1.W.R.L. 965
18. *Chrispin Siingwa vs. Stanley Kakubo* CCZ Appeal No. 7 Of 2017
19. *Muhali George Imbuwa vs. Enock Kaywala Mundia* selected Judgment No. 12 of 2018
20. *Christopher Kalonge vs. Annie Munshya, Electoral Commission of Zambia and Attorney General* SC Appeal No. 115/12
21. *Kapembwa vs. Mamibolwa & Attorney General* (1981) ZMSC 16
22. *Muvi TV Limited vs. Phiri & Another* (Appeal 13 of 2015) [2018] ZMSC 1 (12 January 2018),
23. *Fawaz and Prosper Chilelwa vs. the People* 1995 ZR
24. *Stephen Masumba vs. Elliot Kamondo* selected Judgment No. 53 of 2017
25. *Abiud Kamangu vs. Elijah Muchima* Appeal No. 8 of 2017
26. *Reuben Mtolo Phiri vs. Lemeck Mangani* (Appeal 135 of 2012) [2013] ZMSC 2 (06 May 2013).
27. *Leonard Banda vs. Dora Siliya* (Appeal 95 of 2012) (2013) ZMSC 20
28. *Maseka vs. the People* (1977) Z.R P9
29. *Giles Yamba vs. Simbao & 2 Others* (CC/A 20 of 2016) [2018] ZMCC 259 (29 January 2018);
30. *Margaret Mwanakatwe vs. Charlotte Scott*, Selected Judgment No. 50 of 2018

Legislation referred to:

1. *The Constitutional Amendment Act No. 2 of 2016*
2. *Electoral Process Act, Act No. 35 Of 2016*
3. *Electoral (Code of Conduct) Regulations 2011* Statutory Instrument No. 52 Of 2011
4. *The Electoral Commission of Zambia Act No. 25 Of 2016*

Other Works

1. *Phipson on Evidence, 14th Edition*
2. *Halsbury's Laws of England. Volume 15(4). Fourth Edition*
3. *Electoral Commission of Zambia Registered voters per Polling District/Station 2021*

1. Background

This is a Petition presented by Margret Zulu challenging the election of, Mr. Elias Daka the declared winner of the Msanzala Constituency Parliamentary election held in Lusangazi District of the Eastern Province of the Republic of Zambia, on 12th of August 2021. The Petition was filed into court on the 25th of August 2021 supported by an Affidavit verifying the facts and presented pursuant to articles 47, 68 and 73 of the Constitution of Zambia (as Amended by Act No. 2 of 2016), and sections 97, 98, 83 and 99(b) of the Electoral Process Act No. 35 of 2016.

The 1st and 2nd Respondents, being Mr. Elias Daka and the Electoral Commission of Zambia respectively, filed their Answers and affidavits verifying facts on the 1st and 10th of September 2021 in compliance with the orders for directions issued by Court on the 6th of September 2021. Trial was conducted in Chipata between the 11th to 15th of October 2021.

2. The Petitioner's Case

The Petitioner gave oral evidence and called an additional seventeen (17) witnesses at the trial of the matter.

PW1 Margret Zulu

Her evidence was that she is the Petitioner in this case. She relied on the petition, the affidavit in support and in reply filed into court.

For ease of reference the petition was in the main, settled in the following terms:

1. ...
2. *The Petitioner was a candidate in the Parliamentary Election for the Msanzala Constituency situate in the Lusangazi District of the Eastern Province of the Republic of Zambia having duly filed her nomination on Monday 17th May 2021.*
3. *The Msanzala Parliamentary Constituency consists of Eleven (11) Wards with Seventy-Three (73) Polling Stations.*
4. *Seven (7) candidates validly filed their nominations for the said elections. Videlicet: Elias Daka of the Patriotic Front (PF) Margret Zulu of the United Party for National Development (UPND); Peter W. Daka. Independent. Alice Phiri of the Socialist Party (SP). Amon Mumba, Independent. Sakala Daniel, Independent and Clement C. Kumalinga of the Democratic Party (DP).*
5. *The campaigns in the said elections were characterized by undue influence from the PF campaign team working together with Chief Sandwe and Chief Nyampande that amounted to threats and intimidation against the members of the UPND and members of the general public who were perceived to be inclined to the UPND thereby instilling fear on many voters many of whom could not freely vote for a candidate of their choice.*
6. *The campaign environment was not free and fair and was marked by violation of the conditions governing the campaign period in light of the above stated issues in addition to the following:*
 - 6.1 *There was drilling of water boreholes during the campaign period by the PF and their candidate. Notable ones were in the following areas:*
 - *chingolo area, borehole drilled on 28th July, 2021 and building materials to secure the borehole were being delivered using the Petauke Boarding School truck in the same area.*
 - *Mangolo community school*

- Maila school also had a borehole drilled there
- Mwanza village
- Chidzalila Village

- 6.2 Chiefs were openly campaigning for the Patriot Front (PF) candidates both presidential and parliamentary and were involved in the distribution of PF campaign materials such as T/Shirts, Chitenges, Caps, Bicycles and foodstuffs. Chief Sandwe and Chief Nyampande on several occasions in the company of the PF candidate Elias Daka, held meetings with headmen and members of the community while campaigning for President Edgar Lungu Elias Daka MP candidate and for all the PF councilors. The chiefs warned their subjects that they did not want anyone to vote for anyone contesting under the United Party for National Development (UPND) i.e., President, Member of Parliament and councilors. On the voting day, the named chiefs' vehicles were spotted ferrying voters to the polling stations.
- 6.3 Donation of funds: that Respondent donated ZMW4,000.00 to the Catholic Church at Kachusi Parish for their construction of the church structure.
- 6.4 Renovation and distribution of building materials were made to a number of schools and churches within the constituency: notably,
 - 29 bags of cement donated to Mangolo community school during the campaign period for the construction of a classroom block.
 - Renovation of the roof at Mwanika school
 - Donation at Teteke Community school of roofing sheets
- 6.5 Construction of Msanzala Bridge by the Respondent was done during the campaigns.
- 6.6 A civil society organization called Good Governance Zambia (GGOZA). Known to be a PF wing was buying/getting voter's cards from electorates by enticing them with money, household goods such as mealie meal, sugar, cooking oil etc. this was done during the campaign period and on the voting day.
- 6.7 Ferrying of voters on the voting day was done by various transporters hired by the Respondent some of the voters are believed not to be from within the constituency but coming from other surrounding areas such as Petauke Sinda Districts.
- 6.8 The Respondent and his team were spotted giving food to the electorates on the voting day in various parts of the constituency such as Mawanda, Lutwazi, Mateyo Mzeka and Nyakawise wards among others.
- 6.9 There was serious and unabated intimidation targeted at the UPND campaign meetings by PF officials. During a meeting for UPND in Nyakocha Villages the PF officials went close to the meeting and started distributing campaign materials such as T shirts and chitenge materials while playing loud music when the UPND meeting was in progress. They were also putting

posters for their Presidential and Parliamentary candidates. The Respondent and/or his campaign teams would also go ahead of the UPND team in areas where meetings for UPND were scheduled to take place. This happened at Katasha, Kwa-Seven Sonja, Kasongo and Mbulamala areas.

- 6.10 The Respondent who was a member of the PF mobilization team in Eastern Province used his position to influence the registration as voters of people from Petauke, Kapoche and in some instance from Mozambique and others surrounding areas. Some of these people were transported on the voting day and quarantined them in some camps and gave them some money with the help of GGOZA.
7. The said acts of intimidation and hostile atmosphere exerted on the Petitioner and her party the UPND outlined above was widespread and affected the majority voters by either not freely voting for their preferred candidate or were forced to stay away from voting. Msanzala has over 41,000 registered voters but only 25,620 voted.
8. There was also widespread non-compliance both of the Electoral Act and the Electoral Code of Conduct as the Respondent, his agent or with his knowledge engaged in voter buying, construction of a bridge and sinking boreholes and dishing out construction materials.
9. There was widespread non-compliance with the Electoral Act and Electoral Code of Conduct going by the incidences highlighted above.
10. On Saturday the 14th day of August, 2021 the Returning Officer declared the respondent Elias Daka as duly elected and returned Member of Parliament for the Msanzala Parliamentary Constituency.
11. The results of the Msanzala Parliamentary Elections were as follows:
 - i) Elias Daka of the patriotic Front (PF) received 14,061 votes;
 - ii) Margret Zulu of the United Party for National development (UPND) received 6,971 votes
 - iii) Peter W Daka, independent received 2,605 votes;
 - iv) Phiri Alice of Socialist party (SP) received 449 votes
 - v) Mumba Amon, independent received 360 votes
 - vi) Daniel Sakala, independent received 238 votes
 - vii) Clement C. Kumalinga of the Democratic Party (DP) received 179 votes
 - viii) 902 votes were rejected;
 - ix) Total number of votes cast were 25,620;
 - x) Registered Voters were 41,500; and
 - xi) Percentage Voter turnout was 61.7%
12. Your Petitioner avers that by reasons of the said illegal and unlawful practices committed by the Respondent and his election agents or representatives, the threats to and intimidation to voters as well as the enticements and promises made to the electorates, the majority of the voters were prevented from electing

the candidate of their choice in Msanzala Constituency and the Respondent is guilty of electoral malpractice.

YOUR PETITIONER, therefore, prays that she be granted the following reliefs:

- (a) A declaration that the election was NULL AND VOID ABINITIO;*
- (b) Cost of and incidental to this petition;*
- (c) Such declaration and Orders as this Honourable Court may deem fit."*

The Petitioner also relied on her bundles of documents on record. She testified that the bundles depict boreholes that were being drilled during the campaigns. This was in Mwanza Village, Mangolo Community School and Chingolo Village.

Also included in the bundle are pictures of Mwanika School both before and after it was roofed during the campaign period. It was her further evidence that there were also photographs of a light truck Canter which was ferrying voters in Mateyo Mzeka Ward.

She testified further that there was a form included in her bundle of documents, that was being used by an organization called Good Governance Zambia popularly known as GGOZA. According to the witness, this form was used to give voters money and household goods such as mealie meal and cooking oil. The organization was also promising people early farming inputs such as fertilizer and others were given bicycles.

Moving on to other documents in the bundle, the Petitioner testified that there was proof of ownership of a white Volvo truck that was

stationed at Msanzala bridge with other construction equipment. The vehicle was registered in the names of Eriboma Enterprises Limited. Another document in the bundle from PACRA shows that the directors of Eriboma Enterprises include Elias Daka (The 1st Respondent herein).

The bundle of documents also exhibits a Gen 21 form which tabulates the results of the 12th August 2021 Parliamentary elections for Msanzala Constituency in Lusangazi District. There is also a CD that shows footage of the white Volvo parked at the Msanzala bridge that was being constructed up to about the time of the elections. She identified all the documents mentioned above when the bundle was shown to her.

It was the Petitioner's evidence that the borehole in Chingolo was drilled on 28th of July 2021 during the campaign period. Further that the 1st Respondent would make specific reference to the borehole as part of his contribution to the community in his campaign messages. She was however quick to add that she did not hear him state this personally but had witnesses that attended the meetings that would attest to this.

She asserted that the picture on page 2 depicting the works done at Mwanza village was taken on the 3rd of August 2021. She

testified further that at Pages 4 & 5 are pictures of a light Canter truck ferrying voters to a polling station. Further that page 6 depicts Mwanika school without a roof and another on page 7 after it was roofed.

The Petitioner testified further that on page 8 was the form used by GGOZA the Civil Society Organization she referred to in her earlier testimony. She added that at page 9 of her bundle was a complaint letter written to the District Electoral officer airing her grievance about the intimidation that her camp faced from the 1st Respondent's agents as she was going about conducting her meetings.

She presented the picture at page 11 of the bundle as depicting a violent incident that occurred in Misolo area during the campaign period. According to the Petitioner, this affected her cause as people generally started fearing political meetings. The documents relating to Eriboma Enterprises ownership of the truck spotted at Msanzala bridge and its directorship were proposed to be at pages 12 to 14 of the Petitioner's bundles of documents.

When cross examined, the Petitioner confirmed that Lusangazi constituency is vast. She accepted that a candidate does need to work with a team when campaigning as it was not possible to do so

alone. She further accepted that the UPND team had a campaign manager, councilors, and ward officials to cater for the wards represented by 36 committees. She testified further that Msanzala had 73 polling stations and that UPND had 108 officials per polling station. She accepted that this translated into 108 persons per polling station x 73 stations.

She accepted that she was responsible for her official's movements as they worked for her. She was also responsible for feeding the persons working with her. She would release money to the executive committee to buy food in bulk so that the team would then cook and eat. She thus agreed that there was nothing wrong with feeding and transporting people who were working for her.

Cross examined further; the Petitioner accepted that she did have an election agent named Nyendwa Herbert. She did not bother to establish who the election agent for the 1st Respondent was. She did not consider it important to identify an election agent or to know who is in ones opposing camp. Such an inquiry was not necessary in Zambian politics as far as she was concerned.

When referred to the picture on page 1 of the bundle depicting Chingolo area, the witness agreed it had a narration which she included suggesting the borehole was drilled on the 28th of July

2021. She however accepted there was no date on the picture itself. Further that the 1st Respondent was not in the picture.

Questioned further it was the Petitioner's evidence that she did not know any Francis Phiri the alleged agent for the 1st Respondent. As such she was not in a position to tell if he was in the picture. She however insisted she had a witness who would confirm the picture depicts Chingolo area.

Questioned on the picture on page 2 depicting the borehole at Mwanza village, the Petitioner acknowledged that there was no date on the photograph. She further accepted that the 1st Respondent was not in the picture. The same was true of the picture on page 3 of the Petitioner's bundle of documents.

Asked about the picture on page 4 and the suggestion in the narration that the driver deliberately removed the number plates, it was the Petitioner's evidence that she did not know who had removed the plates. She however maintained she had a witness that knew who did it. She added that in spite of the picture at page 5 of her bundle not having a date, it was her fervent position that the activity captured was undertaken on the 12th of August 2021. Like the pictures earlier referred to her, she confirmed that neither the

1st Respondent or his agent Mr. Phiri were in the one on page 5 of the bundle.

Cross examined further the Petitioner testified that the campaign period started on 13th May 2021. She did not agree that the roof at Mwanika school was done before then. She accepted that there was nothing wrong with assisting people before the filling of the nominations.

She confirmed having visited Msanzala bridge under construction although she did not know who was constructing it. She did however know that the equipment on site belonged to the 1st Respondent. She did not see him or his agent on the site.

She accepted that she was aware the 1st Respondent hires out construction equipment. She however found everything wrong with a person doing business in an area in which he/she may be a candidate in an election.

When cross examined about GGOZA and referred to the document on page 8 of the Petitioner's bundle relating to the said organisation, it was the Petitioner's evidence that neither the 1st Respondent nor his agent are mentioned in the document. It was her evidence that this was a form that was used to lure people to vote in return for benefit. She disputed the suggestion that the

organization was encouraging voters to register to vote. Instead that GGOZA would go round to enroll people to vote for the PF. According to her, this was the tool being used by the PF mobilization team for their own benefit. Asked if she brought this to the attention of the Registrar of societies, the Petitioner stated that she had not done so but had witnesses available that would confirm her assertions.

Cross examined on the letter dated 29th July 2021 on page 9 of her bundle of documents, it was the Petitioner's testimony that there was no date stamp from the office of the District Electoral office confirming receipt of the complaint from her.

She insisted that the picture on page 11 depicts the violence attributed to the 1st Respondent's team. She acknowledged that neither the 1st Respondent nor Mr. Francis Phiri his claimed election agent was in the stated picture.

Asked about the donation to the church, it was the Petitioner's evidence that she did not personally see the 1st Respondent donate the ZMW4,000.00 alleged but she would rely on her witnesses to provide such evidence. She stated that she was aware of a similar allegation that had been made by a councilor in relation to a Local Government petition. However, it was her position that the petition

at hand was the one before this Court. She therefore insisted that as far as she was concerned it was the 1st Respondent that donated the money.

She acknowledged as accepted practice, the paying of a courtesy call on chiefs who she stated are expected to receive all the candidates that come their way and not take a partisan stand. She accepted that in spite of her claims that the 1st Respondent was dishing out mealie meal, cooking oil and money, she had not brought any of these exhibits to Court to confirm her assertions.

When cross examined by the 2nd Respondent's advocate, the Petitioner testified that she did participate in the 12th August 2021 elections. She accepted as true that ECZ allowed her to campaign in Msanzala. Further that she was able to poll over 6000 votes whilst the 1st Respondent polled 14,000 plus votes.

She agreed that the 2nd Respondent informed her all the dos and don'ts prior to the election. She testified that aside from the letter on page 9 of the bundle, she did not put anything else in writing by way of complaint to the 2nd Respondent. She agreed that she was informed that every complaint to the District Electoral Officer had to be in writing.

She further agreed that she did testify that she had over 2500 people working for her and that she did have polling agents at all the polling stations. In addition, that the agents did give her the results that they received from the 2nd Respondent. These were the votes that totaled up to 6971.

It was her evidence that she had no issues with the number of votes received. Her bone of contention was that she would have received more if the rules were followed. The 2nd Respondent in her view observed and tolerated the don'ts. She accepted that she did not report all the complaints as contained in her petition to the 2nd Respondent.

In re-examination the Petitioner stated that she limited her responses on the questions pertaining to the roofing to the dates of delivery of the material but the actual works were done a few days before voting and during the campaign period.

She maintained that the 2nd Respondent did receive her letter of complaint though it was an oversight that it was not stamped. She clarified further that it was the 1st Respondent's trustee popularly known as Saviour that was present at the fighting incident. She explained that she was using the word trustee loosely to mean the person working on behalf of the 1st Respondent to run his errands.

PW2 Aaron Zulu.

A Farmer of Mumba Village in Chief Sandwe area in Lusangazi District. He testified that the 1st Respondent went to Mwanika primary school and held a meeting at the school. That the second time he came through was sometime in July, 2021, when he brought iron sheets, nails, wires, items used for painting and timbers for roofing of the school.

The deputy headteacher looked for a bricklayer and invited PW2 and four of his friends to work with the bricklayer to roof the structure. It was his evidence that they covered two classes and part of an office. He stated that the 1st Respondent delivered the materials openly. He handed over the materials from the delivery vehicles to the P.T.A chairman using the headmen present. After the offloading was done, the 1st Respondent knelt down before all present and asked that people should not vote for anyone else but him.

In cross examination on behalf of the 1st Respondent, Mr. Zulu testified that he was a registered voter in Chisangu ward at Mwanika polling station. He stated that he was a youth in the UPND and that he had wanted the Petitioner to win. He further stated that he was happy that the 1st Respondent had won the

elections but would however be happier if the seat was nullified. He stated that he had come to Court because he wanted the court to nullify the seat.

He insisted that the materials were brought to the school in July 2021. Further that the 1st Respondent brought the materials in a Fuso fighter truck around 14hrs sometime towards the end of July 2021 and addressed a campaign meeting in August 2021. When asked if he knew that ECZ had banned campaigns during the stated period, his response was that the 1st Respondent had indicated that the meeting wasn't going to take long.

PW3 Wilson Phiri.

A farmer in Mumba Village under Chief Sandwe. He testified that on the 29th of July, 2021, the 1st Respondent brought iron sheets at Mwanika Primary School. He was one of the people that offloaded the iron sheets from the vehicle. In the meeting that followed, the 1st Respondent stated that he brought the iron sheets because the school was run down and it had taken long for the structures to be completed. The 1st Respondent then told people to vote for him and not the Petitioner.

Mr. Phiri testified further that the roofing was done on the 5th August, 2021 and this coincided with the 1st Respondent's visit to the school to inspect the works.

In cross-examination by counsel for the 1st Respondent, the witness testified that he did not have any position in UPND and that he was a registered voter. He stated that he was not stopped from voting but he saw some people being prevented from casting their votes on the 11th of August, 2021. To be specific that the PF Councilor for Chisangu ward was telling people not to vote for anybody but the 1st Respondent.

He stated that the 1st Respondent had held different meetings. Two in particular deserved mention. The first was the meeting of the 29th of July at which the roofing sheets were delivered. The second on the 3rd of August, 2021 being the date that the 1st Respondent distributed second hand clothes. He added that it would be a lie if the Petitioner had stated that the iron sheets were delivered in March.

PW4 Noah Daka.

A headman in Mwanika village under Chief Sandwe. His evidence was that he and other headmen were summoned to a meeting by the 1st Respondent through Chief Sandwe. The chief informed them

that he was merely playing a facilitatory role for the 1st Respondent in calling for the meeting to persuade them to vote for him. The headmen were further to tell the people in their respective villages to vote for the 1st Respondent and President Edgar Lungu.

In his address at the 2 meetings subsequently held, the 1st Respondent echoed the chief's message and appealed to the headmen and their people to vote for him and President Lungu. That the headmen should not make a mistake in taking a different path and instead heed the chief's counsel on the manner of voting. He asserted that he attended the 2 meetings that also had 18 headmen from Mwanika present.

In cross examination by counsel for the 1st Respondent, he stated that he did not have a book from the chief confirming that he was a headman. He however maintained that he was well known as a headman in the community. He stated that he was a registered voter at Mwanika Primary school.

When referred to pages 1-5 of the 2nd Respondent's bundle of documents, he stated that the polling stations on those pages were all within the area where he is headman. He testified further that the 1st Respondent was not the only candidate that went to campaign in his village. Other politicians that included the

Petitioner had done so as well. The Petitioner's message was that people should vote for her. He therefore agreed that there was nothing wrong with the Petitioner making that appeal.

When referred to polling station 02301 at page 5 of the 2nd Respondent's bundle of documents, the witness testified that the 1st Respondent received 52 votes whilst the Petitioner polled 192 votes. He further stated that the 1st Respondent received 74 votes at Kapwazi-1 whilst the Petitioner got 298 votes. Further that at Kapwezi-2, the 1st Respondent received 73 votes while the Petitioner polled 221 votes. In Chule 1, the 1st Respondent polled 39 votes whilst the Petitioner received 260. Further that at Maila-1, the 1st Respondent secured 93 votes in comparison to the Petitioner's 195 votes.

Questioned on these results, PW4 testified that he could not explain why people voted for the Petitioner in spite being told to vote for the 1st Respondent. He disclosed that he had wanted UNPD to win but that he did not belong to that party.

In re-examination the witness stated that he followed what he was told by the chief because he was threatened.

PW5 Gabriel Zulu.

A farmer of Nyamapopa village, Chief Sandwe area in Lusangazi District. His evidence was that on the 1st of August, 2021, Chief Sandwe visited a school in his village. He asked the locals that included PW5, whether they were aware it was an election year and who they were voting for. The chief proceeded to tell his audience not to vote for the Petitioner and President Hakainde Hichilema. Further that they should instead vote for the 1st Respondent and President Edgar Chagwa Lungu. He did not support the councilor standing under the PF ticket and advised that the people vote for the councilor of their choice.

The court learnt that a lot of people attended that meeting. Word had spread that the chief was visiting hence people decided to go to the meeting. According to the witness, it was on account of the chief's direction that people felt persuaded they had no choice but to follow what he said. He arrived at this conclusion because a lot of people then said they would vote for the 1st Respondent.

In cross examination on behalf of the 1st Respondent, it was Pw5's evidence that he was a registered voter at Chibale polling station. When referred to page 4 of the 2nd Respondent's bundle of documents he stated that his polling station was not on the list shown to him and that he did not know where his polling station was.

He agreed that he did not see who his friends voted for as each person was alone in the voting booth. He maintained that the chief did tell them not to vote for the councilor contrary to the suggestion put to him that the Petitioner had told the Court that Chief Sandwe had directed that all the PF candidates should be supported. He acknowledged that Chief Sandwe was neither the polling nor election agent for the 1st Respondent.

PW6 Misozi Mwale.

A farmer of Chikuse village, in chief Nyampande's area of Petauke District. She testified that she was a member of GGOZA group. She explained that the organization did not fall under any political party. Further that the staff were not allowed to disclose anything about donations that came to the organization from President Lungu. Other donors were involved as well.

She recalled that some foodstuff was delivered to her on the 3rd of August 2021 by one Jackson Kaliza. This included 420 liters of unlabelled cooking oil, 2 cases of sugar, 16 bags of mealie meal and cases of salt. It was her evidence that she was a coordinator of GGOZA at the time.

On the 8th of August, 2021, the 1st Respondent sent people to inform her and other staff that there was going to be a PF meeting

in the area. Based on the orientation received when she joined the organization, she opted as guided, to stay away from such a meeting.

At about 19:00 hours after the meeting was held, the 1st Respondent sent his people to her to collect the foodstuff that had been donated. This included Gabriel Phiri the Ward Chairman, Felix Mukowami Youth Chairman, Kambani Zulu a PF councilor and one Amibel Sakala. She refused to hand over the items and noted that tempers started flaring when she maintained her position.

She subsequently gave into the pressure and handed over the goods to these men who informed her that the consignment was being taken to their camp and supporters. It was her testimony that all this happened between the 10th of August, 2021 and 11th of August 2021.

When cross examined, the witness testified that she joined GGOZA on the 3rd of August, 2021. She had registered as a voter at Monde polling station in Singozi ward. She testified that the Councilor who won at that polling station stood as an independent candidate. She thus agreed that the activities she mentioned in her earlier testimony had no bearing on the outcome of the election.

Cross examined further, Ms., Mwale stated that GGOZA was an organization established to help the aged and poor people and not for purposes of voter education. It was her further evidence that she did not know of the activities the organization was undertaking relating to registration of voters. She did not rule out the possibility that the food could have been for the volunteers working for GGOZA. However as far as she was aware the organization was established to help poor people and the food was on the face of it meant for them.

She testified that she would not know if the former President Edgar Lungu was an election agent for the 1st Respondent. She further stated that she also did not know if the people she mentioned earlier were the 1st Respondent's agents. When pressed on how the food was connected to the 1st Respondent, she stated that he was linked because he was from the PF.

She testified further that she was aware that the ECZ banned campaigns but that meetings were being held nonetheless. She stated that she withdrew her services from the organization after the food was collected from her and she did not want to take part in campaigns.

When cross examined by Mr. Musoka on behalf of the 2nd Respondent, she testified that she never saw ECZ working with GGOZA during the past elections.

PW7 Lenny Mwanza

He testified that he is a farmer at Kakwiwa village Under Chief Nyampande. He had been employed as a coordinator working for GGOZA. That sometime in June 2021 shortly after he joined the organization, he and others were directed to go out in the villages to educate people on the value of voting. At the time he joined the organization the persons in charge of training were Bizeck also known as Geoffrey Banda and one Mr. Kanecho. They were instructed to enlist 10 people per polling station and to forward such names to Geoffrey Banda who indicated that he would be taking the names to Lusaka.

After submitting the initial names, PW7 and other coordinators were summoned to Petauke for further instructions. He told the court that they were informed that the organization was a State House initiative. Further that it did not seek to recruit anyone who had a position in a political party and would continue to give out items post elections. The coordinators were being addressed by Kanecho and Geoffrey Banda at the time. He stated that he was

given forms to take to the villages and was told that 50 people had to be recruited from each village.

On the 1st August 2021 the Provincial coordinator Mr. Geoffrey Banda brought mealie meal, cooking oil, sugar, salt and bicycles using a truck to Kakwiya Village at about 23:00hours. PW7 received these goods and was told not to distribute the items as more was to be brought first. He was also instructed to inform headman Kakwiya that the foodstuff had been brought.

As he was waiting for the Provincial coordinator to return with the rest of the consignment, some PF cadres came through and stated they had come to collect the goods. Among them was the Youth and Ward chairpersons. They told him that they had been sent by the 1st Respondent to collect the items in his possession that belonged to the PF.

He refused to give them the foodstuff and told the gentlemen to wait for the Provincial Coordinator. The following day, all the coordinators were summoned by Chief Nyampande. The chief told them that people were incensed by his refusal to release the goods and consequently wanted to beat the coordinators. Further that the goods belonged to the 1st Respondent and ought to be released.

Noting the poor security and heightened tension prevailing, Mr. Mwanza decided to leave and went back to the village. He stated that he was later informed that the PF officials collected the goods and that he had lost his job. It was his further testimony that all the goods were collected by the PF camp. Keleshi Phiri a party official at District level in particular broke the news about his dismissal and informed him that he too had suffered the same fate.

Afterwards, the 1st Respondent visited the village to address a meeting. A fight broke out and Mr. Mwanza's young brother was beaten by the 1st Respondent. It was his evidence that he was not in attendance when this was happening but was reliably informed that he was actually the person that was being sought after.

Casting further light on how the registration of names by GGOZA was being done, PW7 explained that they registered people by taking down their names, NRC numbers and Voter's cards. The goal was to know if the people were registered to vote.

When cross examined by Mr. Songolo, PW7 maintained that GGOZA was created by State House. He acknowledged that the 1st Respondent did not live in State House. He stated further that the 1st Respondent did not bring any mealie meal to his house nor did

his agent Mr. Francis Banda. He further agreed that President Edger Lungu was not the 1st Respondent's electoral agent.

He testified that GGOZA recruited 3650 volunteers to do its work and that the person responsible for sending these people to the village and feeding them was Geoffrey Banda. He insisted that it only later dawned on him that the mealie meal and other foodstuff was meant for campaign purposes and not to feed the volunteers.

When questioned further, PW7 acknowledged that he did not go to ECZ or to the Police to complain about GGOZA's activities. He disclosed that there was no police report or medical report to confirm that his young brother was beaten. He further agreed that there was no mention of either the PF or the 1st Respondent in the GGOZA form on page 8 of the Petitioner's bundle of documents.

When cross examined by Mr. Musoka on behalf of the 2nd Respondent it was his evidence that GGOZA was not working with ECZ. He stated that he did not know where GGOZA was taking the names after people were registered.

In re-examination the witness testified that it was whilst he was waiting to receive further instructions on the distribution of the foodstuffs that a claim of ownership was presented by the PF officials.

PW8 Kenazious Banda

A farmer of Chief Sandwe Area in Lusangazi District. He testified that on the 12th of August 2021, whilst preparing to vote, he noticed a Toyota Canter arrive in the village carrying all the voters that were voting from Kamuseche polling station. It also carried people from Manasha Village, Makobe and Chikande village who were taken to Makale Polling station. The same canter took people from Musapenda Village to Chizalila polling station.

He confronted the driver by the name of Bezate Katumbi to inquire who had sent him to ferry the people. The response received was that he was engaged by the 1st Respondent to do so. He recalled that among the group was one Mevias a PF Secretary, who was telling people that they should not vote for Rogor poison, a known pesticide in apparent reference to the Petitioner and UPND Presidential candidate Hakainde Hichilema.

When referred to the photographs on page 4 and 5 of the Petitioner's bundles of documents, Mr. Banda stated that the vehicle depicted was not the one he had seen. He stated that the canter he referred to had a blue head and white trailer. It was his testimony that the canter was carrying all the registered voters.

In cross examination, Mr. Banda agreed that neither the 1st Respondent nor his election agent were seen driving the truck. He testified further that the vehicle did not belong to the 1st Respondent. He stated that he was present when the people were being ferried and that he knew all the people in the village. He however was not able to tell the number of people that were in the truck.

He insisted that the people ferried were told not to vote for the Petitioner. When referred to page 4 of the 2nd Respondent's bundle of documents, it was his evidence that the 1st Respondent polled 77 votes whilst the Petitioner received 99 at Chizalila polling station. He therefore agreed that according to the document, whatever was said did not affect the election result. The witness confirmed that he did not report the ferrying of voters to ECZ, but maintained that he told the Petitioner about it.

In re- examination, it was Mr. Banda's testimony that people from Chizalila and Chilunda villages were not ferried to the polling station. They walked to the station. According to the witness this would explain the outcome at these stations at which the Petitioner won. Whereas at Kamuseche and Makale it was the 1st Respondent that carried the day.

PW9 Joseph Zulu

A farmer of chief Nyampande area, in Lusangazi District. He testified that he was a polling agent for Peter Daka an independent candidate at Nsenya polling station. He stated that on the 12th of August 2021 whilst at the polling station and in the room where people were voting, he saw a Dyna light truck dropping off people at the Station and left. It came back with some more people a second time, dropped them off and drove off. On the 3rd occasion PW9 had seen enough. He decided to go outside to check on what was happening. He traded places with a fellow polling agent who was outside.

He testified that the people who were brought were voters and he recognized one as an old acquaintance from his school days on the queue. His friend told him he had come to vote after being given some money by the 1st Respondent with others and offered transport to the polling station. He further revealed that the truck would return with more people.

Having heard this, he decided to wait and was outside the polling station when the light truck returned a fourth time. He confronted the driver of the truck and asked why he was ferrying voters and crossing the ribbon placed by ECZ when dropping off the voters. In

response the driver told him that he was just hired to do so and that PW9 should ask the passengers who had booked him for the answers sought.

He also inquired why the number plate for the vehicle had been removed. The PF ward Chairman for Mateyo Mzeka Ward told him not to question them as they were from the ruling party and that they were working with the 1st Respondent. Mr. Zulu then took photos of the vehicle and its passengers using his tablet for future reference.

He informed an officer at the station what had transpired. The driver of the truck drove away shortly after in fear of being caught. He testified that the PF officials bragged about how the police could not do anything to stop them as they drove off. He later showed the photographs to honorable Peter Daka. He confirmed the pictures that he took to be the ones on pages 4 and 5 of the Petitioner's bundle of documents.

When cross examined, it was Mr. Zulu's evidence that he had no beef with the fact that the 1st Respondent won the election but felt that the manner in which he had done so was wrong. He would thus be happy if the result was nullified as the elections were not fair. He agreed that he did not have proof that the 1st Respondent

gave money to people as he was just told about this by his friend.

He did not witness the money being given out.

He testified further that he does not belong to any political party but was an agent for an independent candidate in the past elections. He testified that his polling station was Nsenya appearing on page 6 of the 2nd Respondent's bundle of documents. Based on the results set out in the document, 330 people voted for Peter Daka. Other candidates including the Petitioner picked up some votes too. He however still insisted that the will of the people did not prevail or that they voted for the candidate of their choice in spite of the result and seeming spread of the votes across the spectra of candidates.

When referred to pages 4 and 5 of the Petitioner's bundle he testified that the truck in the picture had no number plate. It was PW9's position that the 1st Respondent was in the pictures through his agent Charles Phiri. Pressed further, he agreed that the 1st Respondent was not physically visible in the photos. He stated that he did not have any proof to show that the 1st Respondent hired the truck.

He contended that he did inform the presiding officer about the truck. He did not however write a complaint letter to the 2nd Respondent or file a complaint with the Police,

When cross examined by the 2nd Respondent's advocate, the witness agreed that he was aware that every Zambian above the age of 18 years had a right to vote and that all the voters at Nsenya were Zambians with National Registration Cards and Voters cards.

In re- examination he stated that the person who got the highest vote at Nsenya 1 and 2 polling stations was the 1st Respondent and that not everyone who voted at Nsenya was ferried there.

PW10 Peter Marvin William Daka.

A businessman and immediate past member of Parliament for Msanzala Constituency. He testified that he chaired the Committee on Parastatal and State owed Enterprises which included all the water utility companies in the country at Parliament. He stated that during his meetings he discovered anomalies and requested that the allocations countrywide be improved upon. He stated that he was in the process of rehabilitating bore holes in his constituency using his own resources and his constituents asked him to request for assistance through the Ministry of Water Development and Sanitation for the sinking of boreholes.

Pw10 stated that he told the Permanent Secretary Mr. Masauso Sakala that the project could not continue until after the elections and that in any event he was informed that the funding for the project was not ready so nothing could be done at the time. He emphasized that initiation and execution of a project were different and his involvement must be seen in that light.

He stated that he prepared a list of boreholes in which assistance was sought. However, that the list that he would have loved the Ministry to assist with was rejected. Therefore, whereas he might have requested for the boreholes he did not execute the projects. When referred to pages 1 and 2 of the 1st Respondent's bundle of documents, it was Mr. Daka's evidence that he did not know or remember the document appearing to be a list of boreholes requested for.

He believed that the reason his name was appearing on the document and possible explanation why it might be attributed to him was that he made a lot of requests to companies asking for assistance. He stated that these requests were done before the elections.

He added that in the five years he had been Member of Parliament, no assistance was rendered by the Ministry and the only bore holes

sank were done through the Constituency Development Fund. He also used ZMW 50,000 of his own funds to rehabilitate some boreholes that were dysfunctional. The final request to the Ministry was done in 2020. He was asked to scale down the request and accordingly resubmitted the list in December 2020.

It was his testimony that he did not know about the drilling of the boreholes in Chingolo, and Mangolo community school, Mwanza village and Chizalila village. His plans were known and discussed with constituents but never materialized. To his utter dismay, boreholes were being sank during the campaign period.

He testified further that he did not understand how a candidate could be given the benefit of Government drillers when at the time such candidate was not a Member of Parliament. He reiterated that he was seeing the documents referred to him in court for the first time and that he had no involvement in the siting of any of the boreholes.

In cross examination by Mr. Songolo, Mr. Daka testified that he was a candidate in the last elections and that he lost to the 1st Respondent. He confirmed that he was not happy that he lost the election but that he was not necessarily keen for a by-election. It was his evidence that the document at pages 1 and 2 of the 1st

Respondent's bundle of documents referred to him earlier was not prepared by him. He stated that the list did not include all the boreholes that he requested.

He testified that he was a PF Member of Parliament before he became an independent and that he was naturally unhappy that the 1st Respondent was adopted instead of him. He accepted that the Government did not give a timeline when it would respond to the requests made. Further that there is nothing wrong in Government implementing the request. He however qualified that the timing was wrong. As far as he was concerned the Government was a candidate in the elections standing under the PF ticket.

In re-examination Mr. Daka stated that he considered objectionable the undertaking of projects during an election period as such works influence the decision of the electorate and final outcome of an election.

PW11 Martin Seku Banda

A resident of Mwavula village in Lusangazi District. He testified that on the 12th of August, 2021 around 03:00hrs in the morning he saw 5 trucks and a Rosa bus ferrying unknown people to the polling station near the village. These people were being brought in from the border area of Mozambique. One of the vehicles being used

belonged to a Mr. Dira Zulu of Mulevu Village. Mr. Banda was able to identify one Ishmael Tonga Chirwa whom he asserted was an agent for the 1st Respondent amongst the persons doing the ferrying.

By 06:00hrs there was a very long que which caused most of the locals not to vote. He approached a police officer who was at Mwambula polling station and informed her about the arrival and presence of the people who had been brought from Mozambique. In the process the cadres who were present threatened to beat him. It was PW11's further evidence that he witnessed these people being given ZMW100.00 notes by Ismael Chirwa, a confirmed member in the 1st Respondent's campaign team.

When cross examined on behalf of the 1st Respondent, PW11 testified that he saw people being dropped at 03:00hrs and that he was able to identify the people as there was moon light. He was unaware that there was a large voter turnout throughout the country on voting day. He emphasized that his main bone of contention was that a lot of people who turned up were not from his area. He stated that he was not aware that the law permits citizens to register and vote from anywhere in the country.

Questioned further the witness testified that he could only assume that a report of what he asserted transpired had been written by the Petitioner whom he had briefed. He confirmed that he did not see the 1st Respondent at the polling station but maintained that Ismael Chirwa being his agent as far as he was concerned, was there.

When cross examined on behalf of the 2nd Respondent Mr. Banda testified that he knew that a report about the giving of money was given by the person he complained to but that he did not see it.

He acknowledged that he was aware that the law permits persons to cast their votes as long as they are on the queue irrespective of the time. It was his position that the 2nd Respondent can be faulted for allowing unknown persons to be on the voter's queue. He nonetheless agreed that all the voters had National Registration Cards and Voters cards that enabled them to vote.

In re-examination, PW11 testified that he informed the Petitioner about the money that was being given out through a representative in the area on the poll day.

PW12 Andisen Njovu

A farmer of Sikalinda village in chief Nyampande's area, in Lusangazi District. He testified that on the 12th of August, 2021

whilst on his way to cast his vote at Ray Primary School he found Nanius Lungu, Veronica Zulu and Florence Phiri being given money and told to vote for the 1st Respondent and President Lungu. PW12 was also offered a ZMW 10 note and told the same thing. He testified that it was one Jacob Zulu a Councilor for the 1st Respondent that was paying out the ZMW 10 notes.

When cross examined on behalf of the 1st Respondent, the witness testified that he did not belong to any political party. He agreed that he did cast his vote and that no one was stopped from voting on the day. When referred to page 5 of the 2nd Respondent's bundle of documents displaying results in his ward, it was his evidence that the Petitioner did get some votes as did the other candidates. He was nonetheless not satisfied that people voted in the right manner on account of the payment of the bribes.

He acknowledged that he did not see the 1st Respondent or his election agent on poll day. He further did not see them giving out money. He was not happy to see money being dished out although he received the money that he was given. He further did not report to the police about the money being paid. He further confirmed not having reported the matter to the 2nd Respondent.

When cross examined by Mr. Musoka on behalf of the 2nd Respondent, the witness agreed it was true he got that money and that he therefore participated in corruption by doing so.

In re-examination, it was his evidence that according to the document at page 5 of the 2nd Respondent bundle of documents, the 1st Respondent received the highest votes at Nyakachonkho polling station.

PW13 Emeldah Phiri

A farmer of chief Sandwe area in Lusangazi District. It was her evidence that on the 30th of July 2021, she saw the 1st Respondent's car at the Chairperson's house for Ukwimi Ward. She was not privy to whatever discussion that took place at the Chairman's house. On the 1st of August 2021 she saw borehole drilling vehicles at Nkumbal section and when she inquired who was drilling boreholes, she was told it was the council.

She testified further that on the 2nd of August, 2021 a borehole was drilled and she saw John Phiri a Ward councilor for the PF, at the site where the drilling was being done. Further that on the 9th of August, 2021 pipes were brought in but that it was discovered that there was no water at the site.

It was her evidence that as they were awaiting further drilling to be done, John Phiri in his campaign message at a meeting held at Songovwa polling station told people to vote for a party that would bring development and not one that had no development agenda. Further that the people were told to vote for the 1st Respondent, President Edgar Chagwa Lungu and himself as councilor.

That John Phiri further told the people that the development they were bringing was already visible for all to see such as boreholes, and donation of cement and iron sheets in other areas. He went on to threaten to remove the pipes brought in if the people opted to vote for other candidates

In cross examination on behalf of the 1st Respondent, she testified that Nkumba 1 section was in Ukwimi ward. She initially assumed that the drilling was being done by the Government but that the moment she saw and heard John Phiri, she knew that it was the 1st Respondent's project.

She disclosed that she did not know the 1st Respondent's election agent. She agreed that as the 1st Respondent was a PF candidate there was nothing wrong with him going to a PF Ward Chairman's house. Ms. Phiri further acknowledged that she did not hear anything that was said in the Chairman's house when the 1st

Respondent visited him and hence could not conclude they were discussing the borehole.

She did however arrive at the conclusion that the Government connived with the 1st Respondent in drilling the borehole as he was the one who was standing in the constituency. It was her evidence that she was happy that the borehole was drilled but not with the manner in which it was done. She accepted that she did not see the 1st Respondent or his election agent drill the boreholes.

PW14 Michael Mwanza

A headman of Kalikeka village. He testified that on the 7th of August, 2021 he was invited for a meeting at Saint Gabriel Catholic church which was scheduled to start 14: 00hrs. He went to the meeting which only got underway at 17:00hrs. The DEBS Mr. Nkoloma addressed the meeting. He apologized for his late arrival and informed the people at the meeting that he was a bearer of a message from the Republican President Mr. Lungu and the 1st Respondent. That message was that the people must vote for the PF candidates.

The people present were taken aback by this message that was being delivered in church and remained quiet. According to PW14, Mr. Nkoloma then produced ZMW 4, 000.00 from his pocket and

said the money had come from the 1st Respondent and was to be used to build the Church.

The Priest and Chairman who should have received the money were not in attendance. The people present therefore asked PW14 in his capacity as headman to receive the money and he proceeded to do so. Mr. Nkoloma then repeated his call that those present must vote for the PF President and Parliamentary candidate. Further that they were not to receive fertilizer from FSIP if they did not vote in that manner. They were also to be excluded from receiving the Social Cash transfer funds. The money given was just a start. More money to support the Church would be given in return for the congregant's vote.

After the meeting, PW14 proceeded to see the Church treasurer Maddalena Phiri to deliver the money received. He was in the company of Patson Mwanza and Joe Tembo. He handed over the money and each of them was given ZMW100.00 in gratitude for their effort.

In cross examination the witness testified that Mr. Nkoloma was the 1st Respondent's election agent because he was campaigning for him. He insisted that a person who carries on a campaign for a

candidate is his agent. He was surprised that Mr. Nkoloma was doing so despite being a civil servant.

Questioned further, the witness confirmed that the 1st Respondent was not in the company of Mr. Nkoloma and his entourage at the meeting. He stated that he was not aware that there was a petition by a UPND councilor over the same ZMW 1,000.00. Further that he did not report the donation and utterances made at the meeting to the Police or 2nd Respondent. He denied the suggestion put to him that it was a Catholic Priest that donated the ZMW 4,000.00.

In re-examination, he testified that when the money was given out, the people present were told that it came from the 1st Respondent.

PW15 Moses Phiri

His evidence was that he is a resident and farmer in Chikuse village in Chief Nyampande's area. He recounted that the 1st Respondent asked a Mr. Malvin Lungu to find him cattle to buy. Mr. Phiri was approached and he confirmed he did have some for sale. He later went and met with the 1st Respondent in person who paid ZMW5,000.00 cash for two cows. It was agreed that the money for a third animal was to be collected later.

On the 10th of August 2021 the 1st Respondent sent some men to his farm to slaughter the animals. The animals were slaughtered

and collected. The following day the 11th of August 2021, there was a meeting in the village that was attended by a lot of people. The meat was cooked and given to all the people that were in attendance. He also ate some of the meat.

After the meal, Kambani Zulu, Felix Nkuwani and Gabriel Phiri all PF officials informed the people that it was the 1st Respondent that had bought the meat they had eaten. The people were therefore told not to vote for the Petitioner or anyone else but the 1st Respondent.

In cross examination he testified that he met the 1st Respondent for the first time when they were negotiating the price for the cattle and that was the only issue discussed. The 1st Respondent never asked for his vote. He confirmed that the meeting took place at Chikuse Village and the named PF officials took turns to speak. All the speakers spoke about the cattle in their quest to persuade the people to vote for the 1st Respondent.

He stated that he did not know how many people are involved in a campaign. In his estimation 3 cows would not be sufficient to feed 2500 people. He acknowledged that there was nothing wrong with the 1st Respondent buying meat to feed his people. His problem was that a lot of other people who were not in the PF camp were fed as well.

Asked who won the poll as councilor in his ward, the witness confirmed that it was an independent candidate that carried the day. Questioned further the witness confirmed that he voted for a candidate of his choice. He did not see the 1st Respondent send Gabriel Phiri, Felix Nkowani or Gambani Zulu to the meeting. He further did not know who Francis Phiri is. He maintained that the 3 who addressed the meeting are the 1st Respondent's agents as they spoke on his behalf.

In re-examination, he told the court that he ate the meat but that he was not working for the 1st Respondent nor was he in his campaign team

PW16 Pascal Kambani

A farmer of Kasengu village under Chief Nyampande. It was his evidence that on the 12th of August, 2021, the 1st Respondent sent a campaign team comprising of 3 persons to Headman Mwase's house to buy a cow. These included Ismael Phiri, Joseph Lungu, and Anna Lungu being Ward official, Member of the mobilization team and Councilor respectively. He explained that Bizerk Banda is the present Headman Mwase.

Mr. Kambani was visiting at the headman's house at the time. He therefore witnessed the transaction. The cow was paid for and

slaughtered in Mwase village. The animal was then cut up into pieces on instruction of the 3 gentlemen and given to people freely.

He testified further that people walking past were invited to collect some meat whilst others were being called by phone for a share of the prize. The PF officials further hired a motor bike belonging to Kanyezi Lungu from Mwanza Village to deliver the meat to the far-flung areas. From where PW16 sat, he saw more than 20 persons collecting meat. He testified that the recipients of the meat were told to vote for the 1st Respondent by the campaign team.

He stressed that among the people he saw being given the meat with his "own eyes" as he put it, included Isaac Zulu from Nkunkuzha Village and Kathrine Zulu from Kasenga Village. He too ate some of the meat that was being roasted from the headman's house. He added that the meat was only being given to people with voter's cards. He thus concluded that the meat was being given out to lure people to vote for PF candidates.

In cross examination by counsel for the 1st Respondent, it was PW16's evidence that he stood as a Councilor in the past elections and lost. He disclosed that it was the second time he was losing and that he had petitioned the result. He agreed that it takes a lot of people's effort and involvement to campaign and win an election.

He further agreed that when people are engaged to campaign it is the candidate's responsibility to feed them. Questioned further PW16 stated that he had more than 300 people helping him during the elections and agreed that it was not possible for one cow to feed such a number.

He knew that some of the people who turned up had been called by phone as they told him so. He intimately knew the composition of the 1st Respondent's Campaign team as he was at some point a part of it. He however did not know Francis Phiri or if any of the persons he mentioned were the 1st Respondent's appointed election or polling agents.

In re-examination the witness disputed the assertion that the meat was just meant for the 1st Respondent's foot soldiers. Both Kathrine Zulu and Isaac Lungu were not part of the PF but were given some of the meat.

PW17 Dickson Tembo

A farmer of Chiwa farms in Chief Nyampande's area, Lusangazi District. His evidence was that on the 7th of August, 2021, the wife to the late Chief Nyampande visited Chiwa polling station for a section meeting. He stated that the people called to attend the meeting were the area chairpersons and women clubs.

He testified that she informed the meeting that the current Chief Nyampande had sent her to tell them that they must vote for the 1st Respondent and President Lungu. Further that it was only after voting this way that the people would see development in the area. She and her entourage then started distributing PF T Shirts and Chitenge Wrappers. The Witness explained that he is Chairperson for Chikalu section so was present at that meeting.

In cross examination on behalf of the 1st Respondent, Mr. Tembo testified that a lot of people received the items distributed but that he did not report what was happening to the police or the 2nd Respondent. He further did not inform the Petitioner as he did not have her number.

In further cross examination Mr. Tembo revealed that he was given a T. shirt and a ZMW 20. He insisted that the 1st Respondent was present at the meeting because his name was mentioned. He did not see Francis Phiri nor was he able to tell if the chief's widow was the 1st Respondent's polling agent. He concluded that she was because she spoke on his behalf.

He was not re-examined.

PW18 Melvin Lungu

A farmer of Chief Nyampande area in Lusangazi District. He testified that on the 3rd of August, 2021 an Eriboma truck went to Msanzala bridge carrying materials to work on the bridge. He explained that his house is about 1.5 km from the bridge so was fairly near.

It was his evidence that he went to the site after he had heard works were to be undertaken at the bridge and found the truck. The driver of the truck chased him from the site expressing fear and discomfort that he might take pictures since he was not part of their team. He did not know the name of this driver. He left and went back to his house.

The following week a meeting was held at Kalumbi primary school. Ward officials from the PF were in attendance, Mr. Lungu was also present at that meeting. The ward chairperson gave a speech in which he said that the Msanzala bridge had taken long to be built but that the 1st Respondent had come in to make a difference despite not yet being a Member of Parliament. That he was therefore going to do so much more if he was granted a vote by the people.

He testified further that youths from different villages were employed to work on the bridge. The Eriboma truck remained at the

site and was only withdrawn after the elections. Other vehicles replaced the truck and work stopped for 14 days after elections. Construction works have since resumed and one pillar has been lifted at the bridge.

He added that the speech given by the Ward Chairperson attributed the work to the 1st Respondent and there was no mention of Shachitari Ltd. It was his further evidence that the Eriboma vehicles are no longer seen at the site.

He testified further that he stood as an independent candidate at the election and lost to another independent candidate. He added that the 1st Respondent polled the highest votes at Chimphangala-1 polling station having attained 252 against the Petitioner's 36 as per page 3 of the 2nd Respondent's bundle of documents.

When cross examined by counsel for the 1st Respondent, it was Mr. Lungu's testimony that he was a member of the PF until the last election when he was not adopted to recontest his seat as Councilor for Singozi ward. He was not upset by that decision. he testified further that he has known the 1st Respondent for five years but that he did not know the type of businesses that he runs. He thus did not know that the 1st Respondent has a construction company or that he hires out equipment.

When referred to the addendum between the Ministry of Local Government and Shachitari Contractors Limited on pages 14-16 of the 1st Respondent's bundle of documents, Mr. Lungu stated that the content of the document was different from what was obtaining on the ground so he did not agree it was a government contract.

He testified further that the meeting he referred to that took place in the village was a PF meeting but everyone was free to attend it. No one was being chased away. It was one Gabriel Phiri that gave the speech that he alluded to. As far as the witness was concerned Gabriel Phiri was the 1st Respondent's agent because he was a PF Ward chairman. He was however unable to tell if he was an election or polling agent.

He did not agree that Shachitari hired the equipment from Eriboma Enterprises as that is not what was disclosed at the meeting. Questioned further the witness confirmed he did not see the 1st Respondent at the bridge and did not know Francis Phiri. his professed election agent.

That was the Petitioner's case.

3. The 1st Respondents Case

The 1st Respondent filed an answer, affidavit in support of answer and bundle of documents on the 1st of September, 2021 and 17th of

September, 2021 respectively. Ten (10) witnesses gave evidence in aid of his defence.

1RW1 Jerry James Lintin

His Royal Highness, the current Chief Nyampande. His evidence was that he did not know the Petitioner and that the allegations levelled against him were unfounded. He stated that as a Chief it was his duty to receive visitors in his kingdom whether it is for benevolence works or candidates paying a courtesy call during campaigns. He testified that as far as he was aware no candidate was ever prohibited from seeing him.

When referred to paragraph 6.2 of the Petition, he stated that the allegations contained therein suggesting that chiefs were openly campaigning for PF candidates and ferrying voters were untrue. He stated that he had remained totally neutral in his dealings and that he always advised candidates that it was their duty to persuade the electorates to vote for them and not his.

As regards the allegation that he had ferried voters on voting day, he testified that the only persons he carried along were his retainer and caretaker. He further disputed the evidence of PW7 to the effect that he called GGOZA coordinators to issue the alleged threat. He added that individuals and organizations do go about their

business in his chiefdom. It was customary that they pay a courtesy call on the chief. From what he gathered when GGOZA officials visited him, the organization was in the chiefdom to encourage people to vote.

He testified further that contrary to PW17's evidence, he did not send his late uncle's wife to deliver a message at a meeting reportedly calling on attendees to vote for the PF candidates. It was his evidence that he did not ask her to run any campaigns for or against any candidate.

In cross examination, by Counsel for 2nd Respondent, he testified that from his understanding GGOZA was an independent organization and not a part of the ECZ.

When cross examined by Mr. Mwanabo Counsel for the Petitioner, it was 1RW1's evidence that he had known the 1st Respondent for a very long time and way before he became chief. He assumed the throne sometime in January, 2021. He could not recall if the 1st Respondent visited him at the palace but did not rule out the possibility as he received a lot of visitors.

He testified that he came to hear of the name Margret Zulu the Petitioner, sometime before he became chief through a person who told him that there was a lady who had petitioned the previous MP

bearing that name. He next learnt of her during nomination time of candidates who stood in the last election. He had thus only seen the Petitioner and placed her name to a face in Court. Cross examined further; the witness testified that he did not ask to see the Petitioner earlier with a view of persuading her not to petition the election result.

He informed the court that he had meetings between May 2021 and 12th August 2021 with his headmen as per custom. The 1st Respondent was in attendance at one of the meetings but that he could not remember who he was with. He agreed that he was aware that it was wrong for a chief to openly support a particular candidate but qualified that he did not do such a thing.

It was his further evidence that he knew that it was wrong for a chief to avail transport to voters and distribute campaign materials for one particular candidate. He maintained that his denial of such things occurring was because they never happened and that the witnesses who testified to such occurrence falsely accused him.

1RW2 Musenga Misenga

A Contract Manager of Shachitari Contractors Limited. He disputed as inaccurate and untrue the content of paragraph 6.5 of the Petition alleging that the 1st Respondent built Msanzala bridge. He

explained that this work was a part of a contract or project his company started executing in 2017. The project was for the maintenance of a road from Petauke Boma to Chikowa Rural Health Center.

He testified further that the initial distance covered in the project was 70.9 kilometers and that the scope of the work included clearing and grabbing of trees and vegetation, formation of the roadbed and drainage works that extended to culverts and gravelling.

The witness testified further that from the time the company started work in 2017, there were plans by the client Ministry of Local Government to construct two bridges within the stretch. Msanzala bridge was one of the two bridges. He explained that the construction of the bridges was postponed due to insufficient funds. That towards the end of 2020 there was re-scoping done and some graveling to be undertaken was reduced to cater for funds for construction of the bridge.

Further that in 2021 a valuation order was issued to Shachitari to execute the works on the bridge. He identified the document at pages 14, 15 and 16 of the 2nd Respondent Bundle of documents as an addendum that was initiated as a result of the valuation order.

According to the witness, after the execution of the addendum that was witnessed by the company's Director and Permanent secretary for the Ministry, Shachitari had to mobilize and started execution of the works which are still on going. He further stated that the pieces of equipment that were seen at the bridge were hired by Shachitari constructors. These included the excavator and the lowbed used to carry the excavator. He concluded that it was therefore not true that the 1st Respondent was the one executing the works.

In cross examination Mr. Musenge stated that the equipment was hired for 10 days. He confirmed that he was not the owner of Shachitari Enterprises but an employee. He acknowledged that his names do not appear in the addendum as contract manager and that the document also did not specifically mention Msanzala bridge.

He further agreed that he was not present at any meeting held for the PF at Kalumbi School during the campaign period. It was therefore true that because of that he did not know what was said at the meeting.

In re-examination it was his evidence that the scope of work in the addendum included a reduction of the amount of gravelling in order to accommodate the construction of the bridge.

1RW3 Enock Zulu

A headteacher at Mwanika primary school. Reacting to the content of paragraph 6.4 of the Petition, he stated that it was true that the school has a problem with class accommodation. Because of this the Mwanika community and the PTA had a meeting on the 24th of February 2021 to consider what could be done to resolve the challenge and repair the 1 x 4 classroom block.

It was then agreed that they should find people who could help the school. One of the people who showed interest in extending help was the 1st Respondent, who was a business man in Petauke District. The PTA representative and an Induna to the chief went to meet the 1st Respondent on the 1st of March, 2021 to explore, what assistance could be rendered.

After that meeting, they returned with 20 pockets of Cement which was delivered to the school on the same date. The community was mobilized and arranged for sand and bricks. In the same month of March 2021 works to renovate the school started. Later the PTA representative and the Induna contacted the 1st Respondent with a request for iron sheet. The 1st Respondent accordingly delivered some iron sheets to the school on the 30th of March, 2021.

Mr. Zulu testified further that the renovations had not been completed to date. It was therefore not true as suggested by Pw2 that the roofing sheets were brought at the end of July 2021. He added that at the time the 1st Respondent brought the roofing sheets he made him sign for the delivery in the log book which he had with him in court as a subpoenaed witness. He referred to exhibit “ED4b” of the 1st Respondent’s affidavit in support of the Answer which he confirmed was a copy of the entry in the log book showing the date of delivery as per entry dated 30th March 2021.

It was his further evidence that the minutes for the PTA meeting he had earlier referred to are at pages 10-13 of the 1st Respondent’s bundle of documents. He reiterated that the materials were brought on the 30th of March, 2021 and that the 1st Respondent was not a Parliamentary candidate at that time. He added that the 1st Respondent never came to the school between 14th May and 12th August, 2021 being the campaign period.

In cross examination by Mr. Mwanabo, Mr. Zulu testified that it was the PTA that was overseeing the works on the classroom block. He disclosed that it was a Mr. Luka Zulu that recorded the minutes presented before court. He acknowledged that he was not in the meeting which is why his names do not appear in the minutes but was briefed about it by Mr. Zulu a senior teacher. Questioned

further the witness confirmed that Mr. Luka Zulu's names also do not appear in the minutes in spite of the fact that he recorded the proceedings.

He testified further that the issue of who was going to be voted for did not come up in the meeting according to the minutes. When referred to the entry in the log book and extract marked exhibit "ED4b" referred to above, the witness disclosed that it was the 1st Respondent who endorsed the comment in the log book at the time of delivery of the material. He disputed that the works were done in the month of August 2021 though he agreed he did not have the proof that it was not actually done in that month.

In re-examination, the witness testified that the works were done between March and April, 2021.

1RW4 Joseph Mbewe

A teacher working at Chingolo Primary school. His evidence was that he joined the school as head teacher in February 2018. The water source for the school was a nearby stream. An application to have access to water was first done in 2019. Upon being given advice by the DEBS and Municipal council on the procedure to apply for a borehole, the school successfully met the requirements and filed its application.

In 2021 officers from the concerned Ministry came to install the long-anticipated borehole. The machinery, equipment and Personnel were all from the said Ministry. He explained that first it was an engineer who came for a survey and this was followed by a team that did the actual drilling. The final team came to install the equipment. According to the witness all these were government employees.

He referred the Court to pages 5 ,6 and 7 of the 1st Respondent's bundles of documents. He testified that these documents record the detail of events that occurred in relation to the borehole and drawn from the log book that he had in court. When referred to pages 6 of the 1st Respondent's bundle of documents, it was his testimony that the Department of Water Resources Development visited the school to undertake a geo Physical survey for Chingolo primary on the 28th of May 2021. A record of that visit was signed by a Mr. Zulu a Senior Hydrologist

Other visits include what appears on page 7 of the 1st Respondent's bundle of documents confirming when the borehole was drilled and page 5 the date of installation of the handpump. To be specific that the bore hole was sunk on 29th July 2021 by a team led by a Mr. Charles Saka cell 0977604660. On the same page 7 is a record of

the visit on the 20th of August 2021 at which a Mr. Chifumu Ngoma an Engineering assistant came to:

- 1, Install a pedestal stand in concrete
2. Marking out of a soak pit
3. Casting of concrete lid for soak pit.

He too left his contact details and advised the school about the imminent return of a final team to do the installation.

The last visit came on 25th of August 2021 at which the final works for installation were done. He noted that a record of this visit was not included in the bundle. He added that the school now has running water. He concluded based on the above, that it was not true that the 1st Respondent came to the school to drill a borehole as alleged in paragraph 6.1 of the petition.

In cross examination, Mr. Mbewe testified that the he did not have any document to prove that he was a headmaster of the school. He explained that the works on the borehole were done in collaboration with the community. People in the community contributed in form of crashed stones, man power and delivering of river and building sand. He maintained that the Ministry of Water and Sanitation and Environmental Development did not do the work by itself.

When referred to page 7 of the 1st Respondent's bundle of documents, it was Mr. Mbewe's evidence that the details on that page were written by a Mr. Chanda Saka, the Senior driller from the Department of Water Sanitation and Environmental Protection. He testified further that the rig used to drill the borehole was a GRZ vehicle although he did not capture its full details. He further stated that there has not been a handover of the project by the Government.

It was his evidence that he never attended any campaign by the PF and therefore would not know if the boreholes were used by anybody to campaign for the 1st Respondent. He further confirmed that the drilling and installation of the boreholes was done during and after the campaign period.

1RW5 Alick Phiri

A teacher at Maila day Secondary School. He was asked to comment on the allegation in paragraph 6.1 of the Petition that the 1st Respondent sank a bore hole at the school. He testified that he has been a spokesperson and headteacher for the school from 2018 to date. He revealed that since its inception, there had never been a borehole at the school. The school enrolls pupils on a weekly

boarding basis thus being on campus 2 weeks at a time. Pupils were therefore expected to draw water to bath.

In its resolve to ease this challenge, the school requested for a borehole in writing through the Lusangazi Council Chairperson the late Mr. William Banda. Mr. Phiri personally took the request letters to the Council chairperson and the DC on the 30th November, 2020 and was asked to wait for the outcome.

Sometime in May, 2021 he received a phone call from an officer at Department of Water Resources Headquarters for Eastern Province informing him that they would be visiting the school to establish possible sites for drilling a borehole. On the 29th of May, 2021, he received officers from the Department of Water Resources and they managed to spot out sites where the borehole could be drilled. The officers finally returned to drill the borehole on the 29th of August, 2021.

Mr. Phiri testified that he made the officers from the Ministry sign his log book on the 3 visits they had come through as witnessed on pages 3,4,5 and 6 of the 1st Respondent bundles of documents.

In cross examination by Mr. Mwanabo, he testified that he did not produce any document to show that he is head master for the school or to confirm that his application for a borehole was

approved by any government department. He testified that the application for a borehole was made on the 30th of November, 2020. Further that the application was addressed to the Council Chairperson for Lusangazi District and copied to the District Commissioner. He did not apply to the Department of Water Resources and Development.

He testified that the person who called him was an engineer from the Department of Water Resources and that his name was Katanekwa Katanetwa. The Council Chairperson had also called him. He acknowledged that he did get the feeling someone in the background might have been pushing for the boreholes to be drilled at the school. Further that the person he suspected to be doing so was the Council Chairperson himself.

It was his evidence that the drilling was done by the Department of Water Resource Development based on what they wrote in log book. He acknowledged that he was aware that at the time he received the phone call from the Council Chairperson sometime in May 2021, the Councils had been dissolved.

He agreed that the person who called him was therefore no longer Council Chairperson person at the time and that the borehole in issue was sunk during the campaign period. Further that the works

for the borehole commenced but that by 12th of August, 2021 he had not received any official document from the Government sanctioning the work at the time.

Cross examined further the witness testified that he had not attended any PF meeting so he was not in a position to state if the borehole was used as a campaign tool or not. He agreed that members of the community were aware that a borehole had been sunk.

In re-examination he reiterated his earlier position that the borehole was sunk by the Department of Water Resources and Development and an application letter was sent to the Council Chairperson for Lusangazi District.

1RW6 Dominick Mubenge

A head teacher of Mangolo Community School. In response to the allegations in paragraph 6.1 of the Petition, Mr. Mubenge testified that on the 24th of July, 2020 a meeting was held by the school together with some local leaders to discuss developmental projects. One of the projects was the drilling of a borehole at the school.

It was resolved that contributions were to be made by each village to raise the sum of ZMW1,500.00 which was required to pay for the borehole that was to be sunk by the District Council. In early

February, 2021 the school received some officials from the District Council that came to survey possible sites where a borehole could be drilled. They did the survey and left stating they would be back in May of the same year.

He testified further that on the 17th of May, 2021 the council officials arrived with a driller to sink the borehole. However, the works could not commence on the said day as they had a breakdown with their machinery. A month later on the 18th of June, 2021 the team came back and a borehole was drilled successfully.

On the 19th of June 2021 the borehole was handed over to the community and a receipt of ZMW 1,500.00 was issued. When referred to pages 1-3 of the 1st Respondent bundle of documents, the witness stated that these were the minutes for the meeting which was held on the 24th of July, 2020. Agenda item 4c listed the issue of financing of the borehole as a subject of discussion.

He went on to state that page 5 of the 1st Respondent's bundle confirmed the visit of the 17th of May, 2021 and the receipt of the sum of ZMW 1, 500.00 from Mangolo Community school. Further that page 6 confirms the visit and drilling of the bore hole on the 18th of June 2021 as signed by Lusangazi Town Council. The receipt for the payment of ZMW1,500.00 that was issued is at page

7 of the bundle dated 19th June 2021. He concluded that in light of the evidence above it was not true that the 1st Respondent drilled the borehole at the school. It was Lusangazi District Council that did so.

In cross examination, Mr. Mubenga testified that the PTA agreed to raise ZMW 1500.00 as that was the amount the school was advised to come up with by the Council. He stated that he did not know the commercial cost for drilling a borehole. He did not have any document before court to show that he applied for the sinking of the borehole to the named council. He further did not have any document to show the approval of the application by the Council.

He stated that they had 7 villages in the locality and that contributions collected from the villages amounted to ZMW 2,520.00 out of which ZMW 1,500.00 went to the drilling of the borehole. He stated that he did not have any evidence before Court confirming receipt of money from the villages.

He was aware that Parliament was dissolved on the 14th of May, 2021 which also affected the councilors tenure. He thus agreed that from that date there was no councilor or chairperson working in the councils to approve projects like drilling of boreholes. He disclosed that the communication of the borehole being drilled at the school

was done through their former area Councilor for Chisangu Ward, Mr. Mwanza. Further that it was Mr. Mwanza that availed him the form that he took to the District Council sometime in February, 2021.

Mr. Mubenga testified further that the borehole was handed over to the schools by workers from the district Council but that he did not know their names and positions. He added that he did not attend any campaign meetings held by the PF. He therefore would not know if the borehole was used as a campaign tool for the 1st Respondent.

The witness was not re-examined.

1RW7 Denial Phiri

A driver by profession. He was referred to paragraph 6.3 of the Petition relating to the payment of ZMW4,000.00 to a church by the 1st Respondent. His evidence was that he is secretary for a section of St Gabriel Catholic Church where he also carries out pastoral duties on Sundays. The Parish priest was Father Gastone Sakala at the material time.

He testified that Father Sakala was sent to work from Nigeria. Before he left, he expressed his dissatisfaction with the state of the church infrastructure and his resolve to contribute to extending its

building. The Father specifically stated that the bricks that were molded the previous year were not enough for the contemplated extension works to the Church. His message as he left was therefore that he would be sending people to check on how work was progressing.

True to his word, Father Sakala later sent a sister and treasurer from the Petauke Parish named as sister Ruth and Brother Robert Njovu to visit the church on the 8th of August 2021. After the service, they revealed that Father Sakala had sent ZMW 4, 000.00 to the church to buy food for the people who were moulding bricks to be used for extending the church. The money was handed over to him.

2 days later, a meeting was held with all the church leaders and a budget was drawn up for the food to be bought. It was therefore his testimony that the allegation that the 1st Respondent denoted the money was untrue. He further disputed PW11's evidence suggesting that the money came from the DEBS a Mr. Nkoloma, allegedly in return for votes in favour of the 1st Respondent and President Lungu.

He added that it was not true that Madelainna was the treasurer. He clarified that she was actually Father Gaston's mother. It was

his evidence that he handed over the money received to Bellina Phiri the treasurer

In cross examination, it was 1RW7's evidence he was not the Parish priest but was the one who pastors at the Church. Further that Father Sakala was sent to Nigeria in 2020. He stated that he was in touch with him and that the last time they communicated was in August 2021, after he sent the money. Father Sakala had called to ask if the money was received.

Mr. Phiri admitted that no record was produced before the court to confirm that the money was received. It was his position that he received the money on the 8th of August 2021 around 12:30 hours. When asked why he was giving a different date from the one a previous witness had given the Court. He maintained that he was talking about the money he received and the date he received it.

He did not have any document before the court to confirm he was running St Gabriel's Church.

1RW8 Billy Daka

Also, headman Chule of Chule village in Chief Sandwe's area. He was referred to paragraph 6.4 of the Petition and the allegation therein that the 1st Respondent distributed Twenty nine (29) bags of cement to Mangolo Community School. He testified that this was

not done during the campaign period. He recalled that the delivery was on the 17th of April, 2021.

He testified that he was the one that went to buy the cement after the PTA chairman for the school Mr. Peter Banda approached the 1st Respondent for assistance. The PTA Chair felt 1RW8 was best placed to buy the cement as the school was in 'his hands' being a headman.

The 1st Respondent accordingly sent ZMW4,400.00 via airtel money to Mr. Daka and he went to buy the cement from Sinda. He bought 29 pockets of cement on the 17th of April, 2021. He added that the 1st Respondent had no position at that time.

In cross examination, the witness confirmed that he did not have documents before court to show that he was headman Chule or receipts for the purchase of the cement. He stated that he saw the 1st Respondent on the 30th of March when he visited Mwanika to deliver iron sheets. A light truck was used to deliver the sheets but he could not recall the vehicle the 1st Respondent came with.

He testified further that the PTA chairman is the one who approached the 1st Respondent and asked for pockets of cement for the school. He added that the money was sent through airtel money but accepted that he did not show the court the notification of

payment. He maintained that the contributions were not made during the campaign period. He agreed that he did not produce any document so show the handover of the materials to the PTA chairman.

1RW9 Mwenda Sakala.

A farmer and resident of Teteke Farms in Chief Sandwe's area. In response to the allegations in paragraph 6.4, it was his testimony that on the 11th of April 2021, he accompanied 11 headmen to the office of the 1st Respondent. He testified that the headmen went to request for roofing sheets for a 1x2 block at Teteke Community school. The 1st Respondent told them that he had heard their request and asked that the PTA Chairperson and one headman should go to see him at a later date to collect the iron sheets. He added that at that time, the 1st Respondent was not yet a candidate for the elections.

On the 15th of April 2021 Mr. Sakala in his capacity as the PTA Chairman and headman Mbande went to Petauke to collect the iron sheets from Eriboma Lodge on instruction from the 1st Respondent. The Manager at the lodge handed over the sheets to them which they then delivered to the school. It was thus his conclusive response that the allegations against the 1st Respondent were

untrue. He maintained that the iron sheets were acquired before the campaign period.

In cross examination, Mr. Sakala's agreed that he had not presented any documentary evidence to the court to back his claims. He explained that he did not sign any document at the time of the collection of the sheets. There was further no record of receipt of the sheets at the school. He acknowledged that in hindsight, it was necessary to document receipt of the iron sheets for accountability purposes but that this was not done in this case.

Questioned further, it was Mr. Sakala's evidence that the school was prompted to seek help as enrolled children were learning in thatched roofed structures. He agreed that the period between the delivery of the sheets and the dissolution of Parliament was less than 2 months. He nonetheless insisted he had no idea who was seeking to stand as candidates in that period and only established this around June 2021. No one else was approached for assistance in the period May to August 2021.

IRW10 Elias Daka

The 1st Respondent herein. He testified that he is a Member of Parliament and businessman. Among the businesses he runs

include a construction company that also leases out equipment, is involved in transport, mining and owns a lodge and a school.

He dismissed as false the allegation in paragraph 5 of the petition alleging his association with chiefs to lure voters to vote for him. He testified that there was no such occurrence in Msanzala. In fact, that Chief Nyampande was before the court and dismissed the allegations as untrue.

He also disputed the allegation that he was drilling boreholes and delivering building materials at Chingolo as alleged. He testified that witnesses had come before court and gave evidence on who actually drilled the boreholes. He categorically denied drilling the boreholes at Mangolo or Maila day schools or at Mwanza village and Chizalila village as alleged.

In response to allegations in paragraph 6.2 that the chiefs were campaigning for the PF Presidential candidate and for him as Member of Parliament, the 1st Respondent disputed the claims. He stated that the chiefs were not his campaign managers or election agents. That the only truth he could attest to was that Chief Nyampande had called for a meeting for all stakeholders in his chiefdom. In that meeting were representatives of the Ministry of Health, headmen and churches. All politicians were also in

attendance. The chief called for the meeting in reaction to what was described to be the escalating covid 19 cases in the area. The health officials present explained the threat that the disease posed at that particular time. The chief thus expressed his desire to lockdown any gatherings in the chieftdom.

In response to the allegation in paragraph 6.3 of the petition contending that he donated ZMW4,000.00 to a Catholic Church to lure votes, Mr. Daka stated that this claim was also untrue. He reminded the court that a witness gave evidence that the money had in fact been donated by the Parish priest.

He referred the court to pages 8 and 9 of his bundles. He stated that the same was a copy of a Petition for the Local Government elections in which one Emeldah Lungu had petitioned Cosmas Mulenga raising a similar claim of payment of the same amount of money to the church. That this was in essence the same allegation that had been leveled against him.

He also denied the allegations in paragraph 6.4 of the petition. According to the witness, the cement alleged to have been donated by him to Mangolo School was done long before he was a candidate in the past election. He explained that he was asked for help and gave out the materials on a charitable basis.

He also dismissed as untrue that he renovated Mwanika School during the campaign period. What was true was that the materials in question were requested for by the school through the PTA and subsequently donated long before the elections on the 30th of March 2021. Commenting on the donation to Teteke Community school, the 1st Respondent testified that he also made the donation to the school of Iron Sheets before the election period contrary to what had been alleged.

In response to the allegations in paragraph 6.5 of the petition linking him to the construction of Msanzala bridge, it was the 1st Respondent's testimony that he was not involved in the works. He reminded the court that a witness from the company that did the work came before the court to confirm that fact. He made reference to and relied on the addendum on pages 14, 15 and 16 of the 1st Respondent's bundle of documents signed between the Ministry of Local Government and Shachitari Contractors, the party he asserted was engaged to do the work.

In response to paragraph 6.6 linking him to GGOZA, Mr. Daka stated that the claims therein were untrue. He encountered the organization carrying out its work whilst he went about his business. The organization was sensitizing people to go and vote for

a candidate of their choice. At no point was he introduced to the NGO as a wing of the Patriotic Front.

It was also untrue that he had any involvement in the ferrying of voters as contended in paragraph 6.7. According to the witness, he did not ferry anyone to any polling station nor did he hire any transporter to do so. Also disputed was the allegation in paragraph 6.8 that he was giving food to lure voters on poll day. He denied ever doing so.

He was further not in any place where the Petitioner and her campaign team were as claimed. He was in fact in Chikusi, Kashabele, Teleke and Sichilima areas at the alleged time and date that it was contended he and his team were disrupting the Petitioner's meetings.

Explaining his role in the PF mobilization team, the 1st Respondent testified that their mandate as a team was to sensitize people in the constituency to register as voters. His role ended there. The allegations in paragraphs 6.10 were therefore false. All the allegations and assertions linking him or his agents to GGOZA and its activities were denied as being untrue.

Moving on to paragraph 7, the 1st Respondent contended that a medical report would have been availed by the Petitioner if it was

true there was any violence. He contended further that if there was any truth in the assertion that he breached the electoral code as stated in paragraph 8 of the petition, the Petitioner would have lodged a complaint to ECZ which was not done. Neither he nor his agents were ever called by the 2nd Respondent hence the conclusion that even the letter presented to be a complaint on page 9 of the Petitioner's bundle of documents was not delivered to the Commission.

He accepted the averment that he was duly elected winner and the result of the elections. His party claimed 6 wards from the 11 contested. 3 were won by independent candidates and 2 went to the UPND. He believed that such an outcome would not have been possible if the allegations of his wrong doing were true. He therefore did not agree with the claim in paragraph 11 that the majority of voters did not vote for a candidate of their choice.

He testified further that his witnesses had given evidence relating to when he made the various donations contrary to what was stated by PW2, PW3 and PW4. He submitted as ludicrous the suggestion that he had the powers to request a chief to campaign on his behalf. In fact, that his area councilor even lost in the area that it was alleged he had done wrong.

He accepted having purchased 3 cows from PW15 but that he did so to feed his foot soldiers that were working with him in the campaign. That he had over 3000 persons working for him covering the 11 wards. He explained that his vehicles were indeed used at Msanzala bridge to deliver an excavator which was hired by Shachitari contractors. However, it was not true as contended by PW18 that he was responsible for building the bridge.

He prayed that the Court uphold his election and declare that he was duly elected by the people and for any other relief the court may deem fit.

When cross examined on behalf of the 2nd Respondent, the 1st Respondent agreed that ECZ did inform candidates the dos and don'ts leading up to the elections. He confirmed that he was not summoned by the 2nd Respondent in relation to a complaint lodged by the Petitioner as presented on page 9. He as such, never at any time attended a conflict management meeting pertaining to the said complaint.

He was further never summoned by the police relating to any complaint filed by the Petitioner. He agreed that he had polling agents at all the 73 polling stations and at the totaling center. He did not receive any complaint about the 2nd Respondent from any of

his polling agents. ECZ therefore conducted a free and fair election as far as he was concerned.

When cross examined by the Petitioner's counsel, The 1st Respondent testified that he had known Chief Nyampande from his childhood. The chief was therefore not a stranger to him. He accepted having had social conversation with him on the occasions that they met.

An Induna communicated the invitation to attend the meeting called for by the chief alluded to in his evidence earlier. The second meeting he could recall was when he went to pay a courtesy call on the chief before the campaign period.

He testified further that he had no knowledge of the councilor having admitted donating the ZMW4,000.00 to the church or about a finding to that effect by the Local Government Tribunal in its Judgment. He agreed that the Petitioner in the present matter was not the one who had made the claim of the ZMW4,000.00 payment in the named local Government Petition.

Questioned further, the 1st Respondent did not dispute making the donation to the schools. However, his position was that he did so outside the campaign period in 2021. He agreed that there was

nothing before the court to show he had engaged in previous philanthropic activity involving the schools.

He agreed that he worked with over 3000 people in his campaign. He further agreed that he was not always with his foot soldiers. He did not dispute that there were ward chairmen and councilors in his team that campaigned on his behalf. He insisted there was never a time he met with the UPND campaign team as contended in paragraph 6.9 and would not know if there were other people campaigning for him in the mentioned locations. He acknowledged that there was no mention of an assault in the election petition and that therefore in such circumstances one cannot be expected to submit a medical report on an allegation of intimidation which is what was pleaded.

He accepted that he did not produce the contract by which he hired out equipment to work on Msanzala bridge. He further admitted that the contract on pages 14-16 of his bundle being the addendum relied upon makes no mention of the hiring of equipment from him.

He acknowledged further that the 3000-foot soldiers he referred to were representing his party and that the beneficiaries of the campaign messages given out were the sponsored candidates that included him. His involvement with the PF mobilization team was to

encourage people to register as voters. His intention to contest the election came much later when PF put out an advert inviting persons to contest. The mobilization team ceased to exist once the campaigns started.

In re-examination the witness testified that he had been engaged in philanthropic activity from about 2014. This was why the community leaders knew about Eriboma a company associated with him. He was aware of the challenges faced in the community. He therefore extended help where he could.

4. The 2nd Respondent's Case

The 2nd Respondent called one witness.

2RW1 Lucy Phiri

A Chief Administration Officer for Lusangazi town Council. It was her evidence that she was the returning officer for Msanzala Constituency in the 2021 elections. Her duties as returning officer were to oversee the General elections in the Constituency with the help of her assistant returning officers, three field works and one IT officer.

She testified that on the 12th August, 2021 the General elections were conducted in Msanzala Constituency. The 2nd Respondent

started receiving results in the Constituency the next morning at around the 02:00hrs on Saturday the 13th August 2021. The last polling station's results came in around 04:00hrs.

After all the results were in, the candidate that was declared winner had over 14, 000 plus votes. The second polled 6,000 plus votes. She confirmed the results declared to be as indicated on page 1 of the 2nd Respondent's bundle of documents.

When referred to the complaint letter at page 9 of the Petitioner's bundle of documents, it was her evidence that she was seeing the letter for the first time in court. She only remembered seeing a complaint letter from the Democratic Party which was later withdrawn. It was her evidence that she was not part of the Conflict Management Committee but that the District Electoral Officer who was a part of the Committee would engage her in her capacity as returning officer whenever a complaint was lodged by a party. She was thus only alerted about the Democratic Party's complaint.

The witness also relied on the affidavit she swore in support of the 2nd Respondents Answer to be part of her evidence.

In cross examination by Mr. Songolo on behalf of the 1st Respondent, it was her evidence that she did not receive any complaint from the Petitioner that there was undue influence from

the PF during the campaign period. Further that she did not receive any complaint that the UPND were being threatened and intimidated.

There was also no complaint that the PF were engaged in donations, sinking of boreholes, roofing of schools and distribution of cement in Msanzala during the campaign period. She further confirmed that there was no complaint received about chiefs siding with the PF candidates or about the activities of an NGO named GGOZA. It was her further testimony that there was no complaint received from the Petitioner specifically.

She further confirmed as accurate the figures contained in paragraph 11 of the petition. Thus, the total number of registered voters was 41500 and 25620 voters cast their votes. This translated into a percentage turnout of 61.7%. She agreed that it was therefore true that over half the voters voted.

It was her further evidence that there was no complaint received that people were stopped from voting on poll day or any report from police officers manning the polling station to the effect that PF candidates were feeding people at the polling stations.

Cross examination by Mr. Mwanabo on behalf of the Petitioner, Ms. Phiri agreed that Msanzala is a vast constituency with a distance of

about 67 km from the Council offices to Lusangazi District. It was her evidence that she and her team were going round the polling stations and there was no one queuing up at the stations before the election day.

She testified that she did not attend any campaign meetings held by different political parties or the meetings called by the chief. It was her evidence that she was not a member of the Conflict Resolution Committee and that people with issues were not meant to direct their complaints to her office but to the District Electoral officer Mr. Mbilisha, who was her senior.

She was not aware whether or not the District Electoral Officer had a book in which complaints received were recorded. When referred to page 1 of the 1st Respondent's bundle of documents, Miss. Phiri testified that the said document was the Gen 21 form and that it was prepared by a technical support officer and assistant returning officer IT.

Pressed further Ms. Phiri agreed that as the document bore her signature, she qualified to be considered its author. She further did not dispute that she declared the winner of the election and released the GEN 21 form to all the parties. She acknowledged that

the document was supposed to be witnessed by all the participants but that only the Socialist Party did so in this case.

Questioned further, it was her evidence that the document at pages 3 to 7 of the 2nd Respondent's bundle of documents was the Gen 19 form and that it was supposed to be witnessed by all the parties. She admitted that it was only witnessed by two of the parties in this case. She agreed that the fact that an electoral malpractice is not reported does not make it right.

There was no reexamination and that marked the close of 2nd Respondent's case.

5. Submissions

1. The Petitioner's submissions

The Petitioner filed into Court written submissions on the 19th of August, 2021. A considerable portion of the submissions was dedicated to a synopsis of the evidence before court and justification for the conclusion that the Petitioner has established a case for the nullification of the election as prayed.

In making specific arguments on the law, it was submitted that the grounds upon which the election of a candidate as member of Parliament may be nullified by the High Court are set out in

**section 97 (2) paragraphs (a), (b) and (c) of the Electoral Process
Act No. 35 of 2016**

It was submitted that section 97 (2) (a) of the Act shows that the election of a candidate as a Member of Parliament can be nullified if the person challenging the election of the candidate demonstrates to the satisfaction of the Court that the candidate in question personally or by his election or polling agent committed a corrupt practice or illegal practice or other misconduct in relation to the election or that the corrupt practice or illegal practice or misconduct was committed by another person with knowledge, consent or approval of that candidate or that of the candidate's election or polling agent.

It was submitted further that the Petitioner also has to prove that as a result of that corrupt practice or misconduct, the majority of the voters in the Constituency were or may have been prevented from electing the candidate in that constituency whom they preferred or that the non-compliance with the law affected the outcome of the result of that election.

Reliance was placed on the case of **Mubika Mabika vs. Poniso Njeulu**¹ a Supreme court decision that received approval from the

Constitutional Court in the case of **Jonathan Kapaipi vs. Newton Samakayi**² in setting out the import of the majority clause.

Reference was also made to the case of **Mubita Mwangala vs. Inonga Mutukwa Wina**³, wherein the Supreme Court held that:

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

Further reliance was placed on the case of **Nkandu Luo and the Electoral Commission of Zambia vs. Doreen Sefuke Mwamba and the Attorney General**⁴ in stressing the need to establish requirements to be met under section 97(2)(a) of the EPA

It was submitted that the incidences demonstrated by the Petitioner in support of the grounds of the Petition in the present matter were widespread and that quite clearly, the voters were prevented or may have been prevented from voting for the candidate of their choice. It was argued that the law does not require the Petitioner to go to the extent of showing that the voters were prevented from voting for the candidate of their choice only but that it is also enough to simply show that the voters may have been prevented from voting for the candidate of their choice.

It was submitted that the acts of intimidation, voter buying, donation of building materials, sinking of boreholes, ferrying of the voters, bridge works and treating of voters established in evidence are enough to show that the incidences were widespread and had the effect of swaying the majority of the voters to vote for the 1st Respondent and not the Petitioner. Further, that the voters were thus evidently prevented from choosing the candidate of their choice.

It was argued further that the actions and activities complained of were committed by the 1st Respondent, his election agents and polling agents and in some instances by his Political party the PF. It was submitted that the 1st Respondent did not tell the Court of any measures that he put in place to ensure that members of his campaign team operated within the limits set in the EPA.

Reliance was placed on **Article 54 of the Constitutional Amendment Act, No. 2 of 2016**, to emphasize the obligation placed on parties to comply with the electoral law. The Article provides that:

“A candidate and a political party shall comply with the prescribed electoral code of conduct.”.

It was submitted that the 1st Respondent and his party are guilty of breach of this provision whose compliance is mandatory. Further that any provision of the Electoral Process Act (EPA) that tends to deprive the Constitution of the full force of the article is rendered null and void granted the supremacy of the Constitution.

It was submitted further that the Petitioner has proved her election petition against the 1st Respondent to the required standard of a fairly high degree of convincing clarity. The cases of **Austin Liato vs. Sitwala Sitwala⁵**, **Lewanika and others vs. Chiluba⁶** and **Brelsford James Gondwe vs. Cathrine Namugala⁷** were relied on as authorities for the standard of proof required to be established in election petitions. In closing, it was argued that in line with section 108 (1) of the EPA, the court should find that the election in Msanzala Constituency was null and void and accordingly nullify the election in light of the allegations raised and proved by the Petitioner.

2.1st Respondent's Submissions

The 1st Respondent filed into Court submissions on the 19th of October, 2021. The submissions were fairly lengthy and like the Petitioner, provided a detailed synopsis of the evidence before court

and endeavored to establish why in his view the evidence did not justify the nullification of his election as Member of Parliament.

In terms of the law, it was submitted that it is trite for the parties in an election Petition to ensure that the evidence adduced in support or against an election Petition is credible, relevant and useful to the Court for the determination of the dispute. It was argued that the burden of proof lies upon the party who substantially asserts the affirmative of the issue.

Reliance was placed on the learned authors of Phipson on Evidence, 14th Edition, paragraph 402 at page 50 wherein they observe that:

"The burden of proof lies upon the party who substantially asserts the affirmative of the issue. The rule which applies is El Qui affirmat non ei qui negat incumbit probatio..." which expression the court in **Constantine Line vs. Imperial Smelting Corporation**⁸ in dicta stated literally means *"proof rests on he who affirms not he who denies"*. Further reliance was placed on the case of **Khalid Mohammed vs. The Attorney General**⁹ in which the Supreme Court emphasized the requirement for a party claiming to prove his case.

It was submitted that a Petitioner in an election petition must not only prove her case but must prove it to the appropriate standard

as set out by the Constitutional Court and the Supreme Court of Zambia in the cases of **Mazoka and others vs. Mwanawansa and others**¹⁰, *Lewanika and others vs. Chiluba* (supra), **Mabenga vs. Wina and others**¹¹, and **Kamanga vs. Attorney-General and Another**¹². That these among other cases settle the principle that election petitions are required to be proved to a standard higher than a mere balance of probabilities and attain a fairly high degree of convincing clarity.

Reference was further made to section 97 of the Electoral Process Act, No. 35 of 2016. It was submitted that the law requires that the alleged malpractice or misconduct must have been committed by the candidate or with his knowledge and consent or approval or of his election agent or polling agent.

In addition, that the “Agents” are those persons defined in section 2 of the EPA. It was submitted that it was thus incorrect for the Petitioner and her witnesses to suggest even faintly through their testimonies that it does not matter who the wrongdoer is.

It was thus submitted that in order to succeed with the present Petition, the Petitioner must prove the following to the requisite standard:

- i. That there were election offences committed under section 81 of the Electoral Process Act as pleaded in the Petition and that these offences were committed in connection with the Parliamentary election held on the 12th of August, 2021 for Msanzala Constituency. Further that the offences were committed by the 1st Respondent or with his knowledge and consent or approval or that of his Election Agent or Polling Agent and that as a result, the majority of the voters in Msanzala Constituency were or may have been prevented from electing a candidate of their preference.
- ii. That there was undue influence occasioned by a breach of section 83 of the EPA as a pleaded in the Petition and that the intimidation, threats of violence and non-compliance both of the EPA and the Electoral Code of Conduct alleged, were committed by the 1st Respondent or with his knowledge and consent or approval or that of the Election Agent or Polling Agent. Further, that as a result of such conduct, the majority of the voters in Msanzala Constituency were or may have been prevented from electing a candidate of their preference.

It was submitted that on the allegations of bribery under section 81 of the EPA, the Petitioner and her witnesses, **PW2, PW3,**

PW6, PW7, PW11, PW12, PW13, PW14, PW15, PW16, PW17 and PW18 all failed to prove their claims as each allegation was rebutted through the 1st Respondent's witnesses. It was thus submitted that the evidence by the Petitioner fell short of the requisite standard of proof.

Moving on to the allegations of undue influence under section 83 of the EPA, it was argued that to prove the claimed unabated intimidation, hostile environment including the alleged threats from chiefs to their subjects, the Petitioner called PW4, PW5, PW8 and PW9. It was submitted that Petitioner failed to prove her case to the standard set in the EPA and that their evidence was discredited in cross examination.

It was further submitted that even assuming the allegations were true and that the Petitioner had succeeded in proving the allegations, the Petitioner still lamentably failed to demonstrate to the Court how this prevented the electorate from electing a candidate of their choice.

Further that not a single witness addressed the question of how widespread the breaches were to warrant a nullification of the 1st Respondent's election. It was submitted that the Petitioner had the burden to demonstrate to the Court how many people were affected

by the 1st Respondent's alleged breaches of the law. It was submitted that the record would show that only 5 witnesses namely **PW5, PW14, PW15, PW16 and PW17**, attempted to address the question but did not meet the expected threshold.

It was argued further that no evidence was led to prove the numbers of people who attended the meetings where the breaches were said to have occurred. In this regard that the Constitutional Court has guided that an indication of the numbers of people who attended such meetings must always be provided. That failure to do so is fatal to the Petitioner's case or to the party seeking to rely on such numbers. Reliance was placed on the case of **Mbololwa Subulwa vs. Kaliye Mandandi**¹³, in support of this proposition.

In making further submission on the issue of the alleged intimidation, hostile environment and threats of violence, the 1st Respondent placed reliance was on the learned authors of Halsbury Laws of England, 4th Edition, Vol 15, in defining what constitutes threat of violence at page 429 paragraph 784 in the following terms:

"In order to constitute undue influence a threat must be serious and intended to influence the voter, but it must appear that the threat should be judged by its effect on the person threatened and not by the intention of the person using the threat."

It was submitted that since the test for undue influence is the effect on the person threatened and not the person using the threat, the Petitioner in this case had failed to prove to a fairly high degree of convincing clarity that the majority of the voters in Msanzala were or may have been prevented from electing their preferred candidate. In essence that the witnesses who testified on the issues stated that they voted freely and for their preferred candidate even though she lost the election

It was argued further that despite bearing the responsibility of meeting the required standard of proof, the Petitioner did not provide corroborative evidence to support her testimony or that of UPND cadres or members of her campaign team in all the allegations laid in sections 81 and 83 of the Electoral Process Act. To make the point for the requirement of such supporting evidence, reference was made to the case of Mbolowa Subulwa vs. Kaliye Mandandi (*supra*).

The 1st Respondent argued further that the standard expected in proving how widespread the infractions were for purposes of determining whether the majority of voters were as a result affected by the claimed breaches of section 81 and 83 of the Act was also considered in the Mbolowa Subulwa (*supra*) case in which the Constitutional Court observed that:

"In Sunday Maluba vs. Rodgers Mwewa and the Attorney General Appeal No. 4 of 2017, we adopted the meaning of the term 'widespread' given by the Supreme Court in the Mazoka vs. Mwanawasa (2005) Z.R 138 case. Although the latter case involved determination of a Presidential Election Petition, the meaning given in that case adds some clarity. The Supreme Court put it thus;

"Since a Presidential Petition election involves all the 150 Constituencies; the Petitioner must prove electoral malpractice in at least a majority of the Constituencies."

It was submitted that the Petitioner completely neglected to call witnesses to testify on the question of how widespread the breaches complained of in all the allegations under section 81 and 83 of the EPA were to warrant nullification of the election of the 1st Respondent as member of Parliament for Msanzala Constituency. Conclusively the Respondent prayed that the Petition should be dismissed and that the 1st Respondent be declared as the duly elected Member of Parliament for Msanzala Constituency.

3.The 2nd Respondent's Submissions

The 2nd Respondent filed into Court its Submissions on the 21st of October, 2021. It was submitted that the Petitioner made two allegations against the 2nd Respondent and these were:

1. That the Petitioner wrote a letter to the District Electoral Officer complaining against the Patriotic Front;
2. That some of the Gen 19 and Gen 20 forms were not signed by all the election candidates and/or their election agents.

It was submitted that the letter of complaint to the 2nd Respondent at page 9 of the Petitioner's bundle of documents was not received by it through the District Electoral Officer for Lusangazi District as there was no evidence apart from the testimony of the Petitioner to show that the said letter was delivered. It was submitted that even if the Court was to find that the letter was received by the 2nd Respondent and that the Commission erred by not resolving the issue, it was argued that that act could not be the basis of nullifying an election as the elections were held in substantial compliance with the electoral laws.

Further that the Petitioner and her witnesses did not lead any evidence to show this Court the effect or impact this omission may have caused. Reference was made to **section 97 (4) of the EPA** which provides that:

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

Further reliance was placed on Halsbury's Laws of England. Volume 15(4). Fourth Edition, Paragraph 670 which explains that:

“No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal, having cognizance of the question that the election was conducted substantially in accordance with the law as the elections, and that the act or omission did not affect the result”

I was also referred to a Nigerian decision in the case of **Alhaji Waziri Ibrahim vs. Alhaji Shehu Shagari and Others**¹⁴ in further support of the above position. Further reliance was placed on the case of Mubika Kalema and Poniso Njeulu (supra) in which the Supreme Court set out the import of the majority clause.

Coming to the allegation of the Gen 19 and Gen 20 forms not being signed by all the candidates and/or their agents, reliance was placed on Regulation 5(2) of the Code of Conduct, Schedule to the Electoral Process Act, 2016, which provides that:

“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”.

Further reliance was placed on section 36 (2) of the EPA 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”

It was submitted that it is insignificant whether or not the Petitioner's or his agents or other political parties endorsed the Gen20a or other document of the 2nd Respondent since the signatures of the Presiding officer and/or other designated officials is what are paramount. It was argued that the failed endorsement of the Gen20a by the Petitioner does not invalidate the result.

The 2nd Respondent thus concluded that it conducted the election in substantial conformity with the Electoral Process Act and that the Petitioner had not in any event demonstrated how any omission by the Commission affected the result of the election as per requirement in the Mubika (supra) case. The 2nd Respondent prayed that the Petition be dismissed for being devoid of merit accordingly.

6. Court's consideration and decision

I have carefully considered the evidence before me and the submissions filed by counsel to whom I am eternally grateful.

Article 73 (1) of the Constitution (Amendment) Act No 2 of 2016 grants the High Court the jurisdiction to hear and determine parliamentary election petitions.

The article provides that:

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

The applicable law on Election petitions is unquestionably the Electoral Process Act No 35 of 2016.

The position of the Law as it currently stands is set out in section 97 (2) of the Act, which provides that:

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

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

(i) by a candidate; or

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

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

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

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

It can clearly be discerned as ably submitted by all the parties, that there is an inescapable requirement for a Petitioner to prove the Respondent's wrong doing or that the illegal act or misconduct was

done by his agent or another person with his knowledge and consent or that of his agent; and further that as a result of such action, the majority of the voters were prevented from electing a candidate of their choice. The agents considered in this sense being either an election agent or polling agent as defined in section 2 of the EPA in the following terms.

"election agent" means a person appointed as an agent of a candidate for the purpose of an election who is specified in the candidate's nomination.

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

From the above it is clear that the definition of an election agent is restricted only to the person specified in the candidate's nomination papers. A polling agent is the one appointed by a candidate in respect of a polling station.

I remind myself that the Petitioner bears the burden to prove to the required standard the allegations set out in his/her petition. In the case of Anderson Kambela Mazoka and 2 others vs. Levy Patrick Mwanawasa & 2 others (supra) the Supreme Court adopted the passage in Zulu vs. Avondale Housing Project¹⁵ and stated that:

"...We held in that case that a Plaintiff cannot automatically succeed wherever defence failed; he must prove his case. It follows that for the Petitioner to succeed in the present petition, it is not enough to state that the Respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced established the issues raised to a

fairly high degree of convincing clarity in that proven defects and the 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 results which could no longer reasonably be said to represent the true free choice and free will of the majority of voters."

In Breisford James Gondwe vs. Cathrine Namugala(supra) the court held that:

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

In the case of Austin Liato vs. Sitwala Breisford (supra), the Constitutional Court cited with approval the sentiments of the Supreme Court in the case of Lewanika and Others vs. Chiluba (supra) wherein the Court asserted that it could not be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probabilities and that it followed that the issues raised were required to be established to a fairly high degree of convincing clarity.

Further, in Levison Achitengi Mumba vs. Peter Daka¹⁶ the Supreme Court re stated the standard and phrased it as "*One that*

falls between the civil standard of the balance of probabilities and the criminal standard of proof beyond reasonable doubt"

To succeed in her petition under section 97 (2) (a) therefore, the Petitioner has to establish to a fairly high degree of convincing clarity that there has been some illegal conduct, misconduct or breach of the Electoral Code of Conduct by the 1st Respondent personally or by his agents or another with his knowledge or consent or that of his agent and that as a result of such conduct the majority of the voters were prevented from voting for a candidate of their choice.

The import of this "Majority" clause was succinctly put in the case of Mubika Mubika vs. Poniso Njeulu (supra) wherein the Supreme court stated the following.

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

It must also be pointed out, that nullification can also be premised on section 97 (2) (b) dealing with the conduct of the elections and 97 (2) (c) dealing with non-qualification at the time of elections. The above said it is fair to conclude at this point, that the law places a fairly high standard of proof on the Petitioner to warrant the nullification of a parliamentary seat.

After considering the evidence before me and the submissions by learned Counsel for the respective parties, I find that the following facts are not in dispute:

- i. That the parliamentary elections for Msanzala Constituency was held on the 12th August, 2021 and was contested by among others Margret Zulu the Petitioner and Elias Daka the 1st Respondent from the UPND and PF respectively.
- ii. That the 1st Respondent was declared as duly elected member of Parliament by the returning officer after he polled 14, 061 votes while the Petitioner polled 6, 971 votes.

A number of allegations were raised in this Petition which I propose to group in the following categories:

A. Undue Influence:

The Petitioner asserted that there were a number of incidents at which undue influence was exerted on the electorate that affected their free will to elect a candidate of their choice. At the center of these allegations were the activities of Royal Highnesses Chief Sandwe and Nyampande who were alleged to have been openly campaigning for the Patriotic Front candidates. Further that the PF campaign team working with the chiefs were also alleged to be exerting this influence through threats and intimidation against members of the UPND and others that were perceived to be inclined to it thereby inciting fear in many voters who did not freely vote for a candidate of their choice. These allegations were laid out in paragraph 5 and 6.2 of the petition.

Undue influence is prohibited conduct in section 83 of the EPA.

The section provides in part 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, radicle or restraint upon another person,

83 (2) subject to other provisions of this Act, a person shall not prevent another person from exercising a right conferred by this Act.

83(6) A person who by abduction, duress or any fraudulent device or contrivance, impedes or prevents the free exercise of the votes of any voter or thereby compels, induces or prevails upon any voter either to give or to refrain from giving the persons’ vote at any election, commits an offence.”

Further regulation 14 of the code of conduct provides that;

“A person or a member of a law enforcement agency, civil society, a Church, faith-based organisation, traditional leader, political party or media shall not, by means of threats, violence or sanction, coerce or intimidate another person during campaigns, public debates or elections.” (Emphasis added)

These provisions are meant to safeguard the exercise of the voter's free will to support and vote for candidates of their choice and not to be unduly influenced by threat, violence or inducement from any quarter. To be successful, the Petitioner would therefore have to prove that the 1st Respondent or his agents issued such threat or inducement or that it was done by another person with their knowledge or consent and that this may or did prevent the majority of voters from voting for the candidate of their choice.

Evidence called by the Petitioner in support of these allegations was given by PW1, the Petitioner herself who testified about the reports that she received in this regard. I was of course mindful that the nature of most of her evidence in relation to just about all the allegations were based on reports or intelligence that she gathered as she could most certainly not have been everywhere in the constituency at the same time. **Subramanian vs. the DPP¹⁷** is settled authority for the proposition that-

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

The mischief intended to be curtailed by the hearsay rule being that the Court should not accept as evidence a statement made by a third party being repeated and proposed as truth by another witness when its maker has not been called to testify and have such evidence tested in cross-examination. To her credit, the Petitioner did indicate she had lined up witnesses to confirm all the reports received, a position I cautiously looked out for in the evaluation of the evidence presented.

That said, in support of the allegation, initially against Chief Sandwe, the Petitioner called PW4 and PW5. It was PW4's evidence that he was a headman in Chief Sandwe's area and that he and as many as 18 other headmen, were summoned to a meeting addressed by the Chief.

The Chief told the headmen he was merely facilitating the meeting on behalf of the 1st Respondent. They were therefore to pay attention to what the 1st Respondent had to say. The 1st

Respondent then addressed the meeting and asked the headmen and their subjects to vote for him.

At a second meeting as testified by Pw5, the Chief told all present to vote for the PF candidates with the exception of the proposed Councilor whom they were free to choose from other candidates. According to the witness, a lot of people attended that meeting and were influenced in their voting by the Chief's direction to them.

Evidence in rebuttal was offered by the 1st Respondent who denied using the Chiefs' as alleged. 1RW1 Chief Nyampande also asserted that there was no influence exerted by the Chiefs at all contrary to what was alleged by the Petitioner.

The first point to note is that when the Petitioner's witnesses were cross examined and referred to the results at the polling stations in the areas allegedly affected by the Chiefs influence, the evidence showed that the 1st Respondent lost at all the polling stations. It was actually the Petitioner who polled the most votes at Kapwazi 1, Kapwazi 2, Chule and Maila polling stations in Chisangu ward.

Secondly, only 2 meetings were claimed to be held in 1 out of the 11 wards in Msanzala Constituency. It cannot be contended that the meetings supposedly addressed by the Chief was widespread in

those circumstances and that the majority of voters were or may have been affected by the utterances attributed to him.

Thirdly there was no indication of the numbers of people that attended the meetings aside from the 18 headmen referred to by Pw4. An indication of the numbers becomes paramount as guided by the Constitutional Court in the case of Mbolowa Subolwa vs. Kaliye Mandanda (supra) at which the Court held that:

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

The presence of 18 headmen coupled with the unidentified number of persons at meetings in a constituency with over 41, 500 registered voters and a 61.7% voter turnout cannot be said to have met the required threshold in section 97(2) a of the EPA.

Importantly, there was no evidence led to suggest that perhaps Chief Sandwe was the 1st Respondent's polling or election agent or that he was acting with the said Respondent's knowledge or consent or that of the 1st Respondent's actual agents as defined in

the EPA. Further none of the witnesses gave any evidence of any threats or acts of intimidation traceable to the Chief.

Both PW4 and PW5 were cagey in their answers in cross-examination often giving guarded responses on the Chiefs alleged involvement in campaigns. I do not find the allegation against Chief Sandwe has been proved and further find glaringly absent any connection to the 1st Respondent or his agents.

Evidence against Chief Nyampande was given by PW7. He testified that the Chief issued threats to all of the GGOZA coordinators to release the food stuffs in their possession to the PF officials that turned up to demand for it.

Rebuttal evidence was presented by 1RW1 Chief Nyampande himself who disputed ever meeting the GGOZA officials for the stated purpose. All he knew about the organization was that it was carrying out voter education in his chiefdom. No other witnesses linked the Chief to the alleged threat.

Further evidence against the Chief was led by PW17 Dickson Tembo, who alleged that Chief Nyampande had sent his late uncle's widow to address a section meeting for the area Chairpersons and women's clubs. That the message delivered was that he had sent her to ask the people in attendance at the meeting to vote for the PF

candidates. It was only then that fertilizer was to be received for the area.

He testified further that following the meeting, the late Chief Nyampande's widow proceeded to distribute PF Chitenges and regalia to the people present. He added that a lot of people were present at that meeting.

In cross-examination, the witness disclosed that he received a t-shirt and ZMW 20 note from what was distributed. He did not present that t-shirt in evidence and admitted having used the money that was supposedly paid to influence the voters.

Secondly, he on the one hand accepted that the 1st Respondent was not physically at the meeting but on the other insisted he was "present" nonetheless. His insistence that the 1st Respondent was present at that meeting merely because "his name was mentioned," exposed a witness keen to link the 1st Respondent to the allegations at any costs. The fact remains that the 1st Respondent was not at the alleged meeting and there was no evidence led to link either him or his agents to the allegation.

It was also folly to suggest that because the late Chief Nyampande's widow spoke on the 1st Respondent's behalf, she qualified to be his agent. As stated above, it is only the conduct of the Respondent or

the election and or polling agent or actions done with their knowledge or consent that a Respondent can be culpable. This position was made clear by the Constitutional court in the case of **Crispin Siigwa vs. Stanley Kakubo**¹⁸ which cited the case of Akashambatwa Mbikusitu Lewanika & 4 others vs. Fredrick Titus Jacob Chiluba (supra) with approval wherein the Supreme court stated

".. a candidate is only answerable for things which he has done by his election agent or with his consent..."

There is further the requirement to establish how widespread the offending conduct was and that the greater number of registered voters were or may have been prevented from electing a candidate of their choice.

I find no evidence to confirm that the late Chief's wife addressed the meeting alleged. There is no evidence or indication of what numbers of people attended the said meeting. There was no one aside from PW17 that testified (and notably only in answer to a question in cross examination), that people were or may have been influenced by what was said. I therefore find as a fact that there was no evidence to show that Chief Nyampande sent his aunt to address

the meeting as alleged or that the 1st Respondent was connected to the meeting in any way. I dismiss the allegation accordingly.

Also worth mention is that there was no evidence led in support of the allegations in paragraph 6.2 of the Petition that the chiefs were involved in the distribution of bicycles or the ferrying of voters. I would dismiss these allegations accordingly as well.

B) Bribery of voters

Bribery is prohibited conduct under **Section 81 (1) of the EPA**. And **regulation 15(1) of the Electoral Code of Conduct**. The law proscribes and is intended to deal with acts of corruption or bribery calculated at influencing the direction a voter may take in his/her participation in an election.

Although not spelt out in so many words, the Petitioner in essence alleges activities attributable to the 1st Respondent were meant to “bribe” the electorate into voting and or refraining from voting in a particular way. This included conduct relating to the sinking of boreholes, ferrying of voters, treating of voters, donation to a catholic church, renovation works and distribution of building materials and roofing sheets, construction of a bridge and the use of a named civil-society organisation to bribe the electorate.

I proceed to consider each allegation in turn under this head.

1. Sinking of boreholes

The Petitioner contends that the 1st Respondent sank boreholes during the campaign period with the view of influencing the vote. Witnesses that spoke to this allegation include PW10 Mr. Peter Daka the immediate past Member of Parliament for Msanzala Constituency. He gave evidence about the effort he had made to sink boreholes in the Constituency. He stated that whereas he may have initiated the process, he did not carry it through as his requests to the relevant Ministry did not materialize to an approval.

He disassociated himself from the list of boreholes relied upon by the 1st Respondent on pages 1 and 2 of the said Respondent's bundles of documents emphasizing that he did not initiate the stated document attributed to him. He gave an example of the inclusion of a borehole request for Nyimba which he asserted did not fall in his jurisdiction. Further that the number of boreholes did not tally with the request that he had made.

When cross examined, Mr. Daka revealed that he was previously a PF member of Parliament and stood as an Independent because he was not adopted by his party. He also candidly accepted that he was not pleased about his party's decision on the election result.

This revelation placed him in the category of witnesses that may have a possible interest to serve because of his political inclination or affiliation. On authority of the case of **Muhali George Imbuwa vs. Enock Kaywala Mundia**¹⁹, decided by the Constitutional Court, I warn myself against the danger of relying on the evidence given without corroboration.

The second witness to give evidence on the boreholes was PW13. She testified about the sinking of boreholes at Nkumba-1 section. She testified that she believed it was the Council doing the drilling. However, on the 2nd of August, 2021 the witness saw one John Phiri a known PF Councilor inspecting the works. She also later heard John Phiri in his campaign messages telling the people to vote for a party that had brought development to the area and not one without a developmental agenda in apparent reference to the UPND.

Further that he specifically mentioned that people should vote for the PF as it was evident for all to see what the Party had done. He didn't stop there, the official apparently also threatened to remove the water pipes that had already been delivered if they did not vote for the PF. Based on what was said, PW13 concluded it was the 1st Respondent that was responsible for the drilling of the boreholes.

Worthy of note, the witness was not specific on where in the ward the drilling rigs were sinking the boreholes. In her evidence, the Petitioner made reference to the photographs in the bundle of documents depicting boreholes sank in Chingolo, Mwanza village and Mangolo Community school. As indicated earlier, she specifically told the court that witnesses to speak to these allegations would be availed to give evidence in court. This was not done. There was further no evidence led on the allegation of the sinking of the borehole at Maila School and Chizalila village in paragraph 6.1 of the Petition.

It is the duty of the Petitioner to bring witnesses to speak to every allegation laid down in the Petition. The fact that the Petitioner relied on the Petition and her affidavits as part of her evidence does not in itself qualify the allegations therein as proved. The content thus remains allegations more so that her undeniable position is that these incidents were merely brought to her attention. She did not witness all of what she alleges.

That said, the evidence in rebuttal was presented by the 1st Respondent. He stated he had nothing to do with sinking of the boreholes named in the Petition. These were done by the local authority and government departments. To prove this the 1st

Respondent subpoenaed 1RW4, 1RW5, 1RW6 being the head teachers of Chingolo, Mangolo and Maila Community schools respectively.

They gave a background on how the need to sink boreholes at their respective schools was initiated. All spoke about the requests each had made through the local authority and the subsequent intervention of the Department of Water Affairs and the local authority that ultimately sank the boreholes. The subpoenaed witnesses also referred the Court to minutes of meetings held at the school and extracts in log books confirming visits made by persons from government departments in furtherance of the request to sink the boreholes.

The defence advanced was therefore was that it was the responsible government department and the local authority that sank the boreholes in response to the requests made earlier by the previous MP Mr. Daka (PW10) and the headteachers. PW10's evidence disassociating himself from the list of boreholes is accordingly considered and weighed against the available rebuttal evidence as presented from the schools. Below is a closer consideration of the evidence per school.

Chingolo Community School.

IRW4 gave the evidence in rebuttal in relation to the borehole sank at this school. He was a particularly impressive witness and unshaken in cross examination. I am satisfied that the borehole was sank by the Department of Water Sanitation and Environmental Protection on 29th of July 2021 based on the witness's testimony and the log book extracts presented in Court in the 1st Respondent's bundle of documents. The witness also testified having seen the GRZ rigs at the drilling site at the school.

There can of course be no doubt that a candidate standing on a ruling party's ticket stands to benefit indirectly from the developmental activities undertaken by a government in an election year. Concerns of timing of such projects naturally arise but the law as it presently stands does not prevent the government from carrying on works during the campaigns.

Thus, the Supreme Court in the case of Akashambatwa Mbikusitu Lewanika & 4 others vs. Fredrick Titus Jacob Chiluba (supra) whilst acknowledging the fact that governmental projects may have influence on some voters, still found that this did not amount to illegal activities and that such projects should not come to a standstill during the time of elections as that was not in public interest.

Therefore, notwithstanding PW10's sentiments about the requests that he had made that did not appear to tally with the list advanced by the 1st Respondent in his defence, there can be no escape from the fact that the evidence before me indicates a need was identified; that 1RW4 as headteacher sought assistance and this culminated into the sinking of a borehole by the responsible government department. Further, contrary to the position canvassed by the Petitioner in cross examination and through her submissions I find that it is was not IRW4's burden to show how and when the approvals were done.

Importantly, I find there was no evidence led of the 1st Respondent's direct or indirect involvement in the process or let alone that he used the borehole as a campaign tool. None of the witnesses testified to this effect. PW13 spoke in general terms and did not specifically point to the 1st Respondent or his election or polling agents. There was further no evidence on what effect the sinking of the boreholes had or may have had on the result of the election. This was left to the Court to speculate. I would dismiss this allegation accordingly.

Maila School.

1RW5 testified that the school did not have a borehole from inception. He approached the Chairman of Lusangazi Council and took the application for the sinking of a borehole to him. I am satisfied that the borehole was sunk by the Department of Water Resources and Development on the 29th August, 2021, which was after the general elections held on the 12th of August 2021.

Contrary to the position advanced by the Petitioner, I find that it is immaterial that the witness was not able to show documents confirming that he is the headteacher at the school nor that he was unable to demonstrate when the approval for the sinking of the boreholes was done.

The one thing that did come out in cross examination was that the school through this witness had been dealing with a Council chairperson who at the time the borehole was being sunk was no longer in office as Parliament and the Councils had been dissolved. This naturally invites the question how he was still able to get the Council to facilitate the sinking the borehole.

Could it be that perhaps the chairperson was still able to “pull strings” in favour of the ruling political party of the day? Credence for this theory certainly appears to have been given by 1RW5’s admission during cross-examination that he suspected someone in

the background was pushing for the sinking of the borehole and specifically that it might be the chairperson.

That may very well have been the case. However, there is no evidence that the 1st Respondent was even remotely connected to the borehole drilling or that either his election or polling agent were involved or had knowledge about this. There was further no evidence presented to show that the majority of the electorate were or may have been influenced by the works leading to the sinking of the borehole. This was left to the Court's speculation which is not its role. The threshold in section 97(2)(a) of the EPA was therefore not met in this case.

Mangolo Community School

Evidence on how the borehole was sank was given by the headteacher 1RW6. Questions arose in cross-examination of how the borehole could have been drilled when the Council was dissolved. However, the witness presented evidence of log book extracts, confirming visits by officials from the Council by date and also showing that the borehole was drilled on the 18th of June, 2021.

This was undoubtedly during the campaign period. Also not disputed was that a payment of K 1, 500.00 and receipt was issued

to that effect and presented on page 7 of the 1st Respondent's bundle of documents.

Although the witness had no document to show the approvals, receipts of money collected as contributions from the community or that he could not explain the seemingly low cost charged for the drilling of the borehole, I find no basis to dispel the claim that it was the Council that sank the borehole.

Perhaps more importantly for present purposes there is no evidence linking the 1st Respondent to the sinking of the borehole or that perhaps this may have been done through his election or polling agents. There was further no evidence to show how the sinking of this borehole affected the majority of the registered voters in the ward or larger Constituency. To be specific that the majority were or may have been prevented from voting for a candidate of their choice. I would in the circumstances dismiss the allegation.

Mwanza and Chizalila Villages

Evidence in support of this allegation came from the Petitioner who presented a photo at page 2 of her bundle of documents in support of her claims. The photograph is not dated and only bears a narration asserting that the captured borehole was sank by the 1st Respondent on the 3rd of August, 2021. I cannot rule out the

possibility that the photo could have been taken from anywhere and on any date. There is nothing aside from the narration admitted to be prepared by the Petitioner herself that tells me it was in Mwanza village.

One further cannot conclude that the borehole in the photo was sank by the 1st Respondent or his agents and for the apparent purpose of influencing the vote or yet alone that the majority of the people in the Constituency were or may have been prevented from exercising their free will to choose a candidate of their choice. The allegation was not proved and is dismissed.

No evidence at all was led at all to confirm the sinking of a borehole in Chizalila village. I dismiss that allegation as contained in paragraph 6.1 of the Petition.

ii. Ferrying of voters

PW8, PW9 and PW11 gave evidence in support of this allegation. PW8 testified that he witnessed a light canter truck ferrying voters from Manasha, Mukose and Chikande villages to 3 polling stations which he named as Kamucshe, Chizalila and Makale in Mawanda Ward.

He approached the driver whom he identified as Bezate Katumbi to inquire who had sent him to ferry people. Bezate told him he had been sent by the 1st Respondent. The witness also testified that he identified one Marvia, a known PF official among the group of transporters telling people being dropped off not to vote for the Petitioner and UPND Presidential candidate Hakainde Hichilema whom the official described as rogor, a known potent pesticide.

In cross-examination, the witness acknowledged that the Photo shown to him in court was not the light truck he had referred to. There was further no direct evidence led by the witness linking the 1st Respondent or his election or polling agent to the ferrying of the identified voters. There was further no evidence led to show that the named Marvia being a PF official was in fact the 1st Respondent's election or polling agent as defined in section 2 of the Electoral Process Act.

As settled earlier, it is the personal involvement of the Respondent or that of his election or polling agents or other person with their knowledge or consent that a corrupt practice, illegal conduct or other misconduct can lead to the nullification of an election subject to satisfaction of the majority clause. Such knowledge and consent cannot be discerned simply from the fact that the perpetrators of

the alleged electoral misconduct were known PF officials campaigning for the Respondent. Cogent evidence of such link or knowledge to a high degree of convincing clarity has to be led.

This is demonstrated in the case of Nkandu Luo and another vs. Doreen Sefuke Mwamba & Attorney General (supra) wherein the court observed that:

“That cadres or supporters of the PF were implicated in the attack is not enough to attach responsibility on the 1st Appellant or her duly appointed election agents and to annul the election on the basis of section 97 (2)(a)(ii) of the Act. In the Richwell Siamunene vs. Sialubalo Gift selected Judgment No. 58 of 2017 we said the following;

“Mere proof that the UPND supporters were indeed involved in the said act does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election.”

Even assuming the court were to find that there was a direct involvement of the 1st Respondent or his registered agents in the ferrying of the voters, there was no evidence to show how this affected the result of the election. In any event the ferrying of voters using private transport is not prohibited conduct in the current Electoral Code of Conduct. The Supreme Court in the case of

Christopher Kalonge vs. Annie Munshya, Electoral Commission of Zambia and Attorney General²⁰ held that:

"In this case, the transport used was private transport and it is settled that the use of private transport to ferry voters is not an offence under our Electoral Laws"

The court went on to say

"To argue that the use of private transport which had a message to vote on the clock to ferry voters amounted to a "corrupt practice or illegal practice" in terms of section 93 (2) (a) of the Act; That it amounted to bribery as defined under section 79 (i) (c) of the Act and that it amounted to treating as defined under section 81 of the Act, is casting the net too wide."

Although the court's decision was based on the definition of corrupt practices as it existed under the 2006 Act, the definitions of bribery under section 81 of the EPA No. 35 of 2016 is essentially the same. I therefore find this allegation unproved to the extent that it tries to link the 1st Respondent and or his appointed agents to the alleged corrupt activity and that in any event the ferrying of voters using private transport is not prohibited under the law.

The same observation and conclusions can be made about the evidence of PW9. He disclosed that he was a polling agent for PW10, Mr. Peter Daka the losing Parliamentary candidate for Msanzala Constituency. I therefore find that he may have an interest to serve because of his political inclination or affiliation and caution myself

on the danger of relying on such evidence without corroboration accordingly.

His evidence was that he witnessed a Dyna light truck make as many as 4 trips ferrying voters to Nsenya polling station where he was operating from on poll day as an agent. He confronted the driver who told him it was the 1st Respondent that had hired him. Photographs were presented at pages 4 and 5 of the Petitioner's bundles of documents purporting to confirm such ferrying.

However, neither the 1st Respondent or his election or polling agent were in the pictures as confirmed by the witness himself. He made a feeble attempt at suggesting the 1st Respondent was in the picture through his agent named Charles Phiri. I am inclined to find such response indicative of his desperate attempt to link the 1st Respondent to the allegation at any cost which goes to diminish the credibility of his testimony.

I find as a fact that there was no evidence linking the 1st Respondent to the spotted Dyna truck. Pw9's conviction that the 1st Respondent hired the truck based on what he heard being said is not cogent evidence. I further cannot conclude that the 1st Respondent carried the day at the polling stations on account of the ferrying of the voters. I cannot rule out the inference that he was

simply the more popular candidate. There was no evidence to suggest the majority of registered voters in the ward were prevented from electing a candidate of their choice.

PW11 testified witnessing 4 truckloads and 1 filled bus of voters being ferried to Mwambula polling station and beyond the permissible ribbon placed by the ECZ. His main grievance appeared to be that he did not recognize many of the people that were brought. He further alleged that long queues resulted from the arrival of these people. He testified further that some of the persons transported were from the border areas between Zambia and Mozambique.

I take judicial notice of the fact that there was a large voter turnout throughout the country during the past general elections. There was therefore nothing unusual about the numbers at this particular polling station.

Further, the witness admitted when pressed in cross examination that there was no one that had queued up that was turned away from voting which I find dispels the notion that anyone was prevented from voting. Further, there was nothing in the evidence led to show that any of the persons allegedly ferried did not qualify to register as voters under section 9(1) of the IEPA or from voting

where they did. There was therefore nothing odd about people voting from the said polling station.

In any event there was no evidence led to show that Mozambicans were allowed to vote. There was further no cogent evidence to confirm that the 1st Respondent or his appointed agents hired the trucks and bus with a view of influencing the voters to vote for him and other PF candidates.

No evidence was led to suggest that perhaps either the 1st Respondent or his appointed agents were at the polling stations. I dismiss the allegation accordingly.

iii Allegations of cash payments to voters.

Allegations of payment of cash to voters was led by PW9, PW11 and PW12.

In his evidence, PW9 introduced an allegation of bribery. He alleged that he spotted an old friend amongst the people he asserted were being transported to Nsenya polling station where he had been posted to as a polling agent. His friend told him ZMW 50,00 was being paid out by the 1st Respondent to people being ferried to the polling station to vote for him.

This was without question, inadmissible hearsay evidence as this unnamed friend was not called as a witness and PW9 proposed to

introduce the truth in the statement rather than the fact that it was made to him. I will accordingly discount that evidence and dismiss the allegation.

Similarly, PW11 gave evidence suggesting that the Mozambican nationals and others that he observed being ferried were being paid ZMW 100.00 notes by the 1st Respondent through one of his agents named Ismael Chirwa. This evidence was objected to by Mr. Songolo for not being pleaded anywhere in the Petition.

A perusal of the Petition confirms general reference to payment of money in paragraphs 6.6 and 6.10 without specific detail on amounts paid. In the case of *Kapembwa vs. Mamibolwa & Attorney General*²¹, the Supreme Court held that:

"Where a party refers to evidence not pleaded, the proper course is for the other party to object immediately to this reference, thereupon it would be the duty of the court to decide whether or not it is necessary to grant an adjournment to the other party and whether to allow an amendment of the pleadings subject to an order for costs against the defendant and where it is necessary to cross - examine a witness on this issue, it is for the party affected to apply to recall the witness to rebut the unexpected evidence"

I sustained the objection upon Mr. Mwanabo's concession and direction to his witness on the stand not to dwell on the payment of the money. However, Mr. Songolo himself brought up the issue in

cross examination whereupon the witness insisted the payment of ZMW 100.00 was made.

In the case of **Muvi TV Limited v Phiri & Another**²², the Supreme Court held that:

“Where a matter not pleaded is let in evidence, and no objection is raised by the other side, the court is not precluded from considering it”

I therefore proceeded to consider the evidence as I took it the objection was withdrawn when opposing counsel insisted on introducing the matter.

That said, the cross examination demonstrated there was no evidence to support the allegation of payment of the ZMW100.00. There was further no evidence linking the 1st Respondent or his agents to the bribery alleged. No evidence was led to show that the party official making the payment was doing so with the 1st Respondent’s knowledge and consent or that of his election or polling agents. There was further no evidence led to show what the effect was on the greater number of registered voters in the Constituency. I would dismiss this allegation accordingly.

PW12 gave evidence about how on his way to vote on polling day at Ray Primary School he was given a ZMW10 note to vote for PF candidates together with 3 others that he found along the way. The

question arising was whether the payment was done by the 1st Respondent or his election or polling agents or others with the requisite knowledge and consent. The answer to that question is a resounding no. There was no evidence linking the 1st Respondent to this allegation.

PW12 in cross examination admitted receiving this money that he knew to be a bribe. In corruption offences both the giver and receiver of the bribe are accomplices and hence the evidence by a party seeking to rely on such transaction requires corroboration. The learned authors of Halsbury's Laws of England 4 edition volume 15 at page 425 paragraph 780 say the following on proof of bribery.

"Clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Furthermore, a corrupt motive must in all cases be strictly proved. For this purpose, a corrupt motive in the mind of the person bribed alone is not enough; the question is as to the intention of the person who bribes him"

There was no corroboration whatsoever provided to support the allegation made by this witness.

I have also considered the likely outcome if I were to accept that the 1st Respondent and or his election or polling agent was culpable.

There was still no evidence led on how widespread this cash bribe payments were across the 11 wards and 73 polling stations. The payment of bribes was reported at best at 2 polling stations according to PW11 and PW12. Such isolated incidences cannot by any stretch be said to have been so widespread so as to affect the majority of the registered voters in Msanzala Constituency.

I would dismiss the allegation accordingly.

iv Feeding of voters on poll day

This allegation was contained in paragraph 6.8 of the petition in which it was specifically alleged that food was given in Mawanda, Lutwazi, Mateyo Mzeka and Nyakasiwe wards. 2 witnesses gave evidence about how the 1st Respondent treated people with meat with a view of influencing their vote.

PW15 told the court that he met the 1st Respondent personally and received a cash payment of ZMW 5000.00 for 2 cows pegged at ZMW2500.00 each. The third animal was to be paid for later. 3 cattle were therefore slaughtered, cooked and given to all who attended a PF meeting held in Chikuse village at which people were told to vote for the PF and its candidates in return for the food they had eaten which was purchased by the 1st Respondent. PW15 was at that meeting and ate some of this meat. He named PF councilors

Kombani Zulu, Gabriel Phiri and Felix Nkowane as the persons who took turns to convey that message to those in attendance.

There was no evidence led placing the 1st Respondent or his election and or polling agents at that meeting. There was further no evidence to suggest that the campaign message allegedly delivered by 3 named PF party officials was done with his knowledge and consent of that of his election or polling agents.

The 1st Respondent does not dispute buying the cows but states that the animals were meant to feed his foot soldiers that were campaigning for him. I find no basis to dispel this defence. I cannot draw the inference that because he acknowledged buying the animals then he necessarily knew or sanctioned what was said at that alleged meeting. That is not the only inference that can be drawn. Nothing excludes his assertion that the meat was indeed bought for his campaign troops.

The Petitioner herself had indicated that she had over 2000 people working for her and that she was responsible for feeding them. There was no evidence to show that the named PF officials that addressed the gathering where the meat was served were in fact appointed polling or election agents. I find nothing in the EPA that prohibits the feeding of a candidate's camp.

PW16 told the court that 3 members of the PF campaign team named Ismeal, Joseph Lungu and Anna Ndlovu went to buy a cow from headman Bissek Banda in his presence. The animal was slaughtered in Mwase village and given to all passerby's and others in return for an assurance of a vote for the ruling party and its candidates. According to this witness, only voters with voters' cards were given some meat. A motorbike was also hired from Kanyezi Lungu to distribute the meat to the far-flung areas.

The 1st Respondent did not dispute buying the cow but like the earlier allegation contended it was meant to feed his foot soldiers. This position was challenged in cross examination and arguments advancing a contrary position canvassed in submissions. The Petitioner's position was that the evidence before court confirms that 2 non- PF individuals named as Kathrine Zulu and Isack Zulu were given the meat. Further that PW16 witnessed over 20 other people being given the meat and he too had some that was being roasted from the headman's house. Therefore, that it was not true that the meat was exclusively for the PF team.

It was his testimony that once the cow was slaughtered and cut into pieces, people were being called on their mobile lines to collect the meat. He maintained this position when asked in cross examination on how possible it was that the distributors of the

meat had all the mobile numbers for the people he had claimed were called.

I find the suggestion that the PF officials were able to call persons in the village on phone to collect meat to the extent suggested intriguing. This I would have to say is an example of exaggeration which went to diminish the credibility of the witness. I do not believe this disclosure to be true and dismiss it accordingly.

I further note that the known bike owner that was allegedly hired to distribute the meat to "far flung areas" was not called as a witness nor were the 2 non-PF members Kathrine Zulu and Isaac Zulu, that received some meat. This raises questions of the truthfulness of the allegation that such distribution and in the manner suggested took place at all.

I further hold that even in the event that I was persuaded to find that 20 other persons were given the meat, this can hardly be said to be representative of the larger Constituency with over 25, 620 registered voters that cast their vote. There is therefore nothing in the evidence to show that the distribution of the meat if at all was widespread and that it extended to the wards mentioned in the petition for the purpose of influencing the outcome of the vote.

The 1st Respondent as stated earlier contended he had bought the meat to feed his over 3000-foot soldiers that took part in his campaign. I would agree that he had such a responsibility. The evidence was devoid of any testimony that spoke to the effect the meat consumed had on the vote. There was certainly no basis to conclude that the majority of the voters were or may have been prevented from choosing a candidate of their choice. I would dismiss this allegation as well

V. Donation of ZMW4000.00 to St Gabriel Church Kachusi Parish

This allegation appears in paragraph 6.3 of the petition. PW14 testified that a donation of ZMW4000.00 was made to St Gabriel Catholic church by the DEBS a Mr. Nkoloma on behalf of the 1st Respondent. He asserted that this was done at the church where congregants in attendance were told to vote for the 1st Respondent and President Edgar Chagwa Lungu. He claimed to have received the money in his capacity as headman in the area which he handed over to the treasurer.

Rebuttal evidence came from the 1st Respondent. He denied the allegation entirely. Further evidence was presented by IRW 7. He testified that he was a pastor at the church and that the money was actually donated by Father Gastone Sakala the Parish priest

presently based in Nigeria. Further that the money was meant to buy relish for persons moulding bricks to extend the church building.

In her submissions, the Petitioner suggested that it was the responsibility of the 1st Respondent to bring the DEBS to refute the allegation. I disagree that he had any such burden. There is no property in a witness. The Supreme court makes this proposition abundantly clear in the case of **Fawaz and Prosper Chilelwa vs. the People**²³. It was open to the Petitioner if she so desired to summon or subpoena the witness to testify on her behalf.

There was an argument advanced by the 1st Respondent that the UPND candidates had presented 2 petitions over the donation of money to the Church. The first relating to the local government elections and the other presently before this court. Further that both alleged that the declared winners at local government and parliamentary level had donated the same amount of money and for the same purpose. This I have to agree, appears rather odd and indicative of speculation, irrespective of the absence of evidence of the outcome of the Tribunals inquiry on the allegation before it.

There was further no proof adduced before the court that perhaps the DEBS was the 1st Respondent's election or polling agent to link

the alleged wrong doing to him. None of the people who were in church when Mr. Nkoloma allegedly gave the donation and made the call for the vote were brought before the court to confirm this allegation. The allegation was after all, that the money was given in full view and presence of the congregants who expressed shock at what was said.

Further in light of the fact that the allegation hinged on bribery, corroboration was required which was clearly absent in this case. Thus, a congregant that was present to confirm the donation could have provided such corroboration or the treasurer that PW14 claims to have handed the money to.

IRW7 remained unshaken in cross examination on how he received the money and who had sent it. The fact that he had no documents to prove that he was the pastor for the church in court is not an issue. Witnesses seldom carry those types of documents to court unless an issue is raised in pleadings alerting an opponent of the need for such proof. I therefore accept the witness carries out pastoral duties at the church.

Of significance for present purposes, there was no connection of the alleged wrong doing to the 1st Respondent or his appointed agents. He was not seen at the church nor was it the contention that he

ever addressed the church over the donation. Further, this was by all indications an isolated incident. There was no contention that donations were being made to churches across the Constituency to qualify the conduct as having been widespread. There was further no proof of the effect of such donation on the majority of registered voters. No witness was called to testify on this. I would accordingly dismiss this allegation for the above reason.

VI. Renovation and distribution of building material during campaign period.

(a) Donation of roofing sheets to Mwanika School

This was an allegation in paragraph 6.4 of the petition. Evidence of the delivery of the iron sheets to the school was given by PW2. He testified that the delivery was done on the 29th of July 2021 during the campaign period. Also delivered were nails, and wires, and timbers for roofing of the school. The witness stated he was engaged by the deputy head with 4 of his colleagues to carry out the roofing works. He also contended that at the time of the delivery, the 1st Respondent addressed the people present and asked for their vote.

In cross examination the witness disclosed that he was a youth in the UPND. In **Stephen Masumba vs. Elliot Kamondo**²⁴ the Constitutional court cited with approval the East African decision of

Wadda Rogers vs. Sasayah Isaiah Johny & EC wherein the court observed that:

“... In election matters partisan witnesses have a tendency to exaggerate claims about what might have happened during elections. In such situations it is necessary to look for “other evidence” from an independent source to confirm the truthfulness or falsity of the allegations”

The Constitutional court thus concluded that witnesses from a litigants own political party are generally witnesses that fall in the category of partisan witnesses. Such witnesses should therefore be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood.

It could be argued in the present case, that corroboration was provided by the evidence of PW3. He testified that the 1st Respondent delivered iron sheets to Mwanika school on the 29th of July 2021. He claimed to be part of the persons that offloaded the sheets from the delivery truck and echoed PW2’s account of the appeal for votes that the 1st Respondent made at the time of the delivery of the material.

Rebuttal evidence was presented by IRW3 the head teacher at the school. He testified that the school identified the need to roof a 1x4 classroom block. The school’s PTA resolved to seek external funding and approached the 1st Respondent, a known local businessman for

help. The school was assisted with 20 pockets of cement and iron sheets.

He testified that the iron sheets in particular were delivered on the 30th of March 2021. He therefore disputed as untrue the averment that the sheets were delivered in July 2021. The court was referred to exhibit “ED4b” in the 1st Respondent’s affidavit in support of answer being a copy of an entry in the school log book confirming the date the sheets were delivered. Also presented were minutes of the PTA meeting at which the resolution to seek external help was made. He added that the 1st Respondent was not a parliamentary candidate at the time.

I have no basis to dispel this evidence. I closely observed this witness’s demeanor and his evidence was unshaken in cross examination. I accept his evidence as a truthful account of events. The 1st Respondent also testified on the allegation. He did not dispute having donated the materials. However, his position is that he did so long before the elections on 30th of March 2021 as part of philanthropic activity he was engaged in.

When asked in cross examination, the 1st Respondent admitted that he did not present documentary proof that he had been involved in philanthropic activity before the donations mentioned in the

petition. However, I find that he bore no such heavier burden and no adverse inference can be drawn from his failure to do so. The burden remained squarely on the Petitioner to provide cogent evidence to a high degree of convincing clarity that the 1st Respondent was liable for bribery, illegal activity or other misconduct prohibited by the EPA and that such conduct was widespread and affected the majority of voters who were or may have been prevented from electing a candidate of their choice.

The 1st Respondent did testify he had been doing works in the community from 2014 and everybody knew him as a businessman which was why he was approached in the first place. I find this explanation plausible and accept it. In **Abiud Kamangu vs. Elijah Muchima**²⁵ the court defined philanthropic activities as the practice of helping the poor and those in need, especially by giving money and services which in Zambia include implementing and inspecting developmental projects. This definition was earlier coined by the Supreme Court in the case of **Reuben Mtolo Phiri vs. Lameck Mangani**²⁶.

In **Leonard Banda vs. Dora Siliya**²⁷ the Supreme Court concluded:

“As the electoral law stands now, philanthropic activities, even where they had some influence on voters do not constitute corruption or illegal practice, and hence not petitionable...”

Based on my consideration of the evidence and authorities cited, I accept that the 1st Respondent delivered the iron sheets on the 30th of March 2021 as philanthropic activity and that this was before he was a candidate in the election. I further accept that he was not personally involved in the actual renovation works and his role ended with the donation of the sheets. The law as it presently stands does not prohibit such activity and not much can be raised about the timing of the donation granted the finding that he made the donation long before he was adopted as a candidate.

Even assuming I am inclined to find the donation was made in July, 2021, there is no evidence of the effect that the donation made had on the voters. PW3 in fact testified that he voted for a candidate of his choice. It can further hardly be contended that the few allegations on donations to the identified schools constituted widespread activity to affect the outcome of the election. I would dismiss this allegation for the above reason.

(b) Donation of 29 pockets of cement to Mangolo Community School.

This allegation is contained in paragraph 6.4 of the petition. The evidence in support was presented by the Petitioner. No other witness was called to confirm the allegation. Evidence in rebuttal was provided by IRW8 a headman in Chule village. He testified that

he purchased the 29 pockets of cement on behalf of the School's PTA using money sent by the 1st Respondent via airtel money. Further that the purchase and delivery was done on 17th April 2021.

When pressed in cross examination, he was not able to present any receipts confirming the purchase and delivery of the cement. It was also clear to see that he was very keen to tell the court the cement was bought prior to the campaign period even before he was asked the question in cross examination which was indicative of a witness with a preset position of what he was to say.

The above notwithstanding, there was nothing conclusive presented by the Petitioner to confirm when the cement was delivered. This was squarely her burden to establish and nothing adverse can be said about the witness inability to show documentation to confirm the date he claims to have purchased the cement. He had no such burden.

Both IRW8 and the 1st Respondent maintain that the cement was delivered in April 2021 before he was a candidate in response to a request made by the school through the PTA. I have no basis to discount this evidence. Even assuming I were to accept the donation was done during the campaigning period thereby in

breach of the electoral code of conduct, there is no evidence to show how widespread the donation of cement in the constituency was and the effect that it had on the majority of the registered voters. I would dismiss this allegation accordingly.

(c) Donation of roofing sheets to Teteke School

There was no witness aside from the Petitioner who testified on this allegation in spite of her earlier indication that she had lined up witnesses to give detail on the claims. Granted she did not personally witness the claims, the allegations unsupported by witness testimony remain just that, allegations.

A rebuttal witness was provided in IRW9 the PTA chairman for the school. He testified that the 1st Respondent was approached and favorably considered a request that had been made by 11 headmen and the PTA to purchase iron sheets for the school. This was in April 2021. He stated that this was before the 1st Respondent was adopted candidate in the election.

He, in the company of headman Mbande collected the sheets from the 1st Respondent's lodge upon his instruction and dispelled that this was done during the campaign. The 1st Respondent more or less gave the same testimony in his defence.

There is nothing compelling that would warrant an unfavorable consideration of this defence. There is further nothing to dispel the 1st Respondent's claim that he had been involved in philanthropic activity from as far back as 2014. As stated earlier above, in spite of his inability to provide documentary evidence of this even when pressed in cross examination, I find that he did not possess such higher burden.

There was further no evidence before the court to show how widespread the donations of iron sheets were beyond Mwanika community school and Mangolo school. In a constituency with 11 Wards and 73 Polling stations, this cannot be said to constitute widespread donations that may or did impact on the outcome of the election. No witness was called to state so.

I agree that the donation was done 2 months before the dissolution of Parliament giving credence to the Plaintiff's submissions that the timing may have been questionable. However, there was no evidence that the 1st Respondent was a candidate at the time. The fact that he reigned victor in the concerned ward cannot in and by itself suggest it was an account of the donation. A possible inference could simply be that he was the more popular candidate. I am inclined to find that the allegation has not been proved and I dismiss it accordingly.

Vii.Construction of Msanzala bridge during campaign period.

This allegation was laid out in paragraph 6.5 of the Petition. PW1 and PW18 gave evidence about the 1st Respondent's vehicles being spotted at the bridge and carrying out works during the campaign period. It was further contended that this work was done with a view of influencing the outcome of the election.

The 1st Respondent disputed this and asserts that it was a company named Shachitari Ltd that were engaged to do the works on the bridge. He does not dispute that his vehicles were at the bridge. He contends that he owns a construction company and also hires out equipment and machinery. The vehicles seen were therefore hired by the company.

He called 1RW2 in aid, being a contract manager from Shachitari that gave evidence in support of his position. This witness informed the Court that it was his company that was engaged to maintain the road between Petauke Boma to Chikowa Rural Health Center, a stretch that included the bridge in issue.

He referred the Court to an addendum signed and exhibited on pages 14-16 of the 1st Respondent's bundle of documents between his company and the Ministry of Local Government by which it was agreed that less gravelling was to be undertaken thereby availing

more resources for works on the bridge. He further confirmed that the vehicles spotted at the bridge were indeed hired from the 1st Respondent and that works were carried out during the campaign period, temporarily put on hold and presently on going.

In cross examination the witness acknowledged that the addendum referred to makes no mention of the bridge. He further acknowledges not having presented the agreement for the hire of the equipment and vehicles.

The Petitioner in her submissions argues that people were not privy to such an agreement and therefore having seen the vehicles at the bridge, it was possible for them to conclude that the 1st Respondent was doing the works ultimately affecting the outcome of the election. This undoubtedly is a persuasive argument.

However, in spite of the absence of a hire agreement and non-specific reference to the bridge in the addendum, it was not disputed that the bridge fell in the area that Shachitari Ltd was engaged to maintain. Further not disputed was the fact that there was to be reduced gravelling in implementation of the project. The Addendum at page 2 and paragraph 4 states that:

"4. The additional costs are as a result of the urgent need for addition of bridges and drainages."

This undoubtedly confirms works on bridges though not specifically mentioned were anticipated.

There was no evidence to suggest that the 1st Respondent had an interest in Shachitari Enterprises Limited. There was further no evidence to show that either the 1st Respondent or his election or polling agents had used the construction works at the bridge in their campaign messages.

The Petitioner in cross examination acknowledged that she was aware that the 1st Respondent owned a construction company and that he hired out equipment. There is therefore nothing in the evidence based on the above that would exclude the conclusion that the 1st Respondent did hire out the equipment and had no involvement or interest in the works on the bridge.

It would no doubt have been desirable to have the hire contract available assuming one existed to put the matter beyond question. However, as I have stated earlier above, the 1st Respondent did not possess such higher burden to prove his innocence. The burden remained squarely on the Petitioner to establish her claim to the required standard.

In carrying the point further, there was not a single witness that testified that perhaps such works were widespread in the

Constituency and that as such the majority of the voters were or may have been affected as they were prevented from voting for a candidate of their choice.

It may be said it was inappropriate for a Candidate to hire out equipment associated to him during an election. As stated earlier, the unsuspecting member of the public may attribute the works done to such candidate and tilt the vote in his favour. However, in light of the discussion and conclusion drawn above, this is not the outcome I see in this case. The 1st Respondent does avail a reasonable explanation for the equipment being on the site.

In the case of *Maseka v the People*²⁸ the Court of Appeal stated that:

"An explanation which might reasonably be true entitles an accused to on acquittal even if the court does not believe; an accused is not required to satisfy the court as to his innocence but simply to raise a reasonable doubt as to his guilty. A forfioti such as doubt is present if there exists on explanation which might be true. For the court to be in doubt does not imply a belief in the honesty generally of the accused or in the truth of the particular explanation in question."

Although this case dealt with a criminal matter, I find that the legal principle can be applied in the present case. The 1st Respondent does give a plausible explanation which need not reasonably be

true. He goes further to back his defence with the evidence of 1RW2. The allegation fails and is dismissed for the above reasons.

Viii. Use of Non-Governmental Organization named as GGOZA for campaign activity and to bribe electorate.

This allegation was set out in paragraph 6.6 of the Petition. Evidence in support of the allegation was presented by PW6 and PW7 both former employees /coordinators of GGOZA. PW6 gave evidence of the activities of GGOZA which she believed was an organization established to help the poor and vulnerable.

However, that impression was quickly dashed when she noted that merchandise that she received on behalf of the organisation by way of food stuffs that included mealie meal, cooking oil, sugar and salt were demanded by PF officials between the 10th of August, 2021 and 11th of August, 2021 to be taken to their camp.

She recounted how as coordinators, they were not allowed to disclose that some of the donations were coming from then Republican President Edger C Lungu.

She named the PF officials that demanded for and collected the food stuff as Gabriel Phiri, Felix Mukowane, Kombani Zulu and Amibel Sakala. When cross examined the witness testified that she

would not know whether President Lungu or the other PF officials she mentioned were the 1st Respondent's agents.

PW7 testified that during his orientation with other coordinators, they were specifically told that GGOZA was a State House creation. No one from any political party was to be enlisted in their ranks. Further that the organisation's role was to go out in the villages and educate people on the value of voting. They were instructed to enlist 10 persons per polling station and submit the names to Mr. Geoffrey Banda, one of the persons in charge who would in turn forward the names to Lusaka.

He testified how he received mealie meal, cooking oil, salt and sugar from Mr. Banda on the 1st of August, 2021. These items were later claimed by PF officials who demanded the release claiming the goods belonged to their party.

None of these witnesses linked the 1st Respondent to GGOZA activities. Both acknowledged in cross examination that it was not the 1st Respondent that delivered the mealie meal and that President Lungu was not his agent.

None of the witnesses reported the alleged GGOZA activities to the police or to the Electoral Commission of Zambia. The witnesses

further agreed that neither the PF nor the 1st Respondent's name appeared on the GGOZA document presented before the Court.

Based on the above, it is fair to conclude that there was inconclusive evidence that GGOZA was a vehicle used by the PF in furtherance of its campaign activities that extended to bribery of voters as alleged. There was further no evidence to support the assertion that the organisation was a creation of State House and that donations to it came from President Lungu as alleged. No document from the Registrar of Societies was presented to link GGOZA to State House.

Even assuming I were to accept that the named PF officials forced their way in demanding and collecting the foodstuff, on authority of the case of Nkandu Luo and the Electoral Commission of Zambia vs. Doreen Sefuke Mwamba and the Attorney General (supra) considered earlier in this judgment, a candidate cannot be held liable for acts of the other members of his political party or other persons who are not the candidate's election or polling agents acting with his or his agents knowledge or consent. Neither the 1st Respondent nor his appointed agents were implicated in this case.

There was no witness that took the stand to confirm having received any of the foodstuff as alleged. There is further no shred of

evidence led on show how widespread this alleged conduct was and the possible effect it had on the majority of voters. In addition, PW6 confirmed that in Singozi and Monde polling station it was an independent candidate that carried the day and therefore that the conduct she complained of did not affect the result of the poll.

I further noted that PW7's evidence in particular was highly sensationalized and exaggerated in his quest to tie down the 1st Respondent. This was perhaps more apparent in his suggestion that the 1st Respondent went to his house the day after the goods were collected and beat up his young brother. This evidence was purely hearsay and unsubstantiated at trial.

Worthy of note the allegation in the petition mainly contended that GGOZA was buying voters cards from people by enticing them with money and food. Aside from the Petitioner and only in answer to a question in cross examination, not a single witness gave evidence in support of the allegation of buying of voter's cards. This made the evidence led at variance with the allegation as laid out in the Petition. I nonetheless considered the evidence and found the allegation unproven.

There were further more questions than answers that were provided by the witnesses PW6 and PW7 that gave evidence on GGOZA's

activities. For instance, to whom was the list of enrolled persons forwarded to in Lusaka? What was the purpose of forwarding the list and what was to be achieved from it? Where was the foodstuff allegedly collected from PW6 and PW7 taken and who benefited from it? No evidence to connect these dots was led, hence leaving the Court in a position of speculation.

I also find that there was no evidence led to support the allegation in paragraph 6.10 of the Petition that GGOZA was aiding the 1st Respondent by giving money and food to voters that had been brought in from Mozambique to vote for him. I would dismiss these allegations accordingly.

C.Other Electoral Misconduct.

I. Unabated intimidation targeted at UPND officials

This allegation was set out in paragraph 6.9 of the Petition. The only evidence in support of this allegation came from the Petitioner. She asserted that PF officials disrupted her meetings by playing amongst other things loud music at venues she was having such meetings or unapologetically proceeding with theirs in areas meant for UPND meetings. She cited Katasha, Kwa-Seven Sonja, Kasongo and Mbulamala as areas where this disruption took place. The 1st

Respondent disputes this allegation and states he and his campaign team were elsewhere campaigning at the time alleged.

Such conduct if established would be in breach of **Regulation 15 (d) of the code of Conduct** which provides that:

“15 (1) A person shall not—

arrange a public meeting, demonstration, rally or march at the same time and venue as another similar political event organised by another political party or candidate”

To support her claim of the incident taking place the Petitioner referred the court to her letter of complaint addressed to the Electoral Commission of Zambia highlighting the intimidation from the 1st Respondents agents that she faced as she was attending her meetings. She went on to suggest that this affected her cause to be elected as people stopped attending her meetings out of fear.

There was however, no evidence that the letter was delivered and she does not identify the agents she asserts were working for the 1st Respondent. In the Masumba case (supra), The Constitutional court was able to hold that the presentation of a report does not in any event provide conclusive proof of the occurrence of the infraction complained about.

The Petitioner suggested that the picture at page 11 of her bundle of documents depicts a violent incident perpetrated by PF officials in their quest to disrupt one of her meetings in Misolo area. However, a simple glance at the picture does not tell that story and it is acknowledged that neither the 1st Respondent or his appointed election or polling agents are in the picture.

No evidence of such disruption ever having taken place was presented by any other witness. There was further no evidence to confirm that the 1st Respondent or his election or polling agent were involved or that they had knowledge of and consented to its occurrence.

The allegation was substantially that it was "PF officials" that were involved. I have sufficiently navigated the position of the law on the ramifications where such broad allegation is made. It does not render the 1st Respondent culpable in this case to warrant the nullification of the election. I would dismiss the allegation accordingly.

There was also an allegation set out in paragraph 6.10 contending that the Respondent used his position on the PF mobilization team in the Eastern Province to register voters from Mozambique and other areas that were brought in to vote on voting day, quarantined

in some camps thereafter; and transported out after voting. Further that they were fed and given money with the help of GGOZA whilst in these camps.

No witness spoke to this allegation which therefore remains untested hearsay evidence for all intents and purposes as the Petitioner does not profess that she personally witnessed such occurrence. Not a single witness testified about voters being registered from Mozambique or what camps they were allegedly kept in. PW11's evidence was confined to his assertion that some of the voters that were transported to his area were from the Mozambique border. He did not state that they were registered as voters by the 1st Respondent or that they were quarantined in camps and given money and fed by GGOZA.

The 1st Respondent denies such occurrence and whilst admitting he was a part of the PF mobilization camp, stated the team was disbanded and his role as such ended after adoptions were made and campaigns started. I find no basis to dispel this account. This allegation was thus unproved and is dismissed.

D. Conduct of elections

The Petitioner in paragraph 6.9 and 6.10 suggested the 2nd Respondent permitted the wanton disregard for the Electoral Code

of Conduct by the 1st Respondent. That breaches were allowed to take place seemingly unabated and therefore that ECZ did not conduct a free and fair election.

To be specific the Petitioner spoke about the report that she brought to ECZ's attention at page 9 of her bundle of documents about the 1st Respondent and his agents conduct in disrupting her meetings.

I have exhaustively dealt with this matter under the previous head. Suffice to state that the 2nd Respondent brought 2RW1 who testified that the letter was not received by the ECZ and would have been brought to her attention by the District Electoral officer (DEO) if it had been in her capacity as Returning officer. That this was notwithstanding the fact that she did not sit on the dispute resolution committee.

It was further her evidence that the results at the totaling center started trickling in at 02:00hours. The last results were received at about 04:00hrs in the morning. She announced the result of the poll at which the 1st Respondent emerged victor followed by the Petitioner. She therefore told the court the election was free and fair.

The Petitioner was able to establish through cross examination and stressed in submissions that the witness acknowledged that the Gen 21 and Gen19 forms were not signed by all the contesting participants of the election. It was further suggested that the ECZ officials were not physically on the ground at all the polling stations evidenced by the acknowledged vast nature of the constituency.

None of the Petitioner's witnesses outrightly and convincingly stated that they unable to freely vote for a candidate of their choice. All spoke about wrong doing but accepted that they did not report any incident to either the police or the ECZ for a follow up to have been made on such occurrences.

The Petitioner's only known compliant is therefore what she presents on page 9 of her bundle which she impliedly suggests the ECZ failed to attend to. There is no record that the letter was received by ECZ by way of signed acknowledgment or an official stamp as would be expected. No such representation is made in the document before me. I therefore cannot dispel the 2nd Respondent's contention that the letter was not received.

There is no question that the 2nd Respondent is the body charged with the conduct of the elections and to ensure that the

requirements relating to the electoral process as prescribed are met and adhered to by all.

In **Giles Chomba Yamba Chombo vs. Kapembwa Simbao & others**²⁹ the Constitutional Court held that:

“...The Constitution expressly gives the function to conduct elections to the Electoral Commission of Zambia...The ECZ must fulfill this 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 the ECZ the body charged with the conduct of elections under article 229(2) (b) of the Constitution and not the candidates or agents”

Other provisions of relevance for present purposes include section 97 (4) of the EPA which provides that:

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

I further adopt the passage referred to this court by learned counsel for the 2nd Respondent in the Nigerian case of Alhaji Waziri Ibrahim vs. Alhaji Shehu Shagari and Others (supra) for its persuasive value.

The court aptly stated of similar provisions in Nigerian Electoral Law that:

“The court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with part 11 of the Act it will not invalidate it. The wording of section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established by court by credible evidence is substantial. Further the court will take into account the effect, if any, which such non-compliance with the provisions of part 11 of the electoral Act 1982 has had on the result of the election”

In the case of *Margret Mwanakatwe vs. Charlotte Scott & Attorney General*³⁰, the Constitutional Court guided that

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

The above considered and granted my conclusion on the complaint letter, I am not persuaded to find that ECZ did not conduct a free and fair election. The acknowledged failure to have the Gen 19 and Gen 21 forms signed by all the parties was not a fatal omission to warrant the nullification of the election result. Regulation 5(2) of the Code of Conduct, Schedule to the Electoral Process Act, 2016 also cited by the 2nd Respondent in its submissions makes this

abundantly clear. In the Nkandu Luo (supra) case the Supreme court stated that:

“... failure to countersign the election results by the election or polling agents does not render the results invalid”

There was further no evidence led to show how this omission possibly affected the result of the election.

When cross examined by counsel for the 2nd Respondent, the Petitioner confirmed that the ECZ explained the dos and don'ts to the parties; that she was freely allowed to campaign and took part in the elections; that she had polling agents in all the polling stations; and that her agents gave her the results they had received from the 2nd Respondent and this is what totaled the 6971 that she polled. She further confirmed that she had no issues with the votes received.

No complaint was presented that perhaps the result was not verified or accepted. Against such background the mere failure to sign Gen 21 and 19 forms cannot be said to have affected the conduct of the election or let alone the outcome. I am satisfied that the elections were conducted in substantial conformity with the law.

Conclusion

By way of conclusion, I must state as a matter of general comment that the Petitioner's case as evident in her submissions rested on the premise that the isolated incidents forming the basis of the allegations were perpetrated across a number of wards and in that sense widespread. That taken cumulatively, this affected the result of the election. Whilst I am persuaded to agree in theory that the cumulative effect argument may be possible, there was no evidence in this case that the infractions alleged were attributable to the 1st Respondent and or his appointed election or polling agents. In most instances there was no evidence that the infraction occurred at all or a plausible explanation availed for the frowned conduct hence bringing it out of the realm of what might have qualified to be electoral misconduct.

The law as it presently stands requires the link of the Respondent or of his election or polling agents to alleged bribery, illegal practice or misconduct or proof of their knowledge or consent of such actions which must be widespread and affected the majority of voter's choice of a candidate. This the Petitioner did not establish.

Focus also appeared to have been on the result of the poll at the polling stations and wards where the alleged breaches were said to occur to demonstrate their effect on the electorate. In the *Masumba* case (supra) the Constitutional court guides that the question is not

quite where or the number of polling stations each candidate won in but whether the Petitioner has led sufficient evidence to show the majority of the voters in a Constituency were influenced in their choice to vote for a candidate on account of an alleged infraction. This the Petitioner did not do in this case.

I therefore find the Petitioner failed to discharge her burden to prove her case to a fairly high degree of convincing clarity as prescribed under section 97 (2) (a) and (b) of the EPA. I accordingly dismiss the petition and declare that the 1st Respondent Elias Daka was duly elected member of Parliament for Msanzala Constituency. Each party will bear their own costs for this petition.



JUDGE