

REPUBLIC OF ZAMBIA

IN THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL
HOLDEN AT SHIWANG'ANDU
(Civil Jurisdiction)

2021/F/LGET/12

IN THE MATTER OF: ARTICLE 159 OF THE CONSTITUTION
(AMENDMENT) ACT NO. 2 OF 2016 OF THE
LAWS OF ZAMBIA

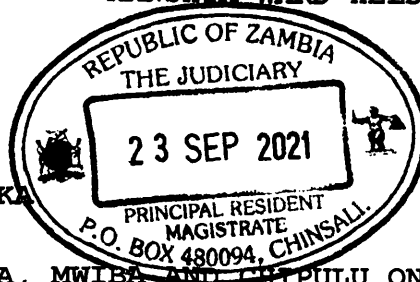
IN THE MATTER OF: SECTION 106 OF THE ELECTORAL PROCESS
ACT NO. 35 OF 2016 OF THE LAWS OF
ZAMBIA

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS FOR
MANSHYA WARD HELD ON 12TH AUGUST, 2021

BETWEEN:

SYDNEY SAMPA
AND

NGOSA ROBERT MUKASEKA



PETITIONER

RESPONDENT

CORAM: CHILINGALA, MWIBA AND CHIPULU ON 23RD SEPTEMBER, 2021

For the Petitioner: In Person

For the Respondent: Mr. L.C. Lemba of Messrs Mulungushi
Chambers

JUDGMENT

CHILINGALA, delivered the judgment of the tribunal.

CASES REFERRED TO:

1. Nkandu Luo & The Electoral Commission of Zambia v Doreen Sefuke Mwamba & The Attorney General, Selected Judgment No. 51 of 2018

2. Chrispin Siingwa v Stanely Kakubo, CCZ Appeal No.7 of 2017
3. Mubika Mubika v Poniso Njeulu, S.C.Z Appeal No. 114 of 2007
4. Mubita Mwangala v Inonge Mutukwa Wina, S.C.Z Appeal No. 80 of 2007
5. Abiud Kawangu v Elijah Muchima CCZ Appeal No. 8 of 2017
6. Kalenge v Munshya & Others, S.C.Z No. 115 of 2012.
7. Margaret Mwanakatwe v Charlotte Scott & Others, Selected Judgment No. 50 of 2018

LEGISLATION REFERRED TO:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Electoral Process Act, No. 35 of 2016
3. The Local Government Elections Tribunal Rules, 2016 (S.I. No. 60 of 2016)

INTRODUCTION

1. This petition follows the Local Government elections for Manshya ward held on 12th August, 2021.
2. The petitioner and the respondent were contestants in the said elections; the petitioner under the United Party for National Development (UPND) ticket, the respondent under the Patriotic Front (PF) ticket.
3. Following the aforesaid elections, the respondent was returned as duly elected councilor for Manshya ward on 14th August, 2021.
4. Dissatisfied with the election results, the petitioner filed his petition on 25th August, 2021 challenging the respondent's election as councilor for Manshya ward.

FACTS ALLEGED IN THE PETITION AND THE RELIEF SOUGHT

5. Below are the allegations contained in the petition:

- (i) That the respondent's political party was ferrying voters to polling stations on the poll day.
- (ii) That throughout the campaign period, the respondent's political party threatened and intimidated members of the petitioner's political party.
- (iii) That the respondent and his political party engaged in bribery by distributing food and giving money to the electorates during the campaign period.
- (iv) That members of the respondent's political party engaged in violence: destroyed property belonging to, and injured members of, the petitioner's political party.

6. The petitioner is seeking nullification of the respondent's election as councilor for Manshya ward.

RESPONDENT'S ANSWER

7. The respondent filed his answer to the petition on 30th August, 2021. He denied each and every allegation contained in the petition.

THE EVIDENCE AT TRIAL

8. Both the petitioner and the respondent gave evidence at trial. The petitioner called four witnesses while the respondent called one witness.

THE PETITIONER'S EVIDENCE

9. **P.W.1** was the petitioner himself who averred that he contested in the 12th August, 2021 elections as councilor for Manshya ward under the UPND ticket. That the respondent contested under the PF ticket and was returned duly elected councilor for Manshya ward on 14th August, 2021. That he was not satisfied with the election results, hence the petition. And, that his petition was premised on the ground of corrupt practices, illegal practices or other misconduct set out in section 97 (2) (a) of the Electoral Process Act.
10. He testified that between May and June 2021, he and his supporters were continuously threatened and beaten each time they went for campaigns by members of the respondent's political party. That some of his supporters which included Patrick Chinina and Eusebious Bwalya were chased from the markets. That following these events, he and the UPND leadership, wrote letters of complaint to the ECZ Conflict Management Committee on 28th June, 2021 and copied the District Electoral Officer and the officer in charge of Shiwang'andu Police station, among others. Same were produced in evidence collectively marked '**SS.1**'
11. He further testified that on 10th July, 2021 they were attacked by members of the respondent's political party. That the incident happened at Kalalantekwe market in which two of his supporters were severely injured. That said, he invited us to watch a video recording evidencing the violence. Same was produced in evidence marked '**SS.2**'
12. He went on to testify that on 11th August, 2021 around 23:00 hours, he witnessed another act of violence in which the

respondent and a Mr. Sichela Chilekwa assaulted one of his campaign team members. To this effect, a photograph was produced in evidence marked '**SS.3**'.

13. He concluded his testimony by stating that he was later informed that the respondent and the PF were ferrying voters in Chimbwi village on the poll day.
14. During cross-examination P.W.1 conceded that the respondent and his election or polling agents do not appear in the video recording (SS.2). When further cross-examined, P.W.1 gave the name of his campaign team member who was assaulted by the respondent and a Mr. Sichela Chilekwa on 11th August, 2021 as Daniel Mulenga Malama and stated that a report was made to the Police and a medical report was issued. He further stated that the Police could not effect an arrest on the respondent because the medical report which was still in his custody had not yet been signed by the Doctor.
15. **P.W.2** was Patrick Chinina who averred that he owns a saloon and barbershop in Shiwang'andu's Kalalantekwe market. That between May and June, 2021 he was approached by a Mr. Simon Sampa Bwali and other members of the respondent's political party who told him to stop supporting the petitioner and the UPND or risk being chased from the market. That he did not comply with the directive and was subsequently chased from the market.
16. Under cross-examination, P.W.2 stated that he was evicted from the shop which he was renting on 2nd June, 2021.
17. **P.W.3** was Violet Mulenga of Chimbwi village who testified that on 12th August, 2021 she saw the respondent come with a

Rosa bus to ferry voters to the polling station. She stated that only those who agreed to vote for the PF and its candidates were allowed to get on the bus and were promised to be given K20.00 each. She said she did not vote in the August, 2021 elections because the respondent threatened to beat UPND supporters if seen at the polling station.

18. During cross-examination, she stated that there were about fifty people on the bus and that she saw the respondent give K20.00 to the occupants of the bus before departure.
19. **P.W.4** was Mike Mulenga who testified that on 10th July, 2021 he was going to attend a funeral in Lwanya while in the company of the petitioner and other members of their political party. That when they reached Kalalantekwe market they stopped to buy food and while there, he was accosted by the respondent who was in the company of Andrew Kamyongo, Sichela Chilekwa, Mulenga and Sebastian. That the respondent held him by his left leg while Mulenga held him by his right leg. That they put him to the ground and descended on him hitting him with fists and kicks.
20. When cross-examined, P.W.4 stated that he reported the incident to Shiwang'andu Police station on the same day and gave the name of the respondent as one of the people who assaulted him.
21. **P.W.5** was Mike Sinkala whose testimony was materially similar to that of P.W.4. He stated that he was together with the petitioner and P.W.4 on 10th July, 2021 when they were attacked by known members of the respondent's political party. That he watched as P.W.4 was being beaten and when he tried to rescue him, the attackers turned on

him. He remembered Andrew Kampyongo, Sichela Chilekwa and a Mr. Bwali as some of the people who assaulted him and that sticks and bottles were used to inflict injuries on him.

22. The witness was not cross-examined.

23. And this marked the close of the petitioner's case.

THE RESPONDENT'S EVIDENCE

24. At the close of the petitioner's case and in exercise of our powers under rule 20 (3) of the Local Government Elections Tribunal Rules, 2016 we ordered the respondent and his witnesses to adduce evidence by affidavit. The affidavits were subsequently filed on 15th September and 17th September, 2021. Same are on record.

25. **R.W.1** was Ngosa Robert Mukaseka, the respondent herein. He deposed in his affidavit filed on 15th September, 2021 that he never ferried any voters nor gave them food or money before, during or after the 12th August, 2021 elections. He further deposed that he never participated in any acts of violence or electoral malpractices during campaigns. And in his further affidavit filed on 17th September, 2021 he deposed that he was never reported to Shiwang'andu Police station as a suspect in the 10th July and 11th August, 2021 violence cases and exhibited extracts from the Occurrence Book maintained at Shiwang'andu Police station marked.

26. Under cross-examination, he denied that there was violence at Kalalantekwe market on 10th July, 2021 but when referred to a video recording ('SS.2') he conceded that the violence happened in which members of the UPND were brutalized by PF supporters. When further cross-examined, he conceded that

'NRM.1' which is an extract from the Shiwang'andu Police station Occurrence Book exhibited in his affidavit of 15th August, 2021 confirmed that Mike Mulenga was assaulted on 10th July, 2021 and that one of the people who assaulted him was Chilekwa.

27. **R.W.2** was Catherine Bwalya of Chimbwi village who deposed that she was a registered voter in the 12th August, 2021 elections and that she voted from Kalalantekwe polling station in Manshya ward of the Shiwang'andu district. She further deposed that she did not see the respondent ferrying voters or giving them money.
28. And when cross-examined, she stated that she did not see the Rosa bus ferrying voters from her village.
29. This was the close of the respondent's case.

SUBMISSIONS BY THE PARTIES

30. The petitioner relied on the evidence on record while Counsel for the respondent filed in written Submissions. We are indebted to Counsel for his candid submissions which we have considered in this judgment.

THE TRIBUNAL'S FINDINGS OF FACT

31. The following facts are not materially in dispute:
 - (i) That the petitioner and the respondent were candidates in the Local Government elections for Manshya ward held on 12th August, 2021.
 - (ii) That the respondent was returned duly elected councilor for Manshya ward on 14th August, 2021.

THE APPLICABLE LAW

32. The petitioner is seeking the nullification of the respondent's election as councilor for Manshya ward on the ground set out in section 97 (2) (a) of the Electoral Process Act, No.35 of 2016. The section reads as follows:

97. (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 was or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred

33. The above provision was interpreted by the Constitutional Court in the case of **Nkandu Luo & The Electoral Commission of Zambia v Doreen Sefuke Mwamba & The Attorney General, Selected Judgment No. 51 of 2018.** The court said:

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

34. It is clear from the above authority that the election of a candidate as mayor, council chairperson or councillor can only be nullified if the petitioner in an election petition proves to the satisfaction of the Court that the candidate in question personally 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 the candidate's knowledge and consent or approval or with the knowledge and consent or approval of his election or polling agents.
35. The meaning of an 'election agent' was considered by the Constitutional Court in the case of **Chrispin Siingwa v Stanely Kakubo, CCZ Appeal No.7 of 2017** and held that regulation 55(1) of the Electoral Process (General) Regulations is clear in its provisions and requires that an election agent must be specifically appointed and named in the candidate's nomination paper.

36. The Constitutional Court's holding in the **Chrispin Siingwa case** is in line Section 2 of the Electoral Process Act which defines an 'election agent' as a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper while a 'polling agent' is defined as an agent appointed by a candidate in respect of a polling station.
37. A thorough reading of section 97 (2) (a) of the Electoral Process Act further reveals that in addition to proving that a corrupt practice or illegal practice or other misconduct was committed by a candidate or that it was committed by other people with his knowledge and consent or approval or with the knowledge and consent or approval of his election or polling agents, the petitioner must further prove that as a result of such corrupt practice, illegal practice or misconduct, the majority of the voters in the constituency district or ward, as the case may be, were or may have been prevented from electing the candidate of their choice.
38. In other words, it is not sufficient for a petitioner to prove only that a candidate committed a corrupt practice or illegal practice or other misconduct in relation to the election without proof that the corrupt practice or illegal practice or misconduct was widespread and prevented or may have prevented the majority of the voters from electing a candidate of their choice. This position was settled by the Supreme Court in the case of **Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 2007.** Their Lordships said;

"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 or might have been prevented from electing their preferred candidate."

39. In another case, Mubita Mwangala v Inonge Mutukwa Wina, SCZ Appeal No. 80 of 2007, the Supreme Court said:

"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 voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred"

40. And in the Nkandu Luo case which we have already cited, the Constitutional Court reiterated that:

"in addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral

malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice."

THE STANDARD OF PROOF REQUIRED

41. In a civil trial, the plaintiff is required to prove his case on the balance of probabilities.
42. However, the authorities show that the standard of proof in an election petition is higher than that required in an ordinary civil action. The petitioner in an election petition is required to prove his case to a fairly high degree of convincing clarity. This was demonstrated by the Constitutional Court in the case of **Abiud Kawangu v Elijah Muchima CCZ Appeal No. 8 of 2017**. The Court said;

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

FACTS FOR DETERMINATION

43. Below are the issues to be determined by this tribunal:
 - (1) Whether or not the respondent personally committed the corrupt practices, illegal practices or other misconduct complained of in this petition;
 - (2) If the answer in (1) above is NO, whether or not such corrupt practices, illegal practices or other misconduct were committed by another person with the knowledge and

consent or approval of the respondent or the knowledge and consent or approval of his election or polling agents;

- (3) If the answer in either (1) or (2) above is YES, whether or not as a result of such corrupt practices, illegal practices or other misconduct, the majority of voters in Shiwang'andu district were or may have been prevented from electing the candidate of their choice.

THE TRIBUNAL'S REASONING AND DECISION

44. We have carefully examined the evidence in light with the allegations contained in the petition. In our considered view, the issues raised in the petition can be summarised under four heads, namely; (1) ferrying of voters (2) bribery, (3) violence, and (4) threats and intimidation. We will now interrogate these issues in the order they appear.

(1) FERRYING OF VOTERS

45. The petitioner is relying on the evidence of **P.W.3** a resident of Chimbwi village who testified that on 12th August, 2021 she saw the respondent with a Rosa bus ferrying voters from Chimbwi village taking them to Kalalantekwe polling station. She went further to state during cross-examination that there were close to fifty people on the bus and that only those who agreed to vote for the PF and its candidates were allowed on the bus.
46. We have searched the law on this subject and found that ferrying of voters does not fall within the umbrella of a corrupt practice or illegal practice or misconduct under part VII of the Electoral Process Act or the Code of Conduct. While the Electoral Code of Conduct forbids the

use of Government vehicle to ferry voters on poll day, it says nothing about ferrying voters using private vehicles. It is our view that had it been the intention of the legislature to criminalise or to classify as 'misconduct' the ferrying of voters using private vehicles, our electoral laws could have expressly stated so. Our conclusion, therefore, is that ferrying of voters using private vehicles is not forbidden. We are fortified by the Supreme Court decision in the case of **Kalenge v Munshya, The Electoral Commission of Zambia & The Attorney General S.C.Z No. 115 of 2012.** While their Lordships agreed that the use of Government transport to ferry voters is illegal, they however held that the use of private transport to ferry voters is not an offence under our Electoral Laws.

47. For the reasons we have stated above, this head fails.

(2) BRIBERY

48. We note, in terms of the law that section 81 (1) (c) of the Electoral Process Act proscribes the use of bribery to induce any person to vote or not to vote for any candidate in an election.

49. Has the petitioner adduced any evidence which tends to show that the respondent personally or through his duly appointed agents engaged in bribery or that the bribery was being perpetrated with his knowledge and consent or approval or that of his duly appointed agents?

50. There was evidence from **P.W.3** that she witnessed an incident in Chimbwi village where the respondent was giving money to the voters on 12th August, 2012. She said close to

fifty people were given K20=00 by the respondent before they were ferried to Kalalantekwe polling station.

51. We have considered the respondent's affidavit evidence and that of his witness (R.W.2) on this issue and found that it is a bare denial. To this end, we hold that the allegation that the respondent engaged in bribery has been proved.
52. But the matter does not here. The next question that falls to be determined by this tribunal is this: has the petitioner adduced cogent evidence showing that the bribery was so widespread that it swayed or may have swayed the majority of the voters from electing the candidate of their choice? The answer is in the negative. As can be seen from the record, the bribery happened at Chimbwi village and in the words of **P.W.3** involved only 'about fifty people'. There is no other evidence of bribery having taken place in Manshya ward so as to sway or have the potential of swaying the majority of voters in that ward.
53. The allegation fails.

(3) VIOLENCE

54. Section 83 (1) (a) of the Electoral Process Act proscribes the use of violence in elections.
55. But what evidence is there to prove that the respondent personally or through his duly appointed agents engaged in violence or that the violence was being perpetrated with his knowledge and consent or approval or that of his duly appointed agents?

56. There was evidence from **P.W.4** Mike Mulenga and **P.W.5** Mike Sinkala that they were both assaulted at Kalalantekwe market on 10th July, 2021 while on their way to Lwanya. A report was made to Shiwang'andu Police station. **P.W.4** asserted at trial that one of the people who assaulted him was the respondent. We have scrutinized '**NRM.1**' which is an extract from the Police Occurrence Book. The said exhibit confirms that **P.W.4** was assaulted at Kalalantekwe market on 10th July, 2021. The names of the perpetrators of the violence which **P.W.4** gave at the police were Andrew, Chilekwa and Mulenga. The respondent's name was not mentioned. Was this by coincidence or a mere act of human forgetfulness? We do not think so. We are given to think that if indeed the respondent had participated in the violence by holding **P.W.4**'s leg as it is claimed, his name could have been mentioned at the police station because at that time **P.W.4** had no reason to give false information. We are inclined to think that the name of the respondent is being mentioned as an afterthought. Our view is strengthened by the fact that **P.W.5** who was assaulted at the same time with **P.W.4** did not mention the respondent as one of the assailants. Our view is further strengthened by the fact that the video recording ('**SS.2**') which the petitioner personally recorded evidencing the violence of 10th July, 2021 and tendered into evidence does not show that the respondent personally participated in the violence.

57. There was further evidence from the petitioner that one of his supporters by the name of Daniel Mulenga assorted by the respondent and a Mr. Sichela Chilekwa. The evidence shows that the incident was reported to the police. We note

from 'NRM.1' that no person was mentioned at the Police station as having assaulted Daniel Mulenga. Infact 'NRM.1' shows that Daniel Mulenga was assaulted by unknown people.

58. Going by the evidence, we are not satisfied that the respondent personally committed the acts of violence in question. We must also point out that there is no tangible evidence before us to show that the acts of violence complained of were committed by the respondent's appointed agents or that the acts were committed with his knowledge and consent or approval or with the knowledge and consent or approval of his appointed agents.
59. In the case of **Margaret Mwanakatwe v Charlotte Scott & Others, Selected Judgment No. 50 of 2018** the Constitutional Court dealt with allegations made against winning candidates with respect to illegal actions relating to the elections attributed to persons other than the candidate's election and polling agents and stated that a candidate cannot be held liable for acts of members of his political party or other persons who are not the candidate's election or polling agents. It is therefore not sufficient for the petitioner in an election petition to say that the act complained of was done by a member of the respondent's political party or his supporters.
60. For the reasons we have stated above, we hold that the allegation of violence also fails.

(4) THREATS

61. Section 83 (1) (c) of the Electoral Process Act forbids the use of threats to induce or compel any person to vote or not to vote for any candidate in an election.
62. In support of this allegation, the petitioner is relying on the evidence of **P.W.2** Patrick Chinina that between May and June, 2021 he was approached by a Mr. Simon Sampa Bwali and other members of the respondent's political who threatened to chase him from the market if he continues supporting the petitioner and the UPND and that he was subsequently evicted from the shop and chased from Kalalantekwe market on 2nd June, 2021. This evidence has not been contradicted and we therefore accept it.
63. We however note from the evidence that the threats complained of were not committed by the respondent personally or through his duly appointed agents. We further note that there is no evidence showing that the threats were done with the knowledge and consented or approval of the respondent or the knowledge and consent or approval of his duly appointed agents.
64. On the basis of the foregoing, we hold that this allegation equally fails.

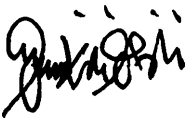
CONCLUSION

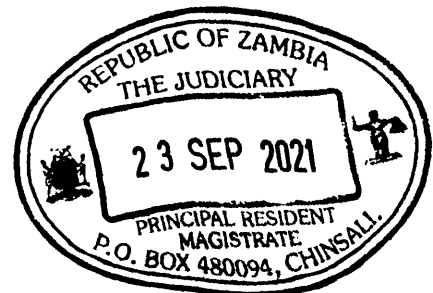
65. The upshot of our decision is that the petitioner has failed to prove his case to the requisite standard.

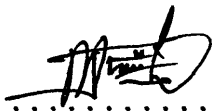
66. We dismiss the petition and declare that the respondent is the duly elected councilor for Manshya ward. Each party to bear own costs.


67. Parties are hereby informed of the right to appeal within 14 days of our decision.

Delivered in open court at Shiwang'andu theday of.....2021


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C. CHILINGALA
CHAIRPERSON




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M. MWIBA
MEMBER


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G. CHIPULU
MEMBER