

**IN THE LOCAL GOVERNMENT ELECTION TRIBUNAL 2021/SEO/LGET/015
FOR THE MUCHINGA DISTRICT**

HOLDEN AT ISOKA

(Civil Jurisdiction)

IN THE MATTER OF: ARTICLE 159(3) OF THE CONSTITUTION, CAP 1 OF
THE LAWS OF ZAMBIA.

IN THE MATTER OF: SECTION 106(1)(a) OF THE ELECTRAL PROCESS ACT
NO. 35 OF 2016, OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL
RULES 2016(STATUTORY INSTRUMENT NO.60 OF
2016).

IN THE MATTER OF: LOCAL GOVERNMENT ELECTION PETITION FOR
MAFINGA COUNCIL CHAIRPERSON IN MAFINGA
DISTRICT HELD ON THE 12TH DAY OF AUGUST 2021.

BETWEEN:

KAONGA BOYD

PETITIONER

AND

KAONGA DUNCAN

RESPONDENT

Coram: Hon O.Z. Katyamba, Chairperson, Gina Nyalugwe and
Cassandra Soko, members, delivered on 22nd September,
2021.

For the Petitioner: I. Simbeye of Messrs Muyatwa Legal Practitioners.

For the Respondent: E. Siatwambo of Mulungushi Chambers.

JUDGMENT

O.Z. Katyamba, Chairperson, delivered the judgment of the tribunal.

Cases referred to:

1. Stanely Kingaipe Charles Chookole vs Attorney General (2010) ZR.
2. Mushemi vs The People (1982) ZR 71.
3. Simasiku Namakando and Eileen Imbwae 2006/HP/EP/002.

Statutes referred to:

1. The Electoral Process Act.
2. The Local Government Election Tribunal Rules, 2016.
3. The State Proceedings Act Chapter 71 of the Laws of Zambia

Since the return of multi-party democracy in Zambia, it has always been a common occurrence that post elections, parties to an election, especially the unsuccessful ones, have for one reason or another petitioned the courts to resolve electoral disputes. One such instance is the current case. In our view, such peaceful manner of resolving electoral disputes should be encouraged given the exponential increase in the number of enlightened citizens who now take interest to participate as candidates in diverse positions.

It is against this background that the law was amended in 2016 to inter alia, make provisions for the quick disposal of elections petitions filed at Local Government Level via the creation of fast-track mechanisms namely, Local Government Election Tribunals. This development in resolving electoral disputes is a milestone in the Judiciary's quest to facilitate easy access to justice.

The genesis of this matter can be traced to the 25th of August, 2021. The petitioner escalated this matter to this tribunal via a petition praying for the following reliefs.

1. That it may be determined and declared that the declaration of the respondent as winner of the Council Chairperson seat for Mafinga is null and void.

2. That there be an order of injunction to restrain the respondent from registering and being sworn in or taking up the position as Council Chairperson for Mafinga, until after the determination of this matter.
3. That there may be an order of injunction to restrain the respondent from receiving any benefits either in form of emoluments or allowances or whatever otherwise meant for the Council Chairperson for Mafinga until after the final determination of this matter.
4. That the petitioner may have such or other reliefs the tribunal shall deem fit; and
5. That the respondent may be ordered to pay costs of and incidental to this petition.

The grounds relied on by the petitioner in support of the petition are that the petitioner's agents were unable to witness the unpacking and handling of the ballot boxes and other electoral materials when they arrived in various polling stations. That members of the Patriotic Front Party (hereinafter referred to as the "PF") were seen distributing money, mealie meal, fertilizer, and cooking oil to members of the general public. That members of the PF persuaded voters on the poll day to vote for the respondent by preparing food for the voters.

The petitioner alleged that some voters were influenced to vote for the respondent after the PF organized a vehicle which ferried voters to polling stations on poll day. That the polling station agents for the petitioner stationed in various polling stations had no access to Gen 20A forms and furthermore, that in certain instances the petitioner's agents were made to append their signatures on blank Gen 20A forms.

Furthermore, it was averred that polling station agents for the petitioner were not granted access to polling stations. That some voters were threatened by the PF, that if they did not vote for the respondent, they would lose their entitlements thereby influencing illiterate voters into voting for the respondent.

Via an affidavit in support of the petition, the petitioner deposed that heading into the elections, the PF coerced the beneficiaries of Social Cash Transfer and the Farmer Input Support Program (Hereinafter referred to as "FISP") to vote for the respondent and that if they did not, such beneficiaries would lose their entitlements under the two programs. It was the petitioner's contention that by reason of the foregoing, many illiterate voters were influenced into voting for the respondent. In addition, the petitioner averred that a special organization founded by the PF called, Good Governance Zambia (GGOZA) coordinated the PF's illicit activities.

In riposte to the petitioner, the respondent filed an answer dated 6th September, 2021. In the main, apart from the respondent denying all the allegations leveled against him, he also averred that the petitioner will be put to strict proof at trial thereof.

In connection with paragraph 3(i)(iii)(v)(vi) of the petition, the respondent averred that the same are within the peculiar knowledge of the petitioner.

The respondent asserted that GGOZA was not a PF organization. He stated that payment of Social Cash Transfer is a preserve of the Government done through its officers.

At the hearing of the matter, the petitioner testifying as **PW1**, told the tribunal that, following the general elections which were held on 12th August, 2021, he does not accept the declaration of the respondent as the winner of the Council Chairperson position for Mafinga District.

His refusal to accept defeat was grounded on his observation of several electoral malpractices on the part of the PF being the party which sponsored the respondent on its ticket in the just ended elections.

He intimated to the court that on various occasions leading up to the elections, some PF members supporting the respondent were seen distributing mealie meal, money and cooking oil in various polling stations. On 11th September, 2021 and

12th September, 2021, supporters of the respondent prepared some food subsequent to which they invited voters to eat. Consequently these voters were persuaded to vote for the respondent. He disclosed that on poll day, the PF organized motor vehicles ferrying voters to and from various polling stations. He testified that in committing the foregoing malpractices, the PF Party was aided by its affiliate organization GGOZA.

Consequently, he urged this tribunal to nullify the election of the respondent as the duly elected Council Chairperson of Mafinga District.

When cross-examined, he deposed that he was not aware that the difference in votes between the respondent and himself was 5000 votes. He admitted that it was the respondent who won the election for the position of Council Chairperson and not the PF as a party. He intimated to the court that he had no photographs to show the tribunal that the respondent was distributing money, food and mealie meal to the voters. He also denied having any evidence linking the respondent to GGOZA or any evidence demonstrating that the PF party and GOZA are one entity. He revealed that he had no evidence showing that the respondent was involved in the alleged electoral malpractice.

In re-examination, the Petitioner explained that he had evidence linking the respondent to the alleged electoral malpractice albeit not there and then.

Akim Singogo was called as **PW2**. His evidence was that on 12th August, 2021, he met the respondent who was in the company of Jozi Ng'ambi and Pestone Mugala. In no time, Jozi Ng'ambi, gave him a sum of ZMW500.00 so that he could share ZMW100.00 each with his friends on condition that they would all cast their vote in favour of the respondent. Subsequently, the respondent, promised to give him another sum of ZMW2,000.00.

Following his encounter with the trio, he indeed voted for the respondent. After casting his vote, he joined the respondent at his house where he was treated to a sumptuous meal and some alcohol.

Under cross-examination, he reiterated his evidence in chief that it was not the respondent who gave him the ZMW500.00. He informed the tribunal that he never reported any of the alleged electoral malpractice to the police. He deposed that the only tangible proof of electoral malpractice which he had, implicating the respondent were his friends. He, however, confirmed to the tribunal that at the time he received the money from Ng'ambi, he was alone and according to him the respondent was present at the time.

When further cross-examined, he told the tribunal that he did not see where his friends voted from and that, neither did anyone see where he voted from. He clarified that after voting, he ate food from the resident of his church mate by the name of Kaonga's and not at the respondent's house. He stated with vigor, that he saw no need to report to the police about the money which he was given. He also acknowledged having used part of the money and sharing it with his friends. He admitted that no one saw him getting the money in question, apart from his uncle being the person who actually gave him the money.

PW3, was Ackson Simbeye. He testified that he was picked by the PF Party to be in charge of GGOZA. During one of the meetings, PF members, namely, Wezi Chilongo and the respondent instructed him, to vote for the respondent. They also instructed him to convince other voters to vote for the respondent. They promised to give out money, laptop bags and smart phones for their services. As he went out, he was given cooking oil, chitenge materials, t-shirts, caps and mealie meal to distribute to the voters. Subsequently, he was given a GGOZA booklet plus an Identification Card as a polling station monitor, which items he tendered in evidence.

He executed his task diligently with the result that the respondent emerged victorious in the said elections.

In conclusion, he told the tribunal that the respondent's malpractice was very widespread in the whole of Mafinga District.

When his evidence was tested at cross-examination stage, he deposed that the respondent was not part of the GGOZA meeting he referred to. He failed to demonstrate to the court that the GGOZA booklet had the PF Party symbol. He also admitted that the GGOZA booklet was not issued by the PF party.

During further cross-examination, he asserted that the activities of GOZA were not done under the instructions of the respondent. He also deposed that the PF party and GGOZA are two separate entities. He re-affirmed that, when distributing items to voters he went under GGOZA as the said items came from GGOZA.

In re-examination, he clarified that although GGOZA and PF were two different entities, during meetings, they were told to inform people to vote for PF.

Wilson Sinyiza testified as **PW4**. He alleged that during one of the campaign meetings organized by the respondent, the PF Member of Parliament Candidate Mr. Chabinga, defamed some people when he stated that, anyone on CAC will be removed from their positions through the office of the District Commissioner. Mr. Chabinga further stated that the President of the UPND Party now President of Zambia, Mr. Hakainde Hichilema, failed to build a house for his mother and that by reason thereof, she lived in a house that looked like a toilet not until the former President Mr. Edgar Chagwa Lungu built her a decent house.

They were furthermore told that, the petitioner chased his wife and children, and as such, the petitioner cannot be entrusted with the position of Council Chairperson.

His evidence during cross-examination was that, as a UPND member, he attended the meeting where the alleged defamatory statements were made so that he could listen to the PF manifesto. He stated that he had no evidence showing that the victims of the alleged defamatory statements sought redress through the courts of law.

The last witness for the Petitioner, James Innocent Ng'ona was called as **PW5**. He narrated that on 12th August, 2021, the respondent hired him for a sum of ZMW1,500.00 to ferry voters to and from various polling stations. He alleged that a police officer from Lusaka whose name he could not recall paid him the said ZMW1,500.00. He also picked some people in Isoka who came from Lusaka at the instruction of the respondent.

Under cross-examination, he deposed that he had no receipt showing that he used part of the money which was given to him by the police officer to buy fuel for his Toyota Noah Bus. He explained that he was not aware that on 11th August, 2021, the respondent went to Mukula to vote.

He reiterated that it was not the respondent who gave him the ZMW1,500.00. Despite acknowledging that when one pays a hiring fee, such a person is deemed to be the one who has hired a vehicle, he still maintained that it is the respondent who hired him. However, when asked to show proof that it is the respondent who hired him, he stated that he had no tangible evidence.

At this juncture, the petitioner closed his case.

In reaction, the respondent (**RW1**) testified that on 11th August, 2021, around 17:00hrs, he went with his wife to Mugula so that he would vote from there. The following day he was amongst the first people to cast his vote. Thereafter, he visited several polling stations to monitor what was happening. Although he won the election by over 5000 votes in comparison to the petitioner, he did not win in the following polling stations; Gwembe, Kalonga, Kakusa, Tonga, Tontella, Zinza and in Senge.

He denied the allegation that he gave some voters cash money, assorted foodstuffs, mealie meal or fertilizer. He equally denied the allegation that he hired a vehicle to ferry voters and that if anything it was the first time during the hearing of this matter that he met PW5. He was shocked that PW2 alleged that he was in Wiya when in fact he was in Mugula.

According to him, it was his first time before the tribunal to learn about the existence of GGOZA. He denied being aware of any agreement between his party PF and GGOZA. He asserted that his agent Kenneth Muwowo and himself never coerced any voters.

He testified that, the sheer fact that he was not voted for by his own people at Gwende polling station, clearly demonstrates that he did not ferry voters or distribute foodstuffs and fertilizer as purported. Otherwise if the allegations against him were true, then the petitioner would not have won on his home turf.

In the main, he denied all the allegations of electoral malpractice leveled against him in this matter.

In conclusion, he told the tribunal that he won 11 Wards out of the available 13 wards in Mafinga District.

When cross-examined, he intimated to the tribunal that he did not have any documents to show that he hired a motorbike. He also deposed that he did not have any evidence to prove that he spent a night in Wenela on 11th August, 2021. He told the tribunal that he never brought any evidence to show that he visited Kapendamaji Polling Station.

He confirmed having had one election agent and that his party PF had polling agents in all the polling stations in Mafinga District who served his interest and that of his party. He therefore acknowledged that it was not only Muwowo who served his interest as an agent.

Under re-examination, he clarified that Mr. Muwowo was his only agent in the elections.

The respondent's lone witness Kenneth Muwowo testified as **RW2**. He confirmed that he was an agent of the respondent. To support his assertion, he tendered in evidence his Political Party Agent Identification Card. From his observations, the campaigns for the Council Chairman position were mostly done by the

respondent and himself for the larger period. He mentioned that they never carried anything to give out to the voters during the campaign period. Consequently, he never saw the respondent giving out cash money or some things to the people. On 11th August, 2021, he parted company with the respondent as the two went in different directions.

Under cross-examination, he admitted that he never saw the respondent arriving in Mugula. He also told the tribunal that the respondent and himself moved empty handed during their campaigns.

At the close of the respondent's case, counsel for the respondent filed written submissions.

Counsel posited that none of the petitioner's witnesses led evidence whether oral or otherwise to prove to the tribunal that the respondent was involved in electoral malpractice. It was submitted that the petitioner must produce strong evidence to prove that the respondent committed an illegal and corrupt practice.

It was submitted that the evidence on record shows that the petitioner did not see the respondent distributing money or mealie-meal, cooking oil and other items to the voters. In counsel's view, there is no evidence on record that the respondent was seen distributing food stuffs or cooking food. Counsel pointed out that the evidence of the petitioner and the petitioner's witnesses was that it the PF members who were cooking and by reason thereof, it meant that the respondent was also one of them.

Counsel further argued that a candidate is liable only for corrupt or illegal act or other misconduct that he or she committed in connection with the election and those committed by his election agent or polling agents or those done with his or her knowledge, approval or consent. In this regard, it was pointed out that the respondent has no control over both the social cash transfer program and the FISP program as the same are government programs.

According to counsel, the testimony of the petitioner and his witnesses are mere allegations and hearsay without corroboration.

In conclusion, counsel posited that there is no evidence warranting the nullification of the respondent's election as the acts of his political party cannot be deemed to be his acts. He therefore, urged the tribunal to uphold the election of the respondent on grounds that the respondent's election was free and fair.

We have considered the evidence on record, the respondent's witness statement and the submissions by counsel for respondent.

We find the following facts to be undisputed. That the respondent was elected as the Council Chairperson for Mafinga District. That the respondent won the elections by over 5000 votes compared to his nearest rival the petitioner. That the respondent won 11 Wards in contrast to the petitioner who carried the day in two Wards only.

Simply put, what the tribunal is being called upon to ascertain is to determine whether the respondent committed the purported electoral illegal acts by himself or via his election and polling agent or to his knowledge, consent or approval.

It is only when the first contentious matter is addressed that the tribunal can move on to address its mind to the other pressing issue, namely, whether in the circumstances of this case, it can be said that as a result of the purported electoral transgressions herein, the majority of voters were prevented from voting for a candidate of their choice.

The starting point in determining the issues in contention is section 97(2) of the Electoral Process Act (EPA). The section puts it thus:

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

tribunal, as the case may be, that— (a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election— (i) by a candidate; or (ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred; (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 is discernable from the provisions of section 97(2) of the EPA Act that to succeed in an election petition, the petitioner must establish three elements, namely;

- i. That a corrupt practice or an illegal act or other misconduct was committed during the election.
- ii. That the illegal act or misconduct complained of was committed by the respondent or by his election agent or polling agent or with the respondent's knowledge, consent or approval.
- iii. That as a consequence of the corrupt or illegal act or misconduct committed, the majority of the voters in the district or ward were or may have been prevented from electing a candidate of their choice.

We are alive to the settled principle of law that in matters of this nature, the onus of proof rests on the petitioner, to prove his case beyond the balance of probabilities. It is clear that the standard of proof in election petitions is a high

one, as it goes beyond that set in ordinary civil matters notwithstanding that it is below the criminal standard of proof.

We shall begin by pronouncing ourselves on the low hanging fruits in this matter.

From the outset we wish to emphatically state that although the petitioner prayed for two injunctive reliefs, namely, restraining the respondent from registering and being sworn in or taking up the position as Councilor for Luhoka Ward and to restrain the respondent from receiving any benefits either in form of emoluments or allowances or whatever otherwise meant for the Councilor for Luhoka Ward until after the final determination of this matter, the same is not attainable under our laws as this is tantamount to issuing an injunction against the state, contrary to the provisions of section 16(2) of the State Proceedings Act Chapter 71 of the Laws of Zambia.

Secondly, having combed the record, we find that no evidence whatsoever, was led at the hearing of this case, in connection with the allegation made in the petition, that ballot boxes and other electoral materials were delivered without the petitioner's knowledge thereby precluding him or his agents from observing the unpacking and handling of the same.

Equally, the petitioner whether by himself or his witnesses, neglected to testify on the allegation that the polling agents of the petitioner were denied access to the polling stations, or GEN 20A Forms and that they were requested to sign on blank ones.

In the case of **Stanely Kingaipe Charles Chookole vs Attorney General (2010) ZR**, where Muyovwe. J stated that:

"From the outset, I would like to point out that it is trite law that he who alleges must prove and in this case the burden is on the petitioners to prove their case on a preponderance of probability.

It follows therefore, that, since the petitioner did not lead evidence to prove the aforementioned allegations, we take that, the petitioner, has abandoned those allegations against the respondent and we so find.

Coming to the issue of social cash transfer and FISP, Rule 20(2) of the Local Government Election Tribunal Rules, 2016 is instructive. The rule is couched in these terms:

“a tribunal may take judicial notice of any fact.”

Therefore, we take judicial notice that Social Cash Transfer and FISP are government programs and by reason thereof, we find that in the absence of any evidence of means, the respondent had no influence on the day to day administration of these programs and we so find.

In support of his case, the petitioner made several allegations prompting him to petition the election of the respondent as Council Chairperson for Mafinga District. These allegations are that, the respondent and his fellow PF members gave out various food stuffs, cash money and transported voters to and from the various polling stations in the district on voting day. The petitioner urged this court to nullify the election of the respondent on grounds that electoral malpractice was committed by the respondent during campaigns and on voting day.

For his part, the respondent denied having been involved in any electoral malpractice as alleged by the petitioner.

It is evident that the evidence of the two rival parties is in conflict with each other. In **Mushemi vs The People (1982) ZR 71**, the Supreme Court guided as follows:

“The judgment of any trial court faced with conflicting evidence should show on the face of it the reasons why a witness who has been

seriously contradicted by others is believed in preference to those others."

The issue then is one of credibility of the witness who testified. Can it be said that that during cross-examination, the credibility of the petitioner and his witnesses was discredited herein? To answer this question, it is only fair that we reproduce some of the responses given by these witnesses during cross examination.

The Petitioner revealed that:

"he had no evidence showing that the respondent was involved in the alleged electoral malpractice."

As for PW2 he stated that:

"it was not the respondent who gave him the ZMW500.00 inducement amount."

Meanwhile PW3 testified that:

"he asserted that the activities of GOZA were not done under the instructions of the respondent."

Coming to PW4 she deposed that:

"as a UPND member, he attended the meeting where the alleged defamatory statements were made so that he could listen to the PF manifesto."

Lastly, PW5 explained that:

"it was not the respondent who gave him the ZMW1,500.00 hiring fee."

Arising from the above captioned evidence proffered during cross-examination, we find that the evidence of the petitioner, PW2, PW3 and PW5 was discredited during cross examination.

Coming to the evidence of PW4, we wish to state that we are alive to the order of credibility of witnesses in election petitions. On this point, we find solace in the unreported case of **Simasiku Namakando and Eileen Imbwae 2006/HP/EP/002** wherein, the High Court guided that:

"... To aid such analysis I will categorize the witnesses into four groups in this petition. The attachment of weight to evidence follows the order. More weight is attached to the fourth, then third, then second and lastly the first category of witnesses.

- i. Witnesses who belong to the petitioner and respondents political party;**
- ii. Witnesses who were electoral officials engaged by the electoral Commission the conductor of the elections;**
- iii. Witnesse or witnesses belonging to the petitioner's or respondent's party who gave evidence against their own party candidate;**
- iv. Monitors or police officers who are not party to these proceedings nor were they party members."**

It is clear as light follows day that, PW4 belongs to the least credible category of witnesses in an election petition. In the absence of a credible witness who could have corroborated his testimony over the purported defamatory statement, it cannot be ruled out that the credibility of PW4 is very questionable.

Given our analysis above and at the risk of repeating ourselves, we have arrived at the inescapable conclusion that the evidence of the petitioner and his witnesses under cross-examination, was discredited and by reason thereof, it falls far below the evidentiary standard of proof envisaged in matters of this nature, to wit, beyond a balance of probabilities, and we so find.

We further find that the respondent, whether by himself, his agents or to his knowledge, consent or approval never committed the alleged electoral misconduct in this matter.

The petitioner having hit a snag on the first contentious issue canvassed above, it would, in our opinion, therefore, be a mere academic exercise if we delved into the second contentious issue.

In our considered view, the petitioner has failed to demonstrate beyond a balance of probabilities that the election of the respondent was not free and fair to warrant us, to nullify the said election. Accordingly and for the avoidance of doubt, we find that the respondent was the duly elected Council Chairperson for Mafinga District of Muchinga Province.

Given that matters of this nature are in the public interest, we order each party to bear his own cost.

DELIVERED IN OPEN

This 22nd day of September, 2021, at Thendele, in Mafinga District of Muchinga Province.



OBRIEN ZILINDI KATYAMBA

RESIDENT MAGISTRATE



GINA NYALUGWE

MEMBER



CASSANDRA SOKO

MEMBER

