

2021/Q/LGET/013

**IN THE LOCAL GOVERNMENT ELECTION TRIBUNAL
HOLDEN AT MKUSHI
(Constitutional Jurisdiction)**

**IN THE MATTER OF: THE ELECTORAL PROCESS ACT NO. 35
OF 2016 ARTICLE 154 OF THE
CONSTITUTION OF THE REPUBLIC OF
ZAMBIA**

**IN THE MATTER OF: THE LOCAL GOVERNMENT
ELECTIONS FOR THE MATUKU WARD
COUNCILOR HELD ON 12 AUGUST 2012**

**IN THE MATTER OF: THE LOCAL GOVERNMENT
ELECTIONS FOR ELECTION OF JAILOS
TEMBO AS COUNCILOR MATUKU**

BETWEEN:

ABEL SIWAKI

PETITIONER

AND

JAIROS TEMBO

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

**BEFORE THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL
F. KAOMA, N. M. SIMACHELA & C. B. MAIMBO**

FOR THE PETITIONER:

IN PERSON

FOR THE 1ST RESPONDENT:

**MR. E. KHOSA OF MESSRS BCM
LEGAL PRACTITIONERS.**

FOR THE 2ND RESPONDENT:

NON ATTENDANCE

JUDGMENT

CASES CITED:

1. **Nkandu Luo & Another V Doreen Sefuke Mwamba & Another, Selected Judgment No. 51 OF 2018**
2. **Austin Liato v. Sitwala Sitwala, Selected Judgment No. 23 of 2018.**
3. **Lewanika and Others v Chiluba (1998) ZR**

LEGISLATION REFERRED TO:

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

KAOMA, F delivered the Judgment of the Tribunal

This matter was commenced on 20th August, 2021, by way of petition. In the petition, the petitioner sought a declaration that the 1st Respondent was not duly elected as Councillor and that his election was null and void. The particulars of the Petition are that the Petitioner was an aspiring candidate for the position of Ward Councillor for Matuku Ward. The election was held on 12 August, 2021 wherein the Petitioner and the 1st Respondent were candidates and the returning officer on 14th August, 2021 declared the 1st Respondent as being duly elected. The petitioner says the following;

- i. **That the election of the 1st Respondent to the office of Matuku Ward Councilor was neither free nor fair as the elections were tarnished by deception, bribery and abuse of government resources which was the order of the day.**
- ii. **That the 1st Respondent throughout his campaigns misled people into believing that he was a Tanzanian national and that they should not vote for him**
- iii. **That on the poll day members of the PF led by the 1st Respondent were seen distributing mealie meal at Chimbofwe School sign post telling voters to only vote for PF candidates in order to continue enjoying free mealie meal.**

- iv. **That on 11th August, 2021, a pig was slaughtered in Kapande Village and voters were told they would only partake of the pork meat if they voted for PF candidates and the following day members gathered at Mr. Chitambos's house to feast on the pig**
- v. **That he was ready to call witnesses in support of his petition who witnessed his complaints first hand.**

In summing up, the Petitioner contended and prayed that this Tribunal determine that the said Jailos Tembo of PF was not duly elected and that the election was null and void.

On 27th August, 2021, the Respondent filed his Answer to the Petition. The Respondent countered the allegations regarding his alleged malpractice as follows:

The 1st Respondent admits the contents of paragraph 1 of the petition to the extent that the Petitioner was an aspiring candidate for the 12th August, 2021 Local Government Election for Matuku Ward in Mkushi North. The Respondent admits paragraph 2 that he was indeed declared as the winner of the Local Government Elections for Matuku Ward and adds that the Results were as follows;

- a. **Jairo Tembo of the Patriotic Front 1, 128 votes**
- b. **Abel Siwakwi of the United Party for National Development 919 votes**

The 1st Respondent refuted allegations in paragraph 3(i) and instead averred that the election was free and fair and that he would put the Petitioner to strict proof. The Respondent further refuted allegation in paragraph 3(ii) and instead averred that at no point during campaigns did he nor any of his agents allege that the Petitioner was a Tanzanian and the Petitioner would be put to strict proof. Furthermore, the 1st Respondent denied the allegation in paragraph 3(iii) adding

that the Petitioner would be put to strict proof. He also denied the allegation in paragraph 3(iv) and instead contended that there was no animal slaughtered for the electorates on the day before the election but for his campaign team and their camp. The 1st Respondent further contended that the Petitioner was not entitled to any of the reliefs sought by him as there was no merit in the petition presented before the honourable Tribunal. He therefore prayed that the Petition be dismissed with costs and that his election as a councillor for Matuku Ward in Mkushi North Constituency in the District of Mkushi be upheld.

Pursuant to the rules of this Tribunal, we set down this matter for trial on 14th September, 2021 and accordingly heard evidence of both parties, viva voce.

In his endeavour to prove his allegations, the Petitioner called to aid 5 witnesses while the Respondent was the only witness. The evidence of the parties is reviewed as follows;

PETITIONER'S EVIDENCE

The first witness for the Petitioner was the Petitioner himself a 35 years old welder of Matuku Ward, Mkushi. His evidence was that he stood as a Councilor on the UPND Ticket at Matuku ward in the election held on 12th August 2021. According to the Petitioner, the campaigns were not free and fair after which the Respondent who stood on PF ticket was declared as the winner. It was his evidence that Respondent used unfair methods to campaign such as telling people that the Petitioner was a Tanzanian on various occasions and at different locations within Matuku ward. He added that the people of Matuku Ward failed to vote for him because they knew that he was a Tanzanian. The Petitioner named some of the people the 1st Respondent told as Muzomba, Benard Muleya and Taiwila Ezekiel. According to the Petitioner, on voting day the Respondent was ferrying people from different places in a Canter driven by Bowas and telling them to vote for him and the PF candidate for Council Chairperson if they were to be given a

lift. He summed up by stating that the foregoing caused him to lose the election and caused him to believe that the election was not free and fair.

During cross examination, he stated that the Canter Jairos was using was white in colour though he did not know the owner but only knew the driver. The Petitioner maintained that the respondent was telling people that he was a Tanzanian. However, he conceded that he did not hear him telling people but was only just told.

The second witness who we shall be referring to as PW2 was Geoffrey Muzomba a Peasant farmer of Momboshi, Mkushi. He narrated that one week before elections at the time when the Vice president visited the district, Jairos Tembo phoned and told them that he was going to be in Momboshi to have a meeting and accordingly went around 14:00hrs with Evans Bwalya, Christopher Chibuye and the Campaign Manager. After introducing the team, Jairos explained the reasons they had gone to Momboshi. He told them that they had come to ask for their votes and outlined who to vote for from the President to Councilor, Jairos Tembo. He told them that there were a number of candidates contesting the elections in the wards including Abel Siwakwi who had stood on the UPND Ticket. After speaking in riddles the 1st Respondent he told them that he was a resident of Lala land while the Petitioner was a Foreigner from Tanzania. The 1st Respondent then told them that if they chose the Petitioner, he would take development to his country and not help them adding that he was just warning them to vote for him. It was his evidence that at the time he was a vice chairman in PF.

During cross examination, he stated that he was a member of the PF and not UPND. He added that he was appointed as Vice Chairperson two years ago. According to him he phoned the 1st Respondent and resigned his position as a

ice Chairperson in protest of what was said at the same meeting. PW2 stated that he is now neutral. When further cross examined, he stated that he did not believe that the Petitioner was a Tanzanian.

The 3rd witness who we shall be referring to as PW3 was Benard Malaya a 35 years old Peasant farmer of Matuku yard, Mkushi. PW3 narrated that it was towards the end of July, 2021, when he was going to Masansa to buy groceries that he met the 1st Respondent who told him not to forget him on polling day since they had grown up together. . In their conversation the 1st Respondent told him that the Petitioner Abel Siwakwi who was also contesting as councilor was not from Zambia but from Tanzania.

During cross examination, he stated that the was appointed as Information and Publicity Secretary for UPND, Matuku ward in the year 2020 which position he still holds. When further cross- examined he stated that he knew that the Petitioner was also contesting under UPND. According to PW3, when he met with the 1st Respondent he believed what he said because he does not know where the Petitioner grew up. It was his evidence that he knows that only Zambians can contest in an election and that is what made him change his mind not to vote for the Petitioner.

The fourth witness who shall be referred to as PW4 was Ezekiel Taiwila a 29 years old small scale farmer of Chimbofye, Mkushi. PW4 narrated that in July, 2021, he was going to attend a funeral of Chief Mulungwe. As he was waiting for transport, he decided to go to Mwaiseni restaurant to eat and he where he found the 1st Respondent eating Nshima. The 1st Respondent asked him if he knew the person that was standing in Matuku ward to which he replied in the affirmative. The 1st Respondent told him that he was also contesting and asked PW 4 to vote

for him because he was a Lala from their area and not a Mwachusa by tribe who will be taking money where he comes from.

During cross examination, he denied ever being chosen as secretary at Matuku ward for UPND. However, he conceded that he is a member of the UPND adding that before the incident he knew that the Petitioner was the one contesting on the UPND ticket in Matuku ward. When further cross examined, he stated that he did not believe what he was told about the Petitioner being Mwachusa by tribe from Tanzania.

The fifth witness who we shall be referring to as PW5 was Mushimpulo Steven a 37years old farmer of Matuku area in Mkushi District. He recounted that it was on 12th August 2021, when the 1st Respondent booked a vehicle from Bowas which he used to ferry people from different places to Matuku polling station. He described the vehicle as a Toyota Dyna. PW5 added that he saw where the 1st Respondent was picking people from because he was a foot soldier and he saw him near the Ribbon.

During cross examination by the learned counsel, he stated that he was a foot soldier for UPND. When further cross examined he said that he is the ward Top secretary for UPND. PW5 conceded that he did not see any hire agreement for the vehicle in question but stated that he just saw the vehicle going to different places and bringing people to the polling station.

RESPONDENT'S EVIDENCE

The first and only witness for the Respondent was the Respondent himself, a 49year old farmer of Masansa, Matuku ward, Mkushi. In his evidence, he stated that in his view the election was free and fair and that there was no malpractice. The 1st Respondent stated that at no point did he ever call the Petitioner a

Tanzanian adding that his team conducted an issue based campaign. He added that at no time, the campaign team talk about the opponent. However, he could not remember the day mentioned by PW 2 when a meeting was allegedly held. He added that the day the Vice President visited he was having a meeting with his campaign team in Masansa. The 1st Respondent could also not remember receiving a phone call from PW2. Further, the 1st Respondent could not remember meeting PW3 during his campaign period. He added that he knew PW3 as an ordinary citizen of the area and a UPND member. The 1st Respondent recounted that on 12th August 2021, he was in Masansa because that is where he stays and after voting he was just at home. In summing up he stated that he wanted the Tribunal to dismiss the Petition.

At the close of the 1st Respondent's case both parties made oral submissions in the support of their evidence.

PETITIONER'S SUBMISSIONS

The Petitioner submitted that the 1st Respondent who stood on the PF ticket never went to Momboshi which is a big area. He contended that in his campaigns the Respondent was telling people that the Petitioner was a Tanzanian so he did not even campaign. He summed up by stating that the election was therefore not fair and asked us to nullify the election of the 1st Respondent as Councillor of Matuku Ward.

RESPONDENT'S SUBMISSIONS

On behalf of the Respondent, the Learned Counsel Mr. E. Khosa submitted that this petition be dismissed as the evidence on Record has not satisfied the burden and standard of proof required in an election petition. The learned counsel further submitted that the Petitioner and all his witnesses belong to the loosing Petitioner's Party therefore as members of the same Party all the witnesses have

an interest to serve. To fortify, his submissions the learned counsel relied on the three cases cited in the earlier petition before us. Furthermore, counsel submitted that the basic tenets to be satisfied as provided for in section 97 of the Electoral Process Act No. 35 of 2016 have not been satisfied by the Petitioner. On the basis of the foregoing, he urged us to dismiss the Petition with costs to the Respondent.

We wish to state here that we are indebted to both the Petitioner and the learned counsel for the brief but vital submissions and for the cases cited by the learned counsel.

Before delving into the case further, we wish to reiterate that the relief the Petitioner seeks from this Tribunal is nullification of the 1st Respondent's election as a Councilor for Matuku Ward of Mkushi North Constituency of the Mkushi District of the Central Province of the Republic of Zambia. We have therefore found it necessary from the outset to state the law upon which this Tribunal may nullify a Local Government Election

GROUND UPON WHICH AN ELECTION RESULT CAN BE NULLIFIED

The grounds upon which local government election result may be annulled are aptly stated in section 97 (2) of the Electoral Process Act Number 35 of 2016 which is couched in the following language:

“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"**

This provision was recently given effect by the Constitutional Court in the case of **NKANDU LUO AND ANOTHER v DOREEN SEFUKE MWAMBA AND ANOTHER, SELECTED JUDGMENT NO. 51 OF 2018**. In that case, the Constitutional Court held that:

"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..."

The Court further said 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."

Having identified the ground under which an election result may be annulled, it has now become absolutely necessary to state at this point the ^{burden} standard of proof and standard of that proof in an election petition.

BURDEN AND STANDARD OF PROOF

The burden of proof in an election petition, just like any other civil matter, lies on the Petitioner who must establish the allegations complained of against the Respondent. However, the standard of proof in an election petition is higher than that required in an ordinary civil action as in an election petition, the Petitioner must establish the issues raised to a fairly high degree of convincing clarity.

In our reasoning, we are fortified by the holding in the of **Austin Liato v. Sitwala Sitwala, Selected Judgment No. 23 of 2018**. In that case, the Constitutional Court cited with approval the holding of the Supreme Court in the case of **Lewanika and Others v Chiluba (1998) ZR 49** wherein the Supreme Court held *inter alia* 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.**

It suffices to mention here that although the holding was based on parliamentary election Petitions, the principle extends to Local Government Petition or putting it differently, the standard of proof is the same in Parliamentary Election Petitions and Local Government Election Petitions.

The onus in this case therefore, lies on the Petitioner to prove the allegations to the required **degree of standard** which is higher than a mere balance of probabilities but lower than the standard in criminal case which is beyond reasonable doubt.

Reverting to the Petition, the Petitioner made the following allegations against the Respondent;

- i. **That the election of the 1st Respondent to the office of Matuku Ward Councilor was neither free nor fair as the elections were tarnished by deception, bribery and abuse of government resources which was the order of the day.**
- ii. **That the 1st Respondent throughout his campaigns misled people into believing that he was a Tanzanian national and that they should not vote for him**
- iii. **That on the poll day members of the PF led by the 1st Respondent were seen distributing mealie meal at Chimbofwe School sign post area and telling voters to only vote for PF candidates in order to continue enjoying free mealie meal.**
- iv. **That on 11th August, 2021, a pig was slaughtered in Kapande Village and voters were told they would only partake of the pork meat if they voted for PF candidates and the following day members gathered at Mr. Chitambos's house to feast on the pig**

We wish to state here that we have carefully and patiently considered the evidence deposited by the both parties in relation to the Petitioner's claims against the Respondent. We must be quick to observe here that, while the Petitioner made four allegations against the 1st Respondent in his Petition, he led evidence only on allegation (ii) above. We therefore deem claims (i), (iii) and (iv) to have been abandoned by the Petitioner and we accordingly dismiss them.

We wish therefore, to consider whether the remaining claim has been established to the required standard and if so whether or not it can be the basis to nullify this election. Before reverting to the evidence we have found it inevitable to restate the second claim. It is crafted as follows;

“That the 1st Respondent throughout his campaigns misled people into believing that he was a Tanzanian national and that they should not vote for him”

Before delving into the question of whether or not this allegation has been proved to the required standard, we wish to reiterate the ground upon which an election may be nullified by this Tribunal as stated in Section 97 of the Electoral Process Act. As already alluded to, the first part to be established by the Petitioner is;

“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”**

An illegal Practice for the purposes of the Electoral Process Act has been defined in section 2 of the Act to mean **“an offence which is declared under this Act to be an illegal practice.**

It follows therefore that it is not every act complained of by the Petitioner that the law considers

an illegal act capable of being the basis for nullifying an election. In the matter before us, the act complained of by the Petitioner is that the 1st Respondent told the electorate that he was a Tanzanian National and that they should not vote for him.

In terms of Illegal practices committed by way of publishing false statements about a candidate section 84 of the Electoral Process Act is quite clear and unambiguous. It is couched as follows;

- (1) A person shall not, before or during an election, publish a false statement of the illness, death or withdrawal from election of a candidate at that election for the purpose of promoting or procuring**

the election of another candidate, knowing that statement to be false or not believing it to be true.

(2) A person who, contravenes subsection (1) commits an illegal practice, unless that person had reasonable grounds for believing, and did believe, the statement to be true.

A close combing of this section will reveal that only specific false statements have been enumerated to amount to illegal practices for purposes of nullification of an election result and the same does not include an allegation that the a candidate in an election is not a Zambian citizen

In order to interpret Section 84(1) of the Electoral Process Act, we turn to the maxim "*expressio unius est exclusio alterius*" which means that the express mention of a thing excludes things which are not mentioned.

Consequently, while it is wrong for a candidate in an election to make a false statement about the nationality of his opponent, i.e. in this case that one is a Tanzanian national when he is a Zambian, the same is not a ground for nullifying election results.

On that basis, this Petition therefore is bound to fail. It suffices to mention here that even if we were to overstretch the meaning of section 84 of the Electoral Process Act and accept that **the false statement made against the Petitioner is within the meaning of an illegal act, the last element still has not been discharged that is to say 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. We say this because all the three witnesses the Petitioner called to his aid namely PW2, PW3 and PW4, alleged that the 1st Respondent told them individually. Only PW2 Geoffrey Muzomba said the statement was made when the 1st Respondent went to meet them together with**

other PF officials though he did not state how many they were. Additionally, all the 3 witnesses said that they did not believe the statement except for PW3 Bernard Malaya who stated that he believed the false statement.

We are therefore inclined to agree with the learned counsel for the 1st Respondent's submission that the basic tenets to be satisfied as provided for in section 97 of the Electoral Process Act No. 35 of 2016 have not been met by the Petitioner.

In the circumstances and by our foregoing reasons, we hold that the Petitioner has failed to prove his case to the required standard. We therefore find that the 1st Respondent was duly elected as Councillor for Matuku Ward.

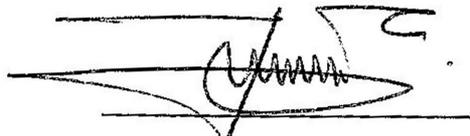
There will be no order to costs.

The Petitioner is accordingly advised of his right of Appeal to the Constitutional Court within fourteen (14) days of this Judgment.

Dated at Mkushi this

day

2021



HONOURABLE F. KAOMA

Tribunal Chairperson



MRS C.B MAIMBO

Member



MRS. N.M SIMACHELA

Member