

**HOLDEN AT LUSAKA**

**(CIVIL JURISDICTION)**

**IN THE MATTER OF:                   ARTICLE 47 (3), 153(1) AND 159 (3) OF THE  
CONSTITUTION OF THE REPUBLIC OF ZAMBIA  
AS AMENDED BY THE CONSTITUTION OF  
ZAMBIA 9AMENDMENT) ACT NO. 2 OF 2016**

**AND IN THE MATTER OF:           SECTIONS 81, 82, 83, 84, 86, 87, 89, 91, 92, 94,  
96, 97, 98, 99, 100 AND 110 OF THE ELECTORAL  
PROCESS ACT NO. 35 OF 2016**

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

**AND IN THE MATTER OF:           THE    LOCAL    GOVERNMENT    ELECTION    FOR  
KABANANA WARD 27 IN THE MANDEVU  
CONSTITUENCY, MANDEVU HELD ON 12<sup>TH</sup>  
AUGUST, 2021**

**BETWEEN:**

**PATRICK PHIRI**

**PETITIONER**

**AND**

**JOSEPH KATONGO**

**RESPONDENT**

**Before the Honourable F. M. Hamaundu (Chairperson), H. Mdala (Member) and K.  
s. Banda (Member)**

**For the Petitioner:           Mr. Numbwa of Mesdames Mushipe and Associates**

**For the Respondent:        Mr. Gausi and M. Phiri of Sukwana Mwemba & Partners**

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**JUDGMENT**

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### **Cases cited**

1. Anderson Kambela Mazoka and two others V. levy Patrick Mwanawasa and Two others (2005) ZR 138
2. Lewanika and others V. Chiluba (1998) ZR (S.C)
3. Nkandu Luo and Electoral Commission of Zambia VS Doreen Sefuke Mwamba and the Attorney General
4. Abiud Kawangu VS Elijah Muchima
5. Margrate Mwanakatwe VS Charlotte Scotte

### **Legislation referred to**

1. Local Government Election Tribunal Rules, Statutory Instrument No. 60 of 2016
2. Electoral Process Act No. 35 of 2016

Before us is a Petition and an Affidavit verifying facts filed on 26<sup>th</sup> August, 2021 by Patrick Phiri petitioner against Katongo Joseph, Respondent. This is a petition relating to the Local Government Election for Kabanana ward 27 in Mandevu Constituency, Mandevu held on 12<sup>th</sup> August, 2021. The Petitioner subsequently filed an amended petition on 15<sup>th</sup> September, 2021.

By the amended petition and Affidavit verifying facts, the Petitioner's allegations in support of his prayer for the election of

the Respondent to be declared void and the petitioner to be declared duly elected are as follows:

1. That the electoral commission of Zambia suspended all manner of political campaigns for Patriotic Front (PF and united Party for National Development (UPND) from 15<sup>th</sup> June to 28<sup>th</sup> of June, 2021 but Patriotic front (PF) continued with the campaign activities which conduct petitioner claims, grossly disadvantaged him and amounted to impartiality of the Electoral Commission of Zambia.
2. That on the voting day 12<sup>th</sup> august, 2021, petitioners 5 polling agents were chased from Kabanana primary polling station and when they resisted, they were brutally assaulted by Respondent's cadres or agents.
3. That there was widespread of fake Gen 20 Forms with fake figures which were swapped with legitimate Gen 20 Forms during counting that was done with the help of ECZ officials.
4. That as a result of the said changing figures for the benefit of the Respondent, petitioner's 2 polling agents and monito were assaulted and driven out of the totaling centers.

5. That during the gazetted campaign period, the Respondent and his party cadres or agents destroyed, mutilated, defaced and removed all campaign placards, posters, bill boards for the petitioner and his party.

6. That during the campaign period, the Respondent was seen bribing voters on 11<sup>th</sup> August 2021 at 23 hours.

We wish to state that Rule 20 (3) of the Local Government Election Tribunal Rules, Statutory Instrument No. 60 of 2016, allows the Tribunal, at any stage of the proceedings, to make an order requiring evidence to be adduced by Affidavit. During the scheduling conference of the matter, the Tribunal ordered the parties to adduce all evidence of the witnesses to be called by way of Affidavit.

PW1 was the Petitioner himself, Patrick Phiri. In support of his allegations, the Petitioner called 9 witnesses while the Respondent did not call any witness. The petitioner's evidence in support of the allegations as stated in his Affidavit verifying facts filed on 26<sup>th</sup> August, 2021, was to the effect that the Electoral Commission of Zambia suspended all manner of Political campaigns for patriotic

Front (PF) and United Party for National Development (UPND) from 15<sup>th</sup> June to 28<sup>th</sup> June, 2021 to which he produced exhibit PP4 a speech by the Chief Electoral Officer. The petitioner said the Respondent never complied with the ban which conduct the petitioner said he was disadvantaged. The petitioner further stated that during the campaign, the Respondent and his cadres or Agents destroyed, mutilated, defaced or removed all campaign placards, bill boards belonging to him and his party, an act which he alleged to have disadvantaged his campaign which reduced the number of people who could have voted for him. Petitioner produced exhibit PP13 as proof. The petitioner further stated that the respondent acting together with officers from Electoral Commission of Zambia changed figures of voters on GEN 20 in favour of the Respondent. He said as a result of the said forgery, his agents were chased from the polling station and when they resisted they were assaulted and evicted from two polling stations in kabanana ward 27.

The petitioner tendered exhibit PP14 in support of his claim.

The petitioner further stated that during the campaign period, the Respondent was seen bribing voters by distribution of money on or before the voting day in exchange for votes. The petitioner called witnesses to support his claim. He said due to the widespread of intimidation and violence by the Respondents cadres, or agents during the campaigns the petitioner could not go out to campaign. He said that as a result of the aforesaid illegal practices committed by the Respondent, the majority of voters in Kabanana ward 27 were prevented from exercising their freedom in electing the candidate in whom they preferred.

Under cross examination, the petitioner said the ban was between 15<sup>th</sup> June, 2021 and 28<sup>th</sup> June, 2021. He said exhibit PP5 tendered to the tribunal as proof of campaign is dated 23<sup>rd</sup> July, 2021, a date outside the ban. The petitioner further said exhibit "PP4" he tendered to the Tribunal is dated 9<sup>th</sup> of august after the 28<sup>th</sup> of June. He further said PP7 dated 17<sup>th</sup> June and 28<sup>th</sup> June has names of Christopher Shakafuswa and not names of the Respondent. The petitioner said the Respondent is not appearing on the pictures on exhibit PP7. The petitioner said when the people

Patriotic front and their candidates on 12<sup>th</sup> August, 2021 general elections. She said after receiving K150 and Chitenge material, the following day she voted for the Respondent Joseph Katongo. She said other people who were given K150 and Chitenge material were Gertrude Mulenga (PW4), Frida Chibuye, Francis Phiri (PW3) and Catherine Saka (PW5). She said she and others who received gifts were cautioned and threatened that if they did not vote for Patriotic Front they were going to be beaten and killed. She said they told them that they were going to know as to who they had voted for by monitoring them through CTC cameras.

Under cross-examination, PW2 said she saw the Respondent in front of the grey motor vehicle.

PW3 was Francis Phiri of Kabanana who testified that on 11<sup>th</sup> August, 2021 at 23 hours she was approached by Joseph Katongo and 5 cadres who were in a grey motor vehicle doing door to door campaign, who gave her K150 and 1 piece of Chitenge material so that she could vote for Patriotic Front and their candidate on 12<sup>th</sup> of august, 2021.

She said some of the people who received similar gifts were Gertrude Mulenga (PW4), Fridah Chibuye, Lista Malilwe (PW2) and Catherine Daka (PW5) she said she was also threatened to be beaten and be killed if she did not vote for Patriotic Front (PF) candidates. She said she was told when voting she was going to be monitored through CTC cameras. She said as a result of the threat she voted for the Respondent.

Under cross-examination PW3 said the person who gave him money was sat on the back sit of the vehicle.

PW4 was Gertrude Mulenga who testified that on 11<sup>th</sup> August 2021 at 23 hours she was approached by Respondent's supporters who told her that they had been sent by Respondent Joseph Katongo who was standing as a councilor in Mandevu to distribute money in the sum of K150, a piece of Chitenge material and a T-shirts. She said she was handed the said items in full view of her friends Lungu Betty, Chibuye Winfridah, Elezedoli Phiri and Catherine Daka (PW5). She said they were cautioned, threatened and told that if they don't vote for "PF" after collecting the items, they were going to be beaten and killed. She said she was told that if the Respondent



lost, they were going to find out through the CCTV cameras in polling stations as to how they voted. She said she voted for PF.

Under cross examination, PW4 said it was Respondent who gave him money, a T-shirt and Chitenge.

PW5 was Catherine Daka who testified that on 11<sup>th</sup> August, 2021 at 23:00 hours he was approached by Joseph Katongo who was with 5 other PF cadres who were doing door to door campaigns in Kabanana ward. She said she received K150 and a piece of Chitenge material and voted for Respondent. She said some of the people who also received K150 and 1 piece of chitenge material were Gertrude Mulenga (PW4), Francis Phiri (PW3), Lister Malilwe (PW1) and Winfridah Chibuye. She also said she was given the said items so that she could vote for Respondent and that they were going to monitor her when voting on CCTV cameras to find out if she voted for the Respondent. She said she was threatened that if she did not vote for the Respondent she was going to be beaten and killed.

Under cross examination, PW5 said Respondent was in a Taxi.

PW6 was Rubby Musopelo who testified that he was a polling agent for the petitioner at Chimwemwe polling station No. 10 with his

colleague Lemba Nkata. He said after counting votes he signed the original Gen 20 form which showed that Joseph Katongo scored 336 votes while Patrick Phiri showed 207 votes. He said the total votes cast were 610. He said a fake Gen 20 Form was announced with different figures. He said the fake Gen 20 reflected that Joseph Katongo had 305 votes and Patrick Phiri had 244. He said he did not sign the fake Gen 20. He said the polling agent signed on the genuine Gen 20 and not the forged one.

Under cross examination this witness said he was issued with accreditation card for identity. He said he has not produced the said card as proof that he was an accredited polling agent. He said he signed Gen 20 Form on 13<sup>th</sup> August, 2021 which was also signed by the returning officer. He said he has not filed the said Gen 20 Form.

PW7 was Stanley Phiri who testified that he was an Electoral Polling Agent for UPND in Kabanana Ward at Kabanana Polling District in Room 6D Mandevu. He said during the counting of the votes, him, his colleagues Purity Muchimba and teddy Mwikisa were chased from the polling room by ECZ presiding officers. He said when he

asked the ECZ officers as to why they were being chased he was told that ECZ, other agents for PF and other political parties were going to have a special private matters to discuss. He said they went out and were only allowed to go back in the polling station after 20 minutes. He said they were not present when counting of votes commenced.

Under cross examination, this witness said he was asked to leave the voting room by the ECZ officer. He said he is a member of UPND. He said it took them 3 hours to count votes.

PW8 was Dennis Silwimba who testified that on 22<sup>nd</sup> July, 2021 him and other members of UPND collided with a group of Patriotic Front cadres clad in PF regalia. He said he was attacked by a group of patriotic Front supporters who were led by Chisenga commonly known as Sega who is also the Respondent's election campaign agent. He said Chisenga's group threw stones at UPND vehicle where this witness was ridding. He said one stone hit him on the lower part of his face cutting his lower lip and lost one tooth leaving the other tooth broken. He said he fell unconscious and was taken to the University teaching Hospital. He said he reported the matter

to police where he was issued with a medical report. He said as a result of this incident most electorates in Kabanana ward were traumatized, that they did not vote for fear of being assaulted.

Under cross examination this witness said Respondent was not present when he was attacked.

PW9 was the last witness for the petitioner was Teddy Mwikisa who testified he was an electoral Polling Agent for UPND in kabanana ward at kabanana polling station Room 6D Mandevu. He said during the counting of votes him, PW7 and Purity Muchimba were chased from the polling room by Clifford Chirwa the ECZ presiding officer to go outside. He said when he asked as to why they were being chased they were told that other agents for PF and other political parties had special private matters to discuss. He said they were only allowed to go back after 20 minutes upon receiving pressure from the concerned Electorates. He said him and his colleagues were not present in the room when the counting started.

Under cross examination, this witness said that he is a member of UPND. He said he was chased by the ECZ presiding officer and not respondent's agents.

At this stage the petitioner closed his case.

The Respondent in response relied on his affidavit in opposition and called no witness.

He stated that he was never involved in activities cited in paragraph 11 and that his agents also were not involved in the said activities. He said on 12<sup>th</sup> of August, he went to vote and after voting he went back to his home. He said he only visited the totaling center in the evening of 13<sup>th</sup> August, 2021. He said he was not accompanied by any duly appointed agents. He said he never went inside the totaling room but confined himself outside the grounds. The respondent denies having bribed the voters. The Respondent denies all the allegations leveled against him.

Under cross examination, the Respondent said he campaigned before the ban. He said sometimes he campaigned with Hon. Shakafuswa on the dates he could not remember.

The said exhibit PP7 is dated 17<sup>th</sup> June, 2021 was a period during the ban. He said the other picture is dated 28<sup>th</sup> June the last day of the ban. He said he never visited any polling station apart from Chimwemwe polling station where he voted from. He said he only

knew exhibit PP8 and not exhibit PP9. He said exhibit "PP8" is written Mandevu 80 under Stanley Nyirenda and that it also has Chimwemwe 10. He said both exhibit PP8 and PP9 has Chimwemwe 10 but are not from same polling station. He said the same name of Mutundia Patrick is allocated to two parties. He said it was not normal to have Gen 20 for the same polling station. He said on 12<sup>th</sup> August he never went to the totaling center. He said he saw violence on TV at totaling center. He said he did not hear of any fracas involving his polling agents.

Under re-examination, this Respondent said only one agent campaigned for him.

At this stage the Respondent closed his case.

Having considered the petition, the answers, replies, affidavits, evidence on record and submissions from both parties, the following facts are not in dispute and thus proved.

1. That the petitioner and the respondent were candidates in the Local Government elections for Kabanana ward 27 on United Party for National Development and Patriotic Front ticket respectively. The other candidates were Mutindiya Patrick for

national Democratic congress (NDC), James Phiri for Democratic party, Mtonga Michael for Socialist party (SP).

2. Following the announcement of results, the returning officer proceeded to declare the Respondent as the duly elected councilor for Kabanana ward 27, Mandevu constituency.

The petitioner seeks nullifying the elections of the Respondent as councilor for Kabanana ward 27. The petitioner claims that the Respondent, his Agent and the Electoral Commission of Zambia manipulated fingers to declare the Respondent duly elected, that the Respondent and his agents involved themselves in corruption, illegal practices and/or other misconducts committed in relation to the Kabanana ward 27 elections held on 12<sup>th</sup> august, 2021 against the constitution and the electorate Act.

From the on set, the issue that is for determination before the Tribunal is as to whether on the facts and evidence before us, the petitioner has proved the allegations raised in the petition to the required standard to warrant the nullification of the Respondent election as councilor for Kabanana ward 27.

The law that governs the circumstances upon which a local government election can be nullified is contained in section 97(2) of the Electoral process Act No. 35 of 2016. Section 97 provides as follows.

“97 (2) The election of 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 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 noncompliance with the provisions of this Act relating to the



conduct of elections, and it appears to the court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliant affected the result of the election, or

- c) The candidate was at the time of the election a person not qualified or a person not disqualified for election.”

According to section 97(2) above, it is not enough to show that there was electoral malpractice or misconduct. The malpractice or misconduct must be attributed to the candidate or his election or polling agent. Further, it must be shown that as a result of the malpractice or misconduct, the majority of the voters were or may have been prevented from electing a candidate whom they preferred.

We therefore warn ourselves that in election petitions the burden of proof is higher than on a mere balance of probabilities in that the issues raised are required to be established to a fair high degree of convincing clarity as decided by the Supreme Court in the case of **Anderson Kambela Mazoka and Two others V. Levy Patrick Mwanawasa and Two others** <sup>1</sup>.

fact that they were polling agent from other political parties such as National Democratic congress (NDC) Democratic Congress (NDC), democratic party (DC), Socialist party (SP) but none of the polling agents from the 3 parties were called to corroborate the evidence of PW7 and PW9. We also find that the two were not evicted by the Respondent or his agents but alleged to have been evicted by an officer from ECZ who have not been joined to the petition as 2<sup>nd</sup> Respondent. We therefore find the allegation not to hold any water against the respondent for irregular and procedurally improper.

The 3<sup>rd</sup> allegation is that of forgery of Gen 20 Forms by ECZ officials alleged to have been forged by the Gen 20 Forms, why has the petitioner failed to join ECZ to this petition as 2<sup>nd</sup> Respondent. Why is the petitioner still thinking about the suit against the ECZ who had access and custody of Gen 20 forms. In the absence of a response from ECZ, and independent evidence, implicating the Respondent in a material particular to have physical and personally seen changing figures on Gen 20 Forms we find the Respondent not liable of committing the said forgery. The fourth allegation was that of violence, widespread of intimidation by the respondent's cadres

or agents during campaign which made petitioner fail to campaign freely.

The petitioner said his supporters Patrick Panga, Vincent Chongo and Dennis Sihimba were alleged to have been assaulted by Respondent's cadres. It must be noted that a candidate cannot be held liable for acts of other members of his political party or other persons who are not his election or polling agents. There is no evidence adduced by the petitioner to prove that the injuries exhibited in his petition were personally inflicted by the Respondent or his agents as decided in the case of **Nkandu Luo and Electoral Commission of Zambia VS Doreen Sefuke Mwamba and the Attorney General** <sup>3</sup>.

The 5<sup>th</sup> and last allegation was that of bribery. PW2, PW3, PW4 and PW5 stated that on 11<sup>th</sup> August, 2021 at 23 hours they were approached by the Respondent who was in a grey car who gave each one of them K150.00, a piece of chitenge material and T-shirts, so that they could vote for the Respondent. The witnesses further stated that they were cautioned and threatened that if they did not vote for him, they were going to be beaten and killed and

that in the polling station they were CCTV that he was going to use to monitor as to whether they voted for him or not. The 4 witnesses said due to the threats they voted for the Respondent. We note from the evidence of PW2, PW3, PW4, PW5 and PW6 that they received money in the sum of K150.00, chitenge materials and t-shirts. We also take recognizance that due to hunger the 5 witnesses might have used to monitor as to whether they voted for him or not. The 4 witnesses said due to the threats they voted for the Respondent. We note from the evidence of PW2, PW3, PW4, PW5 and PW6 that they received money in the sum of K150.00, Chitenge material and T-Shirt. We also take recognizance that due to hunger the 5 witnesses might have used the evidence of Chitenge material and T-Shirts that was used to bribe them. K150.00 and regard the said money as perishable. The question is if the 5 witnesses were also given the pieces of Chitenge material and T-Shirts to bribe them, why are the Chitenge materials and T-Shirt that was part of the bribe which items are not perishable not exhibited? The five witnesses came to give evidence without exhibiting the real evidence of the items they received in order to bribe them. In the case of **Nkandu Luo and Electoral Commission of Zambia VS Doreen**

**Sefuke Mwamba and the Attorney General** the constitutional court held 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 wide spread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice” indeed as submitted by the counsel for the Respondent the constitutional court made a pronouncement on the majority requirement in the case of **Abiud Kawangu VS Elijah Muchima** <sup>4</sup> that an election may be annulled where a petitioner show that the alleged corrupt or illegal practice or misconduct was committed in connection with the election by the Respondent or his election or polling agent and that as a result, the majority of voters in that constituency were or may have been prevented from electing a candidate of their choice.

From the evidence adduced by the petitioner and his witnesses, I find no evidence to prove that the prohibited act was wide spread and affected the result of the election by preventing the majority of the electorate from electing their preferred candidate and so

rendering the election a nullity as decided in the case of **Margrate Mwanakatwe VS Charlotte Scotte** <sup>5</sup>.

For the forgoing reasons we find that the petitioner has failed to meet the higher degree of cogent and credible evidence to prove that the Respondent Joseph Katongo and his dully appointed election agent participated in any of the alleged malpractice or that they were committed within knowledge and consent or approval as required by law. The petitioner further failed to prove that the alleged election malpractices were wide spread and that the acts alleged affected the majority of the voters in the ward.

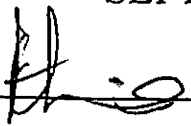
We therefore hold that the Respondent was duly elected to the office of councilor for Kabanana Ward 27.

Each part to bear their own costs.

Petition dismissed.

I.R.A within 14 days.

DATED                      DAY OF                      SEPTEMBER, 2021.

  
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**HON. F. M. HAMAUNDU**

**CHAIR PERSON**

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H. MDALA  
HONOURABLE MEMBER

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K.S. BANDA  
HONOURABLE MEMBER

