**IN THE SUPREME COURT OF ZAMBIA** **SCZ JUDGMENT NO. 2 OF 2014**
**HOLDEN AT LUSAKA** **APPEAL NO.141/2012**

**(Constitutional Jurisdiction)**

**IN THE MATTER OF:** Article 72 (1) (a) of the Constitution of the Republic of Zambia

**AND**

**IN THE MATTER OF:** Section 93 (1) of the Electoral Act No.12 of 2006

**AND**

**IN THE MATTER OF:** Kasenengwa Parliamentary Constituency Elections held in Zambia on 20th September, 2011

**B E T W E E N:**

**SAUL ZULU** **APPELLANT**

**AND**

**VICTORIA KALIMA** **RESPONDENT**

**Coram: Chibesakunda, Ag. CJ, Mumba, Ag. DCJ, Chibomba, Wanki and Muyovwe, JJS.**

**On 16TH October, 2012 and on 30th December, 2013.**

For the Appellant: Mr. B. Soko of Messrs Ferd Jere and Company.
For the Respondent: Mr. W. Ngwira of Messrs SBN Legal Practitioners.

## J U D G M E N T

**Chibomba, JS, delivered the Judgment of the Court**

**Cases Referred to:-**

1. **The Minister of Information and Broadcasting Services and the Attorney General vs Fanwell Chembo and 4 Others (2007) Z.R. 82**
2. **Josephat Mlewa vs Eric Wightman (1995-97) ZR 171**
3. **Michael Mabenga vs Sikota Wina and 2 Others (2003) ZR 110**
4. **Levison Achitenji Mumba vs Peter William Mayambe Daka SCZ Appeal No. 31 of 2003**
5. **Attorney-General and Another vs Kaboiron (1995) 2 L.R.C. 757**
6. **Victor Kachaka vs Simasiku Namakando and ECZ, (2002 HP/EP/0034)**
7. **Samuel Miyanda vs Raymond Handahu (1994) ZR 187**
8. **Mubika Mubika vs Poniso Njeulu, SCZ Appeal No. 114 of 2007**

9. **Anderson Kambela Mazoka & 2 Others vs Levy Patrick Mwanawasa & 2 Others (2005) ZR 138**
10. **Zulu vs Avondale Housing Project (1982) ZR 172**
11. **Akashambatwa Mbikusita Lewanika and 4 others vs Fredrick Jacob Titus Chiluba (1998) ZR 79**
12. **Attorney-General vs Marcus Kampumba Achiume (1983) ZR 1**
13. **Zambia Electricity Supply Corporation vs Redlines Haulage Limited (1992) ZR 170**
14. **Mususu Kalenga Building Limited and Winnie Kalenga vs Richmans Money Lenders Enterprises (1999) ZR 27**
15. **Leonard Banda vs Dora Siliya, SCZ Appeal No. 95 of 2012**

**Legislation and Other Materials Referred to:**

1. **The Electoral Act No. 12 of 2006**
2. **The Electoral (Code of Conduct) Regulations, 2011.**
3. **Black's Law Dictionary, 8th Edition, page 1266.**

The Appellant appeals against the Judgment of the High Court in which the learned trial Judge held that the Appellant had failed to prove the allegation that the Respondent was not duly elected as Member of Parliament (MP) for Kasenengwa Parliamentary Constituency.

The history of this matter is that both the Appellant and the Respondent were Parliamentary candidates at the 20th September, 2011 Tripartite Elections for Kasenengwa Constituency in the Eastern Province of the Republic of Zambia. The Respondent who stood on the Movement for Multiparty Democracy (MMD) ticket was declared winner upon amassing 18,650 votes. The Appellant, who stood on the Patriotic Front (PF) ticket, got 1,141 votes. The rest of the votes went to other candidates. The Appellant claimed that the Respondent was not validly elected as MP for Kasenengwa Constituency.

The Appellant petitioned the High Court alleging as follows:-

**"(i) Between 1st of August 2011 and 20th September 2011, in the course of her campaigns to have offered and made cash donations and distributed chitenge materials in almost all the wards in the Constituency with the intention of inducing the electorate to vote for her.**

**(ii) In the same period and in the course of her campaigns, the Respondent was alleged to have donated grinding mills which were installed at Mboza, Chiparamba, Kwenje, Chingazi and Mukowe wards so as to lure voters who had also been threatened that the grinding mills would be confiscated if the voters voted for any opposition political party.**

**(iii) The Respondent was also alleged to have in the period prior to election date, and in the course of her campaigns, donated over 500 bicycles to village headmen to conduct campaigns for her and with the intentions of inducing voters to vote for her.**

**(iv) Prior to the elections and in the course of her campaigns, the Respondent was also alleged to have maliciously spread false information that the PF candidate would legalise homosexuality, impose a ban on Anti-Retroviral Drugs and exterminate elderly people in villages, and that these utterances were meant to instil fear and thus induce voters to vote for the Respondent.**

**(v) That prior to the elections, in the course of her campaign, the Respondent is alleged to have threatened the electorate at public rallies that the Food Reserve Agency would not pay the farmers for the maize they had supplied if they voted for the opposition and that these utterances were meant to instil fear on the electorates who are mostly peasant farmers and whose primary source of income is the sale of maize."**

It was the Appellant's position that as a result of the aforesaid illegal practices committed by the Respondent and her agents, the majority of voters were prevented from electing the candidate of their choice. The Appellant sought the following reliefs from the Court below:-

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**"i. A declaration that the election of the Respondent as a member of the National Assembly for Kasenengwa Parliamentary Constituency is void.**

**ii. A declaration that the illegal practices committed by the Respondent and or her agents and the Returning Officer, respectively so affected the election result that the same ought to be nullified.**

**iii. An order that the costs occasioned by this petition be borne by the Respondent."**

The learned trial Judge heard evidence from both parties which she analysed and evaluated. The Appellant did not file his submissions in the Court below while the Respondent did. According to the trial Judge, the Appellant sought to have the Respondent's election nullified pursuant to Section 93 (2) (a) of the **Electoral Act, No. 12 of 2006** (**the Act**). Although the Judge found that the Appellant had proved the allegation that Chitenge materials and bicycles were distributed to the electorate and Headmen by the Respondent, she did not find that this prevented the majority of voters from electing the candidate whom they preferred. This was based on the ground that the Appellant did not produce analyses to show how the distribution of chitenge materials and bicycles could have affected the outcome of the election as a whole. She, therefore, came to the conclusion that the Respondent was properly elected. Consequently, she dismissed the Appellant's Petition with costs.

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Dissatisfied with the decision of the learned Judge in the Court below, the Appellant appealed to this Court advancing five Grounds of Appeal. These are:-

> **"1. The trial court below erred in both law and fact when it found as a fact that the Respondent had distributed chitenge materials to the electorate but failed to invoke Section 93 (2) (c) of the Electoral Act No. 12 of 2006.**
>
> **2. The trial court below erred in both law and fact when it found as a fact that the Respondent had distributed bicycles to the electorate but failed to invoke Section 93 (2) (c) of the Electoral Act No. 12 of 2006.**
>
> **3. The trial court below erred in law and fact when it held that the false and malicious statements made by the Respondent had no bearing on parliamentary elections.**
>
> **4. The trial court below erred in law and fact when it held that the Respondent had made false and malicious allegations against the Appellant but failed to invoke Section 93 (2) (c) of the Electoral Act No. 12 of 2006.**
>
> **5. The trial court below erred in law and fact when it awarded costs to the Respondent without considering public interest."**

The learned Counsel for the Appellant, Mr. Soko, relied solely on the Appellant's Heads of Argument.

Grounds 1 and 2 were argued together. It was contended that the Court below erred both in law and fact when it failed to invoke the provision of Section 93 (2) (c) of **the Act** after finding that the Respondent had distributed Chitenge materials and bicycles to the electorate. Page 31 of the Record of Appeal was cited at which the learned Judge accepted the

evidence of the Appellant and his witnesses that at the meeting held by the Respondent in the wards in Kasenengwa Constituency, the people were distributed with Chitenge materials which were produced before Court and the Respondent told them to vote for her in return for having given them the Chitenge materials.

It was further submitted that since the Court below was satisfied by the evidence from the Appellant that the Respondent donated Chitenge materials to the voters and bicycles to Headmen, contrary to the election rules and regulations, the learned Judge should have nullified the election of the Respondent. That, however, the learned Judge, after so finding, went on to state that the cardinal issue for determination before her was whether as a result of the said distribution of Chitenge materials and bicycles the majority of the voters in the affected areas were prevented from electing the candidate in the Constituency whom they preferred.

The learned Judge then went on to conclude that the Appellant had failed to show that the conduct complained of affected the whole results of the election. This was despite having stated that the Appellant had called witnesses from the named wards who testified that bicycles were distributed to them and that some of the bicycles were produced in Court. The learned Judge then also went on to say that since the Appellant did not

produce any evidence to show the number of Headmen in the Constituency and the number of subjects under them, the claim cannot succeed as it had not been shown that the majority of the voters were prevented from electing a candidate whom they preferred.

It was submitted that it is trite law that an election may be declared void upon proof of illegal or corrupt practices or other misconduct committed by a candidate or any other person. In support of this contention, Section 93 (2) of **the Act** was cited. This section provides the grounds upon which an election of a candidate as a Member of the National Assembly may be declared void by the High Court.

Section 79 (1) (c) and (d) of **the Act** was also cited which inter alia, prohibits giving of any gifts to the electorate during or after an election. The Subsections state that any person who gives any such gifts is guilty of bribery.

It was submitted that despite finding that the Appellant had adduced evidence which clearly showed that the Respondent had engaged in illegal activities contrary to Section 79 (1) of **the Act**, the learned Judge went on to find that the Appellant had failed to show how the alleged acts affected the outcome of the elections. That this was a misdirection as the trial Judge should not have restricted herself to Section 93 (2) (a) of **the Act**.

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Therefore, that had the learned Judge made the distinction between the requirements of Subsection (a) and Subsection (c) of Section 93 (2), she could have declared the election results void as the distinction primarily lies on the person who commits an electoral malpractice as provided under the provisos under Section 93 (2) of **the Act**.

It was pointed out that in election petitions, the burden of proof is two-fold and that a Petitioner must establish:-

> **"i. That corrupt practices or illegal practices were committed in connection with the election.**
>
> **ii. That the majority of the voters in a constituency were prevented from electing a candidate of their own choice."**

It was contended that the above provision relates to acts that are committed by any person provided they have a bearing on the outcome of an election and is not restricted to acts committed by a candidate and his/her agents. And that the provisos are meant to carter for electoral malpractices that are committed by any person other than a candidate or his agents and must therefore, be given its literal meaning as it does not lead to absurdity.

We must, however, hasten to add that there is a third element that must also be proved in addition to the ones listed above by the learned

Counsel for the Appellant. This is that it must be proved who committed that illegal act or corrupt practice.

In support of the above submissions, the case of **The Minister of Information and Broadcasting Services and The Attorney General vs Fanwell Chembo (on his own behalf and on behalf of Other Members of the Media Institute of Southern Africa), and 4 Others**[1], was cited in which it was held, inter alia, that words used in Acts of Parliament must be given their literal meaning and should not be read in piecemeal.

It was contended that a close examination of Section 93 (2) (c) of **the Act** suggests that it only applies to illegal or corrupt practices committed by the candidate and his/her election agents but that under Section 93 (2) (a) of **the Act**, a Petitioner must show that one corrupt or illegal practice or other misconduct prevented the majority of voters from electing the candidate in that constituency whom they preferred. That under Subsection (c), a petitioner is only required to show:-

> **"i. That a corrupt practice or illegal practice was committed in connection with the election.**
>
> **ii. That the candidate had full knowledge of the act or consented to its commission."**

Therefore, that under Section 93 (2) (c) of **the Act**, there is no requirement to show that the corrupt act that was committed by the

candidate affected the outcome of the election. Hence, the Provisos in that Section should be given their literal meaning. The case of **Josephat Mlewa vs Eric Wightman**[2] was cited. It was argued that the above cited case fortifies this contention. In that case, this Court stated that: -

> **"The four paragraphs in section 18 (2) of the Electoral Act No. 2 of 1991 are independent and separate paragraphs and an election shall be held to be void if any of the paragraphs is proved to the satisfaction of the High Court. Where it is proved that there is wrong doing of a scale or type which has adversely affected an election, regardless of who the wrong doer is and even if the candidates personally were not involved, the election may be declared void in terms of Section 18 (2) (a)."**

Further, that in confirming this position, this Court, in **Michael Mabenga vs Sikota Wina and 2 Others**[3], stated that:-

> **"Satisfactory proof of any one corrupt or illegal practice or misconduct in an election petition is sufficient to nullify an election."**

It was pointed out that in **Levison Achitenji Mumba vs Peter William Mayambe Daka**[4], this Court aptly elucidated the distinction between the two Subsections when it stated that:-

> **"On the totality of all the incidents of misconduct, illegal and corrupt practices, we are satisfied that the learned trial judge was on firm ground in coming to the conclusion that the majority of the voters may have been prevented from voting for a candidate whom they preferred. With regard to section 18 (2), we are satisfied with the findings of the learned trial judge that the five allegations of corrupt or illegal practice were committed by and with the knowledge and consent or approval of the Appellant or his election agents. With the offence of treating, the slaughtered animal was purchased by the Appellant who authorized his election agents to kill the**

> **animal and give the meat to would be voters. The Appellant was therefore guilty of the offence of treating."**

Further, that this Court, in the above cited case, held that the learned trial judge was on firm ground in finding that the Respondent had proved his case to the required standard in terms of section 18 (2) (a) and (c) of the Electoral Act and dismissed the Appeal.

Therefore, that it was a misconception and a serious departure from the principles of law enunciated in the above cited case for the Court below to fail to invoke Section 93 (2) (c) of **the Act** as it had found that the Respondent and her agents and with her full knowledge, had engaged in corrupt and illegal practices. And that the foregoing cases demonstrate that a Parliamentary election may be nullified if it is proved that a candidate or his/her agents engaged in any corrupt or illegal practices themselves or with their knowledge and consent or approval. Hence, this Court should overturn the findings of the Court below under Grounds 1 and 2 of this Appeal.

Grounds 3 and 4 were also argued together. It was submitted that the Court below erred in law and fact when it held that the false and malicious statements made by the Respondent had no bearing on the Parliamentary elections. The Court below in its findings stated that the Respondent had

in fact, made false and malicious statements against the Appellant but that despite this finding, the Court did not invoke the provision of Section 93 (2) (c) of **the Act**. It was contended that publication of malicious and false information is prohibited by Section 83 (2) of **the Act** which provides that:-

> **" (2) Any person who, before or during an election, publishes any false statement of fact in relation to the personal character or conduct of a candidate in that election, shall be guilty of an illegal practice, unless that person can show that that person had reasonable grounds for believing, and did believe, the statement to be true."**

Further, that Section 82 (1) (c) of **the Act** prohibits threats and duress. Section 82 (1) (c) provides that: -

> **"82. (1) No person shall directly or indirectly, by oneself or by any other person –**
>
> **(c) Do or threaten to do anything to the disadvantage of any person; in order to induce or compel any person."**

It was submitted that on the allegation of false and malicious statements, the Court below held that the alleged false statements did not in any way relate to the Petitioner's personal character nor did she allege that the Petitioner advocated for the practice of homosexuality, extermination of the elderly and banning of ARVs. And that the Court below also stated that the alleged statements did not relate to the Appellant but to his Presidential candidate.

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It was pointed out that it can be seen from the above findings that the learned Judge found that the threats and false or malicious statements were made by the Respondent. That, however, despite making the above findings, the Court below dismissed the Appellant's claims on ground that the acts did not relate to the Petitioner's personal character but to the President of his Political Party. It was argued that the Appellant's position is that even if the requirements in Section 83 of **the Act** were not met, the Respondent's election could still have been nullified under **Regulation 21 (1) (c) of the (Electoral Code of Conduct) Regulation, 2011** which prohibits making of false and/or defamatory allegations against any person or his political party**.** Regulation 21 (1) (c) states that: -

> **"A person shall not make false, defamatory allegations concerning any person or political party in connection with an election."**

It was pointed out that the phrase in Regulation 21 (1) (c) that "any person or political party" puts it beyond doubt that the statements complained of need not relate to the candidate himself in order to form the basis for nullification of an election under Section 93 (2) (a) of **the Act**.

It was argued that the case of **Attorney General And Others vs Kaboiron**[5], a case decided in Tanzania, fortifies this position in that

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Presidential and Parliamentary elections have to be conducted not only in conformity with the Constitution and the Elections Act, but with the due observance of the general laws. That case concerned statements made by candidates to the effect that electing anyone from the opposition would result in war. In reviewing the evidence adduced in the court below, the Court of Appeal stated that:-

> **"The evidence adduced at the trial shows that these statements were widely published in the press. There can be no doubt that those who uttered those statements were aware that the statements would be published in the press.**
>
> **It is our considered opinion that the statements disclosed by that testimony were defamatory of the political parties in opposition to CCM and, in particular, to the petitioner and his political party. In addition, the statements made by Mrema MP and Horace Kollimba MP were intimidating to the electorate of the Kigoma MP Urban Constituency. Since defamation is an offence under the law of the land, everyone is prohibited from committing it at all times including during election campaigns. We are satisfied that legally indefensible or in excusable defamation committed in furtherance of an election campaign, as was done in the present case amounts to a breach of art 26(1) of the Constitution which categorically states 'every person is obliged to comply with this constitution and the laws of the United Republic.' It is our view that this constitutional command applies at all times...we are further satisfied that because of the large number of people who attend these campaign rallies and the respect the people of this country usually give to their president and his ministers must have affected the election results."**

The case of **Josephat Mlewa vs Eric Wightman**[2], was also cited in which we stated that: -

> **"The Court found on the evidence that the exercise books and the T-shirts were campaign materials given as free gifts by UNIP with an intention of wooing votes, this amounted to bribery. The Court further found that in plural politics, it is the parties which mount the campaigns for their**

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> **candidates and that the consequences of any illegal dealings will inevitably affect the candidates so that a defence of not being personally involved would not be upheld if shown that the illegal acts complained of affected the results of the election."**

In support of Ground 5 which attacks the award of costs to the Respondent, it was submitted that the Court below erred in law and fact as it ought to have considered public interest. Further, that although it is trite law that costs follow the event, in Constitutional matters, Courts consider public interest when awarding costs. That in the current case, the Petition was initiated under Article 72 of the Constitution. That in dismissing the Petition, the Court below awarded costs to the Respondent without giving any reasons for departing from the normal practice as the Petition was neither frivolous, vexatious nor without merit as the Court below found that the Respondent did engage in illegal and corrupt practices of distributing bicycles and chitenge materials to the electorate in order to induce them to vote for her.

The case of **Victor Kachaka vs Simasiku Namakando and Electoral Commission of Zambia**[6], was cited in which the High Court stated that since important issues in connection with the electoral process were raised by the Petitioner, it is only fair that each of the parties bear their own costs.

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Further, the case of **Samuel Miyanda vs Raymond Handahu**[7], was relied upon in arguing that in Constitutional matters costs should not be granted to either party.

In summing up, we were urged to uphold all the five Grounds of Appeal and to declare the election of the Respondent as Member of Parliament for Kasenengwa Constituency, null and void.

On the other hand, in opposing this appeal, the learned Counsel for the Respondent, Mr. Ngwira, also relied on the arguments advanced in the Respondent's Heads of Argument. Grounds 1 and 2 were responded to together. It was submitted that the two grounds of appeal attack findings of fact made by the trial Court. Counsel quoted extensively from the learned trial Judge's Judgment at pages 31 – 32 and 35 – 37 of the Record of Appeal where the learned Judge directed herself that the cardinal issue before her was whether as a result of the conduct complained of, the majority of the voters in the affected areas were prevented from electing a candidate whom they preferred. And that since the Petitioner did not adduce evidence to show an analysis of the number of persons in the wards to whom chitenge materials were distributed which could have

shown whether the Respondent received the majority of the votes in those wards, it had not been demonstrated that the majority of the voters were prevented from electing a candidate whom they preferred. Hence, she dismissed the claim.

It was argued that the Court below did not import any new facts or misapplied the evidence in arriving at the above findings of fact and conclusion as the learned Judge, in fact, relied on the evidence of the Appellant and that of his witnesses in arriving at these findings of fact.

In response to the alleged distribution of bicycles, it was submitted that the learned Judge found as a fact that although the Appellant had produced four bicycles allegedly distributed by the Respondent, the Respondent denied the allegation of distributing over five hundred (500) bicycles to the Headmen. And that the learned Judge then went on to make her finding that the Appellant did not adduce evidence to show the number of Headmen and the number of subjects under the Headmen in Kasenengwa Constituency. And that it was on this basis that the learned Judge stated that for a petition to succeed, the Petitioner must show that the conduct complained of affected the whole results of the election. Further, that the Appellant did not show an analysis of the number of votes

that he polled in each ward against the votes the Respondent got in all wards where the Headmen were given bicycles which could have enabled her to determine whether, indeed, the majority of voters were prevented from electing the candidate whom they preferred. Therefore, that the Appellant had not adduced sufficient evidence upon which the learned Judge could have invoked the provisions of Section 93 (2) of **the Act**.

It was further contended that since the Appellant moved the Court below under **Section 93 (1)** of **the Act**, that was the applicable law. Citing the case of **Mubika Mubika vs Poniso Njeulu**[8], it was argued that the Court in that case clarified the meaning of Section 93 and stated that: -

> **"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 the 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 in 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."**

Further, that in **Michael Mabenga vs Sikota Wina 2 others**[3], this Court stated that: -

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> **"As an Appellate Court, we have to look at the evidence supporting each allegation and see if properly directing himself, the learned trial Judge would have found the allegations proved to a degree higher than the balance of probability."**

It was submitted that the learned Judge was, therefore, on firm ground when she dismissed the allegations raised in Grounds 1 and 2 of this Appeal as it must be proved satisfactorily that as a result of the wrongful conduct, the majority of voters in the constituency were or might have been prevented from electing a candidate of their choice. Therefore, that there was no misdirection as the learned Judge's findings were that sufficient evidence was not adduced on the alleged distribution of chitenge materials and bicycles to show that the same affected the outcome of the elections. Further, that even though the Appellant has relied on the case of **the Minister of Information and Broadcasting Services and the Attorney General Vs Fanwell Chembo and 4 Others**[1], the applicable law on this issue was clearly set out in **Mubika Mubika vs Poniso Njeulu**[8], in which this Court dealt with the actual meaning of Section 93 of **the Act**.

Further, that although the Appellant has relied on the case of **Josephat Mlewa vs Eric Wightman**[2], which clearly prescribes that for a Petitioner to succeed under paragraph (c), he has to prove that the corrupt or illegal practices concerned were committed by the candidate or with the

candidate's knowledge and consent or with the knowledge and consent of the candidate's election agent or polling agent. That, however, no such evidence was led by the Appellant to warrant **Section 93 (2) (c)** of **the Act** being invoked as there was no proof that the corrupt or illegal practices concerned were committed by the Respondent or with the Respondent's knowledge and consent or with the knowledge and consent of his election agents or polling agents.

In response to the Appellant's arguments on the applicable burden of proof, it was submitted that it is clear that the Appellant failed to discharge the burden of proof. The case of **Anderson Kambela Mazoka and 2 Others vs Levy Patrick Mwanawasa and 2 Others**[9] was cited in which this court adopted the passage in **Zulu vs Avondale Housing Project**[10] and stated that: -

> **"As we said in Khalid Mohamed v The Attorney General (1982) ZR 49 this Court said on the burden of proof, that: -**
>
> **An unqualified proposition that a Plaintiff should succeed automatically wherever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a Plaintiff's case has collapsed of its own volition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a Defendant in such circumstances would not even need a defence.**

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> **We held in that case that Plaintiff cannot automatically succeed whenever a defence failed; he must prove his case. It follows that for the petitioners to succeed in the present petition, it is not enough to state that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced established the issue raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters. This is the bottom line we alluded to in the Chiluba case (3)."**

Further, that in **Akashambatwa Mbikusita-Lewanika and 4 Others vs Fredrick Jacob Titus Chiluba**[11], this Court stated that in an election petition, the issues raised are required to be established to a fairly high degree of convincing clarity. And that in **Levison Achitenji Mumba vs Peter William Mayambe Daka**[4], this Court re-stated this standard and put it as the "one that falls in between the civil standard of the balance of probabilities and the criminal standard of proof beyond reasonable doubt".

It was submitted that the law is that the Appellate Court may only reverse findings of fact made by a trial Court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts. That, however, in the current case, the Appellant has not satisfied any of the above principles. And as such, the two Grounds of Appeal are incompetent as

per decisions of this Court in **Attorney General vs Marcus Kampumba Achiume**[12] and a plethora of other cases.

In response to Grounds 3 and 4, it was submitted that the learned trial Judge was on firm ground when she held that the false and malicious statements made by the Respondent had no bearing on the Parliamentary elections. It was argued that the Appellant now wants this Court to reverse the findings made by the trial Court but that this cannot be done as shown by the above decided case.

It was further submitted that the learned Judge did not hold that the Respondent had made false and malicious statements against the Appellant. Hence, to argue that the learned Judge erred in law in holding that the Respondent had in fact, made false and malicious statements against the Appellant but failed to invoke **Section 93 (2) (c)** of **the Act** is a grossly misguided argument which this Court should not accept.

In responding to Ground 5 which attacks the awarding of costs to the Respondent, it was submitted that the Court below was on firm ground in awarding costs as what was of utmost importance is the definition of Public Interest. **Blacks' Law Dictionary** was cited in which "public interest" is defined as:-

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> **“1. The general welfare of the public that warrants recognition and protection.**
>
> **2. Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.”**

It was argued that the awarding of costs to the Respondent in this case was in accordance with the law as it was not a departure from the normal practice. In summing up, we were urged to dismiss this Appeal on ground that the Appellant had failed to prove that the majority of the electorate were prevented from electing a candidate of their own choice as a result of the alleged misconduct by the Respondent.

We have seriously considered this Appeal together with the arguments in the respective Heads of Argument and the authorities cited therein. We have also considered the Judgment by the learned Judge in the Court below. The major question raised in this Appeal is whether the Respondent was properly elected as Member of Parliament for Kasenengwa Constituency. As has already been alluded to, the Appellant did not succeed on any of the grounds upon which he had petitioned the High Court to nullify the election of the Respondent. The Appellant, in challenging the Judgment of the High Court, has centred his Appeal on the distribution of chitenge materials and bicycles and on the alleged threats, inflammatory, false and malicious statements made by the Respondent

against the Appellant, his political Party and his Party President. He has also challenged the award of costs to the Respondent.

In determining this Appeal, we shall deal with Grounds 1 and 2 together as they are interrelated and they were also argued and responded to together. The major contention on the two Grounds of Appeal is that since the learned trial Judge found that the Respondent had distributed chitenge materials and about 500 bicycles to the electorate and Headmen in the Constituency during her campaign, the learned Judge should have nullified the election of the Respondent under Subsection (c) instead of restricting herself to Subsection (a) of Section 93 (2) of **the Act**. Section 79 (1) (c) and (d) of **the Act** prohibits bribery by giving gifts either in monetary or otherwise to the electorate during or after any election.

The starting point is to resolve the question whether or not the learned Judge did make a finding of fact that the Respondent did distribute chitenge materials and bicycles to the electorate and Headmen as was alleged by the Appellant. This is in response to the contention by the Respondent that the learned Judge did not say that the Respondent had distributed chitenge materials and bicycles as alleged.

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We have considered the above arguments. It is our considered view that the answer can be found at pages 31 and 36 of the Record of Appeal. It can be deduced from what the learned Judge stated on those pages that she did accept the Appellant's evidence that the Respondent distributed the items in question as alleged. The record also shows that although the learned Judge accepted the Appellant's evidence that the Respondent distributed chitenge materials and bicycles, she, nevertheless, came to the conclusion that the Appellant had not demonstrated how the alleged distribution of chitenge materials and bicycles affected the whole result of the election. The rationale given by the learned Judge for this holding is that no analysis of the number of persons in the wards where the said chitenge materials were distributed was given and that the Appellant did not show the number of Headmen in Kasenengwa Constituency who were given bicycles and the number of subjects under them.

It was argued that since Subsection (c) of Section 93 (2) of **the Act** empowers the High Court to nullify the election of a parliamentary candidate if it is proved that he/she committed an illegal act or corrupt practice, the learned Judge should not have restricted herself to Subsection (a) as she should have distinguished Subsection (a) from (c). In response, the Respondent argued firstly, that the Appellant did not move the Court

below under Section 93 (2) (c) but under Section 93 (1) of **the Act**. And secondly, that both Grounds 1 and 2 attack findings of fact made by the trial Court. And that this Court's position, as stated in **Attorney-General vs Marcus Kampumba Achiume**[12], is that an appellate Court will not reverse the findings of fact made by the trial Court unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of fact or that they were findings which on a proper view of the evidence, no trial Court acting correctly can reasonably make.

We have considered the above arguments. In determining the issues raised in Grounds 1 and 2 of this Appeal, the main question to be resolved is whether once the learned Judge found that the Respondent had distributed chitenge materials and bicycles to the electorate and Headmen during her campaign, she ought to have nullified the election pursuant to Section 93 (2) (c) of **the Act**.

We have perused the record and indeed, the Appellant's prayers in the Petition. As has been alluded to by the Respondent, it is correct to say that the Appellant moved the Court below under Section 93 (1) of **the Act.** Section 93 (1) of **the Act** provides the mode of commencement of actions concerning Parliamentary election disputes. Perusal of the Petition and

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indeed, the entire Record of Appeal has also shown that the Appellant did not plead Section 93 (2) of **the Act.** Section 93 (2) of **the Act** is the section which empowers the High Court to nullify an election if any of the grounds in that Section is proved to the satisfaction of the High Court. For convenience, it would be prudent to recast Section 93 (2) of **the Act** here: -

> **"93 (2) The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say—**
>
> **(a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred;**
>
> **(b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court 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;**
>
> **(c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of that candidate's election agent or polling agent; or**
>
> **(d) that the candidate was at the time of the election a person not qualified or a person disqualified for election**."

**(42)**

In view of our finding that the Appellant did not plead Section 93 (2) of **the Act** which empowers the High Court to nullify the election of any candidate as Member of Parliament, the question that follows is whether the failure to plead Section 93 (2) of **the Act** was and/or is fatal to the Appellant's case.

In **Michael Mabenga vs Sikota Wina and 2 Others**[3], we stated that an election petition, like any other civil claim is governed by the pleadings and that in such cases, it is the petition and answer and that parties are bound by their pleadings. We also cited the case of **Akashambatwa Mbikusita Lewanika and 4 Others vs Fredrick Chiluba**[11] in which we ruled that:-

> **"An election petition is like any other civil claim that depends on the pleadings and the burden of proof is on the challenger to that election to prove, "to a standard higher than on a mere balance of probability. Issues raised are required to be established to a fairly high degree of convincing clarity."**

In **Anderson Kambela Mazoka and 2 Others vs Levy Patrick Mwanawasa and 2 Others**[9] and in **Zambia Electricity Supply Corporation vs Redlines Haulage Limited**[13], we spelt out the function of pleadings and the implication of failure to plead matters in a case. We

made it clear in those cases that in a proper case, failure to plead matters in issue can be fatal.

In the current case, this being an election petition, Section 93 (2) of **the Act** was central or vital to the question whether or not the Respondent was properly elected as Member of Parliament for Kasenengwa Constituency. Hence, the failure to plead Section 93 (2) of **the Act** or indeed to cite or refer to it throughout the proceedings in the Court below raises very serious questions which go to the root of this matter and raises the question whether or not the pleadings by the Appellant were properly done. Our firm view is that this omission was, prima facie, fatal to his case.

The Record, however, shows that the Respondent never raised this issue throughout the proceedings in the Court below. As a result, the learned trial Judge did not have an opportunity to consider and rule on this issue. This issue has only been raised now before us in opposing this Appeal. Our firm view is that the Respondent is estopped from raising this issue at this appeal stage. We are fortified in so holding by our decision in **Mususu Kalenga Building Limited and Winnie Kalenga vs Richmans Money Lenders Enterprises**[14] wherein we stated that:-

> "….. **We have said before and we wish to reiterate here that where an issue was not raised in the court below it is not competent for any party to raise it in this court.**"

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It is our considered view that the principle in **Mususu Kalenga Building Limited and Winnie Kalenga vs Richmans Money Lenders Enterprises**[14] also applies to Grounds 1 and 2 of this Appeal because the Appellant did not at all cite or mention Section 93 (2) (c) of **the Act** in his pleadings and throughout the proceedings in the Court below. Hence, the contentions that the learned Judge ought to have nullified the election of the Respondent under Subsection (c) instead of restricting herself to Subsection (a) of Section 93 (2) of **the Act** flies directly into the teeth of the principle of law enunciated in the above cited case and a plethora of other cases. Therefore, since Subsection (c) was not pleaded, it cannot be raised as a ground of appeal before us for the same reason that the learned Judge did not have an opportunity to consider that Subsection.

We must also hasten to point out that it is the duty of parties and their legal Counsel to properly plead matters in dispute. They cannot transfer that duty to the Court. Therefore, the learned trial Judge cannot be faulted for determining the Petition under Subsection (a) and not Subsection (c) of Section 93 (2) of **the Act**.

It is however, also our firm view that although the Appellant did not plead Section 93 (2) (c) of **the Act**, this is not the end of this matter. The Record shows that although Section 93 (2) (a) of **the Act** was not

specifically cited in the Petition, the learned trial Judge invoked the provision of that Subsection in determining the Petition before her. The manner in which both paragraphs 5 and 7 of the Petition and the Affidavit in Support of the Petition are couched is what guided the learned Judge to apply Section 93 (2) (a) of **the Act**. These paragraphs provide respectively that:-

> **"5 Your petitioner states that as a consequence of the aforesaid illegal practices committed by the said Respondent and his election and other agents, the majority of the voters at the affected areas and/or polling stations were prevented from electing the candidate in the Constituency whom they preferred."** (Underlining ours).
>
> **"7. That as a consequence of the aforesaid illegal practices committed by the said 1st Respondent and his election and other agents, the majority of the voters at the affected areas and/or polling stations were prevented from electing the candidate in the Constituency whom they preferred."** (Underlining ours).

Therefore, in view of the above provisions, there can be no doubt that although Subsection (a) was not specifically mentioned in the Petition, the learned Judge properly applied that Subsection as that is what the pleadings before her alluded to.

Coming back to the main question raised in Grounds 1 and 2 of this Appeal as to whether the learned trial Judge should have nullified the election of the Respondent under Subsection (c) instead of restricting herself to Subsection (a) after finding that the Respondent had distributed

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chitenge materials and bicycles, what we stated in **Josephat Mlewa vs. Eric Wightman**[2] is still good law and is apt to the current case. In that case, we stated that the four paragraphs of Section 18 (2) of the Electoral Act No. 2 of 1991 were independent and separate paragraphs upon which an election of a Member of Parliament may be nullified. Section 93 (2) of the **Electoral Act**, **No. 12 of 2006** under which the Appellant in the current case brought his petition contains exactly the same provisions as Section 18 (2) of the Electoral Act No. 2 of 1991 upon which the **Josephat Mlewa vs. Eric Wightman**[2] case was decided.

In the current case, the learned Judge, in directing herself on the alleged distribution of chitenge materials and bicycles, stated as follows:-

> **"...The cardinal issue for determination before me is whether as a result of the said distribution of chitenge materials the majority of voters in the affected areas were prevented from electing the candidate in the constituency whom they preferred.**
>
> **Section 93 (2) (a) pursuant to which the Petitioner has sought the nullification of the Kasenengwa Parliamentary Election states that**
>
> **"the election of a candidate as a Member of National Assembly shall be void on any of the following grounds which if proved to the satisfaction of the High Court upon the trial of an election that is to say:**
>
> **(a) That by reason of any corrupt practice or illegal practice committed in connection with election or by reason of other misconduct, the majority of voters in a Constituency were prevented or may have been prevented from electing the candidate in that Constituency whom they preferred."**
>
> **"...In my considered view the crucial point is proof that the majority of voters were prevented from electing the candidate whom they preferred..."**

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The learned Judge then went on to state as follows: -

**"...I have analysed the evidence under this claim. The Petitioner has only lead evidence to the effect that chitenge materials were distributed which were produced before Court..."**

**"...The Petitioner in my view ought and should have adduced evidence before this Court to show an analysis of the number of persons in the wards where the said chitenge materials were distributed. The Petitioner ought further to have produced before Court the results of the Parliament Elections in the individual wards by the parties. The analysis of the number of persons and the results in the specific wards would have armed the Court to weigh the same against the margin or difference between the votes polled by the Petitioner and the 1st Respondent. This would have shown whether the 1st Respondent did in fact receive the majority of votes in the wards where the said acts of alleged or illegal practices took place.**

**The above evidence was not provided before the Court in order for me to be satisfied that the majority of voters were prevented from electing the candidate whom they preferred.**

**I therefore find that the Petitioner has failed to prove that the majority of voters were prevented from electing a candidate of their choice as a result of the distribution of chitenge materials. I accordingly dismiss it."**

On the alleged distribution of bicycles, the learned Judge in her Judgment stated as follows: -

**"The Petitioner produced before Court four bicycles allegedly distributed by the 1st Respondent. The 1st Respondent denied the distribution of over five hundred (500) bicycles to the Headmen.**

**The petitioner called witnesses from the named wards to testify that bicycles were distributed to them as Headmen and produced before Court the said bicycles."**

The learned Judge then proceeded to make her findings and stated as follows: -

**"The Petitioner however did not adduce evidence before the Court to show the number of Headmen in Kasenengwa Constituency. In addition, no**

**evidence was adduced to show the number of subjects under the Headmen. For a petition to succeed, the petitioner must show that the conduct complained of affected the whole results of the election.**

**The Petitioner did not show an analysis of the number of votes that he polled in each ward against the 1st Respondent in all the areas namely the wards where the Headmen were given bicycles. This would have enabled the Court to determine whether indeed the majority of voters were prevented from electing the candidate whom they preferred. I refer to Section 93 (2) (a) of the Electoral Act already cited which is the basis upon which the Petitioner seeks nullification of the election results for Kasenengwa Constituency.**

**The Petitioner has not adduced sufficient evidence on the allegation and I find that there is no basis upon which I can invoke the provisions of Section 93 (2) of the Act in respect of the allegation for distribution of bicycles.**

**I therefore find no merit and accordingly dismiss the said allegation."**

As can be seen from the above, it is patently clear that the learned Judge misdirected herself on the applicable standard of proof required of a petitioner under Section 93 (2) (a) of **the Act**. The learned Judge set an additional condition for a petition to succeed under Subsection (a) of Section 93 (2) of **the Act** by stating that a petitioner must produce detailed analyses of the number of votes that he polled in those wards; the number of persons in the wards; the number of Headmen in the constituency and the number of subjects under them. This certainly put a higher standard on the Appellant than the applicable standard of "higher than a balance of probability".

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We illustrated the applicable standard of proof in **Michael Mabenga vs Sikota Wina and 2 Others**[3] and a plethora of other authorities. In the **Michael Mabenga vs Sikota Wina and 2 Others**[3] case, we stated that:-

> "**…the standard of proof in an election petition, although a civil matter is higher than a balance of probability, but less than beyond all reasonable doubt**."

As correctly stated by the learned Judge, what is required of a petitioner under Section 93 (2) (a) of **the Act** is proof that as a result of the conduct complained of, **the majority of voters in the constituency were or may have been prevented from electing the candidate whom they preferred**. (Emphasis ours).

Therefore, what was of import in the Court below is whether the distribution of chitenge materials and bicycles was done on such a large scale that the majority of voters in that Constituency **were** or **may** have been prevented from electing a candidate of their choice. This is a question of fact that is based on the evidence. Hence, as stated in **Michael Mabenga vs Sikota Wina and 2 Others**[3], as an appellate Court, we have to look at the evidence supporting each allegation and see if, properly directing herself, the learned Judge would have found the allegations proved to a degree higher than on the balance of probability.

**(50)**

Applying the above principle to the facts of this case and upon considering the evidence that was adduced in the Court below, we are satisfied that had the learned Judge properly directed herself, she could have come to the inescapable conclusion that the systematic distribution of chitenge materials and bicycles to the electorate and Headmen in most of the wards in Kasenengwa Constituency, was done on a large scale and that this did or may have affected the election results.

We say so because the evidence of the Appellant and that of his witnesses which the learned Judge accepted, was that at every meeting the Respondent addressed during her campaign in 6 different Wards in Kasenengwa Constituency, chitenge materials and bicycles were distributed as alleged. The evidence on record shows that these meetings were attended by a number of people. Some of the witnesses put the number of attendees as ranging from “41- 50; 75 - 80; 150; 300 - 400; 8 villages, and huge crowds”.

Therefore, although the Respondent has argued at length that the Court below did not make a finding that the Respondent had distributed chitenge materials and bicycles as alleged, the learned Judge accepted this evidence as at page J23 of her Judgment, the learned Judge stated as follows:-

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> **"Although the 1st Respondent's evidence of the existence of her organisation VKWI and Plant Agri-Chem being present in all Wards sounds plausible, there is evidence on record by the Petitioner and his witnesses testifying that at the meeting held by the Respondent in the Wards in Kasenengwa Constituency, the people were distributed with chitenge materials which were produced before Court and the 1st Respondent told them to vote for her in return for having given them the chitenges...**
>
> **The Petitioner produced before Court four bicycles allegedly distributed by the 1st Respondent. The 1st Respondent denied the distribution of over five hundred (500) bicycles to the Headmen...**
>
> **The petitioner called witnesses from the named wards to testify that bicycles were distributed to them as Headmen and produced before Court the said bicycles...**
>
> **Analysis of evidence shows that the above witnesses are from different Wards of Kasenengwa Constituency, namely, Chingazi; Ngongwe; Mkowe; Mboza; Kwenge and Chiparamba Wards.**"

It is also our firm view that the distribution of such a large number of bicycles which some of the witnesses said were "over 500" was sufficient evidence for the learned Judge to have come to the conclusion that this had or may have had an impact on the electorate even without the analyses of the votes the Appellant polled or the number of Headmen and their subjects being given. We take judicial notice of the fact that in a rural Constituency like Kasenengwa, a bicycle is only second to a motor vehicle. The sheer number of bicycles that were allegedly distributed by the Respondent was so large that there can be no doubt that this was or may have been calculated at boosting the Respondent's chances of being elected.

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We, are, therefore, satisfied that had the learned Judge properly directed herself on the applicable standard, she could have come to the conclusion that the distribution of chitenge materials and bicycles could or might have prevented the majority of voters from electing a candidate whom they preferred. And that on this basis alone, she could have declared the election results for Kasenengwa Constituency null and void under Section 93 (2) (a) of **the Act**.

For the reasons given above, we do not agree with the Respondent's contention that the Appellant did not discharge his burden of proof to the required standard as there was sufficient evidence which the learned trial Judge accepted upon which she could have nullified the election of the Respondent.

As for the second limb of the Respondent's argument that the two grounds attack findings of fact and that this should not be allowed, we agree with the principle set in **Attorney-General vs Marcus Kampumba Achiume**[12] and a plethora of other authorities as to when an appellate Court may or may not reverse findings of fact made by the trial Court. That is the correct position of the law.

However, in the current case and as illustrated above, this Appeal does not at all deal with findings of fact but the interpretation of the law

under Section 93 (2) (a) of **the Act**. As pointed out in **Michael Mabenga vs Sikota Wina and 2 Others**[3], appeals against decisions in election petitions lie to this Court only on points of law. Therefore, the argument that the two grounds of appeal attack findings of fact cannot succeed.

For convenience, Grounds 3 and 4 will be considered and resolved together as they are also interrelated. The major argument in support of these Grounds of Appeal is that the learned trial Judge, having found that the statements attributed to the Respondent had been proved, she should have nullified the election of the Respondent under Subsection (c) instead of restricting herself to Subsection (a). Sections 82 (1) and 83 (2) of **the Act** prohibits the making of threats; false and malicious statements by candidates against each other. Regulation 21 (1) (c) of the **Electoral** (**Code of Conduct**) also prohibits making of false, defamatory allegations against any person or political party in connection with an election. The threats and the false and malicious statements attributed to the Respondent were that:- if the Appellant and his Party came into power, homosexuality would be encouraged; elderly people would be exterminated; ARVs would be withdrawn and FRA would not pay farmers for the maize supplied to it.

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It was submitted that the Court below, instead held that the threats and the false and malicious statements did not relate to the Appellant's candidacy but to his Presidential Party candidate and to his Party. That by so holding, the learned Judge misdirected herself. In response, it was argued that the learned Judge was on firm ground as the alleged statements had no bearing on the Appellant as they related to the Appellant's Presidential candidate and his political Party. Further, that there is no evidence on record to show that the Respondent made the statements attributed to her. And that both Grounds 3 and 4 also attack findings of fact which were also based on the Appellant's own evidence.

We have considered the arguments relating to Grounds 3 and 4. The Record shows that in considering the alleged threats and malicious statements, the learned Judge stated as follows:-

> **"I am of the considered view that the alleged false statement do not in any way relate to the Petitioner's personal character or alleges that the petitioner advocated for the practice or homosexuality, the advocating of extermination of the elderly and banning of ARVs. I was urged by the 1st Respondent to take judicial notice of the facts that the alleged statements related to presidential candidate and not to parliamentary candidate"**

And that:-

> **"The evidence on record by witnesses is merely that if they voted for the PF party the farmers who supplied maize to FRA would not be paid. This alleged statement or threat in any considered view did not relate to the petitioner's candidacy or to him personally."**

**(55)**

As confirmed by the above portions of the learned trial Judge's Judgment, there can be no doubt that she accepted the Appellant's evidence that the Respondent made the statements attributed to her. However, despite finding this, the learned Judge went on to hold that since these statements did not relate to the Appellant's candidacy or to him personally but to his Party President and his political Party, the said threats and malicious statements did not amount to electoral misconduct. It was on this basis that the learned Judge declined to nullify the election of the Respondent under Section 93 (2) (a) of **the Act**. It is however, our considered view that this was misdirection by the learned Judge as the 20th September, 2011 General Election was a tripartite election that involved Presidential; Parliamentary and Local Government elections. The learned Judge should, therefore, have addressed her mind to the question whether the alleged misconduct, even though not directed at the Appellant personally, it had or may have had an impact on the Parliamentary election in Kasenengwa Constituency. We say so because in a general election like the 20th September, 2011 Election, the campaign messages are not only directed at a Presidential candidate but also at the Parliamentary candidate and the political party on whose ticket he/she is standing.

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We are persuaded in so holding by what the Court in Tanzania stated in **Attorney General And Others vs Kaboiron**[5]. This is that:-

> **"Presidential and parliamentary elections had to be conducted not only in conformity with the constitution and Elections Act, but with the due observance of the general laws. Article 26 of the constitution required every person to comply with the constitution and the laws of the United Republic. Defamation was an offence and there was un-contradicted evidence of legally indefensible inexcusable defamation repeated in furtherance of the elections campaigns at well- attended rallies, which must have affected the elections results. The trial judge had correctly so held, although he had erred in his finding against one another whose statements had not been defamatory."**

The recent case of **Leonard Banda vs Dora Siliya**[15], also fortifies this position as we made it clear in that case on similar issues that:-

> **"…it is inconceivable to detach a parliamentary candidate from false, defamatory or inflammatory statements made against the candidate's presidential candidate and political party. We are of the view that false, defamatory or inflammatory statements against a political party or that party's presidential candidate affect the parliamentary candidate contesting elections on that party's ticket."**

The evidence on record shows that there were a number of people who attended the meetings at which the alleged threats and false and malicious statements were made. Hence, it is apparent that the conduct complained of **must or may** have affected the outcome of the election.

Therefore, there can be no doubt that had the learned Judge properly directed herself, she would have come to the conclusion that the statements attributed to the Respondent, though not directed at the

Appellant personally, had an effect on the outcome of the whole election and on this basis, she could have nullified the election of the Respondent pursuant to Section 93 (2) (a) of **the Act** upon which the petition was based.

We do not also accept the Respondent's argument that the above Grounds of Appeal also attack findings of fact made by the trial Judge as the issues before her involved interpretation of the law in Subsection (a) of Section 93 (2) of **the Act.**

Ground 5 of this Appeal attacks the award of costs to the Respondent. The major contention by the Appellant on this Ground was that since the Petition raised serious Constitutional and public interest issues, the costs should not have been awarded to the Respondent.

In response, the Respondent argued that the matter did not involve public interest as it does not involve the general welfare of the public that would warrant recognition and protection.

We have considered the above arguments and the authorities cited. Ground 5 of this Appeal raises the question whether or not the learned Judge in the Court below was on firm ground when she awarded costs of the Petition to the Respondent.

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In the case of **Samuel Miyanda vs Raymond Handahu**[7] which involved the interpretation of some constitutional provisions, this Court observed that:-

> "**…. it was important for this court to adjudicate on the issue raised by this appeal, which issue was undoubtedly one of general importance. The appeal was one of those rare ones permitted by the proviso to Article 72(2) of the constitution which allows only those appeals which raise questions of law, including the interpretation of the constitution. In keeping with our usual practice in such cases, we consider that there should be no order for costs both here and in the High Court."**

The current case being an election Petition, there can be no doubt that it is a Constitutional matter that involved public interest. The Petition also raised issues of public policy such as those involving the governance of this Country as a whole. As such, costs ought not to have been awarded to the Respondent. Accordingly, the award of costs to the Respondent by the Court below is reversed. We instead order that each party bears its own costs in this Court and in the Court below.

In summing up and for the reasons given above, we declare and order that the election of the Respondent as Member of Parliament for Kasenengwa Constituency is null and void as the same was contrary to **Section 93 (2) (a)** of **the Act**. The same is quashed.

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**L. P. Chibesakunda**
**ACTING CHIEF JUSTICE**

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|---|---|
| ..... | ..... |
| **F. N. M. Mumba** | **H. Chibomba** |
| **ACTING DEPUTY CHIEF JUSTICE** | **SUPREME COURT JUDGE** |
| ..... | ..... |
| **M. E. Wanki** | **E. N. C. Muyovwe** |
| **SUPREME COURT JUDGE** | **SUPREME COURT JUDGE** |