IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 179/2012
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

DAVIES CHISOPA APPELLANT

AND

SYDNEY CHISANGA RESPONDENT

CORAM: Mwanamwambwa, Phiri, Wanki, Muyovwe and Musonda, JJS
On 29th January, 2013 and 18th December, 2013.

For the Appellant: Mr. A. D. Mumba of Messrs A D Mwansa Mumba & Associates

For the Respondents: Major C.A. Lisita of Central Chambers

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Akashambatwa Mbikusita-Lewanika and others vs. Fredrick Jacob Titus Chiluba (1998) ZR 79**
2. **Levison Achitengi Mumba vs. Peter William Mazyambe Daka Appeal No. 38/2003**
3. **Matildah Macarius Mutale vs. Sebio Mukuka and Electoral Commission of Zambia SCZ Appeal No. 45/2003**
4. **Wilson Masauso Zulu v. Avondale Housing Project Ltd. (1982)Z.R. 172**
5. **Eddie Christopher Musonda vs. Lawrence Zimba Appeal No. 41/ 2012**
6. **Newton Malwa vs. Lucky Mulusa Appeal No. 125/2012**

7. **Reuben Mtolo Phiri vs. Lameck Mangani Appeal No. 135/2012**

Legislation referred to:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia**
2. **The Electoral Act No. 12 of 2006**
3. **The Electoral (Code of Conduct) Regulations 2011**

Books referred to:

1. **The Holy Bible, New International Version**

When we heard this appeal Hon. Dr. Justice Musonda sat with us. He has since resigned. Therefore, this judgment is by the majority.

The Electoral Commission of Zambia was the 2nd Respondent in the Court below but is not a party to this appeal.

This is an appeal against the decision of the High Court which dismissed the appellant's petition and declared the respondent as duly elected Member of Parliament for Mkushi South Parliamentary Constituency.

The appellant was a candidate in the Mkushi South Parliamentary Constituency election held on 20th September, 2011 and he stood on the ticket of the Patriotic Front (hereinafter referred to as PF) while the respondent stood on

the ticket of the Movement for Multiparty Democracy (hereinafter referred to as MMD). The other candidate was Kayumba Sunwell who stood on the United Party for National Development ticket (hereinafter referred to as UPND). The respondent was declared duly elected Member of Parliament. The results were as follows:

1. The respondent, (MMD) - 3,744 votes
2. The appellant, (PF) - 1,391 votes
3. Kayumba Sunwell H., (UPND) - 1,035 votes

The appellant petitioned the High Court alleging that the respondent was not validly elected as a Member of Parliament for the Mkushi South Parliamentary Constituency. In his petition, the appellant alleged, inter alia, that contrary to the provisions of Section 93 (1) of the Electoral Act No. 12 of 2006 the respondent made donations to women's clubs during the campaign period. That on 17th September, 2011, the respondent at a rally at Mkushi Copper Mines informed the people that he had bought a cow and had at least K1million for everyone to get K20,000 and would return to give more after voting for him. Further, that between 1st August 2011 and 20th September 2011 the respondent and his agents in cognizance

with Chief Kanyensha issued a decree that any person found to be a sympathizer of PF would be arrested and detained at the Palace and that some people were detained and were only released after paying a fine. That the respondent prior to the election date collected NRCs, details of NRCs and voters' cards of various individuals with a view to tracing how they would vote during the election. The appellant prayed that the election of the respondent as a Member of Parliament for Mkushi South Parliamentary Constituency be declared void; that the illegal practices committed by the respondent or his agents respectively so affected the election result that the same ought to be nullified and also prayed for costs.

In his answer to the petition, the respondent denied the allegations contained in the petition and in turn alleged that in fact it was the appellant who engaged in election malpractices in various wards where he donated various items such as a mono pump at the market in Kamimbya Ward; he donated a wheel chair in Munda Ward; he was campaigning on the 18th September, 2011 in Kaundula Ward; and in Ching'ombe Ward he donated 20 bags of maize, salt and cooked nshima for the

electorate on 20th September, 2011; and donated 20 pockets of cement to Chikupili Rural Health Centre.

After analyzing the evidence the learned trial Judge addressed his mind to the specific allegations raised by the appellant in his petition bearing in mind that the onus lay on the petitioner.

In relation to the allegation on the donations of money to the women's clubs, the learned Judge found that although the donations were made during the campaign period this did not amount to undue influence as it was an on-going government project. He, however, acknowledged that such donations if made close to the voting period have the potential to influence voters. He relied on the case of **Akashambatwa Mbikusita-Lewanika and Others vs. Chiluba**.[1] The learned Judge also found that the appellant admitted that he donated a wheel chair to RW3's daughter; he donated 30 bags of cement to a Health Centre; iron sheets to Churches and a mono pump to the community. According to the learned Judge all these donations which were made during the election period could not fall in the category of philanthropic activities.

With regard to the allegation that RW6 Donata Kalunga was found with an exercise book which contained names and NRCs and voters' cards for various people, the learned Judge found no evidence that any of the people's voters' cards and NRCs were collected. He found that in the same exercise book at the back page, there was a list of names of PF members. The learned trial Judge was of the view that the motive behind having such an exercise book was not well explained and he, therefore, dismissed this allegation.

Pertaining to the allegation of undue influence made by PW7, PW8, PW9 and PW15 against Chief Kanyensha, the learned Judge found that there was no evidence that the Chief was an agent of the respondent. The learned trial Judge found that there was no corrupt or illegal practice on the part of the respondent as there was no evidence that the alleged malpractices were perpetrated or committed with the knowledge and consent of the respondent. The learned Judge dismissed the said allegation.

On the allegations by the appellant that the respondent at a rally issued defamatory statements against him and members

of the campaign team and that they had gang-raped RW6 Donata Kalunga in Ching'ombe Ward, the learned Judge found that there was insufficient evidence to substantiate the allegations.

The learned Judge examined the allegation of undue influence by PW19, PW20 and PW21 who were the respondent's employees that they were provided with transport by the respondent to go and vote. According to these three witnesses, there were other employees who were also provided with transport to go and vote from Mkushi Boma to Mkushi Copper Mine. The learned Judge found that less than 12 employees were allegedly ferried to go and vote and that in accordance with Section 93(2)(a) of the Electoral Act this cannot lead to nullification of election results.

In relation to the evidence of PW16 who alleged that he was the MMD District Youth Chairman, the learned Judge found that he was an untruthful witness whose evidence could not be relied upon. PW16 testified about the strategy adopted by the MMD and also disclosed what he termed as genuine programmes of the MMD District Coordinating Committees and

camps for foot soldiers for the Mkushi North and South Constituencies.

In conclusion, the learned Judge found that the actions complained of did not affect the results of the election in the Mkushi South Parliamentary Constituency and declared, having regard to all the evidence, that the respondent was duly elected as a Member of the National Assembly for the Mkushi South Constituency.

The appellant has now appealed to this Court on the following grounds, namely:

1. **The Learned Judge in the Court below erred and misdirected himself in law and fact when he found that the 1st Respondent's donations of money to Women's Clubs during the campaign period but went on to hold that the activity did not amount to undue influence but was an on-going government project to the Women Clubs.**

2. **The Learned Judge in the Court below erred and misdirected himself in law and fact when he failed to consider and find that in addition to donating monies to Women's Clubs he also gave money to various individuals at public rallies and during the campaign period.**

3. **The Court below erred and misdirected itself in law and fact when it failed to find and hold that the 1st Respondent had announced at a public campaign**

rally that the Petitioner and two others had gang-raped Donata Kalunga (RW6).

4. **The Court below erred and misdirected itself in law and fact when it failed to find and hold that the 1st Respondent and his agent Donata Kalunga (RW6) committed an illegal act and a misconduct by collecting some registered voters' National Registration Cards and Voters Card Numbers and recorded them in an exercise book during the campaign period in Ching'ombe Ward.**

5. **The Learned trial Judge erred and misdirected himself in law and fact by failing to consider and hold that the 1st Respondent and his agent had provided both food and beer to would be electorates at a public campaign rally at Copper Mine in Munda Ward on the 17th September, 2011 which evidence was supported by the 1st Respondent.**

6. **The Learned Judge in the Court below erred and misdirected himself in law and fact when he found and held that "I do not find therefore that there were any corrupt practices or illegal practices on the part of the 1st Respondent as there is no evidence that the alleged malpractices were perpetrated or committed with the knowledge and consent or approval of the 1st Respondent.**

7. **The Learned Judge in the lower Court erred and misdirected himself both in law and fact when he failed to consider and find that the 1st Respondent had directed all his employees and their respective spouses to travel to Mkushi South Constituency using his and or companies motor vehicles to cast their votes on the 20th September, 2011.**

8. **The Learned trial Judge in the Court below erred and misdirected himself both in law and fact by failing to find and hold that the 1st Respondent had admitted that more than twelve (12) of the**

employees and non-employees some of whom the 1st Respondent had lied to the Court that he did not know them were ferried by the 1st Respondent or by his agents with the full knowledge and approval did vote at Copper Mine Polling Station in Munda Ward on the 20th September, 2011.

9. **The Learned trial Judge erred and misdirected himself in law and fact by failing to find and hold that the 1st Respondent had committed a misconduct and an illegal practice when he continuously remained at Copper Mine Polling Station during the Election on the 20th September, 2011.**

10. **The Learned Judge in the Court below erred and misdirected himself in law and fact when he only criticized and found Prosecution Witness Charles Chanda – PW16's demeanour and behaviour that made the Judge believe that he (PW16) was not truthful in giving evidence without applying the similar standard of criticism and the test of untruthfulness in the evidence of the 1st Respondent himself.**

We have considered the evidence on record, the judgment of the lower Court and the submissions of learned Counsel for the parties.

Both learned Counsel filed Heads of Argument which are on record. We do not intend to reproduce the arguments. However, we shall deal with the arguments on both sides as we deal with the grounds of appeal. We note that the appellant filed his Memorandum of Appeal on the 10th July 2012 which

indicated ten grounds of appeal. However, in the appellant's Heads of Argument filed on 12th February 2013, there are three Additional grounds of appeal which are numbered one to three. We have not seen any application for leave to file additional grounds in the record of appeal and for this reason we shall not consider the three additional grounds.

We propose to deal with ground one, two and six simultaneously. The three grounds in summary relate to donations to women's clubs allegedly made by the respondent during the campaign period; that the respondent gave money to various individuals at public rallies during the campaign period and that the learned Judge misdirected himself when he found that the respondent did not commit any corrupt practices or illegal practices as there was no evidence that the same were committed with the knowledge and consent or approval of the respondent.

Firstly, with regard to the issue of the donations to women's clubs, Counsel for the appellant argued that at the time of the campaigns for the 2011 General Elections, Parliament had been dissolved thereby rendering the

respondent an ordinary member of society and not a Member of Parliament. Counsel cited **Article 71(1)** of the Constitution of Zambia which states that:

> **"Every member of the National Assembly, with the exception of the Speaker, shall vacate his seat in the Assembly upon the dissolution of the National Assembly."**

It was Counsel for the appellant's argument that there was no documentary evidence from the Mkushi District Council showing that the money came from the Constituency Development Fund (CDF). That there was no evidence that the cheques were issued by the Ministry of Community Development and Social Services as to support on-going government projects. Counsel further argued that there were no applications from the clubs or documents signed by club officials confirming that the money was CDF.

Counsel for the appellant argued that had the monies come from the Ministry of Community Development and Social Services, the respondent ought to have produced a Payment Voucher (Accounts Form 5) which is issued in all payments made by any government Ministry or Department. Counsel

noted that the absence of such a document meant that the monies the respondent gave out to clubs and individuals at the rallies during campaign period did not come from any government Department or Ministry.

It was submitted that in the event that this Court finds that the money came from the CDF, that would still mean that the respondent had corruptly or illegally applied the CDF or did misconduct himself to the extent that eroded the electoral process as the payments were made to induce the electorate to vote for a candidate not of their choice.

In response, Counsel for the respondent argued that the trial Court found that the appellant admitted donating a wheel chair; 30 bags of cement to Health Centre, iron sheets to churches, mono pumps to the Community during the campaign period. Counsel submitted that the appellant had come to equity with heavily soiled hands.

With regard to the CDF funds, Counsel for the respondent submitted that it was clear that the money came from CDF. That the Court also made a finding of fact that the money given to the clubs was part of the money requested for in June, 2011

from the Ministry of Sport, Youth and Child Development. It was Counsel's argument that there was no finding of fact in this case that the respondent's activities were so improper as to erode the electoral process.

We note that with regard to the donations, the learned Judge had this to say at Page 55 of the record of appeal:

> **"Nevertheless if at all this money was distributed to women's clubs during the rallies, this was part of the ongoing programmes arranged by the Constituency with the Government through the Ministry of Community Development and Social Services. The Court will note that such activities are part of the Government projects as well as philanthropic activities. I find that even though the donations were made during the campaign period, this activity did not amount to undue influence but was an on- going Government project to the women clubs. There is no doubt that such activities have a potential of influencing the recipients if done close to the time of voting. "**

Clearly, the learned Judge found as a fact that the donation of money by the respondent to the women's clubs was made during the campaign rallies. As this is a finding of fact, we cannot disturb the finding as it is not perverse as we held in the case of **Wilson Masauso Zulu vs. Avondale Housing Project**[4] that:

“The appellate court will 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 misapprehension of the facts.”

However, it is our considered view that the learned trial Judge erred and misdirected himself when he found that the donations were part of an on-going Government program. It is important to note that at the time of making donations at various campaign rallies, the respondent was not an MP but was a parliamentary candidate in the constituency.

We are alive to the fact that prior to the election period when Parliament is dissolved all former Members of Parliament cease to undertake Government functions. The persons recognized by law to carry out government functions in the absence of Ministers and Members of Parliament are civil servants, being either Permanent Secretaries or District Commissioners. In view of this, it is quite obvious that the respondent took advantage of his position as a former MP and a member of the then ruling party to make the donations to the women’s clubs during the campaign rallies.

The conclusion by the learned Judge that the said donations did not amount to undue influence was definitely a misdirection. In this case, there was evidence that the request for donations was made prior to the campaign period. In fact, the respondent did confirm that CDF was only received in June 2011 when Parliament was dissolved. It was the lower Court's finding that the respondent made the donations to the women's clubs during his campaign rallies. Making donations of money to the women's clubs during campaign rallies unfairly disadvantaged the appellant and the other candidates. The case of **Levison Achitengi Mumba**[2] supports this position.

Following the guidance by this Court in the **Matildah Macarius**[3] case, the finding by the learned Judge that the act of making donations during the campaign rallies did not amount to undue influence was perverse in view of the glaring evidence adduced by the appellant. See the case of **Wilson Masauso Zulu v. Avondale Housing Project Ltd.**[4]

It was argued by Counsel for the respondent based on the case of **Eddie Christopher Musonda vs. Lawrence Zimba,**[5] that the trial court which had the opportunity to examine the

witnesses and evidence before it was able to assess the truth of the evidence at trial. In our view, the issue at hand is not the demeanour of the witnesses but rather whether the learned Judge was in order to find that donations made during campaign rallies by a candidate can be termed philanthropic or indeed part of an on-going government program. We do not agree with the learned Judge's finding. The timing of the donation was bad. If the donation was requested for in June 2011, as argued by Counsel for the respondent, why was it suddenly available; why was it necessary to present the donations during campaign rallies if not to influence voters to vote for him and why was the donation not made by a civil servant instead of a parliamentary candidate?

In our recent case of **Newton Malwa vs. Lucky Mulusa**[6] we said at page J25 of the judgment:

> **"We wish to point out as we did in the case of Reuben Mtolo Phiri v. Lameck Mangani**[7] **at page J21 that both paragraphs 93(2)(a) and 93(2)(c) of the Electoral Act No. 12 of 2006 deal with corrupt or illegal practices committed during an election. The distinction between the two paragraphs is that under paragraph (a), the corrupt or illegal conduct is not attributed to the candidate in that election but to other persons who may engage in such corrupt or illegal practices. This paragraph also requires wide influence of the electorate.**

Paragraph 93(2)(c), on the other hand, is specific to the candidate in that it relates to illegal or corrupt conduct by or with the knowledge of the candidate or his agents. In this case, paragraph (c) applies because the conduct complained of is attributed to the respondent himself. The strict requirement of only one proven illegal act is meant to safeguard the electoral system so that candidates who may become leaders are persons of integrity."

It is, therefore, clear that the respondent's donation of money (from his pocket) at the rallies was contrary to Section 93(2)(c) of the Act.

Turning to the issue of distribution of money to individuals during the campaign rallies, the gist of the evidence of PW1, PW2, PW3, and PW4 was that money was given to women's clubs and not to individuals. Our finding on perusal of the evidence is that it was only PW6 who said that the respondent took out K1,000,000.00 from his pocket to be shared at K20,000.00 per person among those present at the meeting. That the respondent promised that he would return to give out more money after winning the elections. It would appear to us that evidence on this point was weak and was discounted by the learned trial Judge and we agree that there was insufficient

evidence to show that the respondent distributed money to individuals during the rallies.

Mr. Mumba also alluded to the Bank statement for Mpale Women's Development Association and questioned the deposit of K20 million. In our view, this is the evidence which should have been produced in the Court below. Further, Counsel who represented the appellant in the Court below, chose not to make submissions to assist the learned trial Judge in arriving at a decision. Therefore, he cannot now begin to raise questions which should have been raised in the Court below, such as production of payment vouchers from Ministry of Community Development and so on. It was up to the appellant to prove that the payments in the Bank Statement came from the respondent's account. The onus to prove the allegations lay on the appellant and clearly this allegation was not proved to the required standard of higher than the balance of probabilities.

Before we conclude on this segment, we are compelled to react to Counsel for the respondent's response to the allegations relating to the donations of money by the respondent. It was pointed out that the appellant had come to court with heavily soiled hands on account of the fact that he

equally made various donations such as 30 bags of cement to a Health Centre; donation of iron sheets to churches and mono pumps to the community during the campaign period. That the appellant admitted making these donations. The learned trial Judge in his judgment found that these donations could not be termed philanthropic activities since the same were made during the campaign period.

Clearly, the appellant did not come to court with clean hands. As the Holy Bible in the book of **Luke Chapter 6:41** says:

> **“why do you look at the speck of sawdust in your brother’s eye and pay no attention to the plank in your own eye? How can you say to your brother, “brother, let me take the speck out of your eye,” when you yourself fail to see the plank in your own eye?”**

In agreeing with the trial Judge, we have found that the appellant was equally guilty of illegal practices contrary to Section 93(2)(c) of the Act.

In sum, we find that there is merit in ground one. As far as ground six is concerned, we find that it has merit in so far as it relates to the donation of money to women’s clubs by the

respondent during the campaign period. However, we find that ground two lacks merit and it, therefore, fails.

With regard to ground three, the allegation is that the respondent had announced at a public rally that the appellant and two others had gang-raped Donata Kalunga (RW6). In responding to this ground, Counsel for the respondent relied on the case of **Eddie Christopher Musonda vs. Lawrence Zimba**[5] where at page J28 the Acting Chief Justice said:

> **"Nevertheless, we are alive to the principle that he who asserts must prove his assertion. Also it is well established principle that the learned trial Judge is a trier of facts, has the advantage of observing the demeanour of witnesses to determine as to who was telling the truth in the trial. Bearing that in mind, we cannot upset the findings on this ground."**

In this case, the learned trial Judge observed the witnesses from both sides on this allegation and did not believe the appellant's witnesses. He found, and we cannot fault him, that there was insufficient evidence to substantiate the claim. And in our view, for the learned trial Judge to state that the evidence was insufficient points to the fact that he had perused the evidence. It is not the number of witnesses that proves an

allegation but the substance of the evidence. We find no merit in this ground and it fails.

In relation to ground four, Counsel's argument is that the trial Court erred in failing to find and hold that the respondent and his agent Donata Kalunga committed an illegal act and a misconduct by collecting some registered voters NRC's and voters cards numbers and recorded them in an exercise book during the campaign period in Ching'ombe Ward.

We agree with Counsel for the respondent that the learned trial Judge addressed his mind to the issues raised in this ground when he said at page 56:

> **"There was no evidence that any of the people's Voters and National Registration Cards were confiscated or collected. The exercise book was exhibited in Court. It was later found that the same exercise book had names at the back page where PW18 admitted that he had also written the names of his Party (PF) in the same book. The motive behind that was not well explained to Court and not convincing at all….this allegation is therefore dismissed as lacking merit and not proved by the required standard in election matters."**

Counsel for the appellant conceded that the same exercise book in which RW6 allegedly wrote names of

individuals and their NRCs and voters cards also contained names of PF members written by PW18. We are, therefore, not surprised that the learned trial Judge failed to comprehend the purpose behind such a book and its contents.

Further, Counsel for the appellant conceded that there was a conflict in evidence and this is so as witnesses were representing competing interests and the trial Judge who observed the demeanour of the witnesses after considering the evidence found that the allegation was not proved to the required standard. We cannot fault the learned trial Judge and we will not disturb the finding of the trial Court. Ground four, therefore, fails.

Turning to ground five, we note that this ground relates to the allegation in paragraph 5 (ii) in the petition which was that on 17th September 2011, the respondent at a campaign rally at Mkushi Copper Mines informed the crowd that he had bought a cow. That the cow was slaughtered and shared among the people who attended the rally on the same day. That the respondent left K1,000,000.00 for all who attended to get a K20,000.00 and would return to give more after voting for him

and his party's Presidential candidate. We have already dealt with the issue of the K1,000,000 under ground one, two and six above. We wish to clarify, however, that PW6's evidence was to the effect that the money in question was to be shared among those who were present at the meeting prior to voting and not after voting as stated in the petition.

Now with regard to the issue of the cow that was allegedly slaughtered by the respondent for the people who attended his rally on 17th September, 2011, we have perused the judgment of the lower Court and we find that this particular allegation was not addressed by the learned Judge. This was a misdirection, especially that the appellant led evidence on this allegation and the respondent did respond to the allegation.

Counsel in his submissions attacked the learned Judge's statement where he said at Page J8 of the judgment which is at Page 31 of the record of appeal that:

> **"Re-examined he stated that the cow was donated by Mr. Kapapa to feed the people who had come for the meeting."**

We agree with learned Counsel for the appellant that the question of Mr. Kapapa donating the cow was introduced in cross-examination. We perused PW6's evidence and it is not correct that PW6 agreed that Mr. Kapapa slaughtered the cow for the meeting. In any event, although the above statement found itself in the judgment, we have not found anywhere in the judgment where the learned Judge specifically made a finding that the slaughtered animal was donated by Mr. Kapapa or indeed by the respondent.

As we have stated earlier, it is clear that the learned Judge did not address this issue in his judgment and we are of the view that with the contradictions in PW6's evidence, it would be unsafe to conclude that the respondent was the one who slaughtered the cow; provided the food and beer at the meeting in question. Our firm view is that the allegation was not proved to the required standard which is higher than on the balance of probability. Ground five, therefore succeeds in so far as we agree that the learned Judge erred when he failed to consider the allegation put to him in view of the evidence placed before him.

We considered ground six together with ground one and two above.

We now turn to address grounds seven and eight which were argued together. The gist of these two grounds is that the respondent unduly influenced his employees (over 250 of them) in his various companies to vote for him; that he provided transport to his employees and their families to go and register and vote at Copper Mine Polling Station. That the learned Judge failed to interpret **Section 93 (2)(a) of the Electoral Act** as it was interpreted in the **Mlewa case.** It was submitted that between 2010 and 2011 the respondent prevailed over his employees to go and register at Mkushi Copper Mine Polling station thereby denying them the free exercise to vote for a candidate and a party of their respective choice. This evidence was from PW19, PW20 and PW21. According to Counsel, this was one of the worst illegal practices citing **Section 82 (1)** and **Section 82 (6).**

We have considered the arguments advanced and we agree with Counsel for the respondent that the respondent cannot be guilty of an illegal practice simply because he

facilitated for his workers who were voters to register as voters. The registration took place in 2010. We have found no evidence that any of the respondent's workers were coerced into not only registering as voters at Mkushi Copper Mine but also to vote there. The learned Judge found that less than 12 employees were ferried to go and vote, going by the evidence of PW19, PW20 and PW21. The respondent went to vote in his own vehicle with his spouse. In our view, there was no need to invoke Section 93 (2)(a) of the Act because there was nothing wrong with the managers of the respondent's companies providing transport to fellow employees who wanted to go and exercise their right to vote. In our view, Section 93 (2) (a) of the Act did not even come into play. We find that **Section 82 (1)** and **Section 82 (6) of the Act** cannot assist the appellant as there was no evidence that the same was flouted by the respondent. We cannot fault the learned Judge when he found that the respondent was not guilty of undue influence in this regard. Therefore, grounds seven and eight fail.

With regard to ground nine, which relates to the fact that the respondent remained at the Polling station from the time he registered until results were announced. The appellant's

argument is that it is an offence under **Regulation 10 (2) (d) of the Electoral (Code of Conduct)** for a candidate to remain continually at a polling station on an election day. That the respondent admitted that he remained at the polling station on election day on 20th September 2011. That this amounted to a serious illegal practice and a misconduct on the part of the respondent. That Regulation 10 (2) is prohibitive to any or all of the members, or supporters of political parties or candidates themselves. Counsel submitted that the learned trial Judge predetermined his stand on this issue when he said at Page 421:

> **"This is what State Counsel is saying that candidates are at large, they are at sea, a candidate can be at a polling station, that is what I know also. He can move up and down, he can go inside the polling station and come out."**

We were also referred to **Section 88(1)(f) of the Act** which provides that:

> **"Any person who – on any polling day loiters in any public place within four hundred metres from the entrance to any polling station… - shall be guilty of an offence and shall be liable on conviction to a fine not exceeding ten thousand penalty units or to imprisonment for a period not exceeding two years, or to both."**

It was also argued that since his employees were registered at that polling station, his presence was meant to unduly influence them into voting for him. We have already dealt with this argument in ground seven and eight and we will not repeat ourselves here.

In response, Counsel for the respondent argued that **Regulation 10 (2)(d)** does not prohibit the candidate but his supporter from continuously remaining at a polling station. That even assuming that the Court was to find that the candidate was wrong to remain at the polling station such an omission is not among the conducts that call for the nullification of an election result. That the **Mlewa case** is not applicable and the standard in the **Mabenga case** has not been met. **Regulation 10 (2) (d)** provides as follows:

> **"A member or supporter of a political party or a candidate shall not –**
> **(d) continuously remain at a polling station during the campaign period or elections"**

Sub regulation (3) provides that:

> **"Without prejudice to any other written law, any person who contravenes sub-regulation (2) commits an offence and shall be liable upon conviction to a**

fine not exceeding two thousand five hundred penalty units or to imprisonment not exceeding one year or to both."

We have considered the arguments by both parties. It is common cause that the respondent remained continuously at the polling station on polling day. In our view, Regulation 10 (2) (d) is clear that candidates should not remain continuously at the polling station during the campaign period or on election day. Therefore, the respondent contravened the said regulation. We will come back to this issue.

While we agree that the learned Judge did not make any holding on this issue, we find that it is not correct that the Judge predetermined this issue. It is clear that Counsel only chose to quote the parts of the record which best suited his argument. The record shows that at Page 425 the learned Judge curtailed further submission on the interpretation of Regulation 10(2)(d) and Mr. Mumba stated that he would address the issue in his submissions 'for the Court to interpret'. However, Mr. Mumba did not file any submissions. We are alive to the fact that submissions are for assisting the Court, and this is the more reason why Mr. Mumba should have ensured that

he filed his submissions to cover this point instead of coming to this Court with the arguments he should have raised in the Court below.

The question is whether the respondent's election should be nullified on the ground that he breached Regulation 10 (2) (d)? It is our considered view that this is not a sufficient ground for nullification of an election. While agreeing with Counsel for the appellant that Regulation 10(2)(d) is prohibitive, however, it stipulates that the conduct is an offence with the form of punishment provided therein. Regulation 10(3) clearly states that whoever contravenes sub-regulation (2) commits an offence and it sets out the punishment. We are, therefore, of the view that commission of offences at the polling station is catered for in Section 3(6) of the Electoral Act. We agree with Counsel for the respondent that even though the candidate was wrong to remain at the polling station, this is not a ground for nullification of the election in terms of Section 93 of the Act. Ground nine fails.

Turning to ground ten, the gist of the appellant's argument is that the learned Judge criticised PW16's evidence

and found it untruthful and yet he did not do the same with the evidence of the respondent. In responding to this argument, Counsel for the respondent submitted that the learned trial Judge, having had conduct of the trial and having had the opportunity to examine the demeanour of the witnesses correctly arrived at the conclusions that he did and cannot be flawed. Counsel for the respondent cited the case of **Eddie Christopher Musonda vs. Lawrence Zimba**[5] in which the Acting Chief Justice Chibesakunda said:

"Also it is well established principle that the learned trial Judge, as a trier of facts, has advantage of observing the demeanour of witnesses to determine as to who was telling the truth in the trial. Bearing that in mind we cannot upset his findings…."

We entirely agree with the submission of Counsel for the respondent in this ground and we cannot fault the learned trial Judge in arriving at his finding on this ground. Ground 10, therefore, fails.

Having found that the respondent contravened the provisions of Section 93 (2)(c)of the Act, it follows that the appeal is allowed. Therefore, the election of the respondent as

Member of Parliament for Mkushi South Constituency is hereby nullified. We order that each party bears their own costs.

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M.S. MWANAMWAMBWA
SUPREME COURT JUDGE

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G.S. PHIRI
SUPREME COURT JUDGE

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M.E. WANKI
SUPREME COURT JUDGE

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE

.....
P. MUSONDA
SUPREME COURT JUDGE