

IN THE SUPREME COURT FOR ZAMBIA

Appeal No. 80/2012

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: SECTION 81 OF THE ELECTORAL ACT NO.12 of 2006

IN THE MATTER OF: SECTION 82 OF THE ELECTORAL ACT 12 OF 2006

IN THE MATTER OF: THE ELECTORAL PETITION RULES STATUTORY INSTRUMENT NO. 426 OF 1968 (As amended)

BETWEEN:

KUFUKA KUFUKA APPELLANT

AND

NDALAMEI MUNDIA RESPONDENT

***Coram: Mwanamwambwa, Phiri, Wanki, Muyovwe and Musonda, JJS
On the 11th September 2012 and 19th February, 2013***

For the Appellant: Mr. L.E. Eyaa, Messrs K.B.F. and Partners

For the Respondent: Major C.A. Lisita, Messrs Central Chambers

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

- 1. Matilda Macarias Mutale vs. Sebio Mukuka and Electoral Commission of Zambia SCZ Appeal No. 45/2003**
- 2. Suburamaniam Public Prosecutor (1956) 1 W.L.R 965**
- 3. Mutambo and 5 Others vs. The People (1965) Z.R. 15**
- 4. Machobane vs. The People (1972) Z.R. 101**
- 5. Katebe vs. The People (1975) Z.R. 13**

- 6. Michael Mabenga vs. Sikota Wina and Others (2003) Z.R. 110**
- 7. Simasiku Namakando vs. Ellen Imbwa Appeal No. 108/2007**
- 8. Michael Chilufya Sata vs. Rupiah Bwezani Banda, Electoral Commission of Zambia, Attorney General SCZ/8/EP/01/2009**
- 9. GDC Hauliers (Z) Limited vs. Trans-Carriers Limited SCZ No.7/ 2001**
- 10. Marcus Achiume vs. The Attorney-General (1983) Z.R. 1**
- 11. Mubika Mubika vs. Poniso Njeulu SCZ Appeal No. 114/2007**
- 12. Akashambatwa Mbikusita Lewanika and Others vs. Frederick Jacob Titus Chiluba (1998) Z.R. 49**
- 13. Anderson Kambela Mazoka and Others vs. Levy Patrick Mwanawasa, The Electoral Commission of Zambia and The Attorney General (2005) Z.R. 140**
- 14. Mateo Mwaba vs. Anthony Kunda Kasolo Appeal No. 23/2003**

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

For convenience, we shall refer to the appellant as the petitioner and the respondent as the respondent respectively, which designations they were in the Court below.

The petitioner was a candidate in the Parliamentary election for Sikongo Constituency in Kalabo District of the Western Province of the Republic of Zambia held on 20th September, 2011. The petitioner stood on the PF ticket while the respondent stood

on the MMD ticket. Others were Thomas Kamboi of UPND and Mbambo Sianga of ADD.

The respondent was declared duly elected Member of Parliament for Sikongo Constituency. The Petitioner prayed that he be granted the following relief:

- (i) A declaration that the election was null and void ab initio
- (ii) A declaration that the respondent was not duly elected
- (iii) Costs of and incidental to this petition
- (iv) Such declaration and order as this Honourable Court may deem fit.

The petitioner challenged the election of the respondent and alleged that the election campaign was characterised by treating contrary to Section 81 of the Electoral Act No. 12 of 2006 and undue influence on the electorate contrary to Section 82 of the Act. In his petition, the petitioner set out ten (10) allegations against the respondent which are outlined in the judgment of the lower Court.

The petitioner gave evidence on oath and called thirteen witnesses. In respect of the 1st and 2nd allegations, the petitioner alleged that during the campaign period the World Food

Programme (WFP) through Kalabo District Education Officer distributed mealie meal to more than 20 schools including Liumena, Lubuta and that the respondent and his campaign team distributed foodstuffs, chitenges and other materials. The petitioner's evidence was to the effect that he encountered a truck laden with mealie meal which he was informed was being delivered to schools in Sikongo. The people on the truck were wearing MMD t-shirts and the truck belonged to the MMD Constituency Chairman for Kalabo Central. The petitioner and his entourage got a lift on the truck which delivered mealie meal to Liumena School and a teacher advised that the mealie meal was for cooking nshima for school children. After three days, the petitioner found mealie meal being shared among villagers at the school and he was told that they were given mealie meal for cleaning the school. He said he heard some villagers say that the government was working and that they should vote for MMD so that they have a continuous flow of mealie meal.

As regards the 2nd allegation, relating to distribution of foodstuffs and other materials, the petitioner testified that he received a report over the same from various people who

included Patricia Kawanga, headman Simakando, Mr. Joseph Namuchana Madam Margaret, Mr. Mulenga and others. The petitioner called PW5, PW6, PW7, PW8, PW9, PW10, PW11, PW12 and PW13 to support his evidence on the two allegations.

The 3rd and 4th allegations are not in issue in this appeal so we shall not allude to the evidence adduced on these allegations.

On the 5th, 6th, and 7th allegations which allege that the respondent told people at meetings held at Tuwa School and Katongo village in Mutala Ward respectively that if they voted for the PF Presidential candidate, people living with HIV/AIDS would be caged and killed; that Mbundas would be sent back to Angola and homosexuality would be legalized, the petitioner said as a campaign team they had difficulties in convincing people that what the MMD was saying was not true. Under this head, the petitioner called PW12 and PW13.

With regard to the 8th, 9th and 10th allegations, the petitioner stated that his campaign team was attacked by people who were wearing MMD t-shirts and caps and the campaign manager was assaulted; his campaign vehicle was smashed as well as the land

cruiser he had hired; they removed campaign posters from the vehicle and that the attackers were part of the Sizo band which sang praise songs for the respondent and that they came from the direction where the respondent was. On these allegations he called PW4, PW6, PW14 and PW15.

On the other hand, the respondent called ten witnesses. He denied the petitioner's allegation that he maligned the PF Presidential candidate at his campaign meetings and that he could not talk negatively about Mbundas since his mother was Mbunda. He denied giving money to PW7 as he was not in Mutala Ward on 17th September 2011 but admitted that he had meetings at Loke and Malonde Basic School and he was driven by RW4. He denied giving PW8 money as she was an aunt to the petitioner and she did not attend his meetings. He denied distributing salaula, money and chitenges as alleged by PW9 and PW11. He said that in fact Chief Chumbula was away in Mongu during the period PW9 and PW11 allege that he (the respondent) was at Chief Chumbula's palace distributing salaula. He said he never saw PW10. In response to PW12's evidence he stated that PW12 was a defector who was removed from his position in MMD in

February, 2011. The respondent said he did not know PW13. He denied sending PW14 to attack PW6 and the PF campaign team or that he promised PW14 and his colleagues K11million.

In his judgment, the learned Judge found in relation to the 1st and 2nd allegations which allegedly offended Section 81 of the Act that the mealie meal distribution was part of a joint government/WFP programme. That the respondent was not involved in the exercise. The learned Judge took the view that the present case was distinguishable from the case of **Matildah Macarius Mutale**¹. That PW8's evidence that people were saying they would vote for MMD and the respondent as they were being given food during starvation was hearsay evidence which could not be substantiated.

Still on the issue of food and material distribution, the learned

Judge rejected the evidence of PW5, the UPND Chairlady that RW8 bribed her with K2m cash so that she could leave UPND. He discounted the evidence of PW7 who stated, inter alia, that the MMD Branch Chairmen from Simolombe Village, Sitalo and

Lukowo were distributing mealie meal to the electorate. He refused to accept PW8's evidence that the respondent held a meeting at which about 400 people were given chitenge materials after MMD members bought all the chitenge materials from Manyambu's shop or that the respondent distributed any money.

He found that the petitioner did not lose at Makya, Lito, Lukomane and Matala polling stations because of the alleged distribution of mealie meal and chitenge materials. That Chief Chumbula was in Mongu during the period referred to. The learned Judge rejected the evidence of PW9 and PW11 that the respondent distributed bales of salaula and chitenges to headmen at Chief Chumbula's palace. That in any event, the petitioner and the PF Councillor won at Lulang'unyi Polling Station and that, therefore, if there was any distribution of salaula, it had no impact on the electorate.

That the mealie meal and K250,000 given to headman Kafuka and Mr. Kazaka were not bribes as alleged by PW10. That PW12 was not a credible witness and that his evidence was unsubstantiated. With regard to PW13 an MMD member, the

learned Judge could not accept his evidence that he was bribed by the respondent, his fellow party member, with a K50,000 and a chitenge or that food which PW13 ate on voting day at Councillor Namitondo's house was meant to bribe him to vote for MMD and the respondent. That PW13 was an unreliable witness.

With regard to the 5th, 6th, 7th, 8th, 9th and 10th allegations, which according to the petitioner offended Section 82 of Act, the learned judge found that the same were not proved. He found that the evidence of PW12 and PW13 related only to the PF Presidential candidate and not the petitioner. That the petition was between the petitioner and the respondent and not between the PF Presidential candidate and the petitioner. That PW12 and PW13 were unreliable witnesses.

That there was no proof that the people who attacked PW6 and the campaign team were sent by the respondent; that he did not own Sizo Band and that the removal of campaign posters could not be attributed to the respondent.

After considering the evidence before him, the learned Judge concluded that the petitioner had failed to prove his allegations to justify the nullification of the Respondent's election and dismissed the petition for lack of merit. And the learned Judge declared that the Respondent was duly elected as Member of Parliament for Sikongo Constituency and awarded costs to the Respondent.

The petitioner being dissatisfied with the said Judgment appealed to this Court and the following are the grounds enumerated in the Memorandum of Appeal:

- "1. The trial High Court Judge misdirected himself in law and fact when he held that the Respondent was not involved in the exercise of distribution of mealie meal under the World Food Programme as alleged in particulars of allegation No. 1 of the petition as such he could not be held liable under Section 81 of the Electoral Act No. 12 of 2006.**
- 2. The trial High Court Judge misdirected himself in law and fact when he held that allegation No. 1 of particulars of contravention under the provision of Section 81 of the Electoral Act No. 12 of 2006. The allegation that some people who were given mealie meal at Lwimena School were saying that MMD was working and they should vote for them was a hearsay evidence and therefore inadmissible as no one was called to confirm this whilst the record will show evidence of P.W.8 - Kawanga Mwakoi was to the effect that she and others received mealie meal at Lwimena School and was told to go and vote for**

MMD which is not hearsay but direct evidence which is admissible.

- 3. The trial High Court Judge misdirected himself in law and fact when he opted to believe R.W.8 more than P.W.5 and yet evidence on record shows clearly that R.W.8 lied to Court and therefore the Court should not have been inclined to believe R.W.8's evidence than P.W.5 whose evidence was direct that she was bribed K2M.00 to defect to MMD.**
- 4. The trial High Court Judge further misdirected himself in law and fact when he stated in relation to allegation 2 of bribery and evidence of P.W.5 in support thereof that, P.W.5's evidence required corroboration, yet this was an independent witness who had no interest of her own to serve or reason to lie, as such the Court ought to have upheld allegation on bribery on uncorroborated evidence of P.W.5.**
- 5. The trial High Court Judge misdirected himself in law and fact when he held that the second allegation in the petition has not been established to a fairly high degree of convincing clarity, yet there are direct evidence from witnesses that support the said allegation.**
- 6. The trial High Court Judge misdirected himself in law and fact when he dismissed allegation No. 4 while the evidence adduced on record established the said allegation to a fairly high degree of convincing clarity as provided by law.**
- 7. The trial High Court Judge misdirected himself in law and fact in the 5th , 6th and 7th allegations, when he held that the evidence P.W.12 Muteto Muteto and P.W.13 Jack Mulenga relate only to the then Presidential candidate Mr. Michael Sata and not the Petitioner and that the petition is between the Petitioner and the Respondent and not between the PF Presidential candidate and the Respondent.**

- 8. The trial High Court Judge misdirected himself in law and fact when he held that the 8th, 9th and 10th allegations have not been proved to a fairly high degree of convincing clarity whilst there is overwhelming evidence from witnesses who were attacked and confirmed by one of the attackers who was convicted.**
- 9. The trial High Court Judge misdirected himself in law and fact when he dismissed the petition with costs to the Respondent without addressing the issue that this was a Constitutional and public matter and costs ought to have been in the cause.**
- 10. Further and other grounds either law and/or fact as at the hearing of appeal will be deemed necessary to advance.”**

Mr. Eyaa, learned Counsel for the petitioner relied on the Heads of Argument filed herein.

The gist of Mr. Eyaa’s submissions in grounds one and two which are inter-related is that the respondent by virtue of his position as a Member of Parliament and Deputy Minister had influence in overseeing the social and community activities in the Constituency. That the distribution of mealie meal was associated with the government of the day and that the evidence of PW8 who was a recipient of the mealie meal was unchallenged and unshaken. Counsel contended that PW8 confirmed the petitioner’s

testimony that people were saying they were going to vote for the respondent as he had given them food during starvation. That the distribution of mealie meal was widespread in the Constituency and that the timing was bad as it was distributed during the election period which was to the benefit of the respondent. Counsel buttressed his argument with the case of **Matildah Macarius Mutale vs. Sebio Mukuka and Electoral Commission of Zambia**¹ where this Court found that the distribution of fertilizer and maize was a government programme but that the timing was bad. In that case, the respondent was a District Commissioner who took advantage of the government programme to influence the voters.

With regard to the statement which the judge found to be hearsay, Counsel relied on the cases of **Subramaniam vs. Public Prosecutor**² and **Mutambo and 5 Others vs. The People**³. According to Counsel, in both cases it was stated by the Court that:

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible

when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not truth of the statement, but the fact that it was made.”

In support of ground three and four which are interconnected, it was submitted that although the allegations were denied by RW8, the evidence on record showed that PW5's testimony was clear. Counsel argued that RW8 on the other hand was a very unreliable witness whose evidence was discredited and that in fact he lied to the Court. According to Counsel, RW8 in evidence-in-chief told the Court that he was a farmer who could not get K2million and that throughout the campaign period he was at the MMD campaign camp. Counsel pointed out that during cross-examination it was revealed that, RW8 was the MMD District Treasurer and Constituency Development Fund Chairman. That by virtue of his position in the MMD and the Constituency he had the capacity to raise K2million for a bribe. Further, that RW11 who was the MMD Ward Treasurer for Tuuwa Ward confirmed that RW8 was in the respondent's campaign team and that this showed that

RW8 was a liar and an unreliable witness and the trial Court misdirected himself in fact when he stated that he was inclined to believe RW8 rather than PW5.

In the alternative, it was argued that the Court should have merely warned itself of the danger of believing PW5's evidence which was not corroborated. It was contended that as PW5 was the Chairlady for UPND and since UPND did not petition the election results, PW5 had no reason to lie to the Court and that she had no interest to serve. Counsel relied on the case of **Machobane vs. The People**⁸⁸ where it was held that:

“while a conviction on the uncorroborated evidence of an accomplice is competent as a strict matter of law, the danger of such conviction is a rule of practice which has become virtually equivalent to a rule of law, and an accused should not be convicted on the uncorroborated testimony of a witness with a possible interest unless there are some special and compelling grounds.”

Further, that in **Katebe vs. The People**⁹ the magistrate warned himself carefully of the danger of convicting on the uncorroborated evidence of the complainant. However, he

believed the evidence of the prosecutrix and convicted in spite of the absence of corroboration. The Court held that:

- (i) If there are “special and compelling grounds” it is competent to convict on the uncorroborated testimony of a prosecutrix.**
- (ii) Where there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against an accused, and the case is in practice no different from any others in which the conviction depends on the reliability of her evidence as to the identity of the culprit, this is a “special and compelling ground: which would justify a conviction on uncorroborated testimony.”**

Turning to ground five which was argued together with ground ten, it was submitted that PW7’s evidence was direct as he witnessed and found Fostus Muyambanga, the MMD Branch Chairman distributing mealie meal and plain chitenge materials at Simolombe village where there were more than 200 people. That he also found Jimmy Mwalumuko the MMD Branch Chairman at Sitalo distributing mealie meal and chitenge materials. PW7 then went to his own village at Lukowo where he found his young brother Kufekisa Sikwela, the

MMD Branch Chairman distributing mealie meal and chitenge materials.

It was submitted that these pieces of evidence were not rebutted by the Respondent and the Court ought to have accepted the allegations by PW7 which Counsel argued were established to a fairly high degree of convincing clarity.

Further, that PW9 testified that the respondent went to Chief Chumbula's palace with a bale of salaula from which jackets and chitenge materials were distributed to Headmen; that he also received K20,000 and that Chief Chumbula's wife Josephine Kandala was given the rest of the salaula to distribute at Lulang'unyi School. Counsel pointed out that PW11 also testified that he was also given the same items as PW9. It was argued that the evidence of PW9 and PW11 was not rebutted apart from the Respondent testifying that during that period Chief Chumbula was in Mongu which is not in dispute. Counsel submitted that Chief Chumbula, who PW9 and PW11 talked about, was Chief Chumbula who was the elder brother to the present Chief Chumbula. It was

contended that the Respondent deliberately misled the Court into believing that the Chief Chumbula PW9 and PW11 were referring to was Chief Chumbula who was in Mongu during that period yet the witnesses referred to Chief Chumbula who had remained in the village but who had handed over power to his young brother who was by then in Mongu. That in any event, the Petitioner proved that the Respondent bribed PW9 and PW11 with salaula jackets and chitenge materials and cash. Counsel relied on the case of **Michael Mabenga vs. Sikota Wina and Others**⁶ where it was held that satisfactory proof of any one corrupt or illegal or misconduct in an election petition is sufficient to nullify any election. Counsel contended that in the present case, the evidence of PW7, PW9 and PW11 proved acts of corruption, illegal practice and misconduct. Counsel also argued that the trial Judge misdirected himself in fact and law when he held that 'courts determine disputes based on factual issues and not on conjecture as there was nothing in the evidence of PW9 and PW11 to suggest that they meant the Chief's elder brother'.

According to Counsel, the trial Court failed to appreciate that among Chiefdoms there is a saying that 'once a Chief always a Chief'. That although the elder brother to Chief Chumbula had handed over power to his young brother, the subjects continued to address him as a Chief. Counsel pointed out that PW9 stated that Chief Chumbula's wife Josephine Kandala was given the rest of the salaula to distribute at Lulang'unyi School. It was pointed out that RW5 admitted that Josephine Kandala was one of the wives to his elder brother. Counsel submitted that on this ground the appeal should be allowed.

Turning to ground seven, Counsel pointed out that in the Court below the 5th, 6th and 7th allegations were argued jointly. That the respondent and his campaign team influenced voters by making false allegations against the PF Presidential candidate Mr. Michael Sata. That the petitioner told the Court below that they had difficulties in convincing people regarding their stand on homosexuality and that the evidence of PW12 and PW13 was called to prove these allegations. It was contended that the trial

Court failed to address its mind to the petitioner's evidence in relation to the above allegations and how they affected his campaigns and eventually led to him losing the elections. Counsel submitted that the petitioner testified that at every meeting that they held as a party during the campaign period, people would tell them that the respondent and his campaign team had been saying that if they voted for PF all Mbunda speaking people would be sent back to Angola. That the Court below should not have restricted itself to the evidence of PW12 and PW13 but rather on the totality of the evidence and its impact on the campaigns. It was argued that the defaming, lies and false statements against the PF Presidential candidate negatively impacted on the petitioner during his campaign and the eventual voting. In support of this argument Counsel cited **Section 83 (2) of the Act** which provides that:

“any persons 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.”

In his arguments Counsel referred us to the argument advanced on behalf of the appellant in the case of **Simasiku Namakando vs. Eileen Imbwe** where the case of **Alex Cadman Luluilo vs Batule Imenda** was cited in which Judge Munthali said:

“those who think they can find their way to parliament on the platform of lies and calumnies intended to deform the characters of opponents, those who think they can find their way to parliament on the platform of illegal practices of various shades, those who think they can find their way to parliament on the platform of bribery and corruption the message is this; the Courts will not hesitate to show them the door and eject them from parliament.”

Turning to ground eight, it was submitted that the 8th, 9th and 10th allegations were interrelated. Counsel submitted that the Court below agreed that PW6 was attacked and that the petitioner’s vehicle was damaged. That although PW4 stated that no one was apprehended for removing the posters, the petitioner’s evidence that the same were removed by the attackers was not rebutted by the respondent.

Further, that according to PW14, they were all acting under the respondent’s orders. It was submitted that this evidence was

unrebutted as the respondent made a general denial and did not call any witness to rebut this specific answer from PW14. It was pointed out that PW6 also testified that people were fearing to attend their rallies and that as the result of attacks from the MMD, the attendance of their meetings was very poor. Counsel submitted that on the above ground the Court should allow the appeal and nullify the election results in line with Section 82 (1) (a)(b) of the Act which provides that:

No person shall directly or indirectly by oneself or by any other person-

- (a) Make use of or threaten to make use of any force, violence of restraint upon any other person**
- (b) Inflict or threaten to inflict by oneself or by any other person or by any supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person**

In respect of ground nine which relates to costs, it was argued that the petition was not frivolous and that, therefore, each party should have been ordered to bear its own costs. Counsel buttressed his argument by relying on the case of **Michael Chilufya Sata vs. Rupiah Bwezani Banda, Electoral Commission of Zambia and Attorney-General**⁸ where it was

held that parties should not be inhibited to challenge elections of the President by unwarranted condemnation in costs unless the petition is frivolous.

In support of ground ten which was the supplementary ground to ground five, Counsel submitted that the evidence of PW13 was direct and clear that he was given money, a T-shirt at night and that later, he and his wife ate food before going to vote. Counsel submitted that PW13's evidence was that Councillor Namitondo was given five bags of mealie meal to cook nshima for voters before going to vote and PW13 was among those who ate food before going to vote. That the fact that PW13 did not mention the names of other people who were offered food before going to vote did not disqualify his evidence.

Mr. Eyaa urged us to allow this appeal on the basis of all the grounds advanced.

Major Lisita learned Counsel for the respondent relied on the respondent's Heads of Argument.

In response to ground one and ground two, he submitted that the evidence of PW8 confirmed that the programme of

distribution of mealie meal was a WFP/government program which commenced in 2005 and that the District Education Secretary and the headmaster (RW3) who supervised the Programme confirmed this. It was submitted that the mealie meal was food for work. That this was a finding of fact and Counsel relied on the cases of **GDC Hauliers (Z) Limited vs. Trans-Carriers Limited**⁹ and **Marcus Achiume vs. The Attorney-General**¹⁰ where this Court made it clear that it would not lightly interfere in findings of fact made by the trial Court which had the opportunity to see and hear the witnesses and decide on the demeanour of the witnesses before it. Further, that the fact that the respondent was at one time a Member of Parliament and Deputy Minister did not mean that he was party to the said programme. He submitted that the learned trial Judge was justified in distinguishing this case from the case of **Matilda Macarius Mutale**¹. It was contended that the evidence relating to the distribution of mealie meal was restricted to Liumena School which was one polling station in one ward in a Constituency of 8,876 voters. That the fact that the distribution was done at a school designated to be a polling station could not

alter the fact that the food distribution programme was a WFP/government joint programme. Further, that the said distribution could not by any stretch of imagination be said to have influenced the electorate in the entire Constituency of 51 polling stations. That in fact RW3's uncontroverted evidence showed that 97 persons benefited from this distribution compared to the 302 persons who voted at this polling station. Counsel contended that no evidence was led to show whether the 97 persons were all registered voters. Counsel buttressed his argument by relying on the case of **Mubika Mubika vs. Poniso Njeulu**¹¹ where the Supreme Court said:

“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 that 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 into 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.”

That, therefore, the learned Judge correctly directed himself when he held that the majority of voters were not prevented from electing the candidate of their choice.

It was further submitted that the learned Judge could not be faulted in holding that the allegation that some people were saying that MMD was working and that they should vote for the respondent was hearsay and inadmissible. That the Petitioner's reliance on the cases of **Subramaniam vs. Public Prosecutor**² and **Mutambo and Five Others vs. The People**³ would not be of any assistance to him. Referring to the evidence of PW1 and PW8, it was argued that the lower Court could not have assumed that the statements were made, when the witnesses failed to tell the Court who made the statements. That no evidence was called to supplement this evidence and that it, therefore, remained hearsay evidence.

In response to ground three, it was submitted that the arguments under this head were against findings of fact which this Court ought to frown upon as decided authorities are clear on

this point. That it was the evidence of PW5 against that of RW8 and it was up to the trial Judge to decide which of the two to believe and that the trial Judge gave his reasons in the judgment as to why he did not believe the petitioner's witnesses.

Further, that applying the standard in the case of **Mubika Mubika**¹¹ could it be said that the alleged bribe of K2m influenced her to vote for the respondent and that she campaigned for him or that the rest of the electorate were influenced by this alleged bribe? Counsel contended that there was no such evidence. And that the fact the RW8 was MMD District Treasurer and Constituency Development Fund Chairman did not mean that he could raise K2m. That this was a speculative argument.

With regard to ground four, the respondent repeated his arguments in ground two that the lower Court was on firm ground in holding the way it did after evaluating the credibility of the witnesses. Counsel contended that it was not entirely correct to argue that PW5 had no interest of her own to serve as she was

the Chairlady of the UPND in the Constituency and that the UPND equally lost the election.

Turning to ground five which the petitioner tied to ground ten, it was contended that ground ten was dismissed. Further, that this was another argument against a finding of fact and the respondent repeated his earlier arguments on this point, that the trial Court found the respondent's evidence to be credible in comparison to that of PW7.

On the issue of Chief Chumbula and the alleged distribution of jackets, it was submitted that the lower Court was on firm ground in that the petitioner failed to prove the allegation as the Chief referred to in the evidence was on the alleged occasion in Mongu and not in the Constituency. That the finding of the Court was that the demeanour of Chief Chumbula was unquestionable. Further, that it was up to the petitioner to prove with clarity who allegedly hosted the respondent at the alleged gathering rather leave the matter to the Court to speculate as to which Chief his witnesses were referring to. Counsel relied on the case of **Mabenga vs. Sikota Wina and Others**⁶ which Counsel

submitted was amplified in the **Mubika** case. That the argument under this ground cannot be sustained in view of the clear and precise manner in the circumstances that can lead to a nullification of an election of an MP.

Ground six having been abandoned was not addressed by Counsel.

In response to ground seven, it was argued that this ground is also substantially against findings of fact and that the trial Judge aptly explained his reasons for not believing the evidence of PW12 and PW13 and instead found the evidence of RW11 to be credible. That the trial Judge found no evidence of the respondent maligning the Petitioner. That the petitioner is asking this Court to assume on his behalf that the alleged attacks against the PF Presidential candidate Mr. Michael Sata disadvantaged him without proof of such attacks. That the case of **Mubika Mubika**¹¹ could be used to demonstrate how such allegations ought to be proved where this Court said:

“While we uphold this finding by the learned trial Judge in the course of his election campaign, we are at

pains to verify the extent of influence on registered voters in the whole constituency”

And at Page J30 it was stated:

“The evidence, therefore, does not indicate widespread vilification of the Respondent, neither does it indicate that the majority of the registered voters were influenced against the Respondent. In this type of allegation, statistics of registered voters who attended the rallies should have been given to assist the trial court on the extent of influence in the constituency.”

It was contended that no such evidence was led at trial to show how the electorate was influenced, if at all, by these alleged statements.

In response to ground eight, it was submitted that this ground is against findings of fact. That the evidence of PW14 and PW4 does not tally and that the evidence of PW14 to the effect that the respondent sent him to attack PW6 remained uncorroborated. It was pointed out that the alleged attack was investigated by the Zambia Police and the Assistant Superintendent who gave evidence did not disclose who had attacked the petitioner and that no arrests were made as regards

the removal of posters from the campaign vehicles. That the police could not state from which party the youths were from.

Regarding the issue of Sizo band, it was contended that PW6 stated that the band belonged to one Cheelo and not the respondent. That this evidence was unchallenged as acknowledged by the trial Judge in his judgment. It was contended that the petitioner failed to prove his case to the required standard of proof in election petitions.

In response to ground nine, it was contended that the petitioner having failed to prove a single allegation in his petition cannot be awarded costs as his petition was frivolous and that the Court below gave its reasons for granting costs and that is – that the petitioner had lamentably failed to prove his allegations.

Counsel for the respondent did not respond to ground ten as he contended that the same was dismissed by the Court.

It was argued in conclusion that the position of the law is that he who alleges must prove and that the standard of proof was laid down in a number of cases including the cases of **Akashambatwa Mbikusita Lewanika and Others vs.**

Frederick Jacob Titus Chiluba¹²; Michael Mabenga vs. Sikota Wina and Others⁶ and Anderson Kambela Mazoka and Others vs. Levy Patrick Mwanawasa, The Electoral Commission of Zambia and The Attorney-General¹³ where it was held that the issues raised are required to be established to a fairly high degree of convincing clarity. It was contended that the learned trial Judge cannot be faulted in his findings as he applied the law correctly and critically analysed the evidence before him. Counsel contended that, therefore, this appeal must fail and be dismissed with costs to the respondent and the respondent be declared as the duly elected Member of Parliament for Sikongo Constituency.

We have considered the evidence in the Court below, the submissions by Counsel for the parties and the judgment appealed against. We have also considered the respondent's submission in the Court below.

We propose to deal with grounds one and two together as they are obviously connected. These two grounds relate to the 1st allegation in the petition which the petitioner alleged offended

Section 81 of the Act. The trial Judge found as a fact that the respondent was not involved in the distribution of mealie meal. It is clear from the record that the learned trial Judge ousted the 1st allegation on the overwhelming evidence which pointed to the fact that the distribution of mealie meal was an ongoing government/WFP programme. The learned Judge was satisfied and rightly so, that the distribution during the school holidays was food for work. Further, PW8 confirmed that the distribution was done after the recipients had participated in the repair of infrastructure at the school. Under these two grounds it was contended that because the respondent 'was a sitting area Member of Parliament (MP) and Deputy Minister he knew about the distribution of mealie meal. We take judicial notice of the fact that during the campaign period the respondent was no longer holding office of Deputy Minister nor was he an MP. We take the view that mere knowledge about distribution of mealie meal could not place the respondent in an advantaged position to influence the electorate. Without a doubt, the present case is distinguishable from the **Matildah Macarius Mutale**¹ case where the respondent in that case was actively involved in the

distribution of maize and fertilizer and used his position to his advantage. The Court below did not find this to be the situation in this case and we agree. In this case, the Court rightly found that the distribution was not widespread as to affect the outcome of the election. Looking at the evidence, the petitioner did not produce any evidence to show the widespread distribution which he prominently alleged in the 1st allegation of his petition.

In relation to the petitioner and PW8's evidence that some people were saying that MMD was working and they should vote for them, it was submitted that the learned Judge misdirected himself when he stated that this was hearsay evidence. In this connection, this is what the petitioner said in his evidence (quoted from Counsel's submissions):

“At the same time people who were around were saying that the government is working so you people make sure that you vote for MMD then we will continue giving.....”

In addition, the petitioner also lamented that the mealie meal under WFP was being distributed at a school which was designated as a polling station.

According to Counsel, PW8 confirmed the petitioner's evidence when she said:

“Now people were shouting to say we are going to vote for Mundia because he has given us food during our starvation.”

Quite clearly, the learned trial Judge was at pains to conclude who these people were who the petitioner and PW8 referred to. From the petitioner and PW8's evidence, it appears that there were people at Liumena School who were talking and shouting and should a Court base its findings on what people were saying? We do not think so. The cases cited by Mr. Eyaa on this point cannot be of any assistance. At the same time, as has been submitted by Counsel for the respondent, the evidence of distribution of mealie meal was restricted to Liumena School and there was no proof that this distribution at this one school which is among the many schools mentioned in the 1st allegation influenced the electorate in the Constituency. The court below could not make a conclusion based on what the petitioner heard without any evidence laid before him. We take the view, that the

petitioner in these two grounds of appeal is basically attacking findings of fact properly found by the learned trial Judge and we find no reason to disturb the findings of the trial Judge. Ground one and two, therefore, fail.

Turning to ground three and four which challenge the learned Judge's findings in relation to the 2nd allegation in the petition, we note the findings of the court below. The evidence in issue is that of PW5 the UPND Chairlady who alleged that she was given a bribe of K2m by RW8 so that she could leave her party and campaign for the respondent. According to Counsel, RW8 was an unreliable witness because he did not disclose in examination-in-chief that he was the MMD Treasurer and Chairperson of the Constituency Development Fund. To measure a witness' reliability by the answers he gave in examination-in-chief is an unusual way of establishing the reliability of a witness especially that in court, witnesses answer questions as they are asked. We do not agree with Mr. Eyaa's assertion that because RW8 held some positions in the MMD and the Constituency, this made him capable of raising a bribe of K2m. This is mere speculation by Counsel. The learned Judge gave his reasons for disbelieving PW5's evidence

that he could not envisage a situation where RW8 could go to PW5's home in the night while armed when the place was littered with UPND cadres who were camped at her place. We take the view that the learned Judge was entitled to choose which of the two witnesses to believe as he had the opportunity to observe their demeanour.

As to the argument that PW5 was not a witness with an interest to serve as she belonged to a party that did not petition the results, our firm view is that since the trial judge did not believe her evidence this is the more reason why it needed corroboration. Alternatively, it was argued that the learned trial Judge should have warned himself of the danger of accepting uncorroborated evidence. We do not think that this was feasible in view of the fact that the learned Judge did not find any 'special and compelling reasons' to rely on the uncorroborated testimony of PW5 - this is the principle in **Machobane**⁸⁸. Again, the two grounds attack findings of fact and for reasons given, ground three and four must fail.

We now turn to ground five and ground ten which are tied together which still focus on the 2nd allegation in the petition. It is alleged that the learned Judge misdirected himself by holding that the allegation was not established to a fairly high degree of convincing clarity. Mr. Eyaa alluded to the evidence of PW7 whom he described as a direct witness. We agree with Major Lisita that this is another ground against findings of fact. The Judge considered the evidence of PW7 against that of the respondent and RW4 and he found the respondent and RW4 to be credible witnesses. Counsel pointed out that the petitioner called eight witnesses in respect of this allegation. We must mention that it is not the number of witnesses that prove a case. The trial judge who had the opportunity to observe the witnesses decided which evidence to accept taking into account the demeanour of the witnesses on either side.

In relation to the evidence of PW9 and PW11, it was submitted that the respondent deliberately misled the court into believing that the Chief PW9 and PW11 were talking about was Chief Chumbula who was in Mongu. This is a rather strange argument because the petitioner had the opportunity to clarify

issues before the Court below. We totally agree with Major Lisita that it was up to the petitioner to prove which Chief Chumbula his witnesses were referring to. Counsel argued that there is a saying that 'once a Chief always a Chief' - if indeed this is so; this should have been put across clearly before the trial Judge instead of the petitioner relying on assumptions. In fact from Counsel's submissions, we get the impression that he is referring to two Chiefs and his submission is short of giving evidence from the Bar. As we have stated, it was incumbent upon the petitioner to bring out clear evidence before Court. As the learned Judge found, there was nothing from PW9 and PW11 that suggested that they were referring to Chief Chumbula's elder brother. Further, PW11's evidence was that out of 26 headmen only five attended the alleged meeting and we do not agree that these could have affected the outcome of the election. And in fact, the PF won at Lilang'unyi Polling Station thereby showing that the alleged distribution of salaula had no impact on the electorate. We do not agree that the evidence of PW7, PW9 and PW11 proved acts of corruption, illegal practice and misconduct in terms of Section 81

of the Act. And we agree with the trial Judge that courts determine disputes on factual issues not on conjecture.

The issue of PW13 having been bribed by the respondent was adequately dealt with by the learned trial Judge who found that it was inconceivable for the respondent to bribe his own Councillor and party members. These were members of one party and we find nothing wrong with them eating nshima together on voting day before or after voting. We do not agree, as suggested by Counsel, that PW13 and others were given nshima to influence them to vote for the respondent and MMD. Going by PW13's evidence, it was not clear who the other people were who ate the nshima. The learned Judge found that PW13 was an unreliable witness and we find no basis to disturb his findings of fact.

Ground five and ten, therefore, fail.

The petitioner abandoned ground six.

We will now deal with ground seven which relates to the 5th, 6th and 7th allegations in the petition. We agree that a parliamentary candidate can be affected by the allegations leveled against the Presidential candidate of his party and the

case of **Mateo Mwaba vs. Anthony Kunda Kasolo**¹⁸⁸ is quite instructive on this issue. However, in this case, the evidence in support of the 5th, 6th and 7th allegation came from PW12 and PW13 whose credibility was questionable as stated by the trial Judge. In our view, this makes it difficult for any reasonable tribunal to rely on their evidence. Counsel for the petitioner submitted that the learned trial Judge should have looked at the totality of the evidence on this ground and its negative impact on the petitioner during his campaign and not only at the evidence of PW12 and PW13. We have to agree with Counsel for the respondent that it was for the petitioner to show how the electorate was influenced by these utterances allegedly made by the respondent and his campaign team. In our view, it is not enough for the petitioner to say 'people were saying', what was required was for him to provide the proof of his allegations and the extent of influence these allegations had on the electorate. Counsel for example pointed out that the petitioner said that some individuals who had been to town would say that the issue was being discussed on the television. Was this sufficient? It is trite that he who alleges must prove and in cases of this nature

the standard of proof is higher than on a balance of probabilities. The trial Judge explained his reasons for not believing the evidence of PW12 and PW13 and we find that we cannot interfere with findings of fact. Looking at the evidence before the Court below, we find that the learned trial Judge was on firm ground as there was insufficient evidence to warrant a nullification of the election. Ground seven also fails.

We now turn to ground eight which relates to the 8th, 9th and 10th allegation in the petition. Again, this is a ground challenging findings of fact by the learned trial Judge. That PW6 was attacked was not disputed but the learned trial Judge could not find any evidence to connect the respondent to the attacks on the PF campaign team. The evidence of PW14 could not be considered in isolation and the trial Judge found that according to PW4 none of the convicts mentioned to the police that it was the respondent who sent them to attack the petitioner and his team or that he promised them K11m. After considering the evidence, he found that although campaign posters were removed from the campaign vehicles, the culprits were not identified and PW4 confirmed this. Indeed, simply because the attackers came from

the direction where the respondent was having a meeting cannot lead to an inference that he was responsible for the attack. We are of the view that the learned judge was on firm ground and we find no basis to interfere with the findings of fact. Ground eight, therefore, fails.

With regard to ground nine which relates to the question of costs awarded against the petitioner in the lower Court, we have considered the arguments and authority cited. We take the view that in matters of this nature parties should not be inhibited by issues of costs. Ground nine succeeds.

In conclusion, it is clear that in this appeal, the grounds of appeal attacked findings of fact and in the case of **Simasiku Namakando** we reaffirmed what we said in the case of **GDC Hauliers Zambia Limited vs. Trans-Carrier Limited**⁹ that findings of credibility are not to be interfered with by an appellate court which did not see and hear the witnesses at first hand.

In the circumstances, we affirm the judgment of the learned trial Judge and dismiss the appeal. We declare that Ndalamei

Mundia was duly elected as Member of Parliament for the Sikongo Constituency.

We order that each party bears his own costs.

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M.S. MWANAMWAMBWA
SUPREME COURT JUDGE

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G.S. PHIRI
SUPREME COURT JUDGE

.....
M. E. WANKI
SUPREME COURT JUDGE

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

.....
P. MUSONDA
SUPREME COURT JUDGE