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IN THE SUBORDINATE COURT OF THE FIRST CLASS 2021/KAP/LGET/011
AT THE KAPUTA REGISTRY
HOLDEN AT MPOROKOSO
(Election Jurisdiction)

IN THE MATTER OF: SECTION 81, 87, 99 (a), AND 100 (1) OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: RULES 8 (1) (c), AND 9 OF THE LOCAL GOVERNMENT
ELECTIONS TRIBUNAL RULES, STATUTORY
INSTRUMENT NUMBER 60 OF 2016

IN THE MATTER OF: THE ELECTION OF COUNCILLOR FOR THE
MWAMBESHI WARD IN THE CHIMBAMILONGA
CONSTITUENCY IN THE NORTHERN PROVINCE OF
THE REPUBLIC OF ZAMBIA HELD ON THE 12TH
AUGUST, 2021.

IN THE MATTER OF: AN ELECTION BY MUBANGA SHEPARD

BETWEEN:

MUBANGA SHEPARD

PETITIONER

AND

CHISENGA KELVIN

RESPONDENT

Coram: Before the Honourables M. Mulenga, F. Chibwe and I. Kakanda-Chuula

For the Petitioners: In Person

For the Respondent: Mr. B. Mwelwa of Linus E. Eyaa and Partners

JUDGMENT

Chibwe F; delivered the judgment of the Tribunal

CASES REFERRED TO

1. Christopher Kalenge v Annie Munshya, Electoral Commission of Zambia And
Attorney General 2011/HK/EP/03

2. **Mabenga v Wina and others (2003) ZR 110**
3. **Akashambatwa Lewanika and others v Chiluba (1998) Z.R. 49**
4. **Anderson Kambela Mazoka and others Mwanawasa and others (2005) Z.R. 138**
5. **Kaira v Namugala and others – SCZ judgment No. 131/2002**
6. **Brigadier General Kenneth Kankinza and others v Sara Sayifwanda and another-2011/HP/EP/54**
7. **Col (Rtd) Dr. Besigye v EC & Museveni Yoweri Kaguta-Election Petition No.1 of 2006**
8. **Nabukeera Hussein Hanifa v Kibule Ronald and another (2011) UGHC 72**
9. **Kampafwile v The People (1972) Z.R. 242 (H.C.)**
10. **Machobane v The People (1972) ZR 101 CA.**
11. **Khalid Mohamed v The Attorney-General (1982) Z.R. 49 (S.C.)**
12. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)**
13. **Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 200**
14. **Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13/2017**
15. **Mubita Mwangala v Inonge Mutukwa Wina, SCZ Appeal No. 80 of 2007**
16. **Josephat Mlewa v. Eric Wightman (1995/1997) Z.R. 106**
17. **Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba The Attorney General, Selected Judgment No. 51 of 2018**
18. **Abiud Kawangu v Elijah Muchima, Appeal No. 8 of 2017**
19. **Margaret Mwanakatwe v Charlotte Scott, Selected Judgment No. 50 of 2018,**
20. **Mbololwa Subulwa v Kaliye Mandandi Selected Judgment No. 25 of 2018**
21. **Chrispin Siingwa v Stanely Kakubo, CCZ Appeal No.7 of 2017**

OTHER WORKS REFERRED TO

Phipson on Evidence, seventeenth edition (London, Thomson Reuters (Legal) Limited, 2010) paragraph 6-06 at page 151

1.0 INTRODUCTION

1.1 One of the enduring characteristics of a modern-day democratic society is the periodic holding of free and fair elections. General Elections represents a moment of great historical significance and standing in the life of a nation. Through general elections, the soul of the nation is preserved. This judgment relates to a Local Government Election Petition seeking to impugn the election of the Councillor for the Mwambeshi Ward in the Chimbamilonga Constituency in the Northern Province of the Republic of Zambia.

1.2 BACKGROUND

1.3 On 12th August 2021, just like the rest of the people of Zambia, the people of Mwambeshi Ward in the Chimbamilonga Constituency in the Northern Province of the Republic of Zambia went to the polls to elect their Councillor. The Petitioner stood on the United Party for National Development ticket (the UPND) while the Respondent stood on the Patriotic Front (the PF) ticket. On 14th August 2021, the Returning Officer declared the Respondent as duly elected Councillor for Mwambeshi Ward.

1.4 Dissatisfied with the election outcome referred to in 1.3 above, the Petitioner on 26th August 2021, filed a Petition in the Subordinate Court of the First Class in the Kaputa District seeking to impugn the election of the Respondent as Councillor for the Mwambeshi Ward. The Petition was brought pursuant to the provisions of sections 81, 87, 99 (a) and 100 (1) of the Electoral Process Act No. 35 of 2016 and Rules 8 (1) (c) and 9 of the Local Government Elections Tribunal Rules of 2016. The Petition was heard on the 15th September, 2021.

1.5 GROUND'S UPON THE PETITION WAS PREMISED

1.6 The Petitioner anchored his petition on four (4) allegations structured as follows:

- i. that on the polling day which was the 12th August, 2021 in Mwambeshi ward, the PF members were buying voter's card from voters as an inducement for them to vote for the Respondent;
- ii. that the night before the elections, the presiding officers at various polling stations were giving money to the electorates under the guise of social cash transfer and they were telling the people that if they do not vote for the Patriotic Front and the Respondent, they will not be given more money as there were cameras in the voting booths to monitor all those who received money, and make sure that they vote for the Respondent;
- iii. that on the poll day in Mwambeshi Ward, PF members were telling voter that, if they don't vote for the Respondent, they will be removed from the Social Cash Transfer alias QUAC Program; and
- iv. that PF were bribing voters on the poll day in Mwambeshi Ward by giving them food as an inducement to vote for the Respondent

1.7 ANALYSIS OF THE EVIDENCE PRESENTED BEFORE THE TRIBUNAL

1.8 Besides himself, the Petitioner called two more witnesses in support of his case. With respect to the Petitioner's testimony whom we shall refer to as PW1, he told the Tribunal that he had no evidence to prove all his allegations, but his witnesses would come and prove all his allegations contained in his Petition. We will deal with the allegations contained in the Petition adduced at trial *ad seriatim*.

- i. **That on the polling day which was the 12th August, 2021 in Mwambeshi ward, the PF members were buying voter's card from voters as an inducement for them to vote for the Respondent.**

- 1.9 With respect to the first allegation, the Petitioner whom we shall also refer to as PW1 began his testimony by saying that the UPND District Ward Chairman for Mwambeshi Ward approached him and other UPND team members and asked why they had lost the election in the Mwambeshi Ward despite the fact that all signs were pointing towards victory in their favour. The Petitioner testified further that the said Ward Chairman asked what the Petitioner was doing in the run-up to the elections, to which he replied that he and his team members were campaigning according to Electoral Commission of Zambia (ECZ) rules and Code of Conduct. He told the Tribunal that the Ward Chairman then told him that he would find out what transpired for them to lose. From narrating what his party superior (the District Ward Chairman) told him concerning the elections they lost, PW1 went straight into testifying that they met a PF official who was carrying a book where names of voters in groups of ten individuals were written down and that they grabbed it from him. He further said that the Respondent was giving out money to the voters as an inducement to vote for him.
- 1.10 PW2 was Wesley Musonda, his testimony was that he met a PF official who was a Branch Chairman carrying a book where he had written names of voters. He further said that he met PF officials carrying National Registration Cards (NRCs) and voters' cards. He further stated that he met the Respondent carrying documents where he was writing names of foot soldiers and that these foot soldiers receiving money from the Respondent. He further testified that PF officials were giving out money under the guise of Social Cash Transfer under.
- 1.11 PW3 was Ireen Kabwe of Shikulumumbi village. She began her testimony by lamenting that the General elections of 12th August 2021, were not free and fair. She testified that there was violence and mentioned of one case in Mwambeshi Ward where a person was beaten albeit, she did not elaborate or mention the person who was beaten. Nonetheless, we allowed her as there was no objection from the

Respondent's Counsel. She testified further that she joined a local community club called Sansamukeni Women Club in line with what President Lungu had recommended. She testified that her club was registered to be receiving groceries, but she was told that she must join Patriotic Front (PF) in order to be a beneficiary. Asked if she was unhappy because she did not benefit from the goods distributed, she answered in the affirmative. Asked if she saw anyone buying voters cards, she answered that everyone knows that buying of voters' card happened. With respect to the first allegation PW2's testimony that PF members were buying voter's card from voters as an inducement for them to vote for the Respondent was uncoordinated.

1.12 Next, we will deal with the second allegation contained in the Petitioner's petition namely;

ii. **that the night before the elections, the presiding officers at various polling stations were giving money to the electorates under the guise of social cash transfer and they were telling the people that if they do not vote for the Patriotic Front and the Respondent, they will not be given more money as there were cameras in the voting booths to monitor all those who received money, and make sure that they vote for the Respondent**

1.13 With respect to the allegation that that the night before the elections, the Presiding Officers at various polling stations were giving money to the electorates under the guise of social cash transfer. Petitioner and her witnesses stated that the Respondent and PF members were telling the people that if they do not vote for the Patriotic Front and the Respondent, they will not be given more money as there were cameras in the voting booths to monitor all those who received money and did not vote for the PF and the Respondent. We have already mentioned that PW1 largely relied on the testimony of PW2 and PW3 in these proceedings. In this regard, PW2 Ireen Kabwe told the Tribunal. She told the Tribunal that they were

told that as they vote, they must ensure that they vote for PF and if they will not the people in the Social Cash Transfer Committee (also called QUAC) will know who has not voted for PF because they had installed cameras in the polling booth. She testified that she was removed from the list of beneficiaries under QUAC program because she had joined UPND. In cross examination, she was asked if at all she knew who was responsible for Social Cash Transfer, she responded that it was the PF. Asked further which presiding officers at the polling day were giving out money, she responded that the Respondent was one of them. Asked which persons received the money she replied that many people were receiving money. Asked further if at all she saw any cameras installed in the polling booth, she replied that she did not see them but that there were people with phones as they were going to vote.

1.14 We will now proceed to address the third allegation in the Petition and the evidence submitted at trial.

iii. **that on the poll day in Mwambeshi Ward, PF members were telling voter that, if they don't vote for the Respondent, they will be removed from the Social Cash Transfer alias QUAC Program;**

1.15 PW, P2 and PW3 all testified that that on the poll day in Mwambeshi Ward, PF members were telling voters that, if they don't vote for the Respondent, they will be removed from the Social Cash Transfer alias QUAC Program. They accused a Ms. Ng'andu as the person who was giving out money under Social Cash Transfer on the polling day. PW2 testified that the Social Cash Transfer program Committee members were giving out fertiliser to electorates and urging them to vote for the PF and the Respondent. Asked when the fertiliser was being distributed, she replied that it was sometime in October 2020 last year. As regards, distribution of fertiliser, PW2 conceded that the program has continued even today under the UPND.

iv. that PF were bribing voters on the poll day in Mwambeshi Ward by giving them food as an inducement to vote for the Respondent.

1.16 The Petitioner PW1 and his two witnesses (PW2 and PW3) both testified that PF officials were bribing voters on the poll day in Mwambeshi Ward by giving them food as an inducement to vote for the Respondent. In this regard, PW2 testified that PF slaughtered a goat and cooked nshima and were telling people that they should come back after voting to eat nshima. At this point, we wish to state that the allegation of bribing voters on the poll day in Mwambeshi Ward as an inducement to vote for the Respondent and PF solely centred on cooking nshima and the slaughtering of a goat. Asked in cross examination who slaughtered the goat, PW3 said it was the PF. Asked if she was not happy that she did not partake of the food, (the nshima with goat meat), she replied in the affirmative. Asked where the slaughtering of the goat took place, she replied that it happened at the house of Vero's mother. Asked if she would call the said Vero's mother to come and confirm the allegations, she replied that they are settled at their place and can be asked. PW3 was further asked if at all she knew Ms. Ng'andu, she replied that she did and that is the person who was paying Social Cash Transfer. Pressed further if at all the said Ms. Ng'andu was one of the presiding officers, she answered in the negative.

1.17 RESPONDENT'S TESTIMONY

1.18 The Respondent (RW1)'s testimony was quite brief and to the point. He began by stating that he resides in Kabwata Village in Nsama District and that he is a farmer and Councillor for Mwambeshi Ward in the Chimbamilonga Constituency in the Northern Province. He testified that the allegation that he was bribing people during rallies was false because there were no rallies allowed as they were cancelled by ECZ and he employed door to door campaign. He denied that there

was any buying of voters' cards in Mwambeshi Ward. He stated that if it was indeed true that the issue of buying voters cards happened, they would have taken them to the police. He reiterated that this did not happen. It was his testimony that it was employees from social welfare department who were giving out Social Cash Transfer and not the PF party. RW1 further disputed that there was anything like giving of food to electorates to vote for them. He maintained that this did not happen. On the issue of giving out food, Respondent testified that the time they were campaigning they had members who were eating food at commanding centres. And he testified that the people who were eating from the commanding centres came in August and all went back to their respective homes. Under cross examination, he maintained that there was no buying of voter's cards. He further maintained that he did not give out fertiliser to any one during the campaigns nor did he threaten anyone that they would be removed from the Social Cash Transfer Program if they did not vote for him. He further stated that he was not a member of the QUAC committee to have authority to remove anyone from that program.

- 1.19 Respondent called one witness Steven Musonda whom we shall refer to as RW2. He testified that he lives in Kabawata Village in Nsama District. He began by stating that as PF, they recruited foot soldiers in groups of 10 people. He further testified that they had commanding centres and went on to testify that the mealie-meal was used to cook nshima for foot soldiers. He further added that when foot soldiers came back from where they were campaigning, they would come to the commanding centres to eat. He stated that on 11th of August 2021, there were no commanding centre activities as the same were closed on 10th August 2021. On Social Cash Transfer alias QUAC Program, he testified that in Mwambeshi Ward there are two groups one under Mulenga and another under Freddie. He stated that he recalls that the two Committees stopped paying Social Cash Transfer on 8th August 2021. He also testified that the issue of buying voters card never happened and is false.

1.20 He also testified that he was a member of the Conflict Management Committee a body mandated by Electoral Commission of Zambia as a de-confliction channel to ensure that there is no violence and such related vices. He testified that in terms of composition of the said Conflict Management Committee, it comprised Father Musuma from the Catholic Church, Kasanga Victoria District who is the Planning Officer for Nsama District Council, a Mr. Gospel kafuna as Vice Chairperson, himself (Musonda Steven RW2) representing PF, Katele Steward District Chairman representing the UPND, Songwe Lenny as Senior Citizen, Malumbi Tennent representing MMD, and a member of FDD. He testified that they did not receive any report of violence from UPND or PF, nor did they receive any allegation of buying voters cards.

1.21 He testified that Social Cash Transfer was a government program and the Pay Point Manager ("the PPM") at Mutumpikeni Primary school was Ms. Ng'andu. He testified that Ms. Ng'andu was neither the Presiding Officer for the 12th August, 2021 elections nor was she found paying anyone the said Social Cash Transfer a night before elections as alleged in the Petitioner' petition. He testified that Social Cash Transfer Committee members stopped paying on 8th August, 2021.

2.0 FINDINGS OF FACTS

2.1 The Tribunal observed that when PW1 was asked in cross examination if he witnessed the voter buying himself, PW1 (the Petitioner) responded that he did not see it with his own eyes and that he would call witnesses to testify on his behalf to that effect. PW1 was further asked if he had brought the book where PF official allegedly wrote down the names of voters they had paid money, Petitioner responded that he did not bring it with him and it is not part of the record. Petitioner was asked if he was one of them who sold a voter's card, he replied in the negative. Asked further if at all he saw the PF official buying voters' card, or

whether he was just told by someone, PW1 replied that he did not see a PF official with his own eyes but was only told by a PF Councillor. At this point, Counsel for the Respondent asked PW1 if he was calling this PF official to testify on his behalf, to which he responded that he can do so if the PF accepts. Asked why he did not tell the Tribunal that he got this information from the PF Councillor, PW1 replied that he did not know the functions of PF foot soldiers. Pressed further whether he was in fact confirming that only the PF can explain the role of foot soldiers, he responded in the affirmative. By and large, the testimony of PW1 was hearsay and it was heavily discredited in cross examination.

- 2.2 Upon a careful consideration of the evidence presented at trial, the Tribunal observed that PW3's testimony was extremely unreliable. She was evasive when answering questions in cross examination, kept on avoiding eye contact. When pressed further in cross examination, she was extremely rude and at times refused to answer questions. Additionally, her testimony was uncoordinated and unsubstantiated. For example, she testified that there were PF officials who were giving out money under the Social Cash Transfer program on the polling day, and yet under cross examination she conceded that Social Cash Transfer Program is a Government program. She accused RW2 Steven Musonda as one of the architects behind the illegal activities of giving out money together with the Respondent. Yet the evidence presented at trial pointed to the fact that the Pay Point Manager (PPM) at Mutumpikeni Primary school was Ms. Ng'andu who was not one of the polling agents during the 12th August elections. When pressed further if at all she saw any cameras installed in the polling booth, she replied that most voters and PF officials had phones capable of taking pictures. She could not point out any person who was taking pictures in the polling booth apart from making bare allegations that this was happening.

2.3 With respect to the Petitioner's testimony, he told the Tribunal that he had not witnessed any of the allegations contained in his Petition and that he was relying on the witnesses he would be calling to testify on his behalf. One of those witnesses, as the Tribunal has observed was PW2 Ireen Kabwe, whom we found to be extremely unreliable. Petitioner also testified that what the PF official narrated to him about vote buying, is exactly what happened. The first allegation tabulated above, was severely discredited. The evidence submitted on the allegation that on the polling day which was the 12th August, 2021, the PF members in Mwambeshi were buying voter's card from voters as an inducement for them to vote for the Respondent was, in our view, not proved to the required standard of a fairly high degree of convincing clarity.

2.4 On PW3 (Ireen Kabwe)'s testimony, the Tribunal finds that her demeanour was prevaricating. In the case of *Kampafwile v The People* (1972) Z.R. 242 (H.C.), relying on the case of *Machobane v The People* (1972) ZR 101 CA., the Court held as follows:

Demeanour is one of the factors which should be taken into account when deciding whether a witness is worthy of credit (others being discrepancies in the witness's evidence, a previous inconsistent statement, bad character, etc.) and an adverse finding as to credit is in turn one of the consideration in the decision whether to reject the evidence of the witness. But demeanour is as much an item of evidence as anything else observed by the court from which inferences or conclusions are drawn.

2.5 On the allegations being heavily discredited, we recall to mind the lasting sentiments of Professor John Henry Wigmore, who postulated that cross-examination is "beyond any doubt the greatest legal engine ever invented for the

discovery of truth¹." We also find as a fact that the evidence against the allegation that the PF members were buying voter's card from voters as an inducement for them to vote for the respondent on the polling day in Mwambeshi ward, unsubstantiated by any evidence. Suffice to state that by and large, this allegation borders on malpractice and corrupt practices or more broadly, illegal activities. It is imperative to note that the authoritative statement on what constitutes corrupt or illegal practices is provided for under section 81 of the Electoral Process Act No. 35 of 2016. Sections 81, on corrupt practice are instructive and enacts as follows:

(1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly –

(a) give, lend, procure, offer, promise or agree to give, lend, procure or offer, any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election;

(b) give, lend or procure, offer, promise or agree to give, lend, procure, offer or promise, any money to a voter or for the benefit of a voter or to any other person or on behalf of that person on behalf of any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;

(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;

¹ The second (1923) and third (1940) editions of the Treatise carried the title: A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada

(d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure, the return of any candidate at any election or the vote of any voter at any election;

(e) advance or pay or cause to be advanced or paid any money to or for the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or partially expended in bribery at any election;

(f) before or during any election, receive or contract for any money or loan for oneself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any election;

(g) after any election, receive any money on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any election; or

(h) convey or transfer or be concerned with the conveyance or transfer of any property, or pay or be concerned with the payment of any money, to any person for the purpose of enabling that person to be registered as a voter, thereby to influence that person's vote at any future election, or pay to or be concerned with the payment of any money on account of any voter for the purpose of inducing that person to vote or refrain from voting.

(2) A person who contravenes any provision of subsection (1) commits an offence.

(3) Nothing in this Act shall be construed as applying to any money paid or agreed to be paid for, or on account of, any expenditure bona fide and lawfully incurred in respect of the conduct or management of an election.

2.6 ANALYSIS OF THE LAW

2.7 The Petitioner has moved this Tribunal to nullify the election of the Respondent as Mwambeshi Ward Councillor based on the allegations discussed above. From the onset, we wish to announce that the grounds upon which the election of a candidate as a Mayor, Council Chairperson or Councillor may be nullified by a Tribunal are set out in section 97 (2) paragraphs (a), (b) and (c) of the Electoral Process Act No. 35 of 2016. Section 97 enacts as follows:

“(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election -

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate’s election agent or polling agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal 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; or

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

- 2.8 We also wish to state that we have reminded ourselves that the burden of proof as can be seen from section 97 quoted above like any other civil matter, is on the Petitioner. In terms of our jurisdiction, the *locus classicus* on the subject of burden of proof is to be found in the sentiments of the Supreme Court via Ngulube DCJ; as he then was, in the case of *Khalid Mohamed v The Attorney-General* (1982) Z.R. 49 (S.C.) when he declared as follows:

An unqualified proposition that a plaintiff should succeed automatically whenever 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 proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need defence.

- 2.9 The sentiments expressed above were affirmed and refined in the case of *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 172 (S.C.) where Deputy Chief Justice Ngulube, as he then was, had occasion once again to pronounce himself with fluorescent ability that:

"It appears that the appellant is of the view that the burden of proof lay upon the respondent and it is on this that I would like to say a word. I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the

opponent's case. As we said in *Khalid Mohamed v The Attorney-General* (1982) Z.R. 49172":

"Quite clearly a defendant in such circumstances would not even need a defence".

2.10 We reiterate that the burden of proof in this matter like any other civil matter, rests squarely on the Petitioner. It is also quite clear to us that in order to successfully impugn or annul the election of the Respondent as Ward Councillor for Mwambeshi Ward, the Petitioner must satisfy the Tribunal by producing cogent evidence in accordance with the section 97 set out above. A careful reading of the provisions of section 97 (2) (a) of the Act reveals that the election of a candidate as, inter alia, Mayor, Council Chairperson or Councillor can only be nullified if the person challenging the election of the candidate proves to the satisfaction of the Court or Tribunal that the candidate in question personally committed a corrupt practice or illegal practice or other misconduct in relation to the election or that the corrupt practice or illegal practice or misconduct was committed by another person with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent.

2.11 In addition to this, where it is proved that a corrupt practice or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or that of the candidate's election or polling agent, the Petitioner must further prove that as a result of that corrupt or illegal practice or misconduct, the majority of the voters in the constituency were or may have been prevented from electing the candidate in that constituency whom they preferred. In other words, it is not sufficient for a Petitioner to prove only that a candidate committed a corrupt practice or illegal practice or engaged in other misconduct in relation to the election without proof that the corrupt practice or illegal practice or misconduct was widespread and prevented or may have

prevented the majority of the voters in the constituency from electing a candidate of their choice. On this point, legal authorities are galore.

- 2.12 To this end, in the case of *Mubika Mubika v Poniso Njeulu*, SCZ Appeal No. 114 of 2007 which the Constitutional Court cited with approval in *Jonathan Kapaipi v Newton Samakayi*, CCZ Appeal No. 13/2017, the Supreme Court 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 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.

- 2.13 Further, in *Mubita Mwangala v Inonge Mutukwa Wina*, SCZ Appeal No. 80 of 2007, the Supreme Court said the following:

In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct, it must be shown that the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred..."

- 2.14 In the earlier case of *Josephat Mlewa v. Eric Wightman* (1995/1997) Z.R. 106 the Supreme Court held that:

"The Court must be satisfied about the scale or type of wrong doing. By scale, it is meant widespread as to influence the majority of voters in the constituency not to vote for their preferred candidate." We further said that "in addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice."

2.15 In *Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General*, Selected Judgment No. 51 of 2018, the Constitutional Court stated that:

"In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a) there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent...

2.16 The Constitutional Court further made a pronouncement on the majority requirement in the case of *Abiud Kawangu v Elijah Muchima*, Appeal No. 8 of 2017 that an election may be annulled where a petitioner shows that the alleged corrupt or illegal practice or misconduct was committed in connection with the election by the Respondent or his election or polling agent and that as a result, the majority of voters in that constituency were or may have been prevented from electing a candidate of their choice. Further, in *Margaret Mwanakatwe v Charlotte Scott*, Selected Judgment No. 50 of 2018, the Court said the 1st

Respondent did not adduce any evidence to prove that the prohibited act was widespread and affected the result of the election by preventing the majority of the electorate from electing their preferred candidate and so rendered the election a nullity. The above authorities aptly demonstrate the import of the majority provision under section 97 (2) (a) of the Act. Taking a glance at the interesting sentiments of the Supreme Court in the case of *Akashambatwa Lewanika and others v Chiluba* (1998) Z.R. 49 the Supreme Court stated that "parliamentary election petitions are required to be proven to a standard higher than a mere balance of probabilities". Further, in *Mabenga v Wina and others* (2003) ZR 110 *others* the Supreme Court said that

"an election petition is like any other civil claim that depends on the pleadings and that 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".

22. Further in *Anderson Kambela Mazoka and others Mwanawasa and others* (2005) Z.R. 138 the Supreme Court stated as follows:

"... for the petitioners to succeed..., it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues 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."

2.17 The same principles adumbrated above have been followed in other commonwealth jurisdictions such as Uganda where the Supreme Court in the Presidential election petition No. 1 of 2006, between *Col (Rtd) Dr. Besigye v EC & Museveni Yoweri Kaguta of 2006* made the following observations that the burden of proof: The Supreme Court of Uganda also said that:

the burden of proof lies on the petitioner to satisfy the court on balance of probabilities that the non-compliance under the law and principles affected the result of the election in substantial manner; that the standard of proof is higher than in an ordinary civil case and is similar to standard of proof required to establish fraud, but it is not as high as in criminal cases where proof beyond reasonable doubt is required.

2.18 What emerges from the cases cited above is that in an adversarial system of adjudication such as ours, the concept of burden of proof is lies at the heart of our legal system. It is safe to state that the concept of burden of proof is the foundation upon which the entire superstructure of our legal system is anchored. We reiterate that on both principle and on authority, we are convinced that the allegations made in the petition if proved, must affect the results of the election in a substantial manner. Without a bearing on the result, the election cannot be avoided. It is interesting to glance again at the Ugandan case of *Nabukeera Hussein Hanifa v Kibule Ronald and another* where the court in that country made the following observations:

that in an election petition, just like in the election itself, each party is set out to win. Therefore, the court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection. It was also stated that "it would be difficult indeed for a court to believe that supporters of one candidate behaved in a saintly manner, while

those of the other candidate were all servants of the devil; further that “in election contests of this nature, witnesses most of them motivated by the desire to score victory against their opponents deliberating resort to peddling falsehoods. What was a hill is magnified into a mountain”; and that “.....The evidence of both parties is, in its entirety subjective and cannot be relied upon without testing its authenticity from a neutral and independent source”.

- 2.19 Again, it was said in the election petition of **Brigadier General Kenneth Kankinza and others v Sara Sayifwanda and another** that the standard of proof is higher than the ordinary balance of probabilities because the subject matter of the petition is of critical importance to the welfare of the people and their democratic governance. From the legal authorities discussed so far, it stands to reason that a petitioner has a duty to adduce credible or cogent evidence to prove his allegations on the requisite standard of proof; and that the evidence must be free from contradictions and truthful, so as to convince a reasonable tribunal to give judgment in the party’s favour.

2.20 OUR DECISION

- 2.21 Having guided ourselves in terms of the law articulated above, it now remains to be considered whether the evidence presented at trial by the Petitioner meets the threshold criteria set out in section 97 of the Electoral Process Act in order to avoid the election of the Respondent as Councillor for Mwambeshi Ward in the Chimbamilonga Constituency in the Northern Province of the Republic of Zambia.
- 2.22 We shall, at this point revert to allegations presented in the Petition and deal with each one of them in the order they were presented. The first allegation was that on the polling day which was the 12th August, 2021 PF members in Mwambeshi ward, were buying voter’s card from voters as an inducement for them to vote for the

Respondent. It is important to recall that the Petitioner told the Tribunal that he did not witness the buying of voter's cards himself but that he would call witnesses to prove all the allegations on his behalf. As a Tribunal, we were taken aback that as a principal witness and as the aggrieved person, the Petitioner came to the Tribunal only to say that he heard from people that corrupt and illegal activities happened during the elections in issue. What was even more puzzling was the fact that the Petitioner, in cross examination, admitted that he did not see or even witness any of the activities he alleged in his Petition. He is the one who moved the Tribunal by filing the Petition before us, yet he approached the Tribunal as a messenger sent to report that there will be witnesses coming to prove the case on his behalf. In a nutshell, the Petitioner rested the fate of his case squarely on his witnesses.

- 2.23 The Tribunal, therefore, concludes that the testimony of the Petitioner proved nothing at trial. At best, his testimony was merely that some people told him that there were corrupt and illegal activities happening during the election. His testimony was quite dramatic in that he told the Tribunal that their District Ward approached him and asked why they had lost the elections despite the fact that all signs were pointing to victory in their favour. He did not elaborate what those signs were. He further said that the District Ward Chairman said that he would find out why they lost the elections. His testimony was more of a narration of the post-mortem or autopsy that he and his party members conducted after losing the elections. He was totally unreliable. From the Petitioner's testimony, it was clear that the autopsy or inquiry into the loss of the election and the alleged illegal activities, was triggered by the conversation he had with the District Ward Chairman. What came out clearly was that the loss of the election as Ward Councillor for Mwambeshi Ward weighed heavily on the minds of the Petitioner and the District Ward Chairman and they instituted an inquiry as to why they may have lost. What is also crystal clear from his testimony is that the allegations of

malpractice, corrupt activities or indeed illegal activities, came after it was established that he lost the elections in Mwambeshi Ward. PW2, Wesley Musonda together with PW3 Ireen Kabwe made various allegations which mirrored more closely what was contained in the Petition. However, their testimony was heavily discredited. He failed to link the Respondent to the buying of voter's cards on the polling day.

- 2.24 Given the above genesis of the inquiry into the alleged illegal activities of the PF official by the Petitioner and his superior identified as District Ward Chairman and bearing in mind that these allegations were coming way after the elections, we have reminded ourselves of the caution given in the Ugandan case of *Nabukeera Hussein Hanifa v Kibule Ronald and another* cited above. In that case the court in that country observed that:

in an election petition, just like in the election itself, each party is set out to win. Therefore, the court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection. It was also stated that "it would be difficult indeed for a court to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of the devil; further that "in election contests of this nature, witnesses most of them motivated by the desire to score victory against their opponents deliberating resort to peddling falsehoods. What was a hill is magnified into a mountain"; and that ".....The evidence of both parties is, in its entirety subjective and cannot be relied upon without testing its authenticity from a neutral and independent source".

- 2.25 The Tribunal holds the view that the testimony of a witness who tells the Court or Tribunal that he did not personally witness any illegal activities but was merely

told by people of those activities, should be treated with great care and circumspection. The Petitioner is the one who filed this Petition, yet as we have observed above, he came as a messenger only to tell the Tribunal that there were witnesses whom he would call to come and testify on his behalf and prove the alleged illegal activities contained in his Petition on his behalf

- 2.26 Further, the Petitioner told the Tribunal that they caught a PF official carrying a book where the PF official wrote names of people, he allegedly bought voters cards and NRCs from. PW2 Wesley Muonda said that they grabbed this book from the PF official. However, we were at pains as to why this book which they grabbed from the PF official was never produced at trial or exhibited in these proceedings. Even if the Tribunal were to give him a benefit of doubt that such a book ever existed, no single witness came forward to testify that he sold a voter's cards and NRC to the Respondent or his duly appointed agent in exchange for money. Equally missing from their testimony is the scale on which these activities of buying voters cards and NRCs were happening in Mwambeshi Ward. In view of these glaring gaps in the testimony of Petitioner and his witnesses, the Tribunal finds it extremely difficult to believe their testimony that the buying of voter's cards happened on the polling in Mwambeshi Ward. From the evidence adduced on record, we are also not satisfied that that the Respondent as the person whose election is being challenged, is the one who personally or through his duly appointed election agent or polling agents, committed the corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent. As was stated in the case of **Masauso v Avondale Housing Project** cited above, quite clearly, the Respondent in these circumstances, does not even need a defence.

- 2.27 It is our considered view that the Petitioner should have called persons whose voters' cards and NRCs were bought by the Respondent, or with his knowledge, consent or approval to come and testify of this fact. Or better still, show that these activities were being perpetrated by his polling agent. This allegation has, therefore, not been proved to the satisfaction of the Tribunal to a standard of a fairly high degree of convincing clarity. More pertinent, it has not been demonstrated how, as a result of the alleged buying of voter's cards, the majority of voters in Mwambeshi Ward were or may have been prevented from electing the candidate in that Ward whom they preferred.
- 2.28 We will now address the second allegation in the Petition where the Petitioner alleged that the night before the elections, the presiding officers at various polling stations were giving money to the electorates under the guise of social cash transfer and they were telling the people that if they do not vote for the Patriotic Front and the Respondent, they will not be given more money and fertiliser meant for vulnerable people. That there were cameras in the voting booths to monitor all those who received money and that they were told to make sure that they vote for the Respondent. We wish to state that the Petitioner's witnesses accused the Respondent and Steven Musonda RW2 as the ones behind the illegal activity of giving of money under the Social Cash Transfer the night before the elections. The two were also accused as being the ones who were threatening people that if they do not vote for Patriotic Front, they will be removed from the QUAC program. It was further alleged that they would also be able to tell who voted for UPND because they had installed cameras in the booth to see what will be happening.
- 2.29 However, in a dramatic turn of events, the Petitioner and his witnesses, when pressed in cross examination, conceded that the Pay point Manger (PPM) was Ms. Ng'andu and not Mr. Steven Musonda nor the Respondent. It was further established that the Social Cash Transfer activities ended on 8th August 2021, and not on 11th August 2021 as alleged by the Petitioner. The Petitioner and his witnesses also conceded that the said Ms. Ng'andu neither one of the presiding officers on the polling day nor was she found anywhere near

the polling station giving out money the night before the elections in issue. More gravely, perhaps, the Petitioner did not bring any witness to come and testify that they were paid money as a result of which they voted for the Respondent. Neither was any witness brought to testify that they saw cameras installed in the booth and as a result of which, they believed that they were being captured and hence they were prevented from voting the candidate of their choice. This allegation was also not proved to the required standard of a fairly high degree of convincing clarity and it collapsed on its own inanity.

2.30 The third allegation was that that on the poll day in Mwambeshi Ward, PF members were telling voters that, if they don't vote for the Respondent, they will be removed from the Social Cash Transfer alias QUAC Program. The Tribunal observed that this allegation is connected to the second allegation in so far as it revolves around giving out money under Social Cash Transfer or QUAC program. To that extent, the two allegations are inextricably linked. PW3, Ireen Kabwe testified that The Respondent and Steven Musonda PW2 were the persons behind the issuance of threats telling voters that, if they do not vote for the Respondent, they will be removed from the Social Cash Transfer alias QUAC Program. She testified that she was one of the persons removed from QUAC program because she joined UPND. The Petitioner denied the allegation and stated that he was not part of the QUAC Committee and had no authority to remove any person from that program. He denied ever threatening any person to remove them from QUAC. The Tribunal observes that no person apart from Ireen Kabwe came forward to testify that they were threatened of being removed from QUAC program as a result of which they were prevented from voting a candidate of their choice. Much less, did the Respondent establish how widespread these threats were. This allegation has also not been proved to the required standard of a fairly high degree of convincing clarity. At best, we find this testimony speculative.

2.31 Lastly, the Petitioner alleged that PF were bribing voters on the poll day in Mwambeshi Ward by giving them food as an inducement to vote for the Respondent. In support of

this allegation, the Petitioner's two witness PW2 and PW3 testified that nshima was being cooked at Dorcas mother and a goat was slaughtered to feed the people after they have voted in the elections. She stated that Steven Musonda was one of the organisers in the preparation of the nshima and slaughtering of the goat. Steven Musonda denied promising voters or any person nshima if they voted for PF or the Respondent. In his testimony Steven Musonda RW1, stated that they were recruiting foot soldiers who would return to the commanding centres to come and eat the food prepared by PF members of mobilisers. He testified that the cooking of food was happening at the commanding centre and that all commanding centre activities ceased a day before the elections, because commanding centres were disbanded. We wish to observe that no person was ever called to testify that they were promised nshima by the Respondent or his duly appointed agent as a result of which they were swayed not to vote for their preferred candidate.

2.32 Missing also in a spectacular fashion from the evidence submitted by the Petitioner is the scale on which the alleged activities of cooking nshima and slaughtering of a goat in the Mwambeshi Ward were happening on the polling day. In other words, the question of how widespread this illegal activity was happening in Mwambeshi was not established. In fact, no person came forward to testify that after voting, they went to eat nshima with goat meat as promised by either the Respondent or his duly appointed agent. In the absence of satisfactory and cogent evidence linking the Respondent to the said illegal activities, we find and hold this allegation has fallen away. As such, we hold that the Petitioner failed to produce cogent evidence pointing to a fairly high degree of convincing clarity that the alleged illegal activities happened on the poll day. The cases of **Margaret Mwanakatwe v Charlotte Scott and Others**, Selected Judgment No. 50 of 2018; and **Mbololwa Subulwa v Kaliye Mandandi** Selected Judgment No. 25 of 2018 and the case of **Chrispin Siingwa v Stanely Kakubo**, CCZ Appeal No.7 of 2017 are very clear and the Court in these cases held that regulation 55(1) of the Electoral Process (General) Regulations is clear in its provisions and requires that an election agent be specifically

appointed and named in the candidate's nomination paper. Thus, in our view, to merely allege in global or broad terms that PF officials were involved in malpractice or corrupt at activities without linking any of those activities to the Respondent or his duly appointed agent is far from meeting the threshold criteria prescribed by law. Settled is the rule that the illegal activity or malpractice or corruption must have been so widespread that it prevented the majority of voters from electing the candidate of their choice. The evidence adduced here on record did not even come anywhere near tipping a simple balance of probabilities. The Tribunal holds that this allegation was unsubstantiated.

- 2.33 We reiterate that the general rule relating to the burden of proof in civil cases is stated as follows by the learned authors of Phipson on Evidence, seventeenth edition (London, Thomson Reuters (Legal) Limited, 2010) paragraph 6-06 at page 151:

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

- 2.34 The learned authors of Phipson on Evidence, (supra) continue in paragraph 6-06 at page 151 as follows:

"This rule is adopted principally because it is just that he who invokes the aid of the law should be first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleading place it, and never shifting in deciding which party asserts the affirmative, regard

must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will."

2.35 **CONCLUSION**

2.36 All the allegations contained in the Petition not having been proved to a fairly high degree of convincing clarity by the Petitioner, the Petitioner is not entitled to judgment whatever may be said of the Respondent's case. For the avoidance of doubt, the net effect of what we have said is that the Petitioner has failed to prove his case in terms of the law discussed herein. Accordingly, we dismiss the Petition for lack of merit. On the issue of costs, we are guided by the Supreme Court case of *Anderson Kambela Mazoka v Levy Patrick Mwanawasa (1)* in which the Supreme Court said the following:

"As we have always said on costs in matters of this nature, it is in the interest of the proper functioning of our democracy that challenges to the election of the President, which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.

2.37 For our part, we adopt the reasoning above and order that each party shall bear their own costs.

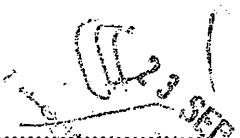
2.38 The Petitioner is informed of his right of appeal to the Constitutional Court within 14 days from the date of this judgement.


2.39 Petition dismissed.

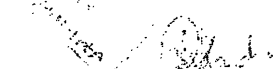
141 We direct the parties' attention to rule 24 of the Local Government Elections
Technical Rules 2016, allowing an appeal to the Constitutional Court within 14 days
from the date of this decision.

Given this day of September

2021


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Hon G. Mulenga
Chairperson


.....
Hon F. Chibwe
Member


.....
Hon I. Kakanda-Chuula
Member