

**CONSTITUTIONAL COURT OF ZAMBIA**

**2021/CCZ/A0021**

**HOLDEN AT LUSAKA**

**(Appellate Jurisdiction)**

**IN THE MATTER OF: ARTICLES 73(1) AND (3) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 70 (1) (a) (b) (c) AND (d) AS READ TOGETHER WITH ARTICLE 52 (1) (2) AND (3) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

**AND**

**IN THE MATTER OF: SECTION 97 (1) (2) (c) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

**BETWEEN:**

**JOSEPH MALANJI**

**APPELLANT**

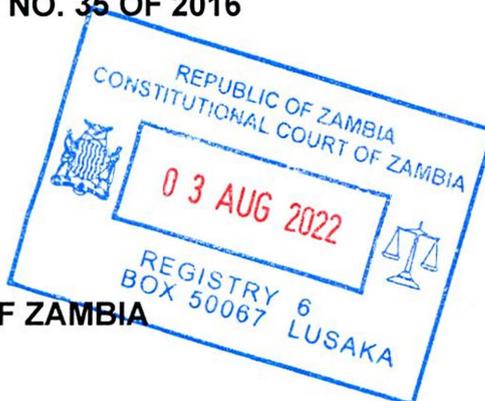
**AND**

**CHARLES ABEL MULENGA**

**1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION OF ZAMBIA**

**2<sup>ND</sup> RESPONDENT**



**Coram:** Sitali, Mulenga, Mulonda, Munalula and Mulongoti JJC on 2<sup>nd</sup> March, 2022 and 3<sup>rd</sup> August, 2022.

**For the Appellant:** Mr. J. Chirwa of Ferd Jere and Co. with Mr. B. Mwelwa of Linus E. Eyaa and Partners

**For the 1<sup>st</sup> Respondent:** Mr. M. Kasaji of C.L. Mundia and Co.

**For the 2<sup>nd</sup> Respondent:** Mr. B. M. Musenga and Mr M Bwalya both in-house Counsel, Electoral Commission of Zambia

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## **JUDGMENT**

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**Munalula JC, Delivered the Judgment of the Court**

**Cases referred to**

1. John Sangwa v Electoral Commission of Zambia 2021/CCZ/0021.

2. Vangelatos and Another v Metro Investments Limited and Two Others SCZ Judgment No. 35 of 2016
3. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.
4. Benjamin Mwelwa v Attorney General CCZ Selected Judgment No. 9 of 2019
5. Amama Mababazi v Yoweri Kaguta Museveni and two Ors (2016) UGSC 3.
6. Chamisa v Mnangagwa and 24 Ors CCZ/42/18
7. Abubakar v Yaradua (2009) ALL F WLR (PT45) ISC.
8. Raila Odinga and Ors v Independent Electoral and Boundaries Commission and Ors (2013) eKLR.
9. Raila Odinga and Ors v Independent Electoral and Boundaries Commission and Ors (2017) e KLR.
10. Opitz v Wrzesneskyj (2012) SCC55.
11. Mutharika and The Electoral Commission v Chilima and Chakwera MSCA Constitutional Appeal No. 1 of 2020.
12. Sentor Motors Limited and Three Other Companies SCZ Judgment No. 9 of 1996
13. U-Rest Foam Limited v Puma Botswana (PTY) Limited and Another SCZ Appeal No. 222 of 2016
14. Shamwana and Others v The People SCZ Judgment No. 12 of 1985
15. Governance Elections Advocacy Research Services Initiative Zambia Limited v Bowman Chilasha Lusambo 8 Ors and the Attorney General 2021/CCZ/0050.
16. Hichilema and Another v Lungu and Others 2016/CCZ/0031
17. Yakub Falir Mullah and 2 Others v Mohamed Jabi SCZ Selected Judgment No. 1 of 2018
18. Afrope Zambia Limited v Anthony Chate and Others Appeal No. 160 of 2013.
19. Lewanika and Ors v Chiluba (1998) Z.R. 79.
20. Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014.
21. Nakbukeera Hussein Hanifa v Kibule Ronald and Another (2011) UGHC64.
22. Nkandu Luo v Doreen Sefuke Mwamba and Attorney General CCZ Selected Judgment No. 51 of 2018.
23. Bizwayo Newton Nkunika v Lawrence Nyirenda and the Electoral Commission of Zambia 2019/CCZ/005

24. Abuid Kawangu v Elijah Muchima CCZ Selected Judgment No. 2 of 2014.

25. R v Hunt [1987] 1 All ER 1.

**Legislation referred to:**

Constitution of Zambia (Amendment) Act No. 2 of 2016

Electoral Process Act No. 35 of 2016

Electoral Process General Regulations Statutory Instrument No. 63 of 2016

**Works referred to:**

Halsbury's Laws of England 3<sup>rd</sup> Edition (London: Butterworth & Co)

Phipson on Evidence, 14<sup>th</sup> Edition (London: Sweet & Maxwell)

Black's Law Dictionary 8<sup>th</sup> Edition (St Paul MN: Thomson West)

Max du Plessis, Glenn Penfold and Jason Brickhill, Constitutional Litigation Cape Town: Juta 2013)

**Introduction**

[1] This is Judgment of the Majority in an appeal against the nullification of the Appellant's election as Member of Parliament for Kwacha Constituency following the August, 2021 General Elections. The appeal is against that part of the Judgment of the High Court, sitting at Lusaka, as decided that the Appellant (1<sup>st</sup> Respondent in the court below) was not eligible for election as Member of Parliament because he did not possess a grade 12 certificate at the time of his re-election in August, 2021.

[2] The Judgment appealed against was delivered on 19<sup>th</sup> November, 2021 and the Notice of Appeal was filed on 23<sup>rd</sup> November, 2021 together with the Memorandum of Appeal.

[3] The Appellant seeks reversal of the trial Court's decision on the following grounds:

**Ground One**

The learned trial Judge erred in both law and fact in holding that the 1<sup>st</sup> Respondent's election is void on account of eligibility.

**Ground Two**

The learned trial Judge erred in both law and fact when he held that the 1<sup>st</sup> Respondent did not hold a grade twelve certificate when in fact he did.

**Ground Three**

The Court below erred both in law and fact when it shifted the burden of proof from the Petitioner to the Respondent by holding that the onus is on the 1<sup>st</sup> Respondent to produce a grade 12 certificate when he knew or ought to have known that "he who alleges must prove".

**Ground Four**

The learned trial court contradicted itself in holding that election[s] were held in conformity with the electoral law but isolated the issue of nomination as not being part of the electoral process.

**Ground Five**

The learned trial Judge erred in both law and fact in holding that the Petitioner has discharged [his] burden above the simple balance of probability on the issue of eligibility when the Petitioner did not lead any evidence at all on this issue.

**Ground Six**

The learned trial court erred in both law and fact in holding that the allegation in ground 13(g) was not clearly traversed when the first Respondent had traversed it at point 2.11 of the 1<sup>st</sup> Respondent's answer.

**Ground Seven**

The court below erred in both law and fact when it failed to uphold the sanctity of the Electoral Process Act and the rules promulgated under it when he upheld ground 13(g) where the Petitioner did not lead any evidence.

**Ground Eight**

The learned trial Judge erred in both law and fact when he resurrected an issue that was statute barred and where clearly he had no jurisdiction as the qualification was clearly dealt with in the nomination of the 1<sup>st</sup> respondent.

**Ground Nine**

The learned trial court erred in both law and fact when he condemned the Appellant in costs when the Appellant won most of the grounds put in the petition by the Petitioner and failing (*sic*) to recognize the democratic dispensations involved in the electoral process.

**Background**

[4] The brief background to this appeal is that in an election held on 12<sup>th</sup> August, 2021, the Appellant and 1<sup>st</sup> Respondent (Petitioner in the Court below) were contestants for the seat of Member of Parliament for Kwacha Constituency in Kitwe. The Appellant emerged victorious in the election. Aggrieved by the outcome, the 1<sup>st</sup> Respondent filed a petition in the High Court seeking nullification of the election on various grounds. The learned trial Judge considered the allegations and the evidence and found that the 1<sup>st</sup> Respondent had not sufficiently proved the allegations except for one allegation stemming from paragraph 13 of the petition.

[5] It was alleged in the said paragraph 13, that the Appellant, did not possess a grade 12 certificate as required by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth the Constitution). The trial Court

considered the issue of eligibility at pages 146 to 156 of the record of appeal and observed that the issue was brought into contention by the 1<sup>st</sup> Respondent. That in his answer, the Appellant did not rebut the allegation of fact but instead mounted a legal technical challenge that the contention was not an issue at law as the challenge was statute barred and he had successfully filed in his nomination.

[6] The trial Court proceeded to address the technicality of whether the failure to challenge the alleged absence of the grade 12 certificate in the seven-day period after close of nominations stipulated by Article 52 (4) of the Constitution meant that it was thereafter statute barred. The Court concluded that Article 52 (4) provides for a nomination challenge whereas what was before him was an election challenge as provided for under section 97 (2) (c) of the Electoral Process Act. The challenge was therefore not statute barred.

[7] Having settled the jurisdictional question, the trial Court proceeded to assess the evidence on the substantive issue of whether the Appellant was eligible to contest the election and had the required grade 12 qualification. He held that the allegation that the Appellant did not have a grade 12 certificate had been proven beyond a balance of probabilities. On that basis, the trial Court held that at the time of the election the Appellant was not

eligible for re-election on account of not meeting the minimum academic qualifications set by Article 70(1) (d) of the Constitution. The Court then nullified the Appellant's election as Member of Parliament for Kwacha Constituency prompting the appeal before this Court.

### **Appellant's case**

[8] The Appellant filed heads of argument in which he argued the nine grounds of appeal together but divided the issues into four parts the first of which was entitled 'the two tier challenge of nomination and election'. It relates to the jurisdiction of the High Court to entertain the issue of eligibility at the trial of an election petition. The Appellant contended that Article 73(1) of the Constitution does not stipulate grounds for petitioning an election of a Member of Parliament although these are prescribed under section 97(2) of the Electoral Process Act. The Appellant averred that the learned trial judge should have applied the law in the Constitution before proceeding to apply a statutory provision.

[9] It was contended that the adjudication of election disputes is two-fold, that is under Article 52(4) and Article 73(1): The first relates to challenge of a nomination and the second relates to challenge of an election. That the two occur separately and the jurisdiction of the court in the first lapses at the

expiration of 21 days by virtue of Article 52(4). The case of **John Sangwa v Electoral Commission of Zambia**<sup>1</sup> was cited to the effect that once a nomination is filed, it is deemed to be *prima facie* regular, it cannot be re-opened at a later stage. The case of **Vangelatos and Another v Metro Investments Limited and Two Others**<sup>2</sup> was cited in support of the claim that a litigant can raise the issue of jurisdiction at any stage in the proceedings including on appeal.

[10] The second part was entitled 'proof of lack of qualification to the satisfaction of the court at trial' and relates to the alleged inappropriate shifting of the burden of proof. It was contended that it was the duty of the Petitioner to adduce evidence to prove his allegation.

[11] That the trial Court misapplied section 97(2) of the Electoral Process Act when it determined that the candidate was at the time of election a person not qualified for election when the Petitioner had failed to adduce evidence to prove this allegation. As authority for this, the Appellant cited the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**.<sup>3</sup>

[12] This Court was referred to pages 615, 616 and 643 of the record of appeal to show that questions about the Appellant's qualifications arose during cross-examination and the Appellant responded that he had a grade 12 certificate and it was at home. It was contended that it was not the duty

of the Appellant to adduce evidence of his affirmation that he possessed a grade 12 certificate when evidence had not been adduced to the contrary. The case of **Benjamin Mwelwa v Attorney General**<sup>4</sup> was also cited in support of the principle that any allegation not supported by evidence or where no evidence is adduced is deemed not to have been proved.

[13] To support the contention that it is well established that the Petitioner bears the burden of proof, several foreign authorities were cited namely; **Amama Mababazi v Yoweri Kaguta Museveni and two Ors**<sup>5</sup> **Chamisa v Mnangagwa and 24 Ors**<sup>6</sup> **Abubakar v Yaradua**<sup>7</sup> **Raila Odinga and 5 Ors v Independent Electoral and Boundaries Commission and 3 Ors**<sup>8</sup> **Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 2 Ors**<sup>9</sup> **Opitz v Wrzesnewskyj**.<sup>10</sup>

[14] Related to the improper shifting of the evidential burden was the allegation of an improper standard of proof having been applied. It was contended that the facts alleged were not proved to the satisfaction of the Court. It was further contended that the learned Judge applied a standard of a simple balance of probabilities when the requisite standard is higher than in civil matters and lower than in criminal matters. The case of **Mutharika and Another v Chilima and Another**<sup>11</sup> was cited in support.

[15] The third part was entitled 'The failure by the trial court to discharge its duty' and argued that the Court misdirected itself. It was contended that the trial Court failed to discharge its duty because if it had done so, it would not have come to such a faulty and absurd conclusion. The case of **Sentor Motors Limited and Three Other Companies**<sup>12</sup> to the effect that it is the duty of the Court to adjudicate all matters before it was cited in support. It was contended that the Court should have appreciated the Appellant's explanation and asked him to adduce his Grade 12 Certificate so as to be certain.

[16] Additionally we were asked, on the basis of the principle established by the Supreme Court in **U-Rest Foam Limited v Puma Botswana (PTY) Limited and Another**<sup>13</sup> and **Shamwana and Others v The People**<sup>14</sup> that proceedings in another matter may be treated as evidence in order for us to take cognisance of the case of **Governance Elections Advocacy Research Services Initiative Limited v Bowman Chilosha Lusambo and 8 Others**<sup>15</sup> to find that the Appellant has a grade 12 certificate.

[17] The fourth issue was entitled 'challenge of a court's jurisdiction at any stage in the proceedings'. The Appellant contended that the lower court had no jurisdiction to pronounce itself on a matter that was statute barred as the court's jurisdiction on the issue of eligibility was limited to the nomination

stage. The cases of **Hichilema and Another v Lungu and Others**<sup>16</sup> and **Yakub Falir Mullah and 2 Others v Mohamed Jabi**<sup>17</sup> were cited in support.

### **1<sup>st</sup> Respondent's case**

[18] In the heads of argument filed in response, the 1<sup>st</sup> Respondent addressed the Appellant's heads of argument both individually and severally and repeated his arguments at the hearing. He began with Ground One, and referred us to pages 146 and 161 of the record of appeal to argue that he brought the issue of eligibility into contention.

[19] That the Appellant's reaction on pages 147 and 266 of the record of appeal was to mount a legal technicality to the effect that the issue of eligibility was statute barred as opposed to rebutting the allegation directly. That the Appellant did not bother to produce the grade 12 certificate. That the cross-examination at pages 151, 615 and 616 of the record of appeal shows that the Appellant testified that he did not produce the grade 12 certificate before court because he did not know that he was required to.

[20] Further, that the 2<sup>nd</sup> Respondent's witness who was the returning officer neither produced the nomination papers nor stated in his testimony that indeed the Appellant possessed a grade 12 certificate. That instead he adopted the Appellant's legal technicality that the issue of eligibility was

statute barred. That as there was no evidence produced or led to show that the Appellant did possess the grade 12 certificate, the trial court was on firm ground in finding that the Appellant did not meet the requirements of Article 70(1) (d).

[21] The submissions relating to Ground Two mirrored those made in response to Ground One.

[22] Grounds Three, Five and Seven were addressed together and the 1<sup>st</sup> Respondent began by reiterating the gist of his response to Ground One. It was further contended that the issue of eligibility was not only pleaded, but sufficiently canvassed at trial for the court to make its decision.

[23] A separation was drawn between 'burden of proof' and 'evidential burden' to contend that whilst the burden of proof always lies with the accuser, both the accuser and the one accused have the evidential burden to bring forward evidence in support of their case. That the latter is a burden to raise an issue fit for consideration by the trier of fact. That the Appellant failed to discharge his evidential burden by failing to traverse paragraph 13 of the petition and to produce the grade 12 certificate when the issue of eligibility was known to him from inception of the case. Pages 151 to 152 of the record of appeal were quoted extensively in support.

[24] Grounds Four and Eight were also argued together. The 1<sup>st</sup> Respondent contended that the right to challenge an election petition is embodied in Article 73. That the grounds under which an election petition may be brought are stipulated in section 97(2) of the Electoral Process Act. That section 97(2) (c) specifically applies to eligibility of a candidate at the time of the election. Hence the separation of nomination from the election process in the court's dictum. That the Court was on firm ground to reject the claim that the issue of eligibility was statute barred.

[25] Ground Six was argued on its own. After reiterating the arguments in response to Grounds One, Two, Three, Five and Seven it was contended that there was no paragraph 13(g) as alluded to by the Appellant. Further that the issue of eligibility was never traversed as found by the court.

[26] Ground Nine was on the award of costs. It was contended on the authority of **Afrope Zambia Limited v Anthony Chate and Others**<sup>18</sup> that costs were correctly awarded to the Petitioner as he had succeeded in his claim. In concluding, the 1<sup>st</sup> Respondent contended that no ground was abandoned and it was in the discretion of the court to decide a matter as it sees fit. Further, that it was not for the trial court to order the production of evidence to assist the Appellant's case as the adversarial legal system

places the responsibility on each of the parties to properly discharge the evidential burden. He prayed that the appeal be dismissed.

## **2<sup>nd</sup> Respondent's Case**

[27] The 2<sup>nd</sup> Respondent also filed heads of argument upon which they relied entirely at the hearing. They contended that the 1<sup>st</sup> Respondent did not meet the standard of proof required in an election petition, which standard is higher than the civil standard of a balance of probabilities. In support of this they cited the cases of **Lewanika and Ors v Chiluba**<sup>19</sup> **Saul Zulu v Victoria Kalima**<sup>20</sup> and **Nakbukeera Hussein Hanifa v Kibule Ronald and Another**.<sup>21</sup>

[28] In contending that the 1<sup>st</sup> Respondent did not discharge the burden of proof, Counsel further cited the cases of **Nkandu Luo v Doreen Sefuke Mwamba and Attorney General**;<sup>22</sup> **Abuid Kawangu v Elijah Muchima**;<sup>23</sup> **Lewanika and Others v Chiluba**<sup>19</sup> and **Saul Zulu v Victoria Kalima**.<sup>20</sup> Counsel submitted that the 2<sup>nd</sup> Respondent duly conducted the elections in substantial conformity with the law.

## **Reply**

[29] Mr Chirwa counsel for the Appellant briefly contended that the evidential burden cannot arise where no evidence was adduced by the 1<sup>st</sup> Respondent to show that the Appellant did not have a grade 12 certificate. Mr Mwelwa contended that the Constitution could not be found wanting on the basis of an Act of Parliament. That the Constitution has drawn a distinction between the eligibility process in Article 52, and the election petition which comes later.

## **Consideration and Decision**

[30] We have considered the record of appeal and Judgment of the trial Court; the Appellant's memorandum of appeal and heads of argument together with oral submissions; as well as the 1<sup>st</sup> Respondent's heads of argument and oral submissions and the 2<sup>nd</sup> Respondent's heads of argument. What is in issue is whether the trial Court erred both in fact and in law by nullifying the Appellant's election as Member of Parliament for Kwacha Constituency on the finding that he was not eligible for election as he did not possess a grade 12 school certificate.

[31] The appeal raises four questions for determination:

Firstly, arising from Grounds Four and Eight, whether the eligibility of the Appellant to contest the election could be challenged after the nomination stage by virtue of Section 97(2) (c) of the Electoral Process Act. Secondly, arising from Grounds Three, Five, Six and Seven, whether the right standard of proof was applied and whether the Appellant carried the evidential burden to prove his eligibility by producing his grade 12 certificate. Thirdly, arising from Grounds One and Two, whether this Court should reverse the trial Court and hold that the Appellant was eligible to stand for election as he had a grade 12 certificate at the time of the election and was therefore validly elected Member of Parliament for Kwacha Constituency. Fourthly, arising from Ground 9, whether this Court ought to reverse the order for costs made by the trial Court. We will deal with the questions sequentially

### **Grounds Four and Eight**

[32] The issue in Grounds Four and Eight rests on the validity of section 97(2) (c) of the Electoral Process Act. The Appellant claims that the 1<sup>st</sup> Respondent was statute barred from raising the Appellant's eligibility in his election petition. That the said section 97(2)(c) flies in the face of Article 52(4) of the Constitution.

[33] The Appellant's contention is that the law provides for two separate dispute resolution mechanisms. The first is triggered at nomination stage by Article 52(4) of the Constitution and relates to the requirements for eligibility to contest Parliamentary elections as stipulated by Article 70 of the Constitution. The second is triggered at the election petition stage and relates to challenges about the election process but excludes issues of nomination and eligibility.

[34] The Appellant further contends that if one did not challenge eligibility at the nomination stage then one cannot do so at the election stage because the issue is settled by then and can never be raised again. That section 97(2)(c) of the Electoral Process Act undermines the Constitution by purporting to create room for an eligibility challenge at the election stage when the Constitution by virtue of Article 52(4) excludes any further challenge on eligibility. The Appellant in essence contends that the said section 97(2)(c) is unconstitutional.

[35] Section 97(2) (c) of the Electoral Process Act provides as follows:

**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—**

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

[36] Article 52 (4) on the other hand provides as follows:

**A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twenty-one days of its lodgement.**

[37] In order to deal with the issue we find it necessary to bring to bear all the relevant provisions of the law. We say so because Article 52 (4) of the Constitution is only one of the provisions governing the electoral process relating to a Member of Parliament. It ought to be read with Articles 70 and 73 of the Constitution. Article 70 of the Constitution sets out the qualifications which a person must hold in order to occupy the office of Member of Parliament whilst Article 73 of the Constitution permits a person to challenge the election of a person as a Member of Parliament after the election without limiting the grounds of or the timing for such a challenge. The three Articles also need to read with Article 48 of the Constitution. The said Article 48 provides that the details of the electoral process are to be prescribed. That prescription is the Electoral Process Act.

[38] Thus Article 52(4) of the Constitution applies to a challenge directed at a nominated candidate and prescribes the time in which the challenge may

be mounted and determined. The use of the word 'may', shows that a challenge about the eligibility of a candidate could be made at the nomination stage. This option must be exercised within seven days. Further, where the option is exercised the Court is obliged to hear the matter within 21 days.

[39] An election petition on the other hand relates to the declared winner of the election who has a seat in Parliament on the assumption that he or she holds the necessary qualifications. Their eligibility is liable to challenge on the basis of grounds raised shortly after the election. That is why section 97(2) (c) of the Electoral Process Act refers to this as trial of an election petition and not a nomination petition. In any event eligibility does not end with election to Parliament. It has to be maintained throughout the term of office. Hence in **Bizwayo Newton Nkunika v Lawrence Nyirenda and the Electoral Commission of Zambia**<sup>23</sup> wherein the question of whether the absence of a grade 12 certificate could be raised long after the time limits for a nomination petition had expired arose, we held at pages R36 to R37 that:

**Our mandate is that when an allegation of the violation or contravention of the Constitution is presented before Court, the allegation must be heard and determined. As the Petitioner has specifically alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have contravened and continue to contravene Articles 70 (1) (d) and 72 (2) (b) of the Constitution, these allegations ought to be heard and determined by this Court on their merit.**

[40] Article 97 (2) (c) of the Electoral Process Act is necessary because eligibility, established at the nomination stage, may not be maintained through the election process. We are fortified in so saying by Article 52(6) of the Constitution which provides that where a parliamentary candidate becomes disqualified in accordance with Article 70 of the Constitution after the close of nominations and before the election date, the election shall be cancelled. The assertion that a litigant should not have recourse to the court system in relation to disqualifications arising during the entire election process or even thereafter is therefore not tenable.

[41] It follows that the Appellant's reasoning is a misapprehension of the law as it is not based on a holistic reading of all the relevant provisions. The assertion by the Appellant's Counsel that the application of section 97(2) (c) of the Electoral Process Act at election stage goes against Article 52(4) of the Constitution is misconstrued. In our considered view there is no conflict between the provisions of the said section 97 (2) (c) and the said Article 52(4). Article 52(4) of the Constitution does not oust Section 97(2) (c) of the Electoral Process Act, rather it creates an early opportunity to sieve out an unqualified candidate at a point when they are nominated to stand in an election that they may or may not win.

[42] Section 97(2) (c) of the Electoral Process Act caters for a qualification challenge that relates to the entire election process. It emanates from Article 73 (1) and provides an opportunity to challenge the eligibility of a person who has won the election but may not have been qualified to do so at the time.

[43] It is therefore our firm view that on a proper analysis of the law, an action relating to the eligibility of a Member of Parliament under Article 70 of the Constitution is not statute barred by Article 52(4) of the Constitution from being considered by a court during the trial of an election petition. Hence, the trial Court was on firm ground to consider the question of the eligibility of the Appellant for election. Grounds Four and Eight have no merit and we dismiss them accordingly.

### **Grounds Three, Five, Six and Seven**

[44] We now turn to the Appellant's attack on the handling of the burden and standard of proof by the trial Court. The Appellant contended that the burden of proof should have been borne by the 1<sup>st</sup> Respondent throughout the trial. That while the evidential burden, which is distinguishable from the burden of persuasion, may have shifted to the Appellant, it could only do so where the 1<sup>st</sup> Respondent had adduced evidence to establish a *prima facie* case. That

the 1<sup>st</sup> Respondent did not do so, hence the trial Court erroneously shifted the said burden from the 1<sup>st</sup> Respondent to the Appellant.

[45] The Appellant further contended that the standard of proof in an election petition is above the civil standard of a preponderance of probabilities and below the criminal standard of beyond reasonable doubt. That the trial Court wrongfully applied the standard of a simple balance of probabilities. The 2<sup>nd</sup> Respondent confined their arguments to the law and guidance given by this and other courts on the burden and standard of proof required in election petitions.

[46] For convenience, we will begin with the standard of proof. The allegation is that the standard of proof which was applied by the trial court was that of a simple balance of probabilities. In their submissions, the Appellant and the 2<sup>nd</sup> Respondent alleged that a simple balance of probabilities was applied in determining the issue of eligibility. We have had sight of the wording employed by the trial Court which is found at page 152 of the record of appeal. In paragraph 5.123 the Court said:

**I accordingly accept that it has been proven by the Petitioner beyond a simple balance of probabilities that the First Respondent did not possess a Grade 12 certificate at the time that he was re-elected.(emphasis added)**

[47] In the case of **Abuid Kawangu v Elijah Muchima**<sup>24</sup> this Court held that the standard of proof applicable in election petitions is that of a fairly high degree of convincing clarity. Therefore, it is higher and distinct from that applicable in ordinary civil matters but lower than the standard required in criminal matters.

[48] It is apparent that the use of the word 'beyond' as opposed to 'higher' than the balance of probabilities is the source of the Appellant's contention. This claim has no substance because the word 'beyond' captures the sense of going further than the simple balance of probabilities. Other adjectives of similar import may be engaged by a court. It is notable that **Black's Law Dictionary (Eighth Edition)** at page 209 simply refers to the higher standard as the middle burden of proof as follows:

**Middle burden of proof. A party's duty to prove a fact by clear and convincing evidence. This standard lies between the preponderance-of-the-evidence standard and the beyond -a-reasonable doubt standard.***(emphasis added)*

[49] In our considered view, the trial Court appreciated the standard of proof applicable in the matter before him which was an election petition. Furthermore, he did so apply it. He was on firm ground.

[50] We now turn to the burden of proof, in particular, the alleged wrongful shifting of the evidential burden. It is important for clarity to set out the distinction between the burden of proof and the evidential burden or evidentiary burden as it is known in some jurisdictions.

[51] We say so because this Court has on several occasions, pronounced itself on the question of who bears the burden of proof in election petition matters. We held in the case of **Abuid Kawangu v Elijah Muchima**<sup>24</sup> at pages J19 to J20 that the burden lies upon the one alleging to prove all the allegations with cogent evidence to the required standard. This is the general principle or rule. We wish to affirm it. In our considered view however, this is not what is in issue here. What is in issue is the evidential burden and to explain the distinction, we refer to **Phipson on Evidence (14<sup>th</sup> edition)**

[52] **Phipson** states at page 51 that the phrase 'burden of proof' has three meanings, that is, the persuasive burden (establishing a case); the evidential burden (adducing evidence); and the burden of establishing the admissibility of evidence. We will consider only the first two meanings, that is, the persuasive and the evidential burden.

[53] **Phipson** elaborates at page 52, that:

The [persuasive] burden of proof rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It 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 pleadings place it, and never shifting in any circumstances whatever.

[54] It is quite clear that the first meaning of burden of proof fell upon the 1<sup>st</sup> Respondent as Petitioner in the Court below. What is in contention therefore is whether the second meaning of burden of proof came into play and the Appellant could be said to have borne the evidential burden (burden to adduce evidence) on the one allegation in paragraph 13 of the petition. It is helpful once again to begin by referring to **Phipson**.

[55] **Phipson** explains at pages 56 to 57 that:

**While the persuasive burden is always stable, the evidential burden may shift constantly, as one scale of evidence or other preponderates. The onus probandi in this sense rests upon the party who would fail if no evidence at all, or no more evidence, as the case maybe, were given on either side-i.e. it rests before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced. (emphasis added)**

[56] The fact that the evidential burden shifts back and forth, is well settled in common law jurisdictions including Zambia. We are fortified in so saying

by the holding of the Supreme Court of Kenya, in the case of **Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others**<sup>9</sup> at paragraph 195, that:

**There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately of course it falls to the Court to determine whether a firm and unanswered case has been made.***(emphasis added)*

[57] It is evident from a reading of the above authorities that the evidential burden could only shift to the Appellant where the 1<sup>st</sup> Respondent had established a *prima facie* case on the point in issue by adducing the required evidence. To settle this question, we have carefully perused the record of appeal and assessed all the evidence. We have also followed the reasoning of the trial Court.

[58] At page 161 of the record of appeal, the 1<sup>st</sup> Respondent alleged in paragraph 13 of the petition that he would aver at trial, that the Appellant did not possess a grade 12 certificate as required by the Constitution.

[59] In his answer at page 266 of the record of appeal, in para 2.7, the Appellant denied the contents of paragraph 13 in the following manner:

The contents of paragraph 13 is denied as the ECZ accepted the First Respondent's nominations and it is only ECZ who can reject a candidate on account of Grade 12. It therefore follows that the Petitioner has nothing to deal with things that concerns. (*sic*)

The transcription of proceedings before the High Court shows that the 1<sup>st</sup> Respondent and his witnesses did not testify on the issue of the Appellant's eligibility or his grade 12 certificate during the presentation of the 1<sup>st</sup> Respondent's case.

[60] The issue of qualifying for nomination however did arise during cross-examination of the 1<sup>st</sup> Respondent found at page 388 of the record of appeal as follows:

**Q. Witness in your testimony on Friday you said that your nomination was accepted by the Electoral Commission of Zambia, is that correct?**

**A. Yes**

**Q. Who else's nomination was accepted by the Electoral Commission of Zambia besides yourself?**

**A. There were three other candidates that come from different political parties.**

**Q. Would you mention them?**

**A. there is the 1<sup>st</sup> Respondent.**

**Q. What is his name?**

**A. Mr Joe Malanji, there is the only lady her name, I can only remember the first name, Grace, I think from the socialist party.**

**Q. Witness if a particular candidate's nomination is accepted, does it mean that person qualifies for that particular election?**

**A. Yes**

[61] The re-examination of the 1<sup>st</sup> Respondent is at page 428 of the record of appeal and the transcription is as follows:

Q. Witness, you told the Court that if the candidate's nomination is accepted by ECZ then that candidate is qualified, what did you mean?

A. What I meant was if the candidate avails the Returning Officer documents that are verified and they conform to the requirements of the electoral process then the candidate is duly nominated to stand in the same election. *(emphasis added)*

[62] When the Appellant began to present his defence, he testified as RW1. The issue of his eligibility was not raised in his examination in chief. When the Appellant was cross-examined however counsel for the 1<sup>st</sup> Respondent raised the issue of the grade 12 certificate.

[63] The transcription at pages 615 to 616 of the record of appeal shows the following:

Q. Mr. Malanji, which secondary school were you at?

A. Chililabombwe Secondary School.

Q. From which year to which year?

A. 81-83.

Q. So you spent two years at the secondary school?

A. Three years 81, 82, 83.

Q. At the end of the three years that you spent at this School, what qualification did you obtain if any?

A. For that school you obtain the form three certificate.

Q. So you agree with me that before this Honourable Court, you have not produced a copy of that form three certificate correct?

A. I haven't.

Q. Because we do not have your form three certificate before this Honourable Court, you will agree with me that His Lordship, will never know for sure whether you possess a form three certificate?

A. No he will not know.

Q. Thank you, similarly, you do not hold a grade 12 certificate correct?

A. I do.

Q. Before this honourable Court, you have not produced a grade 12 certificate correct?

A. No I haven't.

Q. In the like manner, his Lordship, will never know for sure or for a fact you are a holder and you possess a grade 12 certificate because you have failed to produce it, correct?

A. No, he will not.

Q. Equally throughout your testimony yesterday, you agree with me that you did not tell his Lordship which school you obtained your grade 12 certificate, correct?

A. No I didn't.

Q. Neither did you tell this Honourable Court the year in which you were awarded this grade 12 certificate, correct?

A. No, I didn't.

Q. Thank you. You did not tell this Court the school you were at, the time when the grade 12 certificate was awarded to you, correct?

A. No, I didn't. *(emphasis added)*

[64] In re-examination at page 643 of the record of appeal, at lines 8 to 16 the Appellant was asked by his defence counsel to explain his answer to the question that he had not produced his grade 12 certificate before the Court; he responded:

**There was no request for it my Lord, otherwise, I could have brought my credentials.**

[65] The issue of the grade 12 certificate and the eligibility of the Appellant did not arise again until the 2<sup>nd</sup> Respondent presented its case through its sole witness RW10. The transcription of the evidence of RW10, runs from page 739 to page 756 of the record of appeal and is too long to quote verbatim however, the essence of it is that RW10 was the Returning Officer

for Kwacha Constituency, and it was his testimony that the Appellant was one of the four people who validly filed in their nominations.

[66] When RW10 was cross-examined on the issue, he testified that he accepted the Appellant's nomination papers but had not placed them before the Court even though he does have access to them. Although he initially denied that he was obligated to bring the documents to Court, upon further probing he agreed to the averment by counsel that he was duty bound to produce the papers before court. Further that just because he as Returning Officer had received nomination papers did not mean there was full compliance and that the eligibility of the Appellant could not be challenged.

[67] Despite RW10 maintaining that it was not logical for the Court to conclude that it would not know if the Appellant did have a Grade 12 certificate because the nomination papers had not been brought to Court, he did concede that the Court would only know so if he had brought the grade 12 certificate to Court; but that he had not brought it.

[68] Our understanding of the foregoing is that the issue of eligibility on account of holding a grade 12 certificate began with an allegation that the Appellant did not have a grade 12 certificate which was made in paragraph 13 of the petition. The Appellant's answer as far as we can decipher it is to

the effect that only the 2<sup>nd</sup> Respondent could reject a candidate on the basis of eligibility or deal with the issue. The answer did not traverse the allegation.

[69] At trial, the 1<sup>st</sup> Respondent and his witnesses did not testify to the issue of the grade 12 certificate and the Appellant's eligibility and it was the Appellant's counsel who sought to establish in cross-examination of the 1<sup>st</sup> Respondent, that the Appellant was one of the candidates who was validly nominated to stand for election. The Appellant did not testify on the grade 12 issue in his evidence in chief but during cross-examination it was established that the Appellant spent three years at Chililabombwe Secondary School in which period of time he said one obtains a form three certificate. He did not say that he had obtained the form three certificate but asserted that he had a grade 12 certificate.

[70] The Appellant conceded that he did not tell the Court which school he obtained the alleged grade 12 certificate at. He also conceded that the Court would not know for sure that he had both the form III and grade 12 certificates as they were not before the Court.

[71] In re-examination the Appellant's Counsel only asked the Appellant to explain why the grade 12 certificate was not in Court to which he responded

that there was no request for it to be brought to Court otherwise he would have brought his credentials.

[72] RW10's evidence on the issue was that he received the Appellant's nomination papers and had access to them even though he had not brought them to Court. He conceded that he had a duty to place them before the Court and that without their being before Court, the Court could not know for certain whether the Appellant had a grade 12 certificate. He also conceded that the Appellant's eligibility could be challenged before Court.

[73] After assessing the evidence on the issue, the trial Court stated as follows at pages 151 to 152 of the record of appeal:

**5.121 Evidently, the First Respondent has failed to adduce cogent evidence to support his assertion of the affirmative on this contention i.e. that he did possess a Grade 12 certificate on 12<sup>th</sup> August, 2021.**

**5.122 His predicament is worsened by the doubt created by:**

**(i) the fact that-**

**a) the First Respondent did not in his affidavit in support of answer produce it which would have been the logical and simplest response/ rebuttal; and  
b) the First Respondent did not even allege in his answer that he possessed a Grade 12 certificate nor did he address it in examination in chief but only said so for the first time when cross-examined;**

**(ii) the fact that the Second Respondent did not tender any pleadings alleging (*inter alia*) that a Grade 12 certificate was one of the documents presented by the First Respondent at nomination stage; and**

**(iii) the fact that RW10 was the returning officer (that presided over the nomination exercise) did not produce a copy of the First Respondent's Grade 12 certificate or even allege in his testimony that it was part of the nomination papers submitted by the First Respondent to him.**

**5.123 I accordingly accept that it has been proven by the Petitioner beyond a simple balance of probabilities that the First Respondent did not possess a Grade 12 certificate at the time that he was re-elected.(sic)**

[74] To recap the Appellant's bone of contention, it is that the 1<sup>st</sup> Respondent did not adduce any evidence to show that the Appellant did not have a grade 12 certificate when it was his duty to do so. Consequently, the evidential burden wrongly shifted to the Appellant as a *prima facie* case had not been established to justify the shifting of the said burden.

[75] It is apparent to us from the reasons stated in the impugned Judgment that the trial Court concluded that a *prima facie* case had been established so as to shift the evidential burden to the Appellant upon the latter's assertion that he did have a grade 12 certificate. The question is whether in the circumstances the evidence was sufficient and the trial court justifiably shifted the evidential burden to the Appellant.

[76] We have considered the evidence on record. The Appellant had notice in Paragraph 13 of the petition that the issue of his eligibility on the basis of his grade 12 certificate would be raised at trial. Thus the Appellant knew the case he was facing from inception at the time of exchanging the petition and the answer. His lawyers raised the issue of qualifying for nomination in their

cross-examination of the 1<sup>st</sup> Respondent. The Appellant was subsequently cross-examined on the issue and made admissions on it. He was not taken by surprise or ambushed when the issue arose in cross-examination neither did his counsel object on the premise that the 1<sup>st</sup> Respondent and his witnesses did not testify to the grade 12 issue. Once the cross-examination was concluded, the Appellant had the opportunity to undo any damage done during re-examination or through his remaining witnesses or even through the 2<sup>nd</sup> Respondent's witness RW10. He did not do so and RW10 did not corroborate his testimony as he neither mentioned the grade 12 certificate nor thought to bring it to Court.

[77] We are therefore of the considered view that there was sufficient evidence which was solicited from the Appellant during cross-examination to establish a *prima facie* case to the effect that the Appellant did not have a grade 12 certificate at the time of his re-election. That evidence which showed that the Appellant left secondary school after three years could not be discounted or disregarded simply because it was elicited through cross-examination. It was still evidence that supported the 1<sup>st</sup> Respondent's allegation. **Phipson** puts it this way at page 57:

**In civil cases the evidential burden may be satisfied by any species of evidence sufficient to raise a *prima facie* case. (emphasis added)**

[78] It is trite that all relevant evidence including that solicited in cross-examination is taken into consideration by a court.

**Phipson** says, at page 245:

**The object of cross-examination is two-fold – to weaken, qualify or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses (emphasis added)**

[79] It is our firm view of the trial Court's reasoning, that the Court did not err other than by omitting to explain the common law principle by which the evidential burden came to fall upon the Appellant. We say so because the evidential burden shifted for good reason as there was sufficient evidence to establish a *prima facie* case.

[80] We wish to say further that even if the evidence had been found to be insufficient to establish a *prima facie* case, the Appellant would still have been caught by the exceptions to the rule that the allegor bears the burden of proof. The exceptions are two-fold. The first exception stipulates that the evidential burden may shift where the knowledge in issue is peculiar to a particular party. According to the learned authors of **Halsbury's Laws of England, Third edition, Volume 15** at page 270 paragraph 493, an exception may exist where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, so that the burden of disproving the allegation lies on the latter.

[81] In this case, the Appellant's testimony was that he has three years of secondary schooling. We take judicial notice that a grade 12 certificate is normally awarded upon the successful completion of five years of secondary schooling in addition to seven years of primary schooling. That being the case, whether the Appellant went further in his studies and was awarded a grade 12 certificate is within his peculiar knowledge. He ought to have adduced evidence to support his assertion that he did have a grade 12 certificate at the time of his election on 12<sup>th</sup> August, 2021.

[82] The second exception is more compelling and draws on the wider principle that the common law must give way to statute. The exception stipulates that where there is an express or implied provision placing the evidential burden on the respondent such as where a requirement has been set by law either expressly or impliedly, and an allegation, is put to the court that such requirement has not been fulfilled, the evidential burden shifts to the party against whom the allegation is made to show that he has fulfilled the requirement set by the law.

[83] In *casu*, the requirement in issue is found in the Constitution. We are thus mindful that we are dealing with the supreme law of the land which enjoins everyone including this Court to its mandatory provisions. The

requirement to hold a grade 12 certificate is enacted in Article 70 (1) (d) of the Constitution which reads:

**(1) Subject to clause (2), a person is eligible to be elected as a Member of Parliament, if that person—**  
**d) has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent;**

[84] Article 73 (1) of the Constitution allows a person to challenge the election of a person as a Member of Parliament in a court of law by providing that:

**A person may file an election petition with the High Court to challenge the election of a Member of Parliament.**

[85] The Electoral Process Act, in section 97 (2) (c) and section 31(1) respectively, allow for a petition relating to eligibility to be heard and direct a person aspiring for the office of Member of Parliament to lodge their credentials with the Electoral Commission of Zambia as prescribed. Section 31(1) of the Electoral Process Act reads:

**A person who applies to be a candidate for election in any constituency, shall lodge with the returning officer for that constituency that person's nomination paper and an affidavit in the prescribed manner and form.**

[86] Accordingly, the Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016 provide in regulation 12 (2) that a Parliamentary

candidate's nomination paper is to be accompanied by an affidavit as set out in Form Gen. 8. Form Gen. 8 requires that a certified copy of the grade 12 certificate or its equivalent be attached to the affidavit.

[87] We have carefully examined the wording of the said provisions and although they do not expressly compel the Appellant to produce his grade 12 certificate before court in the event there is a challenge to his eligibility, the duty is implied and flows from the constitutional/ statutory nature of the office of Member of Parliament. **Phipson** at page 64 cites the position of the House of Lords that:

... the question of whether a statute places a burden of proof on the defendant depends on the construction of the particular statute...

[88] Further, we find persuasive the holding in the English case of **R v Hunt**<sup>25</sup> where the court found that if the linguistic construction of the statute does not clearly indicate upon whom the evidential burden should lie, the court should look to other considerations to determine the intention of Parliament. In the circumstances, what is in issue is not a simple case of 'the allegor must prove the allegation or fail and the matter ends there'. The grade 12 certificate issue did not arise in litigation between private parties but in

litigation sanctioned by the Constitution to establish whether the Appellant qualified to occupy a public/ constitutional office.

[89] That being the case all parties involved including this Court, were/ are duty bound to ensure that the constitutional requirement was/ is met. The learned authors **Max du Plessis, Glenn Penfold and Jason Brickhill** in their book **Constitutional Litigation** at page 7 are helpful in explaining why we say so:

... constitutional litigation differs in important ways from ordinary litigation, primarily because ... [of] the need to safeguard the rule of law, not merely the discrete claims of litigants. These differences colour the court's assessment of the litigation choices of parties and need to be borne in mind before raising technical defences, withholding evidence ... that might be perfectly appropriate and defensible in ordinary civil proceedings.

[90] It is our finding, on the basis of the evidence on record which established a *prima facie* case and that the Appellant had peculiar knowledge of the issue, as well as, on a holistic reading of the law, that the Appellant bore the evidential burden to adduce evidence of the existence of his grade 12 certificate.

[91] Having found that the trial Court applied the correct standard of proof and that the evidential burden of producing the grade 12 certificate and thereby settling the question of the Appellant's eligibility was rightfully borne

by the Appellant due to exceptional circumstances, it follows that Grounds Three, Five, Six and Seven have no merit and we dismiss them accordingly.

[92] Before we leave this point, we wish to correct any misapprehension that had we found in favour of the Appellant under grounds Three, Five, Six and Seven he would have been entitled to judgment. It is trite that where the evidential burden wrongfully shifts during trial, the court may order a re-trial.

**Phipson**, at page 57 guides that:

**An erroneous decision as to the onus of proof, will, if it has occasioned substantial injustice, entitle the injured party to a new trial.**

### **Grounds One and Two**

[93] We now turn to the third issue which is whether on the basis of Grounds One and Two, this Court ought to reverse the trial Court and hold that the Appellant was eligible to stand for election and was validly elected Member of Parliament for Kwacha Constituency in Kitwe. That the Appellant had a grade 12 certificate at the time of his re-election and therefore met the eligibility requirement in Article 70(1) (d).

[94] The orders sought are dependent on the evidence on record. The only evidence as to whether the Appellant had a grade 12 certificate at the time of his re-election as Member of Parliament is the Appellant's testimony that

he has three years of secondary schooling which testimony belies his assertion that he has a grade 12 certificate. There is no evidence on the record of appeal showing the Appellant's grade 12 certificate. There is also no evidence on the record of appeal to the effect that the Appellant went further than form three in his studies and was awarded a grade 12 certificate at a later point in time. There is equally no evidence on the record of appeal showing that the Appellant holds the equivalent of a grade 12 certificate. We are therefore of the firm view that the Appellant did not have a grade 12 certificate at the time of his re-election. We say so alive to the proviso in Article 70(1) (d) that the equivalent of a grade 12 certificate can suffice.

[95] The trial Court cannot be faulted. We find that Grounds One and Two have no merit and dismiss them accordingly.

### **Ground Nine**

[96] The fourth and final issue is Ground Nine, which challenges the trial Court's order for costs. We find that this Ground has merit as this is an election petition and section 109 of the Electoral Process Act applies. We accordingly, order each party to bear their own costs both here and in the Court below.

[97] All the substantive grounds having failed we dismiss the appeal and uphold the trial Judge's decision to declare the Kwacha Constituency seat vacant.



**A. M. SITALI**

**Constitutional Court Judge**



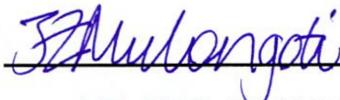
**P. MULONDA**

**Constitutional Court Judge**



**M. M. MUNALULA (JSD)**

**Constitutional Court Judge**



**J.Z. MULONGOTI**

**Constitutional Court Judge**

## **Mulenga, JC Dissenting**

### **Cases cited:**

- 26. Chrispin Siingwa v Stanley Kakubo CCZ Appeal No. 7 of 2017**
- 27. Christabel Ngimbu v Prisca Chisengo Kucheka and Electoral Commission of Zambia CCZ Selected Judgment No. 2 of 2018**
- 28. Mazoka and two others v Mwanawasa and two others (2005) Z.R. 138**
- 29. Galunia Farms Ltd v National Milling Company and Another (2002) Z.R. 135**
- 30. Gutteridge v Revenue and Customs [2005] UKSPC SPC 00534**
- 31. Snell v Farrell (1990) 72 DLR 4<sup>TH</sup> 289**
- 32. Drake v Harbour [2008] EWCA CIV 25**
- 33. Charles Changano Kakoma v Kundoti Mulonda CCZ Appeal No. 5 of 2017**

[98] I have read the decision taken by the majority. While I agree with the decision on grounds four, eight and nine, I have a different position regarding the factual findings impugned in grounds one, three and five to seven of the Appeal.

[99] These grounds question the factual findings of the trial Court on the allegation that the Appellant did not possess a grade 12 certificate and contend that the trial Court shifted the burden of proof onto the Appellant when it required him to prove that he holds a grade 12 certificate.

[100] The Appellant's arguments on these grounds were mainly that the 1<sup>st</sup> Respondent did not adduce cogent evidence to satisfy the trial Court that the Appellant did not hold a grade 12 certificate. Further, that the trial Court made its finding based on the fact that the Appellant did not produce his grade 12 certificate, an evidential burden he did not bear by virtue of being the

respondent in the Petition. That the burden lay on the 1<sup>st</sup> Respondent as petitioner.

[101] The 1<sup>st</sup> Respondent on the other hand maintained that the Appellant bore the evidential burden of proving that he possessed a grade 12 certificate.

[102] The record shows that the 1<sup>st</sup> Respondent did not lead any evidence on the allegation. The only evidence on this issue came through the cross examination and re-examination of the Appellant (RW1) and RW10 (the Returning Officer for Kwacha Constituency) as respectively reflected on pages 615-616, 642-644 and 749-752 of the Record of Appeal, excerpts of which have been reproduced in the majority decision at paragraphs 63, 64 and 66. Briefly stated, the Appellant's statement on the issue was that he attended Chililabombwe Secondary School for three years and obtained a form three (3) certificate. He also stated that he was in possession of a grade 12 certificate and that the same was not produced before the court. RW10 testified that he did not bring the nomination papers filed by the Appellant despite being aware that one of the contentious issues in the Petition had to do with whether or not the Appellant holds a grade 12 certificate.

[103] The trial Court's analysis of the evidence is contained on pages J143 to J146 of the Judgment. In particular, the trial Court stated as follows at pages J143 to J144 of the Judgment:

**5.121 Evidently, the First Respondent has failed to adduce cogent evidence to support his assertion of the affirmative on this contention i.e. that he did possess a Grade 12 certificate on 12<sup>th</sup> August, 2021.**

**5.122 His predicament is worsened by the doubt created by:**

**(i) the fact that-**

**a) the First Respondent did not in his affidavit in support of answer produce it which would have been the logical and simplest response/ rebuttal; and**

**b) the First Respondent did not even allege in his answer that he possessed a Grade 12 certificate nor did he address it in examination in chief but only said so for the first time when cross-examined;**

**(ii) the fact that the Second Respondent did not tender any pleadings alleging (*inter alia*) that a Grade 12 certificate was one of the documents presented by the First Respondent at nomination stage; and**

**(iii) the fact that RW10 was the returning officer (that presided over the nomination exercise) did not produce a copy of the First Respondent's Grade 12 certificate or even allege in his testimony that it was part of the nomination papers submitted by the First Respondent to him.**

**5.123 I accordingly accept that it has been proven by the Petitioner beyond a simple balance of probabilities that the First Respondent did not possess a Grade 12 certificate at the time that he was re-elected.**

[104] It was the trial Judge's position that since the Appellant asserted in the affirmative, it fell on him to adduce cogent evidence to support his assertion on the question of whether or not he possessed a grade 12 certificate. Further, that this, coupled with the fact that the Appellant had neglected to refute the 1<sup>st</sup> Respondent's allegation in the pleadings and RW10 who was in the position to produce the grade 12 certificate had equally not done so, the trial Court concluded that the 1<sup>st</sup> Respondent had proved beyond a

simple balance of probabilities that the Appellant did not possess a Grade 12 certificate at the time of the elections.

### **Determination**

[105] I shall consider the following questions:

1. Who, between the Appellant and the 1<sup>st</sup> Respondent, bore the legal burden of proving the allegation that the Appellant did not possess a grade 12 certificate?
2. Was there a shift of the evidential burden as alleged by the 1<sup>st</sup> Respondent?
3. On the totality of the evidence, did the 1<sup>st</sup> Respondent prove the allegation that the Appellant did not possess a grade 12 certificate to the required standard of proof of a fairly high degree of convincing clarity?

### ***Who bore the burden of proof?***

[106] This Court has been unequivocal on the bearer of the burden of proof in election petitions in a plethora of cases such as **Chrispin Siingwa v Stanley Kakubo**<sup>26</sup> where we stated that the burden of proving the grounds set out in section 97 (2) of the EPA at all times lies on the person alleging. Further, in the case of **Christabel Ngimbu v Prisca Chisengo Kucheka and Electoral Commission of Zambia**<sup>27</sup> we cited with approval the Supreme Court decision in the case of **Mazoka and two others v Mwanawasa and two others**<sup>28</sup> wherein it is stated that:

**Where a plaintiff .... makes any allegation, 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.**

[107] Thus, a petitioner must prove his case and if he fails to do so, the mere failure of the opponent's defence or case does not entitle him to judgment as aptly stated in *Galunia Farms Ltd v National Milling Company and Another*<sup>29</sup>. In the case of election petitions which are required to be proved to the high degree of convincing clarity, even where there is no defence or answer, the petitioner is still required to prove his allegations. It does not matter whether the allegation is a negative assertion or positive assertion or affirmation, the petitioner who asserts a claim must prove it and where evidence is not adduced to the required standard, the claim fails.

[108] In the case at hand, the 1<sup>st</sup> Respondent alleged that the Appellant was not a qualified person to contest the parliamentary election pursuant to section 97 (2)(c) of the EPA which provides as follows:

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

The 1<sup>st</sup> Respondent thus had to prove that the Appellant was indeed not qualified by virtue of not being in possession of a grade 12 certificate. This burden lay on the 1<sup>st</sup> Respondent as petitioner.

[109] I note that the trial Judge, at page J143 of the Judgment, was of the view that since the allegation was in the negative and the Appellant was the one who asserted the affirmative, it now fell on the Appellant to prove his

assertion in the affirmative. This is a misdirection. The position taken by the trial Judge is against the burden of proof that has long been set in election petitions because it is essentially advancing that an affirmative assertion on the part of a respondent in response to a negative assertion by a petitioner would automatically connote a shift in the burden of proof.

[110] The settled position is that a petitioner who alleges, whether a negative or affirmative assertion, is the one who bears the burden to prove that allegation. In *casu*, since it was the 1<sup>st</sup> Respondent who alleged that the Appellant was not a qualified person to contest the 12<sup>th</sup> August, 2021 election, and that consequently his election should be nullified, the onus was on the 1<sup>st</sup> Respondent to prove the allegation to the required standard.

[111] Additionally, where a party makes a negative assertion but does not lead sufficient evidence on it, the mere fact that the opponent asserts the affirmative does not shift the burden of proof and furthermore, does not prove the negative assertion. Hence, the fact that the Appellant asserted in the affirmative that he had a grade 12 certificate did not divest the 1<sup>st</sup> Respondent of the burden of proving the negative assertion he made.

[112] Hence, the trial Judge erred when he shifted the burden of proof onto the Appellant from the 1<sup>st</sup> Respondent who challenged the Appellant's election and alleged that he did not possess a grade 12 certificate.

***Was there a shift in the evidential burden?***

[113] I note that the issue of shifting the evidential burden was neither raised in the court below nor mentioned by the trial Judge but has been raised on appeal. I will address it in view of the majority decision touching on the same. The issue then is whether, in this case, the evidential burden shifted to the Appellant. While I agree with the majority decision that there are instances where the evidential burden shifts, I am of the considered view that this did not arise in the case at hand.

[114] A number of English civil cases on the shifting of evidential burden, namely, *Gutteridge v Revenue and Customs*<sup>30</sup>, *Snell v Farrell*<sup>31</sup> and *Drake v Harbour*<sup>32</sup>, reveal that before the evidential burden can shift, there is need for the party bearing the legal burden of proof to furnish sufficient evidence to warrant the shift.

[115] In the case of *Amama Mbabazi v Yoweri Museveni and two others*<sup>5</sup> the Supreme Court of Uganda stated that:

**An electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner to place credible evidence before the court which will satisfy the court that the allegations made by the petitioner are true....Once credible evidence is brought before the court, the burden shifts to the respondent...**

(emphasis added)

[116] Further, Black's Law Dictionary, Tenth Edition defines 'shifting the burden of proof' in the following terms:

**In litigation, the transference of the duty to prove a fact from one party to another; the passing of the duty to produce evidence in a case from one side to another as the case progresses, when one side has made a *prima facie* showing on a point of evidence, requiring the other side to rebut it by contradictory evidence.** (emphasis added)

[117] It is thus evident that the general rule establishes that, the legal burden of proof, which also carries the evidential burden, rests on the proponent of a case or allegation who must discharge his evidential burden before an obligation to adduce evidence in rebuttal shifts to the opponent.

[118] In *casu*, could it be said that the 1<sup>st</sup> Respondent had laid evidence to warrant a shift of the evidential burden onto the Appellant? My answer is no. The statements that were solicited in cross examination of the Appellant and RW10 were not sufficient to warrant a shift in the evidential burden and did not raise a *prima facie* case that the Appellant did not have a grade 12 certificate. Even the statement to the effect that the Appellant left secondary school after three years (form three) was not sufficient in itself because it is

common cause that one can obtain a grade 12 certificate or its equivalent at any point in time so long as they sit for the requisite examinations.

[119] Article 70(1)(d) and section 30 of the EPA require the candidate to be the holder of a grade 12 certificate or its equivalent. Under the regulations, form GEN 8 being the affidavit in support of nomination of a parliamentary candidate not only includes the requirement for one to declare that he has obtained a grade 12 certificate or equivalent but also to attach the certified copy of the certificate. Further, regulations 20(2) and 22 of the Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016 provide for the information of parliamentary candidates contained in the nomination papers and affidavits to be published and for interested persons in the constituency to inspect the same at the office of the Returning Officer, respectively.

[120] This clearly places the grade 12 certificate in the public domain and it cannot be said that the certificate is within the peculiar knowledge of the candidate. By virtue of regulation 22, the 1<sup>st</sup> Respondent, as a concerned person in the constituency, had access to the Appellant's nomination papers and affidavits.

[121] The 1<sup>st</sup> Respondent thus had means of tendering sufficient evidence in support of his allegation which could have then shifted the evidential

burden on the Appellant. Failing or choosing not to make use of available avenues provided by the law, including the liberty to subpoena relevant documents in aid of one's case, can only work against the party alleging who bears the burden to prove his case. I wish to reiterate that to satisfy the evidential burden that a candidate does not possess the required grade 12 certificate under section 97 (2) (c) of the EPA requires that sufficient evidence should be tendered to the court before the evidential burden can shift. Making mere assertions is not enough.

[122] In *casu*, the 1<sup>st</sup> Respondent laid no evidence on this allegation when presenting his case and the answers solicited from the Appellant and RW10 in cross examination were not sufficient to warrant a shift in evidential burden. The lack of sufficient evidence meant that the threshold for shifting of the evidential burden on to the Appellant was not met and the failure to present sufficient evidence to support his allegation ought to count against the 1<sup>st</sup> Respondent who made the allegation and who bore the burden of proof.

[123] Before leaving this issue, I wish to briefly address the trial Court's position that the 2<sup>nd</sup> Respondent ought to have tendered the documents filed by the Appellant at nomination and that its witness, RW10, should have produced the grade 12 certificate. The record shows that the allegation

regarding the grade 12 certificate was made against the Appellant and therefore, the fact that the 2<sup>nd</sup> Respondent, through its witness RW10, did not take the initiative to produce the same in an adversarial system could not be held against the 2<sup>nd</sup> Respondent or the Appellant. It was the 1<sup>st</sup> Respondent who was at liberty to subpoena the 2<sup>nd</sup> Respondent's production of the Appellant's certificate which was filed at nomination to show that it was not a grade 12 certificate.

***Was the allegation proved?***

[124] The third issue flowing from the two above is whether or not on the totality of the evidence before the trial Court, the allegation was proved that the Appellant did not possess a grade 12 certificate.

[125] In *Charles Changanu Kakoma v Kundoti Mulonda*<sup>33</sup> we emphasised the need for cogent evidence to be presented on allegations advanced by a petitioner. Where there is lack of cogent evidence, the case must fail. The higher standard of proof required in election petitions is anchored on the basis that election results, representing the will of the people, should not be easily disturbed unless there exists clear evidence establishing one of the grounds set out in section 97 (2) of the EPA.

[126] Possessing a minimum academic qualification of a grade twelve certificate or its equivalent is the requirement set out in Article 70 (1) (d) of the Constitution. Section 31 of the EPA and regulation 12 of the Electoral Process (General) Regulations, require a candidate to assert under oath that they possess this minimum qualification as well as to exhibit a copy of it during nomination. It is not in dispute that the Appellant's nomination papers were accepted at nomination. This evidence raised a presumption that the Appellant complied with all the nomination requirements set out in Article 70 of the Constitution. Hence, there was need for sufficient evidence to be adduced on the part of the 1<sup>st</sup> Respondent in discharging his burden which, if not rebutted and where the trial Court has found that the evidence was cogent to satisfy the requisite burden of proof in election petitions, the trial Court would consider the allegation proved.

[127] The Supreme Court of Kenya, in the case of **Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others**<sup>9</sup> stated at paragraph 195 that:

**There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately of course it falls to the Court to determine whether a firm and unanswered case has been made. (emphasis added)**

[128] This shows that after hearing the evidence the court has to ultimately weigh the evidence to determine whether an allegation has been proved to the required standard. This was apparently not done by the trial Court as evidenced at paragraph 103 above. Had the trial Court done so, it would not have arrived at the decision it made. I say so because on the totality of the evidence on record there was no cogent evidence to prove to the required standard the 1<sup>st</sup> Respondent's allegation that the Appellant did not possess a grade 12 certificate.

[129] Therefore, it cannot be said that the 1<sup>st</sup> Respondent had proved to the standard of convincing clarity that the Appellant did not possess a grade 12 certificate when there was insufficient evidence before the trial Court in the form of assertions by both the 1<sup>st</sup> Respondent and the Appellant. In election petitions, the standard of proof is higher than the ordinary balance of probabilities.

[130] Having so stated, I am of the view that grounds one, three and five to seven have merit.



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**M. S. MULENGA**  
**Constitutional Court Judge**