

IN THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL 2021/EP/LWN/LG/003
HOLDEN AT LUANGWA
(Civil Jurisdiction)

IN THE MATTER OF: ARTICLE 47, 153, 159 OF THE CONSTITUTION OF THE
REPUBLIC OF ZAMBIA (AMENDMENT) NO. 2 OF 2016

IN THE MATTER OF: SECTION 83, 97, 98, AND 99 OF THE ELECTORAL PROCESS
ACT NO. 35 OF 2016

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL
RULES, 2016 (STATUTORY INSTRUMENT NO. 60 OF 2016)

IN THE MATTER OF: THE SCHEDULE TO THE ELECTORAL PROCESS ACT NO.
35 OF 2016

IN THE MATTER OF: THE ELECTORAL (CODE OF CONDUCT) REGULATIONS
2011 STATUTORY INSTRUMENT NO. 52 OF 2011

IN THE MATTER OF: THE COUNCILOR ELECTION FOR KAPOCHE WARD,
LUANGWA DISTRICT, HELD ON 12TH AUGUST 2021

BETWEEN:

CATHERINE NYANGU

PETITIONER

AND

AGNES TEMBO

1ST RESPONDENT

Before the Honourable Tribunal:

Jennipher Bwalya – Chairperson

Waicha Ndhlovu – Member

A.D.A. Theotis – Member

For the Petitioner

:

In Person

For the Respondent

:

Ms. N. Nambao – Messrs Mulungushi Chambers

JUDGMENT

LEGISLATION AND REFERRED TO:

1. The Electoral Process Act No. 35 of 2016

CASES REFERRED TO:

1. Lewanika and others v Chiluba (1998) ZR 49
2. Austin Liato v Sitwala Sitwala. selected judgment No: 23 of 2018

3. Brelsford James Gondwe v Catherine Namugala, SCZ Appeal No: 129 of 2012
4. Mubita Mwangala v Inonge Mutukwa Wina, SCZ Appeal No. 80 of 2007
5. Josephat Mlewa v. Eric Wightman (1995/1997) Z.R. 106
6. Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General, Selected Judgment No. 51 of 2018
7. Anderson Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138

1. The Petitioner Catherine Nyangu, and the Respondent Agnes Tembo, were among the candidates during the Councilor elections held in Luangwa held on the 12th day of August 2021. The Petitioner stood on the United Party for National Development (UPND ticket, and the Respondent stood on the Patriotic Front (PF) ticket. Following the said elections, the Respondent was declared victorious and duly elected Councilor for the Kapoche Ward, Luangwa District.
2. Being dissatisfied with the declared election results, the Petitioner commenced these proceedings by way of petition on the 25th day of August, 2021. In her petition, the Petitioner claimed that the Respondent and her PF cadres committed a number of electoral malpractices during campaigns and on the actual voting day of 12th August 2021. The malpractice complained of included: distribution of mealie meal, blankets and rice to the electorate while telling them to vote for the PF; cheating the electorate that there will be cameras mounted at polling stations to monitor the voting and those who do not vote for the PF will be removed from the list of beneficiaries of the social cash transfer program; payment of social cash transfer 2 days before voting as opposed to the normal routine of paying beneficiaries at the monthend; and the Community Welfare Assistant Committee (CWAC) members threatening beneficiaries against voting for the UPND. The Petitioner further claimed that in light of these illegal acts, the Respondent was not validly elected in terms of the Constitution and Electoral Act. She therefore prayed for the following reliefs:
 - i. A declaration that the illegal practices committed by the Respondent and her respective political cadres so affected the election results that the same ought to be nullified;
 - ii. An order that the cost occasioned by the Petitioner be borne by the Respondent.
3. The Respondent filed an Answer and supporting Affidavit in which she maintained that she was duly elected as Councilor for Kapoche Ward and that at no time did she or any of her PF cadres commit any electoral malpractice such as distribution of mealie meal, blankets and rice to voters or engaging in deceit over social cash transfer program or any form of victimization of voters before or on poll day; that she did not have control over the alleged conduct of members of the CWAC; and that at no time did she or any of her agents or cadres engage in beating up UPND cadres. She deposed that the distribution of social cash transfer is a preserve of the State through its *bonafide* officers and that she believes that he was duly elected area Councilor for Kapoche Ward.

4. The Petitioner also gave oral evidence and called four (4) witnesses in aid of her testimony. According to the Petitioner, the Respondent and her PF cadres came to Nakwindi village around 19:00 to 20:00 hours in the evening, in the motor vehicle belonging to Kapoche Secondary School and driven by the headmaster of the said School. They started distributing mealie meal, rice and blankets. When she heard a lot of noise, she went to inquire what was happening at the shop and she was told by people there that mealie meal had come and was brought by the said motor vehicle. She saw the Respondent distributing mealie meal. The mealie meal she saw was meant for the victims of disaster such as having garden produce eaten by elephants. She stepped aside and observed what was happening. She saw that because of time and the large crowds, some people were given the mealie meal while others were not. This led to a scramble for the remaining mealie meal.
5. Petitioner continued that the Respondent held campaign meetings in which she advised people that if they did not vote for the PF, they will be removed from the list of beneficiaries of the social cash transfer. That if they did not vote for the PF, they will be captured by the cameras positioned in the polling stations, and that this footage is what will be used to remove them from the said list of beneficiaries. She personally knew of one person who did not receive her social cash transfer payment. The Respondent told the said woman that she was not the only one, and that all those who would not vote for PF would equally be removed from the list of beneficiaries. This brought fear among the people as they did not want to be removed as beneficiaries. The Petitioner later met with Kizito Njobvu and told him that money meant for social cash transfer for that month would not be received for the reason that some people in Kapoche ward were siding with the UPND. To her knowledge, members of the Community Welfare Assistant Committee (CWAC), which is responsible for distributing social cash transfer, were PF cadres and they were telling people that '*Boma ni Boma*' meaning 'Government is Government'. They were saying that they were the Government in power and that the money brought as social cash transfer was the then President Edgar Chagwa Lungu's half salary and so if they do not vote for the PF from President to Councilor then this money will not come to them.
6. Under cross examination from Respondent's Counsel, the Petitioner stated that there were a total of 549 registered voters, out of which a total of 479 cast their vote and 71 did not vote. She said that people feared to vote because of social cash transfer. She stated that she knew how social cash transfer worked and that the social welfare department works hand in hand with the CWAC and the money helps the people in need. She admitted that she only knew of one person who did not receive the social cash transfer. She said that the Disaster Management and Mitigation Unit (DMMU) gives mealie meal in case of crisis and that it is ordinarily docketed at the community hall from where it is distributed. She said that the beneficiaries are identified through the headmen who are asked to compile a list of those who should benefit, that the beneficiaries are then told to go and receive the mealie meal from the community hall. She said that for those who are unable to go to the community hall, the mealie meal is brought to them.

7. In continued cross examination, the Petitioner stated that the Electoral Commission of Zambia (ECZ) did come to sensitise people on electoral malpractice. She maintained that she saw the Respondent distributing mealie meal, rice and blankets while telling the electorates to vote for the PF. She said that she did not report the matter to ECZ or the police. She stated that apart from the evidence of her witnesses, she did not have any evidence to show that the Respondent was telling people to vote for the PF and no other party like UPND.
8. PW2 was Ireen Augustine Mwanza. She testified that around 19:00 to 20:00 hours on 10th August 2021, she saw some motor vehicle flashlights near her home, with people rushing to where it was heading. She sent her son to investigate and he reported back that a motor vehicle driven by Mr. Banda had brought mealie meal, blankets, rice, beans and some wild fruits. She also rushed there and found the Respondent with the cadres she identified as Gowela and Paul Tembo, the Respondent had a list in her hands. The Respondent was calling out names of people on her list and distributing the said items. When she saw that the items were reducing, she asked the Respondent whether her name would be called from the list of beneficiaries. She confronted the Respondent, stating that she had been standing there for a while and her name was not being called. She reminded the Respondent that it was not too long ago when she the Respondent had approached her to canvas for her vote. She asked the Respondent whether with this conduct if voted into power, the Respondent would remember her or keep the promises made to the electorate. She was becoming impatient and told the Respondent that she would leave the scene if her name was not being called. Without answering her, the Respondent just ordered Gowela to give her a bag of mealie meal. She said that she did not want mealie meal but rice and so she was given a bag of rice and she left. Shortly thereafter, she heard some commotion coming from the scene and when she went to check, she found people scrambling for the remaining items.
9. Under cross examination, PW2 stated that Gowela and Paul were just good and that they were not hostile. She stated that she did not know what was on the list that the Respondent was referring to when giving out mealie meal. She said that the Respondent did not threaten her in any way.
10. PW3 was Catherine Njobvu and she testified that on 10th August 2021, around 19:00 to 20:00 hours, the Respondent came with some PF cadres distributing some items such as mealie meal and blankets. She was given a bag of mealie meal and told that she should vote for them or she will not receive mealie meal again. She then waited around to see what would remain. When the items were nearly finished, she was among the people that rushed to grab items and she managed to get her hands on a blanket. Sometime later, when she heard that there were petitions, she decided to come and testify. The mealie meal and blanket were produced into evidence and marked P1 and P2 respectively.
11. Under cross examination from the Respondent's Counsel, she said that the Respondent came with 2 cadres and that the Respondent is the one who personally gave her the bag of mealie meal.

12. PW4 was Eucaria Ngilazi who gave evidence that as a beneficiary of the social cash transfer, she gets about K800. 00. In the period under review, she did not receive her money although it was released. She then heard words spoken to the effect that whoever votes for UPND and not PF will not benefit from social cash transfer. She was amongst those told that there would be cameras placed in the polling stations which will capture them as they cast their votes and show who they voted for. She was told that PF was going to win the elections and if they do not vote for it then they will be removed from the list of beneficiaries. A week before elections, they were called so that they get K300.00 and they were told that if they did not sincerely vote for PF, from the President to the Councilor, then they will never see the money again. She lamented that to date she has not been given the K800.00.
13. Under cross examination from the Respondent's Counsel, PW4 stated that it is the Respondent who when approaching the election date uttered the words about voting for PF and the cameras being placed at polling stations. She said that she has been receiving social cash transfer from 2012 and that the K800.00 complained of arrived in July 2021. She stated that Government is the one that releases social cash transfer; that it is not the Respondent who has been giving her the money; and that she has never gotten such money from the Respondent.
14. PW5 was Kizito Njobvu whose evidence was that on 9th August 2021, he met the Respondent at J.B. Shop and told her that he had just seen Lawrence Shawa with Mrs. Banda in a motor vehicle and that he believed that they had come to collect the social cash transfer. To this, the Respondent said that people in Kapoche ward would not receive social cash transfer because Titus Tembo, the former Councilor, had sent a WhatsApp message to the President that people in Kapoche ward should not receive social cash transfer. The Respondent further told him that the District Chairperson had asked her to come up with a list of people in Kapoche ward who should not receive social cash transfer money and that once PF wins, only those who voted for PF would remain on the list while those who voted for UPND would be removed. The Respondent then told him that she was supposed to go with the list to the District Chairperson but she had left it. It is at this point that they parted.
15. When cross examined by Respondent's Counsel, PW5 stated that 9th August 2021 was the date when the Respondent talked about the list and it was on the same date that the issue of social cash transfer also came out. He said that he did not know when Titus Tembo sent the WhatsApp message to the President.
16. This marked the close of the case for the Petitioner.
17. The Respondent gave oral evidence and did not call any witness. Her evidence was that following the sensitization by some NGOs who were encouraging women to get involved in governance issues, she got interested and from 4 aspiring PF candidates, among whom she was the only female, she emerged victorious. When campaigns started, the ECZ sent ECZ voter educators who came into the community to sensitise people in general. ECZ called all participating parties to Feira Lodge and sensitized them that if anybody sees anyone engaging

in voter malpractice or violence, they should not hesitate to report such a one to ECZ. The Petitioner was party to this sensitization. She did not distribute any mealie meal to anybody, and if she did, then the Petitioner should have reported her immediately because we are not in stone age and communication is very easy. There are 2 polling stations in her ward and all the witnesses brought by the Petitioner were from one ward. In fact, in that same ward, she lost the elections even after distributing things. She lost elections where she was alleged to have distributed things. As far as she was concerned, she won the elections because the people of Kapoche liked her and they chose her because she worked for them in the community and they believe she will work for them still. Whatever the Petitioner and her witnesses were alleging was not true, as she did not distribute any mealie meal; she is not in charge of social cash transfer; and she does not make cameras.

18. Under cross examination from the Petitioner, the Respondent stated that she knew a Ms. Sakala and that same was a member of PF at District level but she did not know what position she holds in CWAC. She said that if Ms. Sakala was campaigning, then she was campaigning for her. She said that she could not remember the name of her campaign manager but it was not Robbie. She said that she was not aware of anything pertaining to voting for PF to get social cash transfer and she never said that to anybody. She said that the PF District Chairperson was Patrick Ngoma whose duties included organizing the party, and that she knew where he stays. She said that neither she nor her party received any mealie meal in Kapoche ward. She stated that indeed the ward has a motor vehicle and that Mr. Banda is the headmaster for Kapoche Secondary School. She said that she was not aware of where the mealie meal that the said motor vehicle brought on 10th August 2021 came from. She said that if the said head teacher was brought before Court, he would not confirm anything because she does not know what the Petitioner was talking about. She said that she does not hold any position that has anything to do with DMMU. She stated that if the District Chairperson for the party brings mealie meal to the ward, she would not know whose it is because she did not see that happening. She maintained that during campaigns, she and others sensitized the youths on free and fair elections and told them to desist from violence.

19. This is all the evidence we received in this matter and both parties filed written submissions, for which we are most grateful.

20. Section 97 (2) of the Electoral Process Act No. 35 of 2016 provides for the **grounds** upon which the election of a Councilor may be nullified and it is couched in the following terms:

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor 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; ...

21. The burden of proving these grounds or any of them, generally lies on the Petitioner, who must prove them to a degree lower than proof beyond reasonable doubt but higher than proof on a balance of probabilities. More specifically, to the standard of 'a fairly high degree of convincing clarity.' This is as espoused in the case of *Lewanika and others v Chiluba (1998) ZR 49*, which the Constitutional Court cited with approval in the case of *Austin Liato v Sitwala Sitwala, selected judgment No: 23 of 2018*, where it was held that:

It could not be seriously disputed that (parliamentary) election petitions have generally long required to be proved to a standard higher than on a mere balance of probabilities and that it followed that the issues raised were required to be established to a fairly higher degree of convincing clarity.

22. The same was reiterated in the case of *Brelsford James Gondwe v Catherine Namugala, SCZ Appeal No: 129 of 2012*, where the Supreme Court held that:

The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with well settled principles of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions, namely fairly high degree of convincing clarity.

23. As to the question of what threshold is sufficient to annul an election, the Superior Courts have guided, in the interpretation of the afore mentioned section, that it is not sufficient to just prove that the alleged malpractice or illegal act was committed; there must be proof that the said act was committed by the Respondent, or his election agents with his knowledge consent or approval, and that the said act was so widespread that it affected the results of the election, whereby it prevented or may have prevented the majority of the electorate from voting for their preferred candidate. Accordingly, it was held in the case of *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...

24. In the case of *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...

25. And 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.

26. The question that must therefore be answered in this case is whether the Petitioner has proved her case against the Respondent to the extent that a nullification of her election may be justified. We will start with the issue of the distribution of mealie meal, blankets and rice during campaigns and while asking for votes. According to the Petitioner, she stood aside and observed the Respondent distributing DMMU mealie meal, kapenta and blankets while in the company of 2 PF cadres in the evenings. PW2 testified that the Respondent was using a list to distribute the said items while in the company of Gowela and Paul Tembo. She said that she is the one who asked Respondent to give her a bag of rice and to remember that she had asked her for her vote not too long ago. The Respondent then instructed Gowela to give her the rice that she asked for. PW3 gave evidence that the Respondent personally gave her a bag of DMMU mealie meal and asked her for her vote, and that she later looted a blanket when the items were finishing.

27. Coming to the issue of social cash transfer, PW4 gave evidence in cross examination that when nearing elections, she personally heard from the Respondent that whoever votes for UPND and not PF will no longer benefit from social cash transfer and that there will be cameras at the polling stations to monitor who did not vote for the PF and that those are the ones who will be removed from the list of beneficiaries. PW5 gave evidence that he personally heard from the Respondent that she was asked by the District Chairperson of the PF to prepare a list of those in Kapoche Ward who should not benefit from social cash transfer and that she had prepared that list except she had forgotten to carry it. He said that she told him that she was told by the said chairperson that only those who voted for the PF would remain on the list once the PF wins.

28. When confronted with these pieces of evidence, the Respondent denied any involvement in the alleged acts. According to her, the Petitioner and her witnesses, who were all educated by ECZ on electoral malpractices, should have reported her if they saw her engaging in the acts complained of. She maintained that she did not know anything about the allegations whose specific facts she kept saying that she was not aware of. She further maintained that she had no part in the processes surrounding distribution and payment of DMMU mealie meal and social cash transfer; and that she does not make cameras.

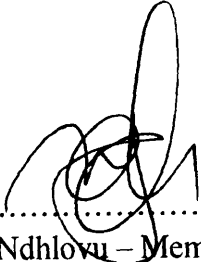
29. Clearly, the Respondent has failed to definitively distance herself from the alleged acts as each witness called by the Petitioner was able to connect her to the acts complained of in some material particular. In fact, in her own evidence in chief, she stated that in the very

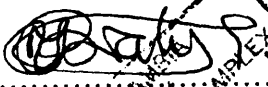
polling station where she distributed the alleged items, she lost the election. It is only when guided by way of questions from her Advocates that she turned and said that in the very polling station where she was alleged to have distributed items, she lost the elections. In spite of this observation, and according to the case of Anderson Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138:

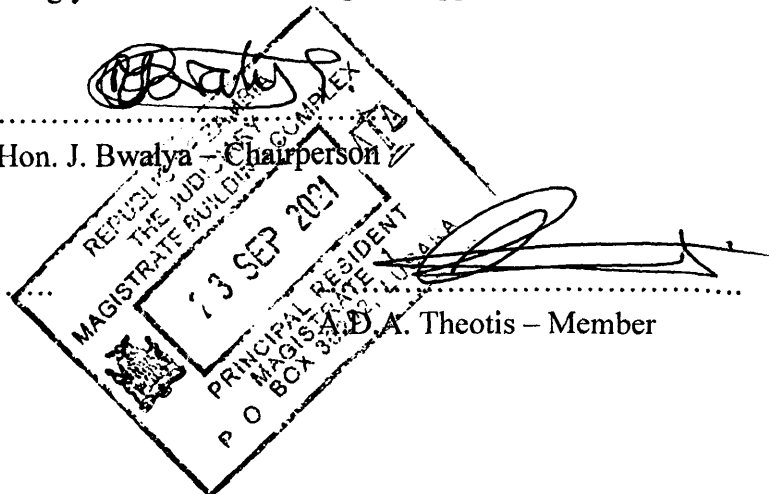
...for the petitioners to succeed..., it is not enough to say that the respondents have completely failed to provide a defence or not call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral 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.


30. There is undisputed evidence on record that there were 2 polling stations in the Kapoche Ward; that all of the Petitioner's witnesses came from the same Ward; and that in that Ward, the Respondent lost the election. Given these facts and the available isolated incidences which allegedly happened in only one Ward, even if we were to hold with certainty that the Respondent committed the alleged illegal acts or malpractices, we would be too constrained to hold that the said acts were so widespread as to influence the majority of voters in the Ward not to vote for their preferred candidate. This is so especially that no evidence has been led to suggest that the same or similar acts were perpetrated by the Respondent in the other wards where she won the elections. It is for this reason that we must, as we do now, hold that the Petitioner has failed to meet the required threshold for the nullification of the Respondent's election. We accordingly dismiss the Petitioner's petition.

31. We do not make any order as to costs. We further direct the parties' attention to Rule 24 of the Tribunal Rules, allowing an appeal to the Constitution Court within 14 days of this Judgment. The parties are accordingly informed of their right of appeal.


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Waicha Ndhlovu – Member


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Hon. J. Bwalya – Chairperson




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A. Theotis – Member