Lubrang J.

IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(Appellate Jurisdiction)

2021/CCZ/A009

IN THE MATTER OF: ARTICLE 73(3) OF THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA

AND

IN THE MATTER OF: SECTION 96 (1) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.

AND

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

AND

IN THE MATTER OF: LOCAL GOVERNMENT ELECTIONS OF SINDA DISTRICT HELD IN ZAMBIA ON 12TH AUGUST, 2021

BETWEEN:

DAVID TEMBO — APPELLANT

AND

JULIUS PHIRI — 1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA — 2ND RESPONDENT

Coram: Chibomba, PC, Mulenga, Munalula, Musaluke and Mulongoti, JJC.

On 30th November, 2021 and on 10th February, 2022.

For the Appellant: Mr. C. M. Besa and Mr. F. Besa both of M. B. Christopher Legal Practitioners.

For the 1st Respondent: Mr. M. Muleya of G. W. Simukoko and Company.

For the 2nd Respondent: No Appearance

JUDGMENT

Chibomba, PC, delivered the Judgment of the Court.

Cases cited:

1. Simbeye Enterprises Limited and another v Ibrahim Yousuf, (2000) Z.R. 159
2. Attorney General v Tall and Another, (1995-97) Z.R. 54
3. Zulu v Avondale Housing Project (1982) Z.R. 172
4. Brelsford James Gondwe v Catherine Namugala (SCZ) Appeal No. 175 of 2012
5. Dr. Saulos Klaus Chilima and Another v Professor Arthur Peter Mutharika and 3 Others, Constitutional Reference No. 1 of 2019
6. Steven Masumba v Elliot Kamondo (2017) Z.R. 130
7. Khalid Mohammed v Attorney-General (1982) Z.R. 49
8. Attorney-General v Marcus Achiume (1983) Z.R. 1

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Electoral Process Act No. 35 of 2016
3. The Local Government Elections Tribunal Rules, Statutory Instrument No. 60 of 2016

1.0 INTRODUCTION

1.1 The Appellant who was the Petitioner in the Court below appeals against the Judgment of the Local Government Elections Tribunal (the Tribunal), which declined to nullify the election of the 1st Respondent as Council Chairperson for Sinda District in the Eastern Province of the Republic of Zambia.

2.0 BACKGROUND

2.1 The brief facts leading to this appeal are that both the Appellant and the 1st Respondent were candidates for the position of Council Chairperson for Sinda District at the elections that were held on 12th August, 2021. The 1st Respondent who stood on the Patriotic Front (PF) ticket having polled 29,960 votes was declared as the duly elected Council Chairperson for Sinda District. The Appellant who stood on the United Party for National Development (UPND) ticket polled 18,000 votes.

2.2 Displeased with the declaration of the 1st Respondent as the duly elected Council Chairperson for Sinda District, the Appellant, on 20th August, 2021 petitioned the Tribunal, seeking the following reliefs: -

1. **A declaration that the election of the 1st Respondent as Council Chairperson for Sinda District is null and void.**
2. **A declaration that the illegal practices committed by the 1st Respondent or their agents affected the election results and that the same should be nullified.**
3. **An order that costs of and incidental to these proceedings be borne by the Respondents.**

2.3 The sum total of the grounds upon which the Appellant based his allegations were that the PF and its supporters used headmen and Chiefs to issue propaganda and hate speech against the Appellant's political party, the UPND, and against the Appellant whereby they claimed that the Appellant belonged to a tribal and regional party.

He also alleged that the PF, the 1st Respondent and his agents also misled the electorate by claiming that if voted into power, the Appellant and his political party would divide the country into two, based on the UPND symbol of an open palm and that this denoted that intention. He also alleged that the PF and the 1st Respondent's agents had engaged in massive corrupt practices and vote buying and used Chiefs and Headmen to distribute bicycles to use in campaigning for the 1st Respondent and his political party. It was also the Appellant's allegation that the PF and the 1st Respondent's agents, on voting day, organized food and meat in almost all the polling stations and urged the electorate to vote for the 1st Respondent and then get food and meat after voting. Further that the PF and the 1st Respondent's agents used intimidation in their campaign message by telling the aged and the vulnerable electorate that those who would vote for the UPND candidates would be removed from the social cash transfer fund beneficiaries.

2.4 The petition was filed together with an affidavit in support in which the Appellant deposed *inter-alia*, that the 1st Respondent and his agents ferried and facilitated a huge number of Mozambican nationals with Zambian National Registration Cards (NRC) and voter's cards who voted for the 1st Respondent. And that the 1st Respondent's agents and the PF supporters in government used

government resources to influence voters through the PF presidential running-mate who gave Pastors K15,000, bags of mealie meal from the Disaster Management and Mitigation Unit (DMMU) under the office of the Vice-President with instruction to distribute the mealie meal to the electorate with the message that they should vote for the PF candidates. It was the Appellant's position that as a result of the above misconduct, the electorate voted for the 1st Respondent and his political party.

2.5 The record of appeal shows that although the 1st Respondent had filed an Answer, the Tribunal, ordered that it be expunged from the record on ground that it was filled out of the prescribed period of 7 days stipulated in the Local Government Elections Tribunal Rules, Statutory Instrument No. 60 of 2016.

2.6 The 2nd Respondent, the Electoral Commission of Zambia, filed its Answer in which it disputed all the allegations against it, stating that the 1st Respondent could not have facilitated the registration of foreign nationals as the 2nd Respondent follows very strict guidelines and regulations when conducting voter registration. That it does not register or issue foreigners with voter's cards. And that the election in question and the process leading to it was conducted in accordance with and in substantial conformity with the law.

2.7 The matter proceeded to trial with the Appellant testifying in support of his case. The Appellant was *cross-examined* by Counsel for the 1st Respondent and his Counsel *re-examined* him.

2.8 The record shows that after the Tribunal concluded receipt of the Appellant's evidence on 10th September, 2021 the Tribunal brought to the attention of the parties the provision of rule 20(3) of S.I. 60 of 2016 which requires parties to dispense with oral *examination in chief* and invited comments from their respective Counsel. The parties through their respective Counsel are on record agreeing to filing affidavits pursuant to the rule in question. The Tribunal thereafter ordered that the parties file written submissions.

2.9 The Appellant filed affidavits in respect of his intended witnesses together with the submissions. Five of the Appellant's witnesses whose affidavits had been filed were *cross-examined* and *re-examined*. This evidence will be reflected where relevant in this judgment.

2.10 The 1st and 2nd Respondents did not call any witnesses. The Respondents however, filed written submissions.

3.0 CONSIDERATION BY THE TRIBUNAL

3.1 The Tribunal considered and analysed the evidence and the submissions from the Appellant and the Respondents and the

Tribunal came to the conclusion that the following facts were not in dispute: -

1. **That the Presidential, Parliamentary and Local Government elections took place on 12th August, 2021;**
2. **That the Appellant and the 1st Respondent were candidates for the position of Council Chairperson for Sinda constituency in Sinda District on UPND and PF tickets respectively;**
3. **That the 1st Respondent was declared winner by the 2nd Respondent; and**
4. **That the said elections were conducted by the 2nd Respondent.**

3.2 The Tribunal however found that the following facts were in dispute:-

"1. That the elections were not free and fair.

2. That illegal acts took place before and during the elections.

3. That the 1st Respondent was not lawfully elected."

3.3 The Tribunal then came to the conclusion that the Appellant had not proved to the applicable standard stipulated in section 97(2) (a) and (b) of the Electoral Process Act No. 35 of 2016 (the Act), the alleged misconduct against the Respondents on ground that no evidence of malpractice was established against the 1st Respondent or his election agent or polling agent and dismissed the petition.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the Tribunal, the Appellant has appealed to this Court advancing five grounds of appeal in the Memorandum of Appeal as follows: -

1. **The Tribunal misdirected itself by disregarding the orders for directions it earlier issued and proceeded to allow the witnesses to be cross examined after trial had closed and the Petitioner had filed in final submissions in compliance with the orders for directions.**

2. **The Tribunal misdirected itself in law and fact when it allowed the 1st Respondent to file the final submissions contrary to the orders for directions and denied the Petitioner to file written submissions to address issues raised in cross examination.**

3. **The Tribunal grossly misdirected itself by not accepting in totality the evidence on record in the absence of any evidence challenging the testimonies of the witnesses.**

4. **The Tribunal erred in law and fact when it did not pronounce itself on the effect on a candidate who commits a serious criminal offence (felony) of aiding and abetting the foreigners to register and consequently vote in Zambia in order to win an election.**

5. **The Tribunal erred in law and fact by not seriously addressing the facts that were not rebutted either by evidence or in cross examination.**

4.2 At the hearing of this appeal, the learned Counsel for the Appellant, Mr. C. M. Besa and Mr. F. Besa, relied on the Appellant's Heads of Argument filed which they augmented with oral submissions. The 1st Respondent's Heads of Argument were expunged from the record on ground that they were filed out of time and without leave of the Court.

4.3 In the Heads of Argument, Counsel for the Appellant began by giving the background leading to this appeal which we have already summed up above.

4.4 Counsel then went on to submit in arguing ground one that trial of the petition in question began on 10th September, 2021 in Katete

and that the Appellant testified on the first day. That from *cross-examination*, the Appellant's evidence was not challenged.

4.5 It was further submitted that on that same day, the Tribunal issued the consent order for direction to the parties for the filing of affidavit evidence on 12th September, 2021 and final submissions. That however, only the Appellant complied whilst the Respondents did not. That on 13th September, 2021 the 1st Respondent applied to dismiss the petition for want of prosecution but that on 16th September, 2021 the Tribunal rejected that application.

4.6 It was contended that the filling of the affidavits by the parties signified the closure of the trial and that allowing the *cross-examination* of the Appellant's witnesses by the Tribunal was outside the consent order for direction. Therefore, that the Appellant's position is that when the Tribunal saw it fit to have the witnesses subjected to *cross-examination*, it should have called both parties and issued amended orders but that the Tribunal did not do so and consequently, that the issues that arose under *cross-examination* that was conducted in the absence of Counsel for the Appellant was in breach of the consent order for direction which made the judgment of the Tribunal irregular.

4.7 In his oral submissions, Mr. C. M. Besa began by informing the Court that in augmenting the Appellant's Heads of Argument, he would highlight what he called "the most salient parts of the Appellant's appeal". Counsel stated that this is what is at the core of the appeal. He went on to state these as the Tribunal's fundamental departure from both the rules governing trial of election petitions and the clear disregard of what the parties agreed upon in the orders for direction at the commencement of the proceedings.

4.8 Counsel pointed out that among the breaches of procedure and the consent orders for direction complained of, was the fact that on 11th September, 2021 the Parties had agreed that each would file affidavit evidence which would be the basis of the testimony to be considered in determining the Petition and that the Parties would also file written submissions on 12th September, 2021 and that the Tribunal would then adjourn for judgment. Counsel pointed to page 105 of the record of appeal where the orders for direction in question is reflected.

4.9 Mr. C. M. Besa submitted that pursuant to this orders for direction, the Appellant filed affidavits of his witnesses on 12th September, 2021 but that the Respondents did not comply as they neither filed the affidavits of their witnesses nor did they file written submissions.

4.10 It was submitted that Counsel for the Appellant, having complied with the orders for direction, drove back to Lusaka. And that for reasons that the Appellant's Advocates were not privy to, the Tribunal allowed the matter to continue and the Appellant's witnesses were called and subjected to *cross-examination* in the absence of the Appellant's Counsel. Counsel's position was that, what the Tribunal did, was outside the orders for direction and therefore void as the legal consequence was that the proceedings by the Tribunal were rendered a nullity and liable to be set aside by this Court.

4.11 Mr. F. Besa, in augmenting the Appellant's Heads of Argument, began by emphasising that the *cross-examination* that took place after closure of the trial was done without the Tribunal making any other order amending the earlier orders for direction thereby making the proceedings thereafter unfair and unjust to the Appellant. Therefore, that these should be set aside.

4.12 Counsel for the 1st Respondent, Mr. Muleya, in responding to the issues orally raised by Counsel for the Appellant, submitted that the Appellant's contention based on his belief that trial had closed, was not accurate in that on 12th of September, 2021 Counsel for the Appellant was present when the Respondents applied to dismiss the matter for want of prosecution and that infact, Counsel for the

Appellant applied to object to that application. Therefore, that Counsel for the Appellant was aware that there was an interlocutory application before the Tribunal which had a huge bearing on the outcome of the Petition. Mr. Muleya submitted that it is trite law that where there is an interlocutory application, the main matter is suspended until that application has been heard and that it is clear from Rule 20 (4) of S. I. No. 60 of 2016 that a Tribunal has inherent discretion to order the *cross-examination* of witnesses. And that based on the above rule, the Tribunal was well within its authority to issue further orders.

4.13 In reply, Mr. Besa submitted that the Appellant's argument as regards the orders for direction is that whilst he agrees that the Tribunal may have power to order *cross-examination* of witnesses, doing so was not among what was stated in the orders for direction earlier agreed to by the Parties. That the Tribunal expressly ordered that the Parties file their affidavits by 12:00 hours on 12th September, 2021 but that the orders do not refer at what point there would be trial or *cross-examination* as the order goes straight into talking about the filling of submissions by the parties on 13th September, 2021 by 17:00 hours.

4.14 In arguing ground two, it was contended that since the orders for direction did not refer to *cross-examination* of witnesses by the

parties, allowing the *cross-examination* of the Appellant's witnesses was an afterthought meant to help the 1st Respondent defend his case when no Answer, affidavit or witness statements and submissions were filed. It was contended by the Appellant that the exposure of his witnesses to *cross-examination* after the filing of the Appellant's final submissions and the refusal by the Tribunal to allow the Appellant to file written submissions after the *cross-examination* of his witnesses deprived the Appellant of the opportunity to address issues that arose during *cross-examination.* To press this point further, Counsel cited the cases of **Simbeye Enterprises Limited and another v Ibrahim Yousuf[1], Attorney General v Tall and Another[2]** and **Zulu v Avondale Housing Project[3]**. In the case of **Zulu v Avondale Housing Project**, Ngulube, DCJ, as he then was, put it thus:

> **I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined with finality. A decision which because of uncertainty or want of finality, leaves a door open for further litigation on the same issues between the same parties can and should be avoided.**

4.15 It was argued that the lack of opportunity for the Appellant to address issues that arose under *cross-examination* of his witnesses negatively affected the duty of the Tribunal to properly adjudicate on the Appellant's case.

4.16 In support of ground three, the Appellant has argued that in election matters, the burden of proof rests on the petitioner to place credible evidence to satisfy the court that the allegation that has been made is true. However, that once credible evidence has been brought before court, the burden shifts to the respondent to show either that there was no failure to comply with the law or that the non-compliance with the law was not substantial as to result in the nullification of the election. In support of this position, the case of **Brelsford James Gondwe v Catherine Namugala**[4] was cited in which 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 the well settled principle of law in civil matters that he who alleges must prove.**

Reference was also made to the case of **Dr. Saulos Klaus Chilima and Another v Professor Arthur Peter Mutharika and 3 Others**[5], in which the High Court of Malawi stated that: -

> **The legal burden of proof in respect of allegations in the petition lies on the petitioners. However, whilst the evidential burden primarily lies with the petitioners, it shifts to the respondents whenever the petitioners have made out a prima facie case on any issue in the within matter. The evidential burden then shifts to the Respondents to rebut the Petitioners allegations on a scale (balance) of probabilities.**

4.17 It was submitted that neither the 1st Respondent nor the 2nd Respondent filed affidavits of their witnesses and that this entailed that the evidence adduced by the Appellant and his witnesses was

not rebutted as it was merely challenged under *cross-examination*. Therefore, that the 1st Respondent did not discharge his evidential burden of proof in disproving the alleged facts brought out by the evidence of the Appellant's witnesses.

4.18 In support of ground four, the Appellant contends that two witnesses of Mozambican nationality, namely, PW4 and PW5, testified that the 1st Respondent had travelled to Mozambique and organized Mozambicans to register and to subsequently vote in Sinda and that a total of 3,000 Mozambicans voted. Counsel argued that this evidence was neither challenged nor rebutted by the 1st Respondent. Therefore, that the Tribunal erred by not pronouncing itself on this allegation and on the effect of this illegality.

4.19 It was further argued that the 2nd Respondent being the institution that is constitutionally mandated to supervise and control registration of voters abdicated its role of ensuring that only Zambian nationals register to vote. Hence, the Sinda elections were not conducted in accordance with the law because of the non-conformity with the Act.

4.20 In support of ground five, the Appellant argued that according to PW3's evidence, he was present at a meeting where the 1st Respondent was also present and that a sum of K30,000 was given

to those who attended the meeting to share. It was the Appellant's position that this evidence was not rebutted or challenged under *cross-examination* which imputed the 1st Respondent with knowledge of the illegality of the acts complained of.

5.0 CONSIDERATION OF THE APPEAL BY THIS COURT

5.1 We have seriously considered this Appeal together with the Heads of Argument filed and the oral submissions by the learned Counsel for the respective parties and the authorities cited by the learned Counsel for the parties. We have also considered the Judgment by the Tribunal.

5.2 We wish to state from the outset that in terms of the law as to when an election of a Council Chairperson may be nullified, the governing provision is section 97 (2) of the Electoral Process Act No. 35 of 2016 which provides in part 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-

(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.

5.3 As can be seen from the above, the requirement for nullifying an election of a Council Chairperson is that a petitioner must not only prove that the Respondent has committed a corrupt or illegal act or other misconduct or that the illegal act or misconduct complained of was committed by the Respondent's election agent or polling agent or with the Respondent's knowledge, consent or approval, but that he/she must also prove that as a consequence of the corrupt or illegal act or misconduct committed, the majority of the voters in the district were or may have been prevented from electing a candidate whom they preferred. A petitioner thus must prove through evidence at trial, that a corrupt practice, illegal practice or misconduct was committed by a candidate or that candidate's election agent or polling agent or with the candidate's knowledge, consent or approval. And that the Petitioner must also demonstrate that by reason of the alleged corrupt practice, illegal practice or other misconduct, the majority of the voters in the district were or may have been prevented from electing a candidate whom they preferred.

5.4 It is also settled that in election petitions, the applicable standard of proof is higher than a balance of probability applicable in civil cases but less than beyond reasonable doubt applied in criminal cases.

5.5 In determining the issues raised in this appeal, therefore, we will be guided by the position of the law as stated above.

5.6 For convenience, we shall address each ground of appeal as advanced in the Memorandum of Appeal.

5.7 The crux of the argument by Counsel for the Appellant in support of ground one is that although the Tribunal had power under rule 20(4) of the Local Government Elections Tribunal Rules, S.I. No. 60 of 2016 to require the personal attendance of a deponent of an affidavit filed under sub-rule (3) for *cross-examination*, the Tribunal acted contrary to the orders for direction that it issued to the parties and that Counsel for the Appellant was not informed of the decision to have the Appellant's witnesses subjected to *cross-examination* after the closure of the trial and the filing of the Appellant's final submissions as directed in the orders for direction. Counsel for the Appellant argued that the Appellant was disadvantaged by having his witnesses *cross-examined* in the absence of his Counsel.

5.8 The response by Counsel for the 1st Respondent was that the Tribunal was within its power to proceed as it did to have the

Appellant's witnesses *cross-examined*. Counsel cited rule 20 (4) of the Local Government Elections Tribunal Rules, S.I. No. 60 of 2016. For convenience, rule 20 reads in its entirety as follows: -

> 20. (1) **A tribunal may receive, as evidence, a statement, document, information or other matter that may assist it to deal effectively with an election petition.**
>
> (2) **A tribunal may take judicial notice of any fact.**
>
> (3) **Evidence before a tribunal may be given orally or, if the parties to the proceedings consent or the tribunal so orders, by affidavit.**
>
> (4) **A tribunal may, at any stage of the proceedings, make an order requiring the personal attendance of a deponent for examination and cross-examination.**

For convenience, the orders for direction in question read as follows:-

> ***Court Order***
>
> ***Upon both sides having consented to invoke the provisions of rule 20 (3) of S.I. 60 of 2016, it is hereby ordered that the proceedings herein shall forthwith be conducted in accordance with the provisions of rule 20 (3) of S.I. 60 of 2016. It is further ordered that Counsel for both parties shall file the affidavits on 12/09/2021 at 12;00. Further it is ordered that all Counsel shall file submissions as agreed on 13.09.2021 by close of business at 17:00 hrs.***

5.9 We have considered the above submissions by Counsel for the respective parties. Ground one of this Appeal raises the question whether the decision of the Tribunal, of allowing the Appellant's witnesses to be *cross-examined* after the alleged closure of the trial and in the absence of Counsel for the Appellant and after the filing of the Appellant's final submissions, was inappropriate as the

Appellant was disadvantaged. And that on that basis, the Judgment of the Tribunal should be set aside on ground that it was null and void.

5.10 It is our firm position that to ably determine the issues raised under ground one of this appeal, we have to critically examine the relevant parts of the record of appeal and the orders for direction reproduced above. Perusal of the record shows that the orders for direction does not refer to *cross-examination* of witnesses. Neither does it state that there would be no *cross–examination* of witnesses.

5.11 We have also considered the provision of rule 20 of the Local Government Elections Tribunal Rules, S.I. No. 60 of 2016 in its entirety. Of interest is rule 20(3) which the Tribunal brought to the attention of the parties and invited their comments before the Tribunal invoked rule 20(3) and issued the orders for direction in question. There is no dispute that the Tribunal had power pursuant to rule 20(3) to invoke and order that the evidence before it be by affidavit.

5.12 What the Appellant is challenging however is that the Tribunal, in the absence of his legal counsel and without amending its earlier orders for direction, ordered that his witnesses be subjected to *cross- examination* by the Respondents. Counsel for the Appellant

argued that the Appellant was thereby disadvantaged as his Counsel was not informed of this change by the Tribunal. Hence the Judgment of the Tribunal should be set aside as it was improper for the Tribunal to proceed as it did.

5.13 We do not agree with the above proposition by Counsel for the Appellant. Perusal of the record shows that Counsel for the Appellant was present before the Tribunal on 11th and 12th September, 2021. When the Tribunal sat on 14th September, 2021 Counsel for the Appellant was however absent. The record shows that the 1st and 2nd Respondent had filed formal applications to dismiss the petition on ground that the petition was not served within the requisite two days period provided for in the Local Government Elections Tribunal Rules, S.I. No. 60 of 2016. Counsel for the Appellant had filed arguments in opposition to this application. The Tribunal reserved its ruling to 16th September, 2021.

5.14 The record further shows that on 16th September, 2021 Counsel for the Appellant was again absent when the Ruling was delivered. The Tribunal is thereafter recorded to have stated as follows: -

Chairperson: **Since the petitioner already filed an affidavit of witness in support of the application, we now proceed to continue trial. The further orders for direction to file affidavits for witness was made on 11th September, 2021. So primarily respondents may indicate whether to xxn the witness or not. We have noted that the respondents did not file witness statement.**

5.15 The Appellant who was present informed the Tribunal that he would rely on the affidavits of the witnesses that had been filed. The Tribunal's response was as follows: -

The record shows that the 1st Respondent's answer was expunged from the record. Therefore, if there is anything available to the 1st Respondent at this stage is to xxn the petitioner witness.

5.16 The record shows that the Tribunal stood the matter down for 20 minutes and when it resumed, it proceeded to have PW1 *cross-examined* by the 1st Respondent's Counsel and the Appellant *re-examined* him. The matter was thereafter adjourned to 17th September, 2021 for continued *cross-examination* of the Appellant's other witnesses.

5.17 When the Tribunal resumed on 17th September, 2021 Counsel for the Appellant was again absent. The Appellant informed the Tribunal that his Counsel was on his way to Katete and that he had advised him (the Appellant) to request the Tribunal to adjourn the matter pending his arrival and that his Counsel had filed an application regarding the same. Counsel for the 1st Respondent objected to the adjournment. The Tribunal rejected the Appellant's application to adjourn. Trial then proceeded with the hearing of the Appellant's other witnesses whom the Appellant *re-examined* after they were *cross-examined* by Counsel for the 1st Respondent.

5.18 The record further shows that at 11:16 hours, Counsel for the Appellant joined the hearing together with another counsel from the same law firm. When it was time to *re-examine* PW3 who was on the stand at that time, Mr. C. M. Besa, informed the Tribunal as follows: -

Since I have just joined the proceedings, may the petitioner who has been present do the *cross-examination* (sic) *re-examination*.

The response by the Tribunal was:

The Petitioner will be at liberty for this particular witness to *cross-examination* (sic) *re-examine*.

5.19 The record further shows that Counsel for the Appellant took over the *re-examination* of PW4 and PW5.

5.20 The record further shows that the Tribunal rejected an application by Counsel for the Appellant to adjourn the matter for *cross-examination* of the Appellant's other witnesses whose affidavits had been filed on account of lack of time and the need to conclude the trial that day. Thereafter, the Tribunal stated as follows: -

Technically the Tribunal has ended since the petitioner's counsel already made their final submissions we will give counsel to the 1st Respondent up to 18th August just to file his final submissions.

5.21 The Tribunal then adjourned the matter for Judgment to 19th August, 2021 at 14.30 hours. On 19th August, 2021, Counsel for the Appellant was again absent when the Judgment was delivered.

adjournment. He did not say to the Appellant not to avail the witnesses.

5.23 Further, the position taken by the Tribunal of ordering the Appellant's witnesses to be subjected to *cross-examination* is supported by rule 20(4) of the Local Government Elections Tribunal Rules, S.I. No. 60 of 2016 which we have recast above. This rule expressly and clearly states that a tribunal may on its motion, order the *cross-examination* of witnesses whose affidavits had been filed. Furthermore, it is trite that affidavit evidence constitutes *examination in chief* and the deponents of the affidavit may be *cross-examined.* Counsel for the Appellant cannot now turn around and successfully argue that his client was disadvantaged when he is the one who was absent from the hearings. He also did not raise any issue with the Tribunal to verify why the Tribunal proceeded as it did. He even *re-examined* PW4 and PW5, an indication that he had no issue with the Appellant's witnesses being *cross-examined.* We are thus not satisfied that the Appellant was disadvantaged or prejudiced in any way by having his witnesses *cross-examined* in the absence of his Counsel. The Appellant cannot be allowed to benefit from the default of his own Counsel. It is common knowledge that election matters are *sui generis* as they are a class of their own and are time bound which point the learned Counsel for the Appellant is on record on

page 99 lines 24 to 28 of the record of appeal to have clearly and correctly asserted by stating that in election matters parties have no luxury of time as the petition must be determined within the short period of time stipulated by the law. We therefore, find no merit in ground one of this appeal. We dismiss it.

5.24 In Ground two, the reason for the Appellant's displeasure is that the Tribunal ought not to have allowed the 1st Respondent to file final submissions whilst the Tribunal did not allow the Appellant to file submissions to address the issues that arose under *cross-examination* of the Appellant's witnesses.

5.25 We have perused the record. It is correct that the Tribunal had in the orders for direction in question, ordered the parties to file submissions the day after the date of filing of affidavits of witnesses. The record further shows that the Appellant did file what he termed final submissions whilst the Respondents did not.

5.26 The record however does not show whether Counsel for the Appellant requested the Tribunal to allow him to file further or additional submissions to address whatever issues that he felt had arisen under *cross-examination* of the Appellant's witnesses by the Respondents. Neither does the record show that the Tribunal rejected Counsel's application as argued.

5.27 The record of proceedings before this Court shows that the Court infact prodded Counsel during the hearing of the appeal on this issue. Counsel's response was however to accuse the Tribunal of not recording his request. There is however no viable or plausible explanation as to why the Tribunal's record should suddenly omit to reflect only this aspect of the proceedings before it when the Appellant has not taken issue with the rest of the record.

5.28 In any event, the Record of Appeal shows at page 3 where Counsel's Certificate appears that Counsel certified the record as a true copy of the record of appeal that he himself had prepared on behalf of the Appellant which does not include the portion that he has now argued did not reflect his request to be allowed to file final submissions. Counsel could not have so certified if the record was not a correct record as alleged. Further, we are perturbed by this kind of allegation as the correct procedure that Counsel could have taken was to engage the Tribunal Secretary over the alleged missing part of the proceedings before certifying and filing the Record of Appeal instead of raising it as a ground of appeal before us. For the reasons given above, we find no merit in ground two of this appeal. The same is dismissed forthwith.

5.29 Ground three attacks the Tribunal for not accepting in totality, the evidence on record in the absence of any evidence challenging the

testimonies of the Appellant's witnesses. The crux of the Appellant's arguments in support of this ground of appeal was that since the 1st Respondent did not discharge his evidential burden of disproving the alleged facts brought out by the Appellant's witnesses as no witnesses were called to rebut the Appellant's evidence, the Tribunal ought to therefore have accepted the evidence of the Appellant's witnesses. In support of this ground of appeal, the cases of **Brelsford James Gondwe v Catherine Namugala**[4] and **Dr. Saulos Klaus Chilima and another v Professor Arthur Peter Mutharika and 3 others**[5] were cited.

5.30 We have considered the above submission. Our short response as regards the contention by the Appellant above is that the Appellant's argument in this respect is an attempt to shift the burden of proof to the Respondents to disprove his allegations first, that 3,000 foreign nationals including PW4 and PW5 were facilitated by the 1st Respondent to obtain Zambian NRCs, voter's cards and that they voted on 12th August 2021. And secondly, that 300 bicycles, K30,000 and K15,000 cash were distributed to headmen by the 1st Respondent as alleged.

5.31 In **Steven Masumba v Elliot Kamondo**[6], we stated that the petitioner being the claimant, bears the burden of proof. We cited

with approval, the position taken by the Supreme Court of Zambia in **Khalid Mohamed v Attorney-General**[7], that: -

> ***An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that the defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence.***

The above aptly applies to the current case as we have found no support for the Appellant's argument that the burden of proof shifted to the Respondents as has been canvassed by Counsel for the Appellant. It was incumbent on the Appellant to prove his case to the required standard even if the Respondent had chosen to remain silent.

5.32 Further, we find the argument by Counsel for the Appellant that the Tribunal did not make any finding as regards the Appellant's witnesses that they saw the 1st Respondent, his election agent and polling agents participate in the alleged malpractices to be a misapprehension of the findings of the Tribunal. The record of appeal at page 21, paragraph one, lines 1 to 6, shows that the Tribunal did make its finding and stated that none of the witnesses on record saw the 1st Respondent, his election agent or polling agent participate in any of the alleged malpractices.

5.33 The Tribunal further noted that there was no evidence on record to corroborate the testimony of the Appellant's witnesses that the 1st Respondent participated in any of the meetings or illegal practices or that these meetings were held with the 1st Respondent's knowledge or approval or that of his polling or election agents.

5.34 We are thus not persuaded that we as the appellate court, should interfere with the findings of fact of the Tribunal above. In **Steven Masumba**[6], we cited with approval the decision of the Supreme Court of Zambia in the case of **Attorney General v Marcus Achiume**[8] where the Court reiterated the well settled principle that the appellate court will not interfere with the findings of fact made by the trial court unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts. The findings were supported by the evidence adduced which did not meet the threshold for nullification of the election. The Appellant has not shown why we should reverse the findings of fact by the Tribunal in this matter. Therefore, the Tribunal was on firm ground when it did not accept the evidence of the Appellant's witnesses as argued. We find no merit in ground three of appeal. We dismiss it.

5.35 Ground four of appeal alleges that the Tribunal erred in law and fact when it did not pronounce itself on the effect on a candidate who commits a serious criminal offence (felony) of aiding and abetting foreigners to register and consequently vote in Zambia in order to win an election. The thrust of the Appellant's argument in support of this ground of appeal was that the two witnesses of Mozambican nationality, namely, PW4 and PW5, cited the 1st Respondent as having travelled to Mozambique and organised them to obtain NRCs, register as voters, and they subsequently voted in the 12th August, 2021 general elections in Zambia.

5.36 Our short response to the above contention is that first, the Appellant, in arguing this ground, is trying to make his own finding of fact that the 1st Respondent committed criminal acts when his own witnesses, PW4 and PW5 upon whose evidence he relies to impute the alleged criminal acts on the 1st Respondent told the Tribunal that they did not know who issues NRCs and voter's cards in Zambia.

5.37 Secondly, the Tribunal cannot be faulted for finding and stating that the evidence of the two witnesses in question required corroboration as already stated above. Their evidence should be treated with caution as these are suspect witnesses who told the Tribunal on oath that they had participated in the illegality of obtaining Zambian

National Registration Cards, Zambian voter's cards and that they actually voted in the 12th August, 2021 general elections in Zambia whilst knowing very well that their acts were illegal or wrongful. These are not witnesses that any court or tribunal properly directing itself can believe or rely upon without the necessary corroboration. We thus find that the Tribunal was on firm ground and perfectly in order when it did not accept in totality, the evidence of Appellant's witnesses let alone rely on it in the absence of corroborative evidence.

5.38 Further, having discounted the evidence of the two Mozambican nationals on account of lack of corroboration, the effect is that the Appellant's evidence that he had travelled to Mozambique to investigate and that he learnt that the 1st Respondent had gone there and had organized 3,000 Mozambican nationals to obtain NRCs, register as voters and vote in the 12th August, 2021 general elections in Zambia, has the net-effect of reducing his own evidence to hearsay. The Appellant was not personally present when the 1st Respondent is alleged to have committed the said wrongful or illegal acts. Therefore, the Appellant's evidence in this respect is caught by the hearsay rule.

5.39 In **Steven Masumba v Elliot Kamondo**[6], we defined hearsay as testimony that is given by a witness who relates not what he or she

knows personally, but what others have said they had seen or heard and that this therefore depended on the credibility of someone else other than the witness. This testimony is generally inadmissible under the rules of evidence. The evidence of the two Mozambican nationals having been found not credible and uncorroborated and therefore incapable of corroborating the Appellant's hearsay evidence, the allegation was therefore not proved to the required standard.

5.40 The Appellant's contention was that the 2nd Respondent is the institution that is mandated to ensure that only Zambian nationals are registered to vote. Therefore, that there was non-compliance with the electoral laws on the existence of foreign nationals on the register of voters that were allegedly facilitated by the 1st Respondent and other PF officials. It was further the Appellant's contention that the Tribunal ought to have nullified the election on that basis. Our view is that this allegation is not supported by any cogent evidence on record as the same was not proved to the applicable standard for nullification of an election as enunciated under section 97 (2) of the Electoral Process Act No. 35 of 2016.

5.41 For the reasons given above, we find no merit in ground four of this appeal. We dismiss it.

5.42 As regards ground five, the Appellant's position was that the Tribunal erred in law and fact by not seriously addressing the facts that were not rebutted either by evidence or in *cross-examination*. The sum total of the Appellant's argument under this ground is that the evidence of the Appellant's witnesses was not rebutted or challenged as the *cross-examination* conducted was irregular and could not form part of the proceedings.

5.43 We find that we have already addressed the issue that ground 5 asks us to consider when we addressed grounds one and three above. We do not intend to repeat what we stated above suffice to say for emphasis that there is no basis upon which we can order that the *cross-examination* of the Appellant's witnesses was irregular and should not be part of the record. Ground five too is dismissed for want of merit.

6.0 CONCLUSION

6.1 All the five grounds of appeal having failed on account of want of merit, the sum total is that we uphold the decision of the Tribunal and hold that the 1st Respondent was duly elected as Council Chairperson for Sinda District in the Eastern Province of the Republic of Zambia.

6.2 The appeal is dismissed.

6.3 We order that each party bear own costs.

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H. CHIBOMBA
PRESIDENT CONSTITUTIONAL COURT

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M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

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M. M. MUNALULA
CONSTITUTIONAL COURT JUDGE

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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

.....
J. Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE