

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2021/CCZ/A004

HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF: ARTICLES 159 (3) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: SECTION 106 (1) (a) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS TRIBUNALS RULES, 2016 AS READ WITH STATUTORY INSTRUMENT NO. 60 OF 2016.

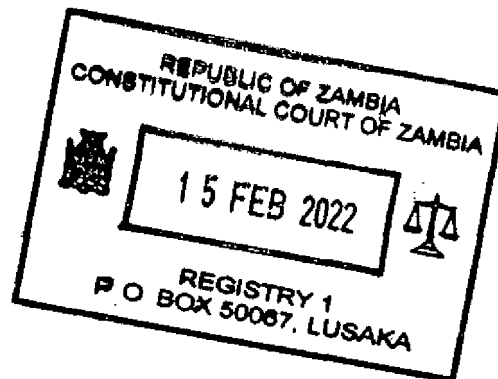
IN THE MATTER OF: COUNCILLOR ELECTION PETITION FOR CHINSALI WARD HELD ON THE 12TH DAY OF AUGUST, 2021.

BETWEEN:

DESMOND CHANDA

AND

DERRICK LUKONDE



APPELLANT

RESPONDENT

CORAM: Chibomba, PC, Mulenga, Musaluke, Chisunka and Mulongoti, JJC,

On 19th January, 2022 and 15th February, 2022

For the Appellant: Ms. K. Mwila and Mr. F.S. Chikonkela of Tutwa Ngulube and Company

For the Respondent: Ms. M. Mwiinga of James and Doris Legal Practitioners and Ms. M. Phiri of PNP Advocates

JUDGMENT

Mulongoti, JC, delivered the Judgment of the Court

Cases referred to:

1. *Johnathan Kapaipi v Newton Samakayi (CCZ) Appeal No. 13 of 2017.*
2. *Mubika Mubika v Poniso Njeulu (SCZ) Appeal No. 114 of 2007*
3. *Abuid Kawangu v Elijah Muchima (CCZ) Appeal No. 8 of 2017.*
4. *Michael Mabenga v Sikota Wina and others (2003) Z.R 110.*
5. *Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General, (CCZ) Selected Judgment No. 51 of 2018.*
6. *Haonga & Others v The People (1976) ZR, 200.*
7. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R 172*
8. *Abel Kambikambi v Zambia Railways Ltd (1999) Z.R 42, 43.*
9. *Chipale v Kabwe Municipal Council (2000) Z.R 61, 63.*
10. *Morgan and others v Simpson and others (1974) 3 WLR 517*
11. *Nana Addo Dankwa Akufo-Addo & 2 others v John Dramani Mahama & 2 others (Writ J1 /6/2013)*
12. *Afrope Zambia Limited v Anthony Chate & others (SCZ) Appeal No. 160/2013*
13. *Anderson Kambela Mazoka, Lt. Gen. Christon Sifapi Tembo & Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, The Electoral Commission of Zambia & Attorney General (2005) Z.R 138*
14. *Nkhata and others v Attorney General (1966) Z.R 124*
15. *Mbololwa Subulwa v Kaliye Mandandi (CCZ) Selected Judgment No. 25 of 2018*
16. *Chrispin Siingwa v Stanley Kakubo (CCZ) Appeal No. 196/2016*
17. *Mwiya Mutapwe v Shomeno Dominic (CCZ) Appeal No. 19 of 2017*
18. *Kufuka Kufuka v Mundia Ndalamei (CCZ) Appeal No. 15 of 2016*

Legislation referred to:

1. *The Constitution of Zambia Chapter 1 of the Laws of Zambia*
2. *The Electoral Process Act No. 35 of 2016*

Other works:

1. *Patrick Matibini, 'Zambian Civil Procedure: Commentary and Cases' Volume 2, Lexis Nexis, 2017*

1.0. Introduction

- 1.1 This is an appeal against the decision of the Local Government Elections Tribunal (the Tribunal) which nullified the election of Desmond Chanda, the appellant herein, as Councilor for Chinsali Ward of Chinsali Constituency, in the Chinsali District of Muchinga Province of the Republic of Zambia.
- 1.2 The Tribunal found that there was evidence of widespread malpractice which may have affected the majority of voters from exercising their free will on their choice of the candidate.
- 1.3 The appeal therefore deals with the issue whether or not the evidence adduced proved that there was widespread malpractice sufficient to warrant nullification of the appellant's election.

2.0. Background

- 2.1 The appellant, Desmond Chanda, and the respondent, Derrick Lukonde, were candidates in the Chinsali Ward Councilor

elections conducted on 12th August, 2021 during the tripartite elections.

2.2 The respondent, stood on the United Party for National Development (UPND) ticket while the appellant was the candidate under the Patriotic Front (PF) ticket.

2.3 The appellant was declared as the duly elected councilor for Chinsali Ward. Aggrieved with the poll result, the respondent presented a Petition before the Tribunal on grounds that the PF party gave bags of mealie meal to people including Bright Mukuka, of Chinsali District who received a 25kg bag. The appellant also alleged that the PF was giving out money to voters before voting and threatening them to vote for the appellant. That the PF also organized transport to ferry voters to and from the polling stations and also prepared food which was given to voters. The Petition was accompanied by an affidavit sworn by the respondent in which he reiterated the grounds in the Petition.

2.4 In response to the Petition the appellant filed an Answer and denied that he had authority to give bags of mealie meal or any

form of inducement directed at persuading the voters. He averred that the Disaster Management Mitigation Unit (DMMU) had been distributing mealie meal in Muchinga Province for over three years. He further stated that Bright Mukuka did not receive any mealie meal from him and that he did not ferry voters to polling stations as alleged. That the petitioner neither specified the polling stations at which the said misconduct was performed nor had he shown that the misconduct and irregularities alleged were widespread to warrant nullification of the election.

3.0. **Evidence Adduced Before the Tribunal**

3.1 A brief overview of the affidavit and oral evidence adduced was as follows: the petitioner (now the respondent) testified that on polling day he and other people confiscated 14 face masks which were distributed by the appellant to the voters and inside the face masks were K10 notes. That the appellant ferried voters between 03 hours and 04 hours and took them to the polling stations at Chinsali Day and Grace Ministries. The appellant told the people how to cast their votes by telling them to vote for

him. The respondent further testified that the appellant together with his agents prepared food stuffs for people to eat after voting at village headman Choshi's former wife's place, bana Cleo's house in Makoba Village and Bana Lubansa's house. The appellant and his agents also employed guards at all entrances to the polling stations and told people who to vote for and gave them money. The appellant who had no accreditation documents to enter the polling station, was going around the polling station even though he was not registered as a voter in the ward. 14 face masks, one 12.5 kg bag of mealie meal labelled DMMU and one 25kg bag of mealie meal were produced by the witness and admitted in evidence as "P1".

3.2 In *cross-examination*, the respondent testified that: he confiscated the 14 face masks with the help of a police officer. The motor vehicle used to ferry voters was known to the appellant. The appellant went round the places where cooking was done from.

3.3 The respondent called four witnesses. **PW1, Elias Bwembya** testified that on 12th August, 2021 he ferried about 40 people to

the polling station and gave them K20.00 each, as instructed by the appellant who woke him up that day at 04:00 hours. The appellant went to PW1's house with a Toyota Hilux and promised to pay him K300.00 later but never paid him. The appellant also gave him two bags of mealie meal, a 12.5 kg and a 25kg bag. In *cross-examination* he said the program of ferrying voters ended at 16:00 hours. He admitted that he was not happy that the appellant did not pay him K300.00 as promised.

3.4 **PW2, Micheal Kaengele**, also testified about face masks and voters being given K20.00 each at the polling station. He said he was with the respondent when they confiscated the 14 face masks.

3.5 **PW3, Steven Mutale**, testified that on 12th August, 2021 he found people receiving K20.00 notes from the appellant and he was also given a K20.00 and told to vote on the boat. **PW4, Benny Mwamba**, testified that on 12th August, 2021 after voting from Chinsali Basic School, he went to Bana Cleo's house and found a group of people cooking nshima and chicken. The appellant was also present and was busy grouping people in

tens and instructing them to vote for PF after which they would be given nshima. That people ate before voting and the appellant gave them K20.00 each. In *cross-examination* PW4 testified that he also went to Grace Ministries Polling Station and found his granddaughter cooking nshima and chicken which she said was given to her by the appellant.

3.6 In rebuttal, the appellant denied all the respondent's allegations. He stated that PW4 lied when he testified that he met him at Chinsali Day Polling Station as PW4 was not even a registered voter at Chinsali Day Polling Station but at Mutale Polling Station as per Voter's Register produced and admitted in evidence as "P3". In *cross-examination* he testified that he was not using his vehicle for campaigns. In re-examination he testified that he was using the area Member of Parliament's vehicle.

3.7 The appellant called one witness, Alice Chanda, who testified as RW1, a Ward Official for Chinsali Ward under PF. She simply stated that she went everywhere with the appellant and they campaigned door to door and carried Chitenge material, T-

shirts and Caps. In *cross examination*, she said they used hand sanitizer and face masks when campaigning and they were guided not to exceed the number 50 when campaigning.

4.0 **Consideration of the Evidence and Decision of the Tribunal**

4.1 After considering the evidence adduced before it, the Tribunal restated the law relating to nullification of elections as contained in Section 97 (1) and (2) of the Electoral Process Act No. 35 of 2016 (EPA), Local Government Election Tribunal Rules 2016, and Article 159 of the Constitution.

4.2 The Tribunal also relied on our decision in **Jonathan Kapaipi v Newton Samakayi**¹ and the case of **Mubika Mubika v Poniso Njeulu**² where the Supreme Court elucidated that:

The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of is proved satisfactorily that as a result of that wrongful conduct the majority of voters in the constituency were, or might have been prevented from electing a candidate of their choice, it is clear that when facts alleging misconduct are proved and fall into prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in

that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate.

4.3 The Tribunal made findings of fact that there was malpractice throughout the ward which included:

1. *Ferrying voters from 04:00 to 16:00 hours as per testimony of PW1;*
2. *The respondent and others being placed at strategic places to talk to voters as per testimony of PW2;*
3. *Distribution of masks, mealie meal and money as per testimony of the petitioner and PW3;*
4. *Cooking of food at 3 different homes as per testimony of PW4 and the petitioner; and*
5. *Campaigning despite the ban by the Electoral Commission of Zambia (ECZ).*

4.4 Having observed that the appellant did not *cross-examine* the respondent and his witnesses on material facts and that (RW1) the appellant's witness was evasive while the respondent was steady and consistent, the Tribunal found that the malpractices as testified by the respondent were widespread and not disjointed isolated incidents. That the incidents were properly planned and coordinated activities which were widespread in

the ward and may have affected the ability of the voters to elect the candidate of their choice.

4.5 The Tribunal therefore held that the minimum threshold for nullification of an election had been satisfied. The election of the appellant, Desmond Chanda, as councilor for Chinsali ward was declared void and accordingly nullified.

5.0 **The Appeal**

5.1 Dissatisfied with the decision of the Tribunal, the appellant appealed to this Court advancing nine (9) grounds of appeal, as follows:

- 1. That the Local Government Elections Tribunal erred in law and fact when it declared that the election of the Appellant was void when the Petitioner had not proved the malpractice alleged to the standard required in Election Petitions;*
- 2. That the Local Government Elections Tribunal erred at law and fact in finding that the misconduct complained of was widespread without any cogent proof or evidence;*
- 3. That the Local Government Elections Tribunal erred in law and fact when it considered that the electorates were hindered from voting for the candidate of their choice*

without sufficient evidence proving the alleged hinderance from the Respondent's end;

- 4. That the Local Government Elections Tribunal erred in law and fact when it nullified the Appellant's election without sufficient evidence as to whether the Appellant was seen ferrying any voters in the ward;*
- 5. That the Local Government Elections Tribunal erred in fact by considering the contradictory evidence of the Petitioner's witnesses and disregarding the evidence of the Respondent;*
- 6. That the Local Government Elections Tribunal erred in law and fact when it considered the evidence of the Petitioner to be to a fairly high degree of convincing clarity;*
- 7. The Local Government Elections Tribunal erred in fact when they held that there was picketing of voters at miracle life polling station when the same is not a polling station in the Appellant's ward;*
- 8. The Local Government Elections Tribunal erred in law and fact when it considered contradictory evidence of the Petitioner and his witness as regards the time the Appellant was picked up by the police as evidence of convincing clarity to warrant a nullification of the Appellant's election;*
- 9. That the Local Government Elections Tribunal erred in law and in fact when it awarded costs to the Petitioner who was not represented by a qualified Legal Practitioner.*

6.0 The Arguments

- 6.1 On 23rd November, 2021, counsel for the appellant filed heads of argument in support of the appeal.
- 6.2 Grounds one and six were argued together. According to counsel, the standard of proof in an election petition has been established to be higher than that required in an ordinary civil action as held in the cases of **Abuid Kawangu v Elijah Muchima**³ and **Michael Mabenga v Sikota Wina and others**⁴.
- 6.3 It was counsel's submission that, of the alleged malpractices as enumerated in the Election Petition which appears on pages 32 and 33 of the record of appeal, none were proved to have been conducted by the appellant himself but rather his political party, the Patriotic Front (PF). In support of this argument, counsel called in aid the case of **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General**⁵, in which this Court held that a candidate cannot be liable for acts of members of the candidate's political party or other persons who are not the candidate's election or polling agents.

6.4 Referencing section 97(2) of the Electoral Process Act, (EPA) which defines an election agent and a polling agent respectively, counsel argued that the Petition neither pointed to the appellant, nor his agents as the ones conducting malpractices and only made mention of the appellant's political party. On this basis, it was counsel's submission that the Tribunal fell in grave error in nullifying the election based on the evidence contained in the Petition despite there being no cogent proof of the appellant conducting the alleged malpractices.

6.5 Counsel submitted as regards oral evidence, that the witnesses contradicted one another and that no other evidence in the form of videos or recordings was adduced before the Tribunal to show the appellant's involvement in the alleged malpractices. In this regard, counsel submitted that the respondent had not discharged the burden.

6.6 It was counsel's further submission that the respondent did not prove with convincing clarity the allegation that the car ferrying people was being driven by the appellant or that he was seen refueling. Furthermore that, when *cross-examined*, the

respondent said he did not know the owner of the vehicle allegedly being driven by the appellant to ferry people as evidenced on page 103 of the record of appeal, under line 32.

6.7 In addition to the above, counsel submitted that the respondent's witness, Elias Bwembya, (PW1) whose testimony appears on page 104 line 21 of the record of appeal, was a witness with an interest to serve and therefore, the Tribunal fell into grave error in failing to caution itself of the dangers of relying on evidence of such a witness. Accordingly, the Tribunal misdirected itself when it nullified the election on account of malpractices without due regard to the credibility of the evidence which did not meet the threshold.

6.8 As regards grounds two and three, it is argued that there was no evidence adduced to prove how widespread the alleged misconduct was and that the same affected the elections. Reliance was placed on the case of **Jonathan Kapaipi v Newton Samakayi**¹ in which this Court stated that where an activity is complained of, it must be shown that the said activity was

widespread to a level where registered voters in greater numbers were influenced.

6.9 It is argued that in *casu*, Benny Mwamba (PW4) who testified to the alleged cooking and ferrying of voters and whose testimony appears on page 108 line 1 of the record of appeal, gave contradictory evidence in this regard, and that the evidence from the witness was hearsay. That on this basis, the Tribunal misdirected itself when it relied on the evidence of such a witness which was unsubstantiated.

6.10 Additionally that, apart from failing to demonstrate how widespread the cooking for electorates was, the respondent and his witness, Elias Bwembya, had not demonstrated how widespread the ferrying of voters was and did not prove how widespread the distribution of face masks was. Counsel contends that the testimonies of the witnesses only made mention of Chinsali Polling Station, where the appellant allegedly did not even finish giving out the face masks, as the police confiscated them and that the same applied to the distribution of mealie meal as none of the witnesses testified to

seeing the appellant doing the same at any of the polling stations.

6.11 Regarding ground 4, counsel submitted that section 97 (2) of the EPA requires that the corrupt practice(s) must be committed by a candidate or his election or polling agents who should have been acting with the candidate's approval, knowledge or consent. Counsel contended that the respondent herein did not produce before court any cogent evidence to prove that the appellant ferried voters on his own or through his agents with his consent, knowledge or approval.

6.12 It was submitted that the respondent and his witness, Elias Bwembya, gave contradictory statements regarding who was allegedly ferrying people and that whereas the respondent said that he saw the appellant drive the vehicle, Elias Bwembya stated that he was driving a vehicle on instruction from the appellant. It was counsel's submission that the possibility of one of the witnesses lying, could not be ruled out and therefore, the Tribunal erred when it nullified the appellant's seat on the ground of malpractice of ferrying voters.

6.13 With regards to ground five and eight, it is argued that there was contradictory evidence as regards the distribution of face masks. Whereas the respondent alleged that it is the appellant who was giving out face masks and K10 notes to the electorate, the respondent's witness' testimony (PW2) contained on page 106 of the record of appeal, line 19, is to the effect that he saw the appellant give out K20 notes and face masks, an assertion which the appellant denied as evidenced on page 110 of the record of appeal. That the Tribunal therefore, fell into grave error when it decided that the denials by the appellant were bare, as no standard of proof of denial is placed on the appellant to prove his denials.

6.14 Counsel also pointed out that another contradiction was the testimony of Benny Mwamba (PW4), whose testimony is at page 108 of the record of appeal, that he voted from Chinsali Basic School Polling Station when, on page 58 of the record of appeal, line 5, the voter's register contained thereon indicates that he was registered at Mutale -1 polling station and was supposed to vote from there. In line with this, it is argued that the witness

lied and the Tribunal should have attached little weight to his evidence as guided by the Supreme Court in the case of **Haonga & Others v the People**⁶.

6.15 On ground seven, counsel noted that the Tribunal made a finding on page 30 of the record of appeal, lines 15 – 17, that there was picketing of voters from Chinsali and Miracle Life polling stations, yet Chinsali Ward only had two polling stations at Chinsali and Grace Ministries. Miracle Life polling station was not a polling station in Chinsali Ward and hence, it was a misdirection on the part of the Tribunal to have found that there was widespread picketing of voters in the Ward.

6.16 Counsel has urged this Court to reverse the Tribunal's findings in relation to the said polling station as it was made in the absence of relevant evidence or on misapprehension of facts as no witness had testified that there was picketing of voters at Miracle Life. The case of **Wilson Masauso Zulu v Avondale Housing Project Limited**⁷ was relied upon where the Supreme Court stated that:

The appellate court will only reverse the findings of facts by the trial court if 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.

6.17 As regards ground nine, it is argued that costs are awarded to legal practitioners and not unrepresented persons. That unrepresented persons are only entitled to expenses incurred in filing process and transport. Counsel referred us to the works of Patrick Matibini learned author of Zambia Civil Procedure: Commentary and Cases, Volume 2 at page 1695 where it is stated that:

(a) the costs that are payable by one party or parties, in respect of the fees of any legal practitioner(s) who has or have acted on behalf of a party or parties, that is to say, the charge for legal services, are called "legal fees";

And

(b) the case costs, that is to say expenses that legal practitioners incur on behalf of the instructing party in respect of items such as court filing fees, telephone calls, facsimiles, photocopy charges, courier payments, witnesses, travel expenses, etc. (collectively or compositely known as 'disbursements').

6.18 To amplify, counsel called in aid the cases of **Abel Kambikambi v Zambia Railways Ltd⁸**; **Chipale v Kabwe Municipal Council⁹**; which adjudicated on costs for an unrepresented party and affirmed

that if a person represents himself, then he is only entitled to out-of-pocket expenses.

6.19 On the basis of the above authorities, counsel maintained that in *casu*, the respondent appeared in person throughout the hearing of the petition, that all documents were prepared by him and that he did not call any witnesses who stayed out of the district, he was therefore, only entitled to money spent on filing the petition, if at all.

6.20 The respondent filed his heads of argument in response on 11th January, 2022. Grounds one, two, three and six were argued together. With respect to ground one, counsel referenced section 97(2)(c) of the EPA and submitted that all allegations as contained in the petition were proved, thereby meeting the requirement as prescribed under section 97(2)(c). Counsel added that the Tribunal was on firm ground in holding that the respondent had proved his case to a fairly high degree of convincing clarity as the appellant did not adduce evidence to rebut the respondent's allegations. And that, the respondent's

witnesses directly linked the appellant to the commission of the electoral malpractices.

6.21 It was counsel's submission that the appellant's assertion that the oral evidence of the respondent's witnesses was insufficient in itself and could not meet the standard of proof was misguided, as a witness's testimony is in itself evidence and does not, as a requirement, need any external evidence to validate it. That the record of appeal at page 103, paragraphs 20 and 25, clearly shows that the respondent produced 14 facemasks and two bags of mealie meal as part of evidence against the appellant.

6.22 It was further submitted that the assertion by the appellant that the testimony of the respondent's witnesses linking the appellant to electoral malpractices lacked merit as it was not pleaded, was misguided as it is trite law that once evidence which is not pleaded is allowed to grace the court record without objection, the Court should consider it in its judgment.

6.23 As regards the appellant's assertion that the respondent's witnesses contradicted themselves, counsel argued that the

appellant failed to show the alleged contradiction in any material particular. That regarding the appellant's reference to page 103, line 32 of the record of appeal relating to ferrying of voters, a review of the entirety of the respondent's case showed that the testimony of the vehicle ferrying voters being known by the appellant, was not at odds with the testimony that the appellant directed the transportation of the voters to the polling stations.

6.24 In addition, that the appellant's argument that PW1 Elias Bwembya's evidence should not have been taken into account as he was a witness with an interest to serve and the Tribunal should have warned itself before relying on it, was overridden by the fact that the said witness' testimony was corroborated by that of PW4, Benny Mwamba, at page 107, paragraphs 15 and 20 of the record of appeal.

6.25 In response to the appellant's arguments on grounds two and three, counsel for the respondent submitted that RW1, Alice Chanda, stated, during *cross-examination* that the PF used to draw large crowds during campaigns. Counsel submitted in this

regard that this depicted how widespread the appellant's malpractices were and that the appellant himself confirmed this in *cross-examination*, when he stated that the distances between places in his ward were not wide apart and that in some areas he would even walk. It was counsel's submission that contrary to ground two, there was evidence led which proved the misconduct as at page 103 of the record of appeal and that 14 face masks, 1 x 12.5kg bag of mealie meal from DMMU and 25kg bag of mealie meal were produced into evidence.

6.26 The case of **Morgan and Others v Simpson and others**¹⁰ was relied upon in which the Court of Appeal of England, stated that if elections are so poorly conducted that they cannot be said to have been conducted in substantial compliance with the electoral laws, then they are void whether or not the non-compliance affected the results. In this regard, it is argued that what transpired in Chinsali Ward elections was downright fraud whose only consequence was nullification of the result. To augment this submission reliance was placed on the case of **Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 others**¹¹ where it was held that if non-compliance with

electoral laws can be attributed to fraud or any fraudulent intentions on the part of the election officials, then the election result would be annulled.

6.27 Coming to grounds four, five and eight, counsel argued that the contradiction with regards to the denomination of money, whether it was K10 or K20 notes is not a contradiction at all as it was not in dispute that the appellant was distributing money. That the Tribunal considered the demeanour of the witnesses and rightly placed more weight on the respondent's evidence.

6.28 It was submitted that once evidence is tendered proving the facts in issue, it was the duty of the opposing party to bring evidence which dispels the evidence tendered. That the appellant alleged that the evidence of Benny Mwamba, PW4 was questionable as he did not vote from Chinsali Basic but Mutale 1 Polling Station, and produced a Voter's Register for Mutale 1.

Benny Mwamba was however, not *cross-examined* on this and no proof was tendered to show that it was his name and his NRC that were reflected on the Voter's Register or indeed that

he was the only Benny Mwamba in Chinsali District. Furthermore, that the Voter's Register for Chinsali Basic School was not produced to completely dispel the possibility that the name of Benny Mwamba was reflected on that voter's register.

6.29 As regards ground nine, it is argued that section 109 of the EPA confers discretion of costs on the court. We were referred to the case of **Afrope Zambia Limited v Anthony Chate & Others**¹², which holds inter alia that:

It is a settled principle of law that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs.

Therefore, that the order of costs was reasonable and that it must be viewed in the right context as the respondent spent considerable sums of money to defend his petition and is entitled to out-of-pocket expenses as it would not be in the interest of justice to deprive him of the due compensation.

Counsel concluded by praying that this Court upholds the decision of the Tribunal with costs to the respondent.

7.0 **Analysis and Decision on Appeal**

7.1 We shall deal with grounds one to eight simultaneously as they are interlinked in that they assail the findings of fact by the Tribunal. As we see it, the cardinal issue the appeal raises is, whether or not the respondent proved his case to the requisite standard to warrant nullification of the appellant's election as Councilor for Chinsali Ward.

7.2 Section 97(2) of the EPA sets out the grounds upon which an election of a Member of Parliament (MP), Mayor or Councilor shall be void as follows:

(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 election-

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) Subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or

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

Authorities abound from this jurisdiction on the burden of proof in election cases.

7.3 In the case of **Michael Mabenga v Sikota Wina and others**⁴ the Supreme Court observed that *"an election petition is like any other civil claim that depends on the pleadings and that the burden of proof is on the challenger to that election to prove to a standard higher than a mere balance of probability; issues raised are required to be established to a fairly high degree of convincing clarity."*

7.4 We echoed similar views in many of our decisions such as **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke**

Mwamba and The Attorney General⁵ and Jonathan Kapaipi v Newton Samakayi¹, that the burden of establishing any of the grounds lies with the petitioner and must be established to the requisite standard in election petitions, namely, a fairly high degree of convincing clarity.

7.5 In **Anderson Kambela Mazoka, Lt. Gen. Christon Sifapi Tembo & Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, the Electoral Commission of Zambia & Attorney General¹³** the Supreme Court illuminated that *"for the petitioners to succeed, it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true choice and free will of the majority of the voters."*

7.6 It is clear therefore that the standard of proof in an election petition is higher than the balance of probabilities. Thus, a petitioner has the duty to adduce credible or cogent evidence to

prove his allegations to the required standard of proof with convincing clarity to warrant nullification of an election.

7.7 Adverting to the present matter, the Tribunal made the findings of fact as stated at paragraph 4.3 of this Judgment. It is settled law that as an appellate Court we can only interfere with the findings of fact of a trial court if the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or they were findings which on a proper view of the evidence no trial court acting correctly could reasonably make. This is the ratio *decidendi* in **Nkhata and others v Attorney General**¹⁴.

7.8 The question therefore is, were the findings of fact made by the Tribunal supported by the evidence adduced and proved to the requisite standard as to warrant nullification of the election of the appellant?

7.9 The respondent and his four witnesses testified to the allegations in the petition as summarized at paragraphs 3.1 to

3.6. At trial, the appellant was also accused of committing all the malpractices in the petition like ferrying voters to the polling stations and feeding the voters with nshima and chicken which were cooked at three different named places.

7.10 We must hasten to state that in his petition, the respondent accused the PF as a party of these electoral malpractices and did not categorically state that it was the appellant who was guilty of the malpractices. In the Petition which is at pages 32 to 33, the allegations of malpractices are clearly levelled against the PF party.

7.11 This is apparently why the appellant has argued that the evidence that the appellant committed any malpractices was not pleaded. In response, the respondent's counsel argued that when evidence which is not pleaded is let in evidence without objection, the Court/ tribunal is not precluded from considering it. This is in line with the Supreme Court decision in the case of **Anderson Kambela Mazoka, Lt. Gen. Christon Sifapi Tembo & Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, the Electoral Commission of Zambia & Attorney General**¹³ in which the Supreme Court held inter alia, that: "*...where any matter not pleaded is let*

in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the court will attach to the evidence of unpleaded issues."

7.12 We are of the considered view that it is incumbent upon a petitioner to specifically plead his or her claims/allegations in the Petition. The rationale is clearly to prevent ambushing the other side. However, we note that the appellant apart from not objecting to the unpleaded evidence was not ambushed because in his Answer, he clearly denied some of the allegations as if they were levelled against him and not the PF party. Therefore, the Tribunal did not err in considering the evidence as it was placed before it without objection from the opposing party, even if it was not pleaded in the Petition. Thus, the appellant's arguments in this regard are without merit.

7.13 Thus, the question is, did the respondent prove that the appellant or his election or polling agent was involved in the malpractices and that the majority of voters were or may have been prevented from voting for a candidate of their choice? In relation to the face masks, the respondent and PW2 testified

that they personally confiscated the 14 face masks from the appellant at Chinsali polling station. PW2 stated that the face masks were confiscated from a child whom the appellant gave as he ran away. The respondent testified that inside the face masks were K10.00 notes while PW2 said it was K20.00 notes. We note the contradictions which we opine are fatal as the two were supposedly together when the said face masks were confiscated and cannot confuse the denomination of the money in the face masks. This evidence with contradictions cannot be considered to have been proved with convincing clarity.

7.14 With regard to the allegation of ferrying voters, only PW1 alluded to ferrying 40 voters from about 10:00 hours to 16:00 hours in a Toyota Hilux. It is unclear how many trips he undertook or if all 40 people were ferried in the Hilux at once. Furthermore, as canvassed by the appellant, the respondent said he saw the appellant driving the vehicle while PW1 said he was instructed to drive by the appellant. This was allegedly on the same day and using the same car. This allegation was therefore, not proved to the required standard. As to the allegation of cooking

is trite that in election petitions some witnesses are partisan and their testimonies need to be viewed with great care and caution, scrutiny and circumspection. We stated in **Mbololwa Subulwa v Kaliye Mandandi**¹⁵ that:

As a starting point, we wish to echo here the position we took in Steven Masumba, where we made it clear that in terms of the requirement for corroborating evidence in election petitions, witnesses who belong to a candidate's own political party or who are members of the candidates campaign team must be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood by such witnesses in an effort to tilt the balance of proof in favour of the candidate that they support.

7.17 The authenticity of such witnesses' testimony requires corroboration. The evidence of confiscation of the 14 face masks could have been corroborated by a police report or the police officer. As for PW1, we find merit in the appellant's arguments that PW1 is a witness with an interest to serve who graciously admitted that he was promised to be paid K300.00 by the appellant for ferrying voters but was never paid which upset him. Clearly, this evidence was unsafe to rely on unless corroborated by an independent source or something more.

7.18 Furthermore, as canvassed by the appellant's counsel, we agree that the Tribunal shifted the burden to the appellant, which is a serious misdirection. It was incumbent upon the respondent as the petitioner to prove to the requisite standard the allegations made in the Petition irrespective of the appellant's case.

7.19 The Tribunal filled in the gaps which a trial court is not supposed to do and worse still, it started framing questions which it opined the appellant should have asked the respondent and his witnesses in *cross-examination* for instance about fueling and refueling of the vehicle. Furthermore, it wrongly concluded that because these questions were not asked, the respondent had discharged the burden and proved his case. Yet, the Tribunal did not address its mind to whether or not the evidence adduced by the respondent had met the threshold as prescribed by section 97 (2) (a) of the EPA. In so doing, it shifted the burden of proof from the respondent to the appellant. It is settled law that the burden of proof throughout proceedings, rests on he who alleges, election petitions are no exception.

7.20 We stressed this point in **Chrispin Siingwa v Stanley Kakubo**¹⁶, that the burden of proof lies with the petitioner and where the trial court finds the petitioner's evidence unconvincing or it does not prove the allegations to the requisite standard of proof, it matters not the evidence proffered by the other party, the case will fail. We echoed similar sentiments in the case of **Mwiya Mutapwe v Shomeno Dominic**¹⁷.

7.21 We opine that the evidence adduced on all the allegations of malpractices were not proved to the requisite standard.

7.22 Regarding the finding at page 30, line 15 – 17 of the record of appeal that there was picketing of voters at Chinsali polling station and Miracle Life polling station, we combed through the record of appeal and found that there was no such polling station going by the name Miracle Life polling station in Chinsali Ward. The two polling stations in Chinsali Ward were Chinsali polling station and Grace Ministries polling station. We would attribute this to a lapse as the ward had no Miracle Life polling station.

7.23 We are of the considered view that based on the totality of the evidence adduced, allegations of malpractices against the appellant were not proved to a high degree of convincing clarity. We accordingly reverse the findings of fact made by the Tribunal. The upshot is that grounds one to eight succeed.

7.24 On ground nine alleging that the Tribunal erred in awarding costs to the respondent who appeared in person throughout the proceedings, section 109 of the EPA has elaborately laid out the guiding principles on award of costs in Election Petitions. Costs are to be awarded against a party guilty of vexatious conduct or any party found blameworthy in line with section 109(2) of the EPA. Thus, costs do not necessarily follow the event as in other civil cases. We held in **Kufuka Kufuka v Mundia Ndalamei**¹⁸ that a trial Judge must always make a finding of misconduct of any erring party, before awarding costs. It was therefore wrong for the Tribunal to have awarded costs without considering if the parties had misconducted themselves.

7.25 Accordingly, the Tribunal erred in awarding costs to the respondent in the circumstances of this case. This ground also

succeeds and the award of costs is accordingly set aside. For avoidance of doubt, the respondent is not entitled to anything as the appeal has succeeded.

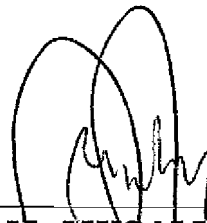
7.26 Having found merit in all the nine grounds of appeal, the appeal is allowed. We set aside the decision of the Tribunal and find that the appellant was duly elected as councilor for Chinsali Ward in the Chinsali District of Muchinga Province of the Republic of Zambia. We order each party to bear own costs in this Court.



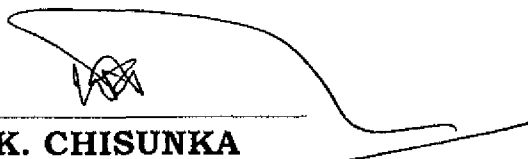
H. CHIBOMBA
PRESIDENT CONSTITUTIONAL COURT



M. S. MULENGA
CONSTITUTIONAL COURT JUDGE



M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE



J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE