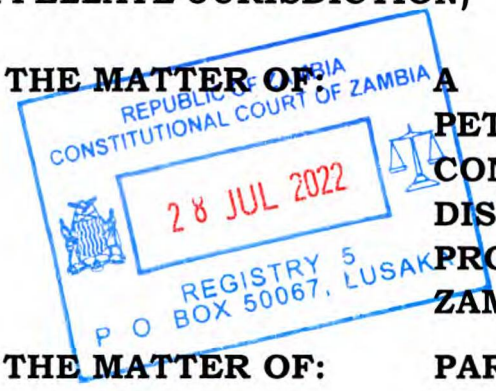
IN THE CONSTITUTIONAL COURT OF ZAMBIA 2021/CCZ/A0019
AT THE CONSTITUTIONAL REGISTRY
HOLDEN AT LUSAKA
(APPELLATE JURISDICTION)



IN THE MATTER OF: **A PARLIAMENTARY ELECTION PETITION FOR KABUSHI CONSTITUENCY IN THE NDOLA DISTRICT OF THE COPPERBELT PROVINCE OF THE REPUBLIC OF ZAMBIA, 12TH AUGUST, 2021**

IN THE MATTER OF: **PART IX (SECTION 97 AND 98) AND PART VIII (SECTION 83, 84, 86 AND 89) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

IN THE MATTER OF: **ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

BETWEEN:

BOWMAN LUSAMBO **APPELLANT**

AND

BERNARD KANENGO **1ST RESPONDENT**

ELECTORAL COMMISSION OF ZAMBIA **2ND RESPONDENT**

CORAM: CHIBOMBA PC, MULENGA, MULONDA, MUNALULA AND MULONGOTI, JJC.

On, 24th February, 2022 and 28th July, 2022

For the Appellant : **Mr. M. Zulu, Mr. J. Zimba and Ms. M. Phiri of Messrs Makebi Zulu Advocates**

For the 1st Respondent: **Mr. C. Magubbwi of Messrs Magubbwi and Associates**

For the 2nd Respondent: **Mr. B. Musenga and Mr. M. Bwalya, In -House Counsel**

JUDGMENT

CHIBOMBA PC, delivered the Judgment of the Court.

Cases referred to:

1. **Siamunene v Sialubalo (2017) Vol 3 Z.R. 335**
2. **Kapaipi v Samakayi 2016/CC/A048**
3. **Mubika v Njeulu SCZ Judgment No. 114 of 2007**
4. **Maluba v Mwewa and Another Appeal No. 4 of 2017**
5. **Lewanika and Others v Chiluba (1998) Z.R. 79**
6. **Siingwa v Kakubo Appeal No. 7 of 2017**
7. **Seaford v Asher [1949] 2 All ER 155**
8. **Mumba v Daka Appeal No. 38 of 2003**
9. **Luo v Mwamba and Another Selected Judgment No. 51 of 2018**
10. **Mutapwe v Shomeno Appeal No. 19 of 2017**
11. **Liato v Sitwala Selected Judgment No. 23 of 2018**
12. **Shamwana and Others v The People (1985) Z.R. 41**
13. **Mlewa v Wightman (1995 – 1997) Z.R. 171**
14. **The People v Shamwana and Others (1982) Z.R. 122**
15. **Mazoka and Others v Mwanawasa (2005) Z.R. 138**
16. **Hanifa v Ronald and Another (2011) UGHC64**
17. **Phiri v Mangani (2013) Vol 1 Z.R. 43**
18. **Kariba v ZSIC (1980) Z.R. 118 HC**
19. **Masule v Kang'ombe 2019/CC/A002**
20. **Subulwa v Mandandi Selected Judgment No. 25 of 2018**
21. **Zulu v Avondale (1982) Z.R. 174**
22. **Attorney General v Achiume (1983) Z.R. 1**
23. **Masumba v Kamondo (2017) 3 Z.R. 130**
24. **Zulu v Kalima Appeal No. 2 of 2012**
25. **Phiri and Others v The People (1978) Z.R. 79**
26. **Credland v Knowler (1951) 35 Cr App Rep 48 DC**
27. **Reddy v R. Sultan and Others (1976) AIR 1599**
28. **Nyambe v The People (2011) 1 Z.R. 246**
29. **Mohammed v Attorney General (1982) Z.R. 49**
30. **Partapa v State of Naryana (2015) 3 SCC 724**

31. **Odinga and Others v Independent Electoral and Boundaries Commission and Others (Petition 5, 3 and 4 of 2013) [2013] eKLR**
32. **Mwale v Kaunda Appeal No. 50 of 2012**
33. **Chota v Mucheleka and The Electoral Commission of Zambia Appeal No. 15 of 2015**
34. **Mabenga v Wina and Others SCZ Judgment No. 35 of 2003**
35. **Attorney General and Others v Kaboiron (1995) 2 LRC 757. 5**
36. **Nkhata and Others v Attorney General (1966) Z.R. 124**

Legislation referred to:

1. **The Electoral Process Act No. 35 of 2016**
2. **The Constitutional Court Act No. 8 of 2016**
3. **The Constitutional Court Rules No. 37 of 2016**

Works referred to:

1. **International Foundation for Electoral Systems Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections (2011)**
2. **Halsbury's Laws of England Volume 12 5th Edition Lexis Nexis 2013**
3. **Oxford Medical Dictionary 10th Edition**
4. **Black's Law Dictionary 4th Edition 2004**

1.0 INTRODUCTION

1.1 The appellant, Mr. Bowman Lusambo, appeals against the judgment of the High Court at Ndola, which nullified his election as Member of Parliament for Kabushi Parliamentary Constituency in the Copperbelt province of the Republic of Zambia on the ground that he had engaged in violence and other illegal acts or practices.

2.0 HISTORICAL BACKGROUND

2.1 The brief facts leading to this appeal are that the appellant and the 1st respondent (Mr. Bernard Kanengo) together with six others stood as candidates in the Kabushi Parliamentary Constituency election that was held on 12th August, 2021. The appellant, who stood on the Patriotic Front (PF) ticket, having polled 18,417 votes, was declared by the 2nd respondent's Returning Officer as duly elected Member of Parliament for Kabushi Constituency. The 1st respondent who stood on the United Party for National Development (UPND) ticket was the closest contender, having polled 12,593 votes. The other six candidates collectively polled 5,270 votes.

2.2 Disenchanted with the declaration, the 1st respondent, by an amended petition filed in the High Court at Ndola on 23rd August, 2021, sought a declaration that the appellant was not duly elected as Member of Parliament for the said Constituency on the ground that he had committed multiple and widespread electoral infractions which influenced the outcome of the election.

2.3 The amended petition was supported by an affidavit verifying the petition in which the 1st respondent alleged that the appellant had personally and/or through his agents, committed electoral malpractices summarised as follows:

1. **Corrupt and bribery practices before the election, contrary to section 81 of the Electoral Process Act;**
2. **Undue influence and false publication, contrary to sections 83(1)(b) and 84 of the Electoral Process Act;**
3. **Illegal practices by acting and/or inciting others to act in a disorderly and violent manner, and thereby preventing the 1st respondent from conducting campaigns, contrary to section 86 of the Electoral Process Act; and**
4. **Illegal practices in respect of the poll by communicating and canvassing for votes on the election day.**

2.4 In opposing the claims in the amended petition, the appellant filed an answer supported by an affidavit in which he disputed all the allegations made against him.

2.5 The matter proceeded to trial, and the 1st respondent testified on his own behalf as PW1 and called 19 other witnesses. The appellant testified in defence as RW1 and called four other witnesses. The 2nd respondent called one witness.

2.6 The learned trial Judge considered the allegations in the petition, the answer and the evidence of the respective parties, which he analysed. He also considered the authorities cited by the parties and came to the conclusion that the allegation of violence, among others, had been established to the required standard. The learned trial Judge upheld the petition and declared that the appellant was not duly elected.

2.7 Dissatisfied with the determination by the Court below, the appellant and the 1st respondent have now appealed and cross-appealed respectively to this Court.

3.0 THE GROUNDS OF APPEAL IN THE MAIN APPEAL AND THE APPELLANT'S SUBMISSIONS

3.1 The appellant advanced four grounds of appeal in the memorandum of appeal couched as follows:

1. **The learned trial Judge erred in law and in fact when he held that the reported violence in the four out of eight wards amounted to widespread violence while acknowledging that the 1st respondent (appellant herein) may only have been present on two occasions when violence is alleged to have been perpetrated.**

2. **The learned trial Judge erred in law and in fact when he shifted the burden of proof to the 1st respondent (appellant), when he held that the failure to show that he attempted to stop the violence meant that he consented or acknowledged the violence.**

3. **The learned trial Judge erred in law and in fact when he held that the majority of the voters were or may have been prevented from voting for a candidate of their choice.**

4. **The learned trial Judge erred in law and in fact when he held that the clenched fist was used as a symbol for the Patriotic Front party.**

3.2 At the hearing of this appeal, learned Counsel for the appellant, Mr. Zulu and Mr. Zimba, relied on the heads of argument filed in support of the appeal, which they augmented with oral submissions.

3.3 In support of ground one which attacks the learned trial Judge's holding that violence reported in four out of the eight wards in Kabushi Constituency and the appellant's presence on two occasions amounted to widespread violence, Counsel for the appellant began by referring us to the provisions of sections 97(2)(a) and 83(1) of the **Electoral Process Act (the EPA)**[1]. Learned Counsel submitted that the law on the avoidance of an election was clear and unambiguous and that this Court had occasion to pronounce itself on the import of the two provisions in the case of **Siamunene v Sialubalo**[1].

3.4 It was learned Counsel's submission that the learned trial Judge made a finding of fact that violence had occurred in five wards in Kabushi Constituency and that with the exception of one incident in Toka ward, violence in four wards was attributable to the appellant and the "Nato Forces". Further, that violence in four out of the eight wards in the Constituency was enough to be called widespread given the magnitude, cruelty and callousness of the violence and the fact that the appellant was present during the violence on two occasions.

3.5 Counsel contended, however, that it was not enough for a petitioner to only prove that a candidate had committed an illegal or corrupt practice or other misconduct without proof that the malpractice complained of was widespread and prevented or may have prevented the majority of voters from electing a candidate of their choice. To buttress the above proposition, the cases of **Kapaipi v Samakayi**[2] and **Mubika v Njeulu**[3] were called in aid. Counsel also cited the case of **Maluba v Mwewa and Another**[4] for the definition of "widespread".

3.6 Learned Counsel argued that from the evidence on record, violence in four out of eight wards could not be said to have been so widespread as to have prevented voters in Kabushi Constituency from electing their preferred candidate. More so that the appellant was only present during the violence on two occasions.

3.7 It was further submitted that the learned trial Judge erred when he apportioned the violence committed by the "Nato Forces" to the appellant as his agents, when they did not come within the definition of an election agent in section 2 of the **EPA**[1]. Further that it was erroneous for the learned trial Judge to hold that violence in Kabushi Constituency was committed with the appellant's knowledge and consent when none of his appointed election agents was placed at the scene of violence. To press on this point, Counsel cited the cases of **Lewanika and Others v Chiluba**[5] and **Siingwa v Kakubo**[6]. In urging us to uphold ground one, Counsel submitted that the role of the Court is simply to give effect to the electoral law as intended by the framers in line with **Seaford v Asher**[7].

3.8 In augmenting the written submissions on ground one, Mr. Zimba submitted that the Court below applied the wrong standard of proof for ordinary civil matters based on the pre-2016 electoral principles laid down in the case of **Mumba v Daka**[8] instead of the higher standard as pronounced by this Court in the case of **Luo v Mwamba and Another**[9].

3.9 Reinforcing Mr. Zimba's oral submissions, Mr. Zulu argued that the learned trial Judge only satisfied himself on the allegation of violence as having been proved to a fairly high degree of convincing clarity but did not make a similar finding for the other allegations. He concluded by urging us to set aside the judgment of the Court below, re-assert the law as stated in the case of **Luo v Mwamba and Another**[9] and uphold the election of the appellant as Member of Parliament for Kabushi Constituency.

3.10 In support of ground two, Counsel argued that the learned trial Judge shifted the burden of proof when he held that the appellant's failure to show that he attempted to stop or discourage the violence meant he had knowledge and

consented or approved of the violence. It was submitted that it was trite that the burden of proof in an election petition rested on the petitioner, the 1st respondent herein, to prove his allegations to a fairly high degree of convincing clarity. That to require the appellant to adduce evidence to show that he had dissociated himself from the acts and scenes of violence or attempted to stop or discourage the violence, the Court below effectively shifted the burden of proof from the 1st respondent to the appellant.

3.11 It was submitted that for the learned trial Judge to simply conclude that the appellant was responsible because he had failed to dissociate himself from the acts of violence was not enough to warrant an inference that the appellant was part of the violence or that he incited the "Nato Forces" or the PF supporters to act as they did. The cases of **Mutapwe v Shomeno**[10], **Maluba v Mwewa and Another**[4] and **Siamunene v Sialubalo**[1] were cited.

3.12 Coming to ground three, which attacks the learned trial Judge for holding that the episodes of violence may or actually did prevent the majority of voters from electing a

candidate whom they preferred, Counsel began by referring us to the number of registered voters in Kabushi Constituency which they put at between 49,000 and 53,000. It was further submitted that the actual votes cast in the election was 36,830, out of which the appellant polled 18,417 and the 1st respondent polled 12,593.

3.13 Learned Counsel posited that simple arithmetic demonstrated that voter turnout in the Constituency was 70 per cent and that the majority of the registered voters in the Constituency voted and did in fact vote for the appellant. And that therefore, the learned trial Judge erred when he found that the episodes of violence prevented or may have prevented the majority of the electorate in Kabushi Constituency from electing their preferred candidate. To buttress this point, Counsel cited the cases of **Maluba v Mwewa and Another**[4] and **Liato v Sitwala**[11].

3.14 In relation to ground four, which attacks the learned trial Judge's finding that the clenched fist was used as a symbol for the PF party, learned Counsel contended that the Court below did not directly venture into the question as to

whether or not to take judicial notice that the boat is the PF symbol. Further that it was erroneous and futile for the Court below to have insisted on the testimony of RW6 and conclude that the clenched fist was the party symbol for the PF when the official PF symbol was a boat, a fact that everyone is fully aware of. To press on this point, the appellant relied on among others, the Supreme Court decision in the case of **Shamwana and Others v The People**[12].

4.0 1ST RESPONDENT'S HEADS OF ARGUMENT IN OPPOSITION

4.1 In opposing the appeal, learned Counsel for the 1st respondent, Mr. Magubbwi, relied on the filed heads of argument which he reinforced with oral submissions.

4.2 Mr. Magubbwi responded by submitting that the learned trial Judge was on firm ground when he found that there was widespread violence in Kabushi Constituency which prevented the majority of the voters from voting for a candidate of their choice and that the violence was attributable to the appellant and his supporters known as the "Nato Forces".

4.3 It was contended that the learned trial Judge rightly reminded himself that Kabushi Constituency had eight wards and proceeded to find that violence occurred in five wards albeit that one incident was discounted. Learned Counsel submitted that the learned trial Judge found that the first incidence of violence occurred in Toka and Kaloko wards when the UPND team was moving from Toka ward to the 1st respondent's residence in Kaloko ward. Counsel submitted also that the "Nato Forces" destroyed a motor vehicle the 1st respondent was using for campaigns, at the entrance of his residence in Kaloko ward.

4.4 Learned Counsel submitted that the second incident was on 17th July, 2021 in Skyways ward and that the appellant had admitted being present during the violence perpetrated by the "Nato Forces". Learned Counsel pointed us to the 1st respondent (PW1)'s evidence recounting the violence committed by the appellant and the "Nato Forces" and describing that a Toyota Hilux double cab inscribed "Nato Forces" on the bonnet was used at the scene of the violence. He also referred extensively to PW20's evidence which, he said, placed the appellant at the centre of the violence.

4.5 Learned Counsel submitted that the learned trial Judge found that the third incident occurred in Kabushi ward on 9th August, 2021 and concluded on the uncontroverted evidence of PW19 that the appellant was present when the "Nato Forces" caused mayhem on the 1st respondent's campaign team. Mr. Magubbwi further submitted that the learned trial Judge found that other spates of violence occurred in Lubuto ward, where the self-styled "Nato Forces" stripped UPND supporters of their party regalia. Counsel submitted that based on these incidents, the only immutable and conclusive finding of fact was that violence inflicted on the 1st respondent and his supporters by the "Nato Forces" was done with the appellant's active participation and/or knowledge and consent.

4.6 It was submitted that the learned trial Judge rightly dismissed the appellant's alibi and claims that he and his campaign team were attacked by the UPND and that the violence in Kabushi and Skyways wards was not committed by his election agents, as these claims were discredited in *cross-examination* and by the evidence of the 1st respondent's witnesses.

4.7 It was further submitted that the record was replete with evidence that all incidents of violence in the other wards were committed by the "Nato Forces" and that this was the same group that inflicted violence in the appellant's presence without him acting against it and hence the finding by the learned trial Judge that from the evidence, the appellant had not been dissociated from the violence in Kabushi and Skyways wards. Mr. Magubbwi submitted that the only inference that could be drawn from the evidence on record was that the violent conduct of the "Nato Forces" on all occasions was with the full knowledge and consent or approval of the appellant.

4.8 Mr. Magubbwi submitted that the learned trial Judge properly guided himself as to the import of the provisions of section 97(2) of the EPA[1] adding that the appellant was clearly and actively an accessory or an accomplice to the violence perpetrated by the "Nato Forces".

4.9 Commenting on the appellant's argument that the "Nato Forces" were not his agents within the meaning of section 2 of the **EPA[1]**, Mr. Magubbwi submitted that Counsel missed

the point because the learned trial Judge did not at any stage suggest or hold that the "Nato Forces" were or had committed the violence as the appellant's election or polling agents. He submitted that the **Lewanika v Chiluba**[5] and **Siingwa v Kakubo**[6] cases, on which the appellant was relying insofar as they related to who was an agent, in fact support the learned trial Judge's finding that the appellant had knowledge of and consented to the violence by the "Nato Force".

4.10 It was submitted that the learned trial Judge correctly applied and was properly guided by the principles laid down in the case of **Siamunene v Sialubalo**[1] adding that the present case was distinguishable in that the appellant's association to the violence was not based on his mere candidacy or on the fact that violence was committed by ordinary supporters who were far removed from him.

4.11 Mr. Magubbwi submitted that the learned trial Judge properly reminded himself of this Court's decisions in the cases of **Mutapwe v Shomeno**[10] and **Maluba v Mwewa and Another**[4], stressing that the 1st respondent needed to prove

the allegations to a fairly high degree of convincing clarity. He further submitted that in terms of proving the allegation on violence, the 1st respondent had produced impeccable evidence with convincing clarity, demonstrating that the violence in all the affected wards was committed by the appellant and the "Nato Forces".

4.12 In response to the appellant's submissions in support of ground two, the 1st respondent submitted that the learned trial Judge was on firm ground when he drew an inference that the appellant had knowledge and consented or approved of the violence because he had failed to dissociate himself. Further that, the appellant's alibi and claim that he and his supporters were attacked by the UPND, had also failed.

4.13 Reacting to the appellant's arguments in support of ground three, Mr. Magubbwi submitted that the finding by the Court below that the majority of voters were or may have been prevented from voting for a candidate of their choice due to the violence was factually and legally sound. It was pointed out that the second limb of section 97(2)(a) of the

EPA[1] calls for an inquiry into whether the violence was such that it prevented the majority of voters from electing a candidate of their choice. That in this regard, the finding of the Court below was that violence occurred in five out of eight wards, albeit, that one incident was dismissed. According to Mr. Magubbwi, violence in four out of eight wards meant that violence occurred in 50 per cent of the Constituency.

4.14 Learned Counsel submitted that the framers of the law used the word "may" in section 97(2)(a) of the **EPA**[1] because "shall" would have invited an empirical test. He posited further that determination of whether the majority of voters may have been prevented was a subjective one based on the material or evidence before the Court. Counsel referred us to the cases of **Mlewa v Wightman**[13] and **Mumba v Daka**[8], which the learned trial Judge relied on in his judgment. In particular, our attention was drawn to a portion in the case of **Mumba v Daka**[8] where the Supreme Court stated that:

> **"The evidence on record, highlighting incidents of misconduct in form of violent acts committed by the Kulima Tower boys is overwhelming. The intimidation and actual violence committed against the appellant and his party, the MMD, is well documented. The boys**

who were sponsored by the appellant can be said to have caused so much fear among the voters in the constituency."

4.15 According to Mr. Magubbwi, the catch-phrase is that the acts of violence committed must be "widespread or overwhelming". As for what constitutes widespread occurrence of a breach, Mr. Magubbwi equally relied on the case of **Maluba v Mwewa and Another**[4]. Learned Counsel averred that violence in 50 per cent of the Constituency, of which half was ascribed to the appellant was, by any objective measure, overwhelming and widely distributed.

4.16 In response to the argument whether widespread violence may have prevented the majority of voters from electing a candidate of their choice, Counsel's answer to this question was in the affirmative. It was submitted that the violence perpetrated by the appellant's "Nato Forces" was callous and savage and was carried out in broad daylight in densely populated areas such as markets, township roads and even at a police station. It was further submitted that the nature and extent of the violence was laid bare by the testimonies of the 1st respondent, PW19 and PW20.

4.17 It was contended that the violence in question was aimed at, and did result in, decapitating the 1st respondent and his campaign team from reaching out to the majority of voters in 50 per cent of the Constituency. Counsel submitted that the learned trial Judge, after drawing comparisons and similarities with the **Mumba v Daka**[8] case, was right in finding at pages 129 to 130 of the record of appeal that:

> **"The similarity is that in this Kabushi Constituency petition, violence was used during campaigns by the 1st respondent (appellant) to prevent the UPND candidate from campaigning. That violence was used by the 1st respondent and his "Nato Forces". On some notable occasions the 1st respondent and his "Nato Forces" attacked the petitioner and his UPND campaign team thereby forcing the petitioner and his campaign team to abandon their campaign and scamper for safety."**

4.18 Mr. Magubbwi contended that the effect of mass-scale violence is that it cannot be reduced to a simple arithmetic equation, as suggested by the appellant, because violence lent itself to, among others, intimidating the electorate into voting for an undesired candidate or abstaining from voting altogether.

4.19 Counsel went on to submit that where there is widespread violence, the conclusion is that the majority of voters were prevented from voting for a candidate of their choice and

therefore, the learned trial Judge was on firm ground when he found that the "1st respondent (appellant herein) who was referred to as 'Bulldozer' and his militia called "Nato Forces" caused terror and fear in the voters in Kabushi Constituency". Mr. Magubbwi ended by urging us to dismiss ground three for want of merit.

4.20 With respect to ground four, Mr. Magubbwi submitted that the learned trial Judge was on a sound footing when he found that a clenched fist was a symbol akin to the PF party. Counsel, referred us to PW17's evidence and the appellant's response on the subject matter, and submitted that there was no argument at trial as to whether or not the boat was the PF symbol and, therefore, to have expected the Court below to take judicial notice of it was misconceived. Counsel submitted that RW6's evidence, which was uncontroverted, was that it is not uncommon to see a clenched fist on PF chitenge and t-shirts and there was no suggestion that the clenched fist was an official symbol for PF.

4.21 As regards the notoriety of the PF symbol, Mr. Magubbwi quoted extensively from the opinion of Chirwa, J, (as he then was), in **The People v Shamwana and Others**[14] case. According to Mr. Magubbwi, a clenched fist and "pamaka" being symbol and slogan associated with the PF was a notorious fact of general knowledge to every reasonably and civically aware person in Zambia, and that these were and are widely used on PF apparel and billboards and by PF members and followers. Mr. Magubbwi submitted that Counsel for the appellant misconstrued the *dictum* in the case of **The People v Shamwana and Others**[14], arguing that the learned trial Judge was not precluded from considering RW6's evidence but rather, the evidence was a source by which the Court could confirm a notorious fact. Further, that had the learned trial Judge ignored such a notorious fact, he would have ensnared himself. This Court was accordingly urged to dismiss ground four for lack of merit.

4.22 In augmenting the 1st respondent's written submissions in opposition to ground one, Mr. Magubbwi orally submitted that the learned trial Judge properly reminded himself of the

onus and standard of proof and, therefore, the standard that he applied in determining the election petition could not be faulted.

4.23 Reacting to the appellant's argument that the learned trial Judge wrongly apportioned incidents of violence to him in wards where neither he nor his election agents were present, Mr. Magubbwi submitted that the trial Court was on firm ground. Counsel pointed out that in arriving at his conclusion, the learned trial Judge noted that the appellant was in the company of the "Nato Forces" who committed violence in his presence on two occasions and that the Court went further to consider other incidences of violence perpetrated by the "Nato Forces" where the appellant was not present and was satisfied to a high degree of convincing clarity that the appellant had knowledge of the violence and did nothing to discourage it.

4.24 Reacting to the appellant's argument that the learned trial Judge only satisfied himself to a fairly high degree of convincing clarity on violence, and not on the other allegations, Mr. Magubbwi submitted that the trial Court

made findings of fact that bribery was widespread and attributed it to the appellant. It was submitted that even assuming the decision of the Court below in that respect was not conclusive, this Court is empowered under the section 25(1)(a) of the **Constitutional Court Act**[2] to make a finding of fact and hold that the election should be repudiated. In closing, Mr. Magubbwi urged us to dismiss the entire appeal, with costs.

5.0 THE 2ND RESPONDENT'S HEADS OF ARGUMENT

5.1 Counsel for the 2nd respondent, Mr. Musenga, relied on the filed heads of argument. A reading of the 2nd respondent's heads of argument shows that the 2nd respondent did not address any specific grounds of appeal.

5.2 Counsel for the 2nd Respondent began by citing a litany of authorities governing electoral infractions and re-stating the law that a petitioner must satisfy the Court that the respondent, personally or through his appointed agent, committed malpractice or misconduct adding that a general allegation was not enough to attach responsibility to the respondent. It was submitted that the wrongdoer must be specifically identified and that it must be demonstrated that

the act complained of was widespread and affected the majority of the voters under the Majoritarian Principle.

5.3 Counsel for the 2nd respondent referred to **Mazoka and Others v Mwanawasa**[15] and **Mubika v Njeulu**[3] to demonstrate occasions when the Courts have dismissed an election petition for not meeting the widespread threshold or the majoritarian principle. It was argued that the absence of statistics to assist the Court meant that the petitioner had failed to discharge his burden, and that anything less amounted to speculation. He invited us to look at a Ugandan case, **Hanifa v Ronald and Another**[16] on the treatment of partisan witnesses.

5.4 It was further submitted that international electoral law instruments are categorical on the sanctity of election results and guide that election results should not be disregarded lightly or easily. In support of this proposition, learned Counsel drew our attention to a publication titled the **International Foundation for Electoral Systems Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections (2011)**[1].

5.5 It was the 2nd respondent's position that the 1st respondent lamentably failed to prove any electoral malpractice or misconduct to the required threshold. Further that the 1st respondent did not adduce any cogent evidence that the electoral malpractices or misconduct, if any, was so widespread that it swayed or may have swayed the majority of the electorate from electing their preferred candidate. That there was no evidence on record that shows that the electorate were prevented from participating in the election or that the 2nd respondent breached any specific provision of the law. In closing, learned Counsel submitted that the 2nd respondent had duly conducted the election in substantial conformity with the law and on that basis, the appeal should be allowed with costs.

5.6 In opposing the 2nd respondent's submissions, Mr. Magubbwi reiterated orally that determination of widespread violence did not require a specific formular. That once the widespread nature of the electoral malpractices is proved, it necessarily follows that the majority of voters were or may have been prevented from choosing a candidate of their choice. To press on this point, the case of **Phiri v**

Mangani[17], which followed **Mlewa v Wightman**[13] with approval, was cited to the effect that:

> **"Under paragraph (a) of the Electoral Act, 1991, it does not matter who the wrongdoer is. The election will be nullified if there is wrongdoing of the type and scale, which satisfies the Court that it has adversely affected or may have affected the election."**

6.0 APPELLANT'S ARGUMENTS IN REPLY

6.1 In reply, Counsel for the appellant more or less repeated their arguments except to state that the 1st respondent pleaded only two incidents of violence in his amended petition and that the Court below was, therefore, bound to consider only those pleadings. For this proposition, Counsel relied on a High Court decision in the case of **Kariba v ZSIC**[18] on the purpose of pleadings.

6.2 In his brief oral submissions, Mr. Zulu submitted that the question left for this Court's determination is whether the appellant's presence during the violent incidents amounted to condonation and knowledge and if it did not, then this appeal must succeed. He submitted that in the unlikely event this Court finds that it did, then the next question to consider is whether the appellant's presence on two

occasions of the violence amounted to a widespread occurrence. Counsel drew our attention to the case of **Masule v Kangombe**[19] where this Court stated that the **Phiri v Mangani**[17] case, cited by the learned Counsel for the 1st respondent, had no application to that matter.

7.0 CONSIDERATION AND DECISION BY THIS COURT

7.1 We have carefully considered this appeal, the written and oral submissions by learned Counsel for the respective parties as well as the authorities cited. We have also considered the Judgment of the learned Judge in the Court below and the evidence on record. The main issue, as we see it, is whether the learned trial Judge was on firm ground when he nullified the election of the appellant as Member of Parliament for Kabushi Constituency on the ground that he had engaged in violence and other illegal acts or practices, and if so, whether the majority of the voters in the said Constituency were or may have been prevented from electing a candidate of their choice.

7.2 From the outset, we are alive to the fact that this appeal mainly seeks to assail findings of fact made by the trial Judge. The law on this aspect is well settled in a plethora of

cases that an appellate Court will not lightly interfere with the findings of fact of a trial Judge, unless satisfied that the findings in question are either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or the findings, which on a proper view of the evidence, were such that no trial Court or tribunal properly directing itself can reasonably make. **Subulwa v Mandandi**[20], **Siingwa v Kakubo**[6], **Zulu v Avondale**[21] and **Attorney General v Achiume**[22] are cases in point.

7.3 In terms of our electoral law, the threshold for nullifying an election of a Member of Parliament where corrupt practice, illegal practice or other misconduct is alleged in an election petition, is governed by the provisions in section 97(2) of the **EPA**[1], which is couched in the following manner:

> **"(2) The election of a candidate as 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 of and consent or approval of a candidate or of that candidate's election agent or polling agent; and

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

7.4 Hence, this Court, in interpreting the above provision in the case of **Masumba v Kamondo**[23], stated that:

> **"The requirement in the current law for nullifying an election of a Member of Parliament 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 other misconduct committed, the majority of voters in the constituency were or may have been prevented from electing a candidate whom they preferred."**

7.5 Further, in the case of **Luo v Mwamba and Another**[9] we went on to hold that:

> **"Section 97(2) of the (Electoral Process) Act is central to the judicial resolution of electoral disputes...In order to successfully have an election annulled, 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 agent, 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... In addition, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

7.6 It is also settled that the applicable standard of proof in an election petition is higher than that required in an ordinary civil action but lower than the standard of beyond reasonable doubt required in criminal matters. Furthermore, the evidence adduced in support of the allegations made must prove issues raised to a fairly high degree of convincing clarity. This position of the law was re-stated by this Court in the case of **Mutapwe v Shomeno**[10] where we held that:

> **"The petitioner in an election, just as in any other civil matter, bears the burden to prove the electoral offence complained of. However, the standard of proof in an election petition is higher than that required in an ordinary civil action. The evidence adduced in support of the allegations made in an election petition must prove the issues raised to a fairly high degree of convincing clarity."**

7.7 Therefore, in determining the issues raised in this appeal,we shall be guided by the principles illustrated above. For

convenience and to avoid repetition, we shall consider grounds one, two and four, first and then ground three, last.

7.8 However, before we consider the grounds of appeal, there is one issue which we find to be profound and needs to be addressed at this stage. This relates to the other allegations on which the learned trial Judge made findings against the appellant. We in fact prodded Counsel at the hearing on this issue. In response, Mr. Zulu, learned Counsel for the appellant, submitted before us that the learned trial Judge, in nullifying the election of the appellant as Member of Parliament for Kabushi Constituency, did not make any findings as regards other wrongful acts or misconduct alleged to have been committed by the appellant. Mr. Zulu contended that the trial Judge satisfied himself to a fairly high degree of convincing clarity on the allegation of violence only.

7.9 In response, Mr. Magubbwi, Counsel for the 1st respondent submitted that the trial Court, from pages 133 to 144 of the record of appeal, did make findings of fact on the other allegations and that as regards bribery, the Court below

made a finding that it was widespread and attributed it to the appellant. Further that the appellant has not challenged these findings in this appeal and that if at all the trial Court did not make any findings, this Court, as an appellate Court, is empowered under section 25(1)(a) of the **Constitutional Court Act**[2] to make findings of fact.

7.10 Counsel for the 2nd respondent's written submission on the other hand was that the 1st respondent had lamentably failed to prove any electoral malpractice or misconduct. He however did not state which allegation or allegations were not proved.

7.11 We have considered the above submissions by Counsel for the respective parties. We do not agree with the submission by Mr. Zulu, Counsel for the appellant, that the Judge in the Court below did not make any findings or conclusions on other misconduct alleged by the 1st respondent in the amended petition. This is so because the record shows that the learned Judge in fact made findings of fact and conclusions on bribery and other alleged illegal or wrongful acts or misconduct that he found had been proved against

the appellant in relation to the election in question. The learned trial Judge held thus at pages 153 to 154 of the record of appeal:

> **"The within petitioner made several allegations. I have upheld those allegations except for the following three (3) allegations:**
>
> **1) The allegation relating to false publication;**
>
> **2) The allegation that the 1st respondent stormed radio FM station on 16th June, 2021 while petitioner was on a paid for political program (sic) and disturbed and/or disrupted the program (sic) by his uninvited and unwanted presence; and**
>
> **3) The allegation that the 1st respondent caused violence in Toka ward on 14th July, 2021.**
>
> **I have already discussed these allegations. These three (3) allegations against the 1st respondent have failed. The rest of the allegations having been proved to the high degree of convincing clarity have succeeded."**

7.12 Further to accept the submission by Mr. Zulu implies that the other proved misconduct are conceded and hence once this Court considers the issue of violence and if it agrees and upholds the trial Judge's findings and conclusions on violence, then this Court must proceed to consider the question as to whether or not the learned trial Judge was on firm ground when he found and concluded that the wrongful acts in question were widespread and affected the majority of the voters in the Kabushi Constituency without

the Court first interrogating whether or not the other wrongful acts found against the appellant were proved to the required standard and if the appellant was properly connected to the wrongful acts upon which his election was nullified.

7.13 To do this, will require that, as we consider ground one, we look at the evidence adduced as regards all allegations of malpractices upon which the learned trial Judge relied to nullify the appellant's election so as to enable us determine whether the allegations were indeed proved to the required standard as required by section 97(2)(a) of the **EPA**[1].

7.14 We are fortified in taking this approach by the fact that the appellant in his Notice of Appeal did indicate that he was dissatisfied with the decision of the Court below and was appealing against "the whole Judgment of the Court". Secondly, this Court, in exercise of its appellate jurisdiction, has power under section 25(1)(a) of the **Constitutional Court Act**[2] to:

> **"Confirm, vary, amend or set aside the judgment appealed from or give such judgment as the case may require."**

7.15 Further, Order XI rule 9(3) of the Constitutional Court Rules[3] provides that:

> **"The appellant shall not thereafter without leave of the Court put forward any grounds of objection other than those set out in the memorandum of appeal, but the Court in deciding the appeal shall not be confined to the grounds put forward by the appellant."**

7.16 Furthermore, we adopt the Supreme Court decision in the case of **Zulu v Kalima**[24] which though not binding on this Court, is good law. It states as follows:

> **"As an appellate Court, we have to look at the evidence supporting each allegation and see if properly directing herself (or himself), the learned trial Judge would have found the allegations proved to a degree higher than on the balance of probability."**

7.17 Having said that, we now proceed to consider the arguments under ground one of this appeal.

8.0 GROUND ONE OF THIS APPEAL

8.1 The thrust of the appellant's argument in support of ground one was that the learned trial judge erred when he held that the violence in Kabushi Constituency was widespread because the incidents of violence occurred in four out of eight wards and that the appellant was present on two occasions. Further that the learned trial Judge erroneously

apportioned violence alleged to have been committed by the "Nato Forces" to the appellant when they were not his agents within the definition in section 2 of the **EPA**[1].

8.2 The crux of the 1st respondent's argument in response to ground one was that the learned trial Judge rightly found that violence in Kabushi Constituency was widespread albeit that he discounted one incident. Further that the Court below, on the evidence of the 1st respondent (PW1), PW19 and PW20, was correct to attribute the violence which occurred in Kabushi Constituency to the appellant and the "Nato Forces". Further that at no time did the trial Court hold or suggest that the "Nato Forces" were the appellant's agents and that the "Nato Forces" were not ordinary supporters.

8.3 The thrust of the 2nd respondent's argument, though not specific to any grounds of appeal, was that the 1st respondent had lamentably failed to prove the alleged electoral malpractices to the required threshold or that they were so widespread as to affect the outcome of the election. Further that the 1st respondent had not shown

that the 2nd respondent had contravened any provisions of the law in the conduct of the elections.

8.4 We have considered the submissions in support and against ground one. Under this ground, the issue as we see it is whether the violence in Kabushi Constituency was widespread and whether the "Nato Forces" who are alleged to have perpetrated violence were the appellant's agents. However, the manner in which ground one has been argued requires us to delve into the evidence adduced for each allegation on violence.

8.5 We are fortified in this position by the case of **Zulu v Kalima**[24] cited in paragraph 7.16 which states that an appellate Court can review evidence supporting each allegation to determine whether a trial Court, properly directing itself, would have come to the same conclusion.

8.6 Applying the above principle, we have to first deal with the issue as to whether the violence as alleged was proved to the required standard in order for us to determine whether the learned trial Judge was on firm ground in his findings. And only then can we deal with the issues raised in ground one

by the appellant as to whether the alleged violence was connected to him or if the "Nato Forces" who are alleged to have committed the violence were his agents and indeed whether the alleged violence was widespread.

9.0 VIOLENCE IN KABUSHI CONSTITUENCY

9.1 The 1st respondent alleged in paragraph 4.3 of his amended petition that the appellant, personally and by his agents, acted or incited others to act in a disorderly and violent manner, and disrupted his campaign meetings contrary to section 83(1)(a) of the **EPA**[1]. The appellant in his answer denied the allegation.

9.2 The learned trial Judge considered the evidence before him and concluded that violence was reported in five out of the eight wards in Kabushi Constituency, which he summarised as follows:

1. **Toka ward on 14th July, 2021**
2. **Skyways ward on 17th July, 2021**
3. **Kaloko ward between 6th and 8th August, 2021**
4. **Kabushi ward on 9th August, 2021 and**
5. **Lubuto ward between 19th May, 2021 and 11th August, 2021 where UPND supporters who were marketeers were stripped naked by 1st respondent's "Nato Forces" for wearing UPND regalia (including in Kaloko and Skyways wards).**

9.3 The trial Judge, having found that there was violence in the above-mentioned wards, the question that follows is whether the alleged violence in each of these wards was proved to the requisite standard as set out in section 97(2)(a) of the **EPA**[1].

9.4 Violence in Toka Ward

9.5 In terms of the alleged violence in Toka ward, the issue is a subject of a Cross-Appeal, and therefore, we will consider it later in our judgment. Suffice to mention that the learned trial Judge discounted the violence in Toka ward on the ground that the same could not be apportioned to the appellant and the PF.

9.6 Violence in Kaloko ward

9.7 As regards the alleged violence in Kaloko ward, the 1st respondent's evidence was that whilst he was resting in the afternoon at his home in Kaloko township between 6th and 8th August, 2021, he heard a big bang outside his gate, and that upon going outside he found that one of his campaign motor vehicles had been smashed in what he stated, "*full view of the police*". It was his further evidence that Peter

Mwewa, the UPND candidate for Kabushi ward, told him that whilst dressed in his UPND regalia and driving a Toyota Corolla at Kabushi market, he met a convoy of motor vehicles, and that a group of people disembarked from a Landcruiser inscribed "Nato Forces" and chased him from Kabushi market up to his (1st respondent's) residence.

9.8 During *cross-examination*, the 1st respondent stated that he did not report the matter because the police were biased.

9.9 The appellant denied knowledge about the incident during *cross-examination.*

9.10 Based on this evidence, the learned trial Judge made a finding of fact that violence did occur in Kaloko ward between 6th and 8th August, 2021 at the entrance of the 1st respondent's residence and in the presence of Zambia Police.

9.11 We have considered the above evidence and the alleged violence in Kaloko ward. We observe that, in his evidence, the 1st respondent stated that he heard a loud bang whilst he was in his house resting and that it was only when he went outside that he found that one of his campaign motor

vehicles had been smashed. Clearly, the 1st respondent having been inside the house, as per his testimony, did not, and could not, have seen how the motor vehicle in question was damaged or who damaged it.

9.12 The 1st respondent told the Court below that Peter Mwewa told him how he was chased by the "Nato Forces" from Kabushi market up to his residence. However, this Peter Mwewa, who was a crucial eye witness to the alleged incident leading to the smashing of the vehicle, was not called to testify. Going by his own evidence, the 1st respondent did not see the perpetrators of this alleged violence. Therefore, his evidence insofar as it relates to the incident and the smashing of the motor vehicle is hearsay evidence which is inadmissible under the rule against the admission of hearsay evidence.

9.13 In the case of **Masumba v Kamondo**[23], this Court dismissed the evidence of the petitioner's witness as hearsay because the witness had relied on what his friends had told him about the alleged ill-speaking of a referendum, which the witness did not hear or perceive himself. In guiding on what

hearsay evidence is and how it should be treated, we put it thus:

> **"Hearsay - Traditionally testimony that is given by a witness who relates not what he or she knows personally but what others have said and this is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence."**

9.14 In the current case, other than what the 1st respondent told the Court below, no other evidence was adduced upon which the finding that the appellant or his so-called "Nato Forces" were the ones who chased this Peter Mwewa and smashed the motor vehicle in question. The 1st respondent's evidence was hearsay, and therefore inadmissible. Based on the Supreme Court decision in the case of **Attorney General v Achiume**[22], we, accordingly, reverse the learned trial Judge's finding in this respect as the same is not supported by the evidence on record.

9.15 Violence in Lubuto ward

9.16 Coming to the alleged violence in Lubuto ward, the 1st respondent (PW1), when asked during *examination-in-chief* whether the incidents of violence were happening in the

same area, his response was that there was violence in Kaloko ward, Skyways ward and Lubuto ward.

9.17 The learned trial Judge made a finding of fact that there was violence between 19th May, 2021 and 11th August, 2021 *"where UPND supporters who were marketeers were stripped naked by the appellant's "Nato Forces" in Lubuto ward, including in Kaloko ward and Skyways ward, for wearing UPND regalia".*

9.18 We have considered the evidence as regards the alleged violence in Lubuto ward. We have also perused the entire record as well as the finding by the learned trial Judge that there was violence in Lubuto ward. We find that no evidence whatsoever was adduced to support the allegation and finding that there was violence in Lubuto ward. The 1st respondent only made a general statement that there was violence in Lubuto ward, Kaloko ward and Skyways ward.

9.19 No other evidence was adduced to show how the alleged violence in Lubuto ward occurred, let alone to link the said violence to the appellant and the so-called "Nato Forces" as perpetrators of the alleged violence. We, therefore, reverse

the finding on the basis of our decision in the case of **Subulwa v Mandandi**[20] that an appellate court can interfere with findings of fact of a trial court if those findings are perverse or are not supported by any evidence.

9.20 Violence in Fantasy Area and Cairo Area of Skyways Ward

9.21 Fantasy Area

9.22 As for the alleged violence in Fantasy area in Skyways ward, the 1st respondent called Benjamin Chishala, UPND Skyways Ward Chairman who testified as PW20. PW20's evidence on this aspect was that on 17th July, 2021 whilst the 1st respondent's 12-member campaign team was conducting door-to-door campaigns in accordance with the ECZ timetable in Fantasy, near Zambeef area in Skyways ward, the appellant arrived in a convoy of vehicles at around 14:00 hours. PW20 said he saw the appellant and a group of people disembark from a 'Noah or Regius-like' vehicle, which was inscribed "PF" and "vote Edgar Chagwa Lungu and Bowman Lusambo" advance towards him (PW20) and his group. And that he also saw another group clad in green PF overalls and t-shirts, advancing towards him and the rest of

the 1st respondent's campaign team on foot. That this latter group was brandishing short batons and catapults.

9.23 It was PW20's further evidence that at the sight of the appellant and his group, members of the 1st respondent's campaign team scampered in different directions and that the appellant's group, among them a man named "Toto", grabbed a woman and tore her UPND chitenge and that this attack happened in the presence of the appellant.

PW20's further evidence was that he and one Emmanuel Chisala, who was unable to flee due to his disability, had remained behind. He further testified that the appellant came to where he (PW20) and Emmanuel Chisala stood and accosted them for supporting the 1st respondent saying *"See how you are suffering from hunger"*. PW20 said the appellant thereafter left.

9.24 Cairo Area

9.25 Concerning the violence in Cairo area also in Skyways ward, PW20's evidence was that after the attack in Fantasy area, the 1st respondent's campaign team regrouped on the same day (17th July, 2021) and that whilst they were in Cairo area

between 15:00 and 16:00 hours, the appellant came again in a convoy of vehicles. He said he saw a Toyota Hilux, grey in colour, another vehicle which was branded and a Landcruiser. That upon seeing the appellant and his group disembark from the vehicles, three members of the 1st respondent's campaign team ran into Chakanga bar while he hid in a booth that was two metres from where some UPND members were selling merchandise. PW20 testified that he saw the appellant and his group go to the UPND members who charge phones and that he heard the UPND members lamenting, *"what have we done"*.

9.26 It was PW20's further evidence that after the appellant and his group left amid shouting that they were going to receive the president, he went to check on the UPND members and found that four of them had been attacked and that their t-shirts were torn and hot porridge had been poured on them. PW20's further evidence was that he accompanied the four UPND members to Masala Police station where the injuries were reported and medical reports were issued to them and that thereafter he accompanied them to the hospital where the four were examined and treated. PW20 identified the

medical reports in the names of Dipak Mumba, Brian Kampamba, Andrew Mulenga and Abraham Mbambo.

9.27 When asked during *cross-examination* whether "Toto" was the appellant's registered agent, PW20's response was that "Toto" and the appellant used to move together. As to whether the attack was reported to the ECZ Conflict Management Committee, PW20 stated that it was although the letter was not before Court. When asked by Counsel for the 2nd respondent where else other than the police station was the matter reported, PW20 stated that he reported to the Constituency chairperson.

9.28 The evidence of the 1st respondent (PW1) was that Brian Kampamba and Andrew Mulenga informed him that whilst they and other UPND members were selling merchandise in Cairo area on 17th July, 2021 the PF "Nato Forces" attacked them in full view of the appellant. Further that Andrew Mulenga told him that some men had disembarked from a Landcruiser branded "Nato Forces" which was in a convoy of vehicles, beat them up, tore their UPND t-shirts and poured hot porridge, meant for cooking nshima, on them.

9.29 In his evidence, the appellant denied being in Skyways ward at the time of the alleged incident. He admitted in *cross-examination* that the PF were supposed to be in Kabushi ward.

9.30 The learned trial Judge, in his finding, put it thus:

> **"In fact, the 1st respondent (appellant) admitted being in Skyways ward on 17th July 2021 and at the time of the violence. His only defence was that it is the UPND team which attacked them (PF team). Looking at the schedule (calendar) for campaigns, I note that the UPND on 17th July 2021 between 13:00 hrs and 18:00 hrs were supposed to be in Skyways ward. The PF team was supposed to be in Kabushi ward. It was not explained why the PF team found itself in Skyways ward, instead of Kabushi ward. Clearly, the 1st respondent and his PF contravened the ECZ campaign schedule when they went to Skyways on the date and time allotted to UPND when the PF should have been in Kabushi ward which was allotted to the PF on the same day and time."**

9.31 We have carefully perused the record and considered the evidence. The question is whether or not the alleged violence in Fantasy and Cairo areas in Skyways ward was proved to the standard required by section 97(2)(a) of the **EPA**[1]. To ably answer this question, we have critically reviewed the evidence on record.

9.32 As a starting point, we note that PW20 who was called to testify on behalf of the 1st respondent on the alleged violence in Fantasy and Cairo areas in Skyways ward was a UPND ward chairperson and as such a partisan witness. The legal position on the treatment and the weight to attach to partisan evidence is well-settled in the Zambian jurisprudence. In the case of **Masumba v Kamondo**[23], this Court stated that in terms of election petitions, witnesses who belong to a candidate's own political party or who are members of the candidate's campaign team must be treated with caution and require corroborating evidence 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 their candidate. We also take cognisance of the case of **Hanifa v Ronald and Another**[16], cited by the 2nd respondent, which echoes the same legal position to treat partisan witnesses with great care and caution.

9.33 As to what corroborating evidence is, we have adopted the words of Baron DCJ (as he then was) in the case of **Phiri and Others v The People**[25] which though relates to a criminal matter, applies *mutatis mutandis* to civil actions,

and states that it is something more that goes to confirm what the accomplice has said. We also find the principles on corroboration laid down by Lord Goddard, CJ, in the English case of **Credland v Knowler**[26] though only persuasive, useful and apt. He guided that the evidence only has to be corroborated in some material particular by some other material evidence.

9.34 Further afield, the Supreme Court of India in the case of **Reddy v Sultan and Others**[27] goes a step further and guides that:

> **"Where the election petitioner seeks to prove that charge by purely partisan evidence consisting of his workers, agents, supporters and friends, the Court would have to approach the evidence with great care and caution, scrutiny, circumspection and would, as a matter of prudence though not as a rule of law, require corroboration of such evidence from independent quarters unless the Court is fully satisfied that the evidence is so credit worthy and true, spotless and blemish-less, cogent and consistent that no corroboration to lend further assurance is necessary. It has to be borne in mind that the attempt of agents or supporters of defeated candidate(s) is always to get the election set aside by means fair or foul and the evidence of such witness, therefore must be regarded as highly interested and tainted evidence which should be acted upon only if the Court is satisfied that the evidence is true and does not suffer from any infirmity."** [Underlining ours for emphasis]

9.35 We adopt the principle in the above persuasive authority to the effect that evidence of a partisan witness requires corroboration by independent evidence unless the Court is fully satisfied that evidence of that partisan witness is so credible and true, cogent and consistent that no further corroboration to lend further confirmation is necessary.

9.36 Therefore, applying the above principles to the current case we observe that the 1st respondent was not in Fantasy area in Skyways ward at the time the violence allegedly occurred. The 1st respondent thus relied on the evidence of PW20. As for the alleged violence in Cairo area, we observe that the 1st respondent's testimony was based on what he was told by Brian Kampamba and Andrew Mulenga who were not called to testify.

9.37 It is trite that a statement made by a person who himself or herself is not called as a witness is hearsay evidence and inadmissible if the purpose is to prove the truth of the statement and admissible if the purpose is to prove that the statement was said. We are fortified by the Supreme Court

decision in the **Shamwana and Others v The People**[11] case which guided that:

> **"...a statement...is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is however not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of that statement, but the fact that it was made."**

9.38 Based on the above cited authority, we find that the evidence of the 1st respondent, being based on what he was told by other persons, was hearsay and therefore inadmissible as it could not prove the allegation.

9.39 The 1st respondent did, however, call PW20 who testified as to what happened in Cairo area. And on further perusal of the record, we find that the learned trial Judge, in evaluating the evidence before him, did not mention the need to caution himself on the treatment of PW20's evidence as a partisan witness nor did he state reasons for admitting his evidence. On the basis of the **Zulu v Kalima**[24] case, which we have cited in paragraph 7.16, this Court, therefore, is at large and is not precluded from considering PW20's evidence.

9.40 We have, accordingly, examined PW20's evidence in totality including that under *cross-examination.* We find, PW20's evidence cogent and consistent, and thus reliable. He was at the scenes both at Fantasy and Cairo areas. He gave a vivid account of how the violence happened. PW20 positively identified the appellant at both scenes of violence in Fantasy and Cairo areas. In one instance in Fantasy area, the appellant even accosted him for supporting the 1st respondent. PW20's evidence was not shaken under *cross-examination.*

9.41 The medical reports produced at pages 271, 273, 275 and 277 of the record of appeal also confirm the violence in the two areas in Skyways ward and these medical reports were signed on 17th July, 2021 by a Dr. Mwamba. The medical report for Dipak Mumba indicates that he *"had obvious blisters on the anterior lateral aspect of arm and right chest."* The medical reports for Brian Kampamba and Andrew Mulenga, show that both had tenderness on the lumbar area and on palpation (physical examination) respectively. As for Abraham Mbambo, the medical report indicates that *"pair of trousers soiled with porridge, no obvious burns noted,*

slight tenderness on palpation on leg (upper 2/3) and lateral lower 1/3 right abdominal area (iliac fossa)". According to the **Oxford Concise Medical Dictionary**[3], the term *"iliac fossa"* refers to the concave depression on the inside of the pelvis.

9.42 It is our firm view that the medical reports on record do constitute independent evidence that support PW20's testimony and the finding that there was violence in Skyways ward of Kabushi Constituency whereunder the four above-named UPND members were attacked and injured. The medical evidence provided that something more to support PW20's evidence. We thus have come to the inescapable conclusion that the 1st respondent did prove the allegation of violence in Skyways ward of Kabushi Constituency to a fairly high degree of convincing clarity as required by section 97(2)(a) of the **EPA**[1].

9.43 Violence in Kabushi Ward

9.44 Concerning the alleged violence in Kabushi ward, the evidence of the 1st respondent (PW1) was that whilst he and his campaign team were campaigning in Hostels area near

Kabushi market on 9th August, 2021 there was noise and commotion. He then heard a passer-by shout "Bowman and his hooligans, well known as "Nato Forces", are here". It was the 1st respondent's evidence that upon hearing this, he rushed to establish if his motor vehicle and public address system were safe. He said he then saw a Hilux double cab, without a number plate but branded "Nato Forces" and "Kabushi constituency", flashing lights at him.

9.45 It was the 1st respondent's further evidence that some of the occupants in the back of the vehicle were chanting "we want Kanengo" while others threw stones at him, his campaign team and supporters and that one of the assailants was armed with a firearm. The 1st respondent testified that he fled from the scene and hid in Kabushi Mosque.

9.46 It was the 1st respondent's further evidence that the following day on (10th August, 2021) Tabson Chipanama (PW19) and Aaron Kanchebele informed him that some members of his campaign team had been assaulted and that the public address system was damaged. The 1st respondent produced medical reports at pages 279 and 280 of the

record of appeal for Tabison Chipanama and Aaron Kanchebele. In *cross-examination*, the 1st respondent said he did not recognise his assailants but that he associated them with the PF through the vehicles they used.

9.47 The evidence of Tabison Chipanama, UPND Constituency vice-chairperson (PW19), was that whilst he and others in his team were campaigning with the 1st respondent at Hostels area near Kabushi market in Kabushi ward in accordance with the ECZ timetable, the appellant and his supporters appeared in a convoy of motor vehicles and that the appellant was in a grey vehicle. It was PW19's evidence that the appellant's supporters began throwing stones at their vehicles forcing people to scamper. And that he (PW19) and his colleagues fled in a Canter truck towards Kaloko Police station and a group of the appellant's supporters followed in a Landcruiser and continued throwing stones at them. And that he, Aaron Kanchebele and another colleague sustained injuries during the attack. He testified that this occurred in the presence of the police at Kaloko Police station and that the incident attracted the

attention of 200 people. PW19's further evidence was that he recognised one of the assailants as "Toto".

9.48 When asked during *cross-examination* as to why he did not mention the aspect of the crowd in his witness statement, PW19's response was that he brought it up because Counsel for the 1st respondent asked him if he had anything more to say. He said he did not see the appellant throw stones. Further that his medical report read "assaulted by the PF and "Nato Forces" and that the incident was reported to police and that the suspects were arrested. PW19 said he did not know if "Toto" was an ECZ registered agent for the appellant. He stated further that the assault was also reported to the ECZ Conflict Management Committee although the report was not before Court. In *re-examination*, PW1 said the appellant was among the PF and "Nato Forces" when he and others were attacked.

9.49 In his answer, the appellant (RW1) denied being in Kabushi ward at the alleged time, stating that he was at the airport to receive then Republican President. He alleged that the UPND attacked his entourage. In his *evidence-in-chief*, the

appellant denied the allegation that his entourage attacked the 1st respondent. He maintained his position that he had spent the whole day with then Republican President and that the only time he was in Kabushi ward was between 18:00 and 18:30 hours when he was returning from the airport after seeing off then Republican President. He said it was the UPND that ambushed his entourage on their return from the airport and threw stones, thereby damaging three vehicles for the PF.

9.50 In *cross-examination*, the appellant stated that the UPND started the confrontation on Chiwala road when his group was on its way to Lubuto. When further pressed, he said the confrontation happened between Mukuba and Kabushi wards and admitted being in Kabushi ward when the violence occurred. The appellant said the damage to the vehicles was reported to the police but that he was not able to confirm if the injuries were reported. He admitted having no police report to confirm the alleged damage to the PF motor vehicles. The appellant admitted that the UPND were according to the timetable supposed to be campaigning in Kabushi ward between 13:00 and 18:00 hours.

9.51 RW2, the appellant's campaign manager, told the Court below that he was with the appellant at the time of the alleged violence in Kabushi ward. However, that he did not see the need to mention the attack by the UPND because *"damage to three vehicles in a convoy of five to eight motor vehicles was insignificant and no life was lost".*

9.52 The learned trial Judge found as a fact that there was violence in Kabushi ward and based it on the evidence of PW19, which he put thus:

> **"PW19 gave a detailed story of how the 1st respondent (the appellant's) militia the "Nato Forces" in the presence of the 1st respondent attacked and assaulted the UPND team in Kabushi ward. The 1st respondent was present during the fracas."**

9.53 We have considered the evidence as reflected above regarding the violence in Kabushi ward. We note that PW19, being UPND vice-chairperson for Kabushi constituency, was a partisan witness. We re-state the law in the case of **Masumba v Kamondo**[23], as we did in paragraph 9.12, that evidence of partisan witnesses must be treated with caution and requires corroborating evidence in order to eliminate the danger of exaggeration and falsehood. We note here too

that the learned trial Judge, in his analysis of the evidence relating to the alleged violence in Kabushi ward did not expressly caution himself on the need to treat PW19's evidence with care and caution.

9.54 Nevertheless, we find that PW19's evidence was cogent and consistent. We find that PW19, as observed by the learned trial Judge, did give a detailed account of the events that led to the violence in Kabushi ward. PW19 positively identified the appellant as being at the scene of the violence.

9.55 Moreover, the appellant's alibi that he was not in Kabushi ward at the time of the alleged violence and that it was the UPND that attacked the PF entourage is in direct conflict with his own evidence where in one breath the appellant said he was not in Kabushi ward as he was with then Republican President the whole day and in another, he said he was in Kabushi ward. His evidence was thus discredited, and rightly so found by the learned trial Judge. Furthermore, quite apart from his own admission, the evidence of his own witness (RW2) placed the appellant and his entourage at the scene of the violence in question.

9.56 Further, PW19's evidence as regards the violence is supported by his medical report and that of Aaron Kanchebele, which were signed on 9th August, 2021 by Dr. Zyambo and by Dr. Mwila respectively. In PW19's case, the medical report indicates that he was assaulted by a group of *"PF Nato Forces using (a) stone"* and that he suffered *"tenderness on the left hip joint on active and passive movement. Swelling on the hip which is tender"*. As for Aaron Kanchebele, the medical report indicates that he was assaulted by a number of male persons and that he had a *"slight swelling on the left side of the neck and small laceration noted not bleeding. Slight decreased range in movement. Tenderness present. Laceration noted in the upper left mucous membranes"*.

9.57 We are satisfied that PW19's evidence supported by the medical evidence proved to the required standard the violence and injuries as alleged. We thus uphold the finding of the learned trial Judge that there was violence in Kabushi ward which occurred three days before the election day on 12th August, 2021.

9.58 Having found that violence was proved to the required standard in the Fantasy and Cairo areas of Skyways ward and Kabushi ward of Kabushi Parliamentary Constituency, the question that follows is whether the evidence on record proves to the required standard as set in section 97(2)(a) of the **EPA**[1] that the appellant and the "Nato Forces" were responsible for the violence in question.

10.0 WAS THE APPELLANT CONNECTED TO THE VIOLENCE PERPETRATED BY THE NATO FORCES

10.1 The appellant's contention is that it was wrong for the trial Court to apportion violence committed by the "Nato Forces" on him. In response, the 1st respondent submitted that the violence in Kabushi Constituency was perpetrated by the appellant as he was present on two occasions when violence occurred.

10.2 We have perused the evidence on record as regards this aspect. We find the appellant's close association with the "Nato Forces" was not a mere coincidence. We say so because PW20 and PW19, as regards the violence in Skyways and Kabushi wards, gave a vivid picture of how the appellant and the "Nato Forces" were moving and arriving

together in the two wards of Kabushi Constituency. This evidence shows the appellant and "Nato Forces" moved in a convoy of vehicles some inscribed "PF", "Vote Edgar Chagwa Lungu and Bowman Lusambo", "Nato Forces" and "Kabushi Constituency". That the appellant and his entourage would emerge in the areas where the 1st respondent and his campaign team were assigned by ECZ to campaign from.

10.3 The two witnesses described how upon seeing the appellant and his supporters, people in the vicinity, including the 1st respondent and his campaign team and supporters would scamper in different directions for safety. In one area, as the appellant's convoy arrived, another group clad in "green PF overalls and t-shirts" were seen advancing on foot and throwing stones. In another, the appellant's group was seen tearing a woman's UPND chitenge in Fantasy area and moments later, in Cairo area, where the appellant's group tore UPND t-shirts and poured hot porridge on UPND members. Both incidents occurred in the presence of the appellant. The incidences of violence resulted in injuries highlighted in paragraphs 9.26, 9.28 and 9.41 of this judgment. PW20 said the appellant personally accosted him

for supporting the 1st respondent during the attack in Fantasy area in Skyways ward.

10.4 This conduct was contrary to Section 83 of the **EPA**[1] which among others prohibits the use of force, threats and violence whether directly or indirectly through another person. In the case of **Siamunene v Sialubalo**[1], this Court stated that:

> **"When section 83 is read with section 97, it is clear that the violence or threat must be perpetrated by the candidate or with the candidate's knowledge and approval or consent or that of his election or polling agent. In order for the candidate to be liable for the illegal practice or misconduct, it must be shown to be that of his official agent; there must be proof to the required standard that he had both knowledge of it and approval or consented to it; or that his election or polling agent had knowledge or consented to or approved of it."**

10.5 In support of the contention that the violence by the "Nato Forces" was not linked to him, the appellant cited and relied on our decision in **Luo v Mwamba and Another**[9]**.** It is however, our firm view that the case of **Luo v Mwamba and Another**[9] should be distinguished from the current case, as in the earlier case, the evidence did not connect the appellant in that case to the violence and neither was she

present at the scene of the violence nor did the evidence connect her to the perpetrators of the violence. For the same reasons, the case of **Siamunene v Sialubalo**[1] should also be distinguished from the current case in that the evidence did not directly or indirectly connect the respondent to the violence.

10.6 In the case in *casu*, the evidence has clearly shown that violence in the two wards of Kabushi Constituency was committed by the appellant's supporters in the appellant's presence. The appellant in his own evidence, placed himself at the scenes of the violence. His own campaign manager (RW2) also placed himself at the scenes of the violence. Therefore, the learned trial Judge was on firm ground when he attributed the violence committed in the appellant's presence by the "Nato Forces" to the appellant.

11.0 WERE THE NATO FORCES THE APPELLANT'S AGENTS?

11.1 The appellant has forcefully argued that the learned Judge was wrong in attributing the violence committed by the "Nato Forces" to him as the "Nato Forces", were not his agents within the contemplation of section 2 of the **EPA**[1] which defines an election agent to mean:

"a person appointed as an agent of the candidate for the purpose of an election and who is specified in the candidate's nomination paper."

11.2 On the other hand, Counsel for the 1st respondent's argument in response was that the learned trial Judge did not hold or suggest that the "Nato Forces" were the appellant's election or polling agents but that the "Nato Forces" were not ordinary supporters far removed from the appellant.

11.3 We have considered the submissions by both Counsel on this aspect. We agree that a candidate is only answerable for those acts done by himself or herself or by someone else with the candidate's consent or that of his election or polling agent who are duly appointed. The Supreme Court in the case of **Lewanika v Chiluba**[5], put it clearly when it stated that:

"A candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent...An election agent has to be specifically so appointed."

11.4 This is the correct position of the law and we in fact affirmed this position in the case of **Siamunene v Sialubalo**[1] cited above. In that case, we put it thus:

> **"Mere proof that UPND supporters were indeed involved in the said acts could not warrant an inference that the respondent had directly or indirectly incited the supporters to act as they did. To do so would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election".**

11.5 In the current case, the "Nato Forces" cannot be said to have been the appellant's election agents as they do not fall within the ambit of section 2 of the **EPA**[1]. However, the evidence on how the appellant and the Nato Forces would arrive together in a convoy of motor vehicles, some branded "Nato Forces" at the scenes of violence and the manner the violence was executed in the appellant's presence, established to the required standard the close connection of the appellant to the "Nato Forces".

11.6 It is thus correct to conclude that, the "Nato Forces" were more than just ordinary supporters of the appellant and the PF. The appellant moved and was together with the "Nato Forces" where and when the violence was committed.

Therefore, there can be no doubt that the "Nato Forces" were part and parcel of the appellant's campaign team for purposes of promoting the appellant's election. In our view, the two, the appellant and the "Nato Forces", were inseparable. And based on the fact that the appellant was present on all three occasions when violence occurred, we find that the appellant was part and parcel of the violence and therefore it cannot be said that he had no knowledge of that violence. Neither can it be said that he did not acquiesce to the "Nato Force's" actions.

11.7 We thus find no reason to fault the learned Judge, on the violence in Skyways ward and Kabushi ward when he attributed the violence to the appellant and his "Nato Forces".

11.8 As regards the appellant's contention that the learned trial Judge wrongly shifted the burden of proof to the appellant when he stated that the appellant did not dissociate himself from the violence or the "Nato Forces", we wish to state that since this allegation is part of the grounds of

appeal, in ground two, we shall consider this issue as we resolve the issues raised in ground two of this appeal.

11.9 Having found that the learned trial Judge was on firm ground when he found that there was violence in Skyways and Kabushi wards in Kabushi Constituency which he attributed to the appellant, we shall at this stage proceed to consider whether or not the other wrongful acts or misconduct that the trial Judge also attributed to the appellant were proved to the required standard.

11.10 The starting point is for this Court to identify the wrongful acts or other misconduct upon which the learned trial Judge made findings and drew conclusions that he connected to the appellant. These are, corruption and bribery, and illegal practices in respect of the poll.

12.0 CORRUPTION AND BRIBERY

12.1 In his amended petition the 1st respondent alleged that the appellant had on divers dates but before the election day personally or by his agents offered, given and promised money, mealie meal and other material goods to voters to induce them to vote for him and the PF contrary to the

provisions of section 81 of the **EPA**[1] which prohibits such conduct.

12.2 INVITING CHOIR GROUPS TO THE APPELLANT'S RESIDENCE

12.3 The 1st respondent's evidence was that on 8th August, 2021, the appellant invited two choir groups from the Catholic Holy Trinity Church of Masala comprising 87 members, a group from Holy Cross Catholic Church of Kabushi comprising 48 members, and another group from St. Paul's United Church of Zambia of Masala comprising more than 40 members to his residence. That the appellant addressed them and gave each Choir member a bag of mealie meal and also a sum of money not less than K20,000 cash to each Choir group to share.

12.4 In support of this allegation, the 1st respondent called PW2 and PW3. The sum total of their evidence was that they were among the 40-50 UCZ Choir members who went to the appellant's residence and that there were other choir groups present. That the appellant addressed them and promised to buy a mini bus for the UCZ Choir after he and the PF were voted back into power. They also said they were given a bag

of mealie meal each and K20,000 cash for each Choir group and that both the mealie meal and cash were shared at the church premises after they had left the appellant's residence. PW2's evidence was that he voted for the appellant while PW3 said she did not vote for the appellant.

12.5 Although the appellant denied inviting the choir groups to his residence, he however told the Court below that his campaign manager, RW2, had informed him of the invitation of the Choir groups to his residence whilst he was in Kitwe attending a rally. The appellant admitted during *cross-examination* that he hosted the Choir groups and addressed them. He however denied giving the Choir groups money and mealie meal.

12.6 The learned trial Judge did consider the above allegation and evidence. He reached the conclusion that the appellant did indeed invite various choir groups to his residence and that he gave each Choir group cash sums of at least K20,000 and each choir member, a bag of mealie meal and that he also promised the UCZ choir a minibus, a "stone's throw away from the election".

12.7 We have considered the above evidence and the findings of the trial Judge. It is our firm view that the learned trial judge was on firm ground when he held that the appellant did invite the Choir groups in question. The evidence of PW2 and PW3 shows that cash and mealie meal were given to the Choir groups with a promise of a minibus after the elections to the UCZ choir group. Clearly the intention of the appellant was to entice the choir groups to vote for him and the PF by giving them mealie meal, cash and a promise to buy a minibus for the UCZ choir after the elections. Section 81 of the **EPA**[1] prohibits such conduct. We are fortified in so finding by the decision of the Supreme Court in the case of **Nyambe v The People**[28], which though not binding on us is persuasive. Although the two witnesses said that the choirs were only given the items after they left the appellant's house, the cash and the mealie meal were distributed right after their visit to the appellant's residence. We therefore find that the evidence of PW2 and PW3 was cogent and consistent, and thus reliable based on the **Reddy v Sultan and Others**[27] case which guides on accepting partisan

evidence which is cogent and consistent that no corroboration to lend further confirmation is necessary.

12.8 ATTENDING WOMEN'S MASS AT ST. KIZITO CATHOLIC CHURCH AND GIVING CASH TO CONGREGANTS

12.9 In support of the allegation that the appellant attended women's mass on the eve of the elections on 11th August, 2021 and gave money to the congregants, the 1st respondent called PW13, PW14 and PW15. The sum total of these witnesses' evidence was that the appellant attended the women's mass in the company of a woman and that after the service, the appellant thanked the congregants for allowing him to worship with them. He then said he would leave *"something for water"*. The three witnesses told the court below that after the appellant had left, the church leadership told them not to leave the premises. They were asked to line up outside the women's office where each received K300. Their re-collection was that about 100 to 150 women had attended mass that day. PW13 said she was not an active UPND member whilst PW14 and PW15 said they were UPND but voted for the appellant.

12.10 The appellant admitted attending women's mass on the day in question. He however, denied giving each congregant K300. He admitted that on that day, the PF were, as per ECZ schedule, supposed to be campaigning in Mukuba ward. The appellant's witness (RW3) who was a member of the St. Kizito Catholic Church said she accompanied the appellant for prayers on that day. She however, denied that the appellant addressed the women or that he gave the women money. RW3 testified that it was in fact the women that had requested the appellant's help to procure uniforms, which the appellant declined.

12.11 The learned trial Judge considered the evidence and found that the appellant did go to St. Kizito Catholic Church on 11th August, 2021 and that through the church leadership, he gave K300 to each congregant. The learned trial Judge also observed that the appellant attended the mass which was meant for women only, a day before the election.

12.12 We have considered the above evidence and the findings of the trial Judge. We find that the learned trial Judge's finding that the appellant did indeed attend the women's

mass at St. Kizito Catholic Church in Lubuto and gave each congregant K300 for water is supported by the evidence of the three witnesses which we have summed up above. Whilst the law does not prohibit candidates from attending church, section 81 of the **EPA**[1] prohibits offering and promising money and other gifts before, during and after elections. The learned trial Judge was thus on firm ground when he found that the appellant gave congregants K300 each, on the eve of the elections.

12.13 TREATING THE UPND MEMBERS TO FOOD AND INVITING THEM TO THE APPELLANT'S RESIDENCE

12.14 In support of the above allegation the 1st respondent called PW4, PW5 and PW6. The sum total of PW4, PW5 and PW6's evidence was that on 10th August, 2021 they had gone to bana Mpundu's house where they found chicken, beef, rice and nshima being prepared. That bana Mpundu told them that the appellant had supplied the food. After the meal, they were told to wear their UPND regalia and thereafter were ferried to the appellant's residence where the appellant's campaign manager addressed them. The appellant too addressed them and then introduced them to

the PF aspiring councillors and gave them PF regalia and a K100 to share between two. The appellant also promised each person K500, a bag of mealie meal and 2.5 litres of cooking oil after the elections. PW4 went further and told the Court below that at least 200 people were at the appellant's residence. PW4, PW5 and PW6 testified in the Court below that they voted for the appellant.

12.15 The appellant (RW1) admitted during *cross-examination* to having received about 30 to 40 UPND defectors on the 10th August, 2021 at his residence and to addressing them. He, however, denied promising them money, mealie meal and cooking oil after the elections. He initially expressed ignorance as to whether the UPND defectors were given K100 per pair to share as he said he had gone into the house after addressing them. Later he said he told his campaign manager (RW2) to ensure the defectors got home safely as the meeting had ended late and because of the distance between Kabushi and Northrise.

12.16 The appellant's witness, RW5 admitted to receiving and feting the UPND group at her residence and to consulting

the PF Ward Chairperson who advised her that the defectors should be taken to the appellant's house.

12.17 The learned trial Judge did consider the above allegation and the evidence. He put it thus in the relevant portion of the Judgment at pages 131 and 132 of the record of appeal:

> **"The allegation insofar as they relate to corruption and bribery are that...on 10th August, the 1st respondent (appellant) through RW2 gave a group of about 200 people, which he referred to as defectors K50 each and promised them gifts of K500 and mealie meal to each one of them after the elections and if the PF and the 1st respondent win the elections".**

12.18 As regards, PW4's evidence, the learned trial Judge made a finding and put it thus at page 139 of the record of appeal:

> **"He (sic) defected from UPND to PF because he (sic) received K100 to share with another person who he (sic) was paired with because the 1st respondent (appellant) promised him (sic) K500, 2.5 litres cooking oil and a bag of mealie meal if the 1st respondent and the PF were voted for".**

12.19 We have considered the above evidence and the findings of the learned trial Judge. We find that the learned trial Judge was on firm ground when he found that each pair of UPND defectors totalling about 200 was given K100 to share at the appellant's residence and promised K500, 2.5 litres of

cooking oil and a bag of mealie meal each after being voted back in office. This was two days before the elections. It is clear that the appellant's intention, by treating the said persons to food and giving them cash to share and promising each a K500 cash, cooking oil and mealie meal, was to induce the UPND members to vote for him to secure his return in the election. This is contrary to section 81 of the **EPA**[1] which prohibits giving, offering or promising money or gifts to induce voters to vote or refrain from voting for a candidate.

12.20 GIVING MONEY TO YOUTHS IN KABUSHI WARD AND LUBUTO WEST

12.21 As regards the allegation that a group of youths from Kabushi ward was invited to the appellant's home where they were given K4,000 and promised jobs at the appellant's slug dump in Bwana Mkubwa, the 1st respondent called PW9, PW10 and PW11 to testify. The sum total of their evidence was that on 24th May, 2021 the trio were among other youths, doing weightlifting at PW11's house. However, that, the appellant came by and said he wanted to see them and that later his security men called Dan and Doffy picked

them up and took them to the appellant's residence where the appellant gave them K4,000 to share and promised to give them jobs at his slug dump if they campaigned for him and the PF. The trio said they shared K380 equally and gave K200 to Dan. PW9, PW10 and PW11 told the Court below that they campaigned and voted for the appellant because of the promise of jobs. PW10 went further to state he also voted for the UPND presidential candidate and remained UPND member.

12.22 As regards the allegation that the appellant had given a group of about 10 to 15 youths from Lubuto West, K2,000 cash to share among themselves, the 1st respondent called PW7 and PW8. The sum total of PW7 and PW8's evidence was that on 11th August, 2021 the appellant had come in his white Landcruiser with no number plate and parked outside PW7's barbershop. They testified that they both saw the appellant give money to a youth called Junior Ebenezer who shared the money with the two witnesses and 10 other youths and that each received K100. PW8 went further to state that he saw the appellant raise a clenched fist and say, *"ivote, pamaka"* to mean *"tomorrow vote pamaka"*. Both

witnesses said despite getting the money, they voted for the UPND parliamentary candidate but PW8 said he voted for a PF councillor.

12.23 The appellant denied the allegation and told the trial Court that he was in Lusaka on 24th May, 2021 collecting campaign materials. He also denied meeting any youths in Lubuto or that he raised his fist while saying *"ivote pamaka"*. He stated that after he attended mass at St. Kizito Catholic Church that morning, he went home through Twapia, and not Lubuto.

12.24 The learned trial Judge found that the appellant had personally and for purposes of the poll given ten young men K4,000 cash to share and that he also promised them jobs at the slug dump in Bwana Mkubwa in order to induce them to vote for him and the PF. The learned trial Judge also dismissed the appellant's alibi that he was in Lusaka. The Court below made a further finding of fact that PW9, PW10 and PW11 were among those swayed to vote for the appellant. The learned trial Judge also found that the appellant had on 11th August, 2021 given a group of about

13 young men in Lubuto K100 each which translated to K1,300, whilst asking them to vote for him and the PF.

12.25 We have considered the above evidence and the findings by the learned trial Judge. With regard to the allegation of giving K4,000 to youths from Kabushi ward, we find that the learned trial Judge was on firm ground when he found that the appellant had invited ten youths to his residence and that he gave them K4,000 to share. We say so because PW9, PW10 and PW11, though partisan witnesses, all vividly and consistently narrated the events on 24th May, 2021 leading to the appellant giving them K4,000 to share and to promising jobs once elected. This was during the campaign period. The three witnesses positively identified the appellant at his residence thus discrediting the appellant's alibi that he was in Lusaka at the time. We note that the appellant did not adduce evidence to support his alibi. In line with what we have said in paragraph 9.35 we find that the evidence of the three witnesses, despite being partisan, was sufficiently corroborated by the appellant's failed alibi. Their evidence was cogent and consistent, and thus reliable.

12.26 With regard to the second allegation that the appellant gave money to youths from Lubuto West, we find no reason to fault the learned trial Judge for finding that the appellant had personally given youths in Lubuto K1,300 to share, a day before the elections. We say so because PW7 and PW8's evidence was cogent and credible, and thus reliable. The two are non-partisan and their evidence was that they saw the appellant give money to Junior Ebenezer and that each received K100 from Junior Ebenezer. They also saw and heard the appellant say *"ivote pamaka"* to mean *"tomorrow vote pamaka"* with a raised fist. The only inference that can thus be drawn is that the money was meant to entice the youths to vote for the appellant, which act is contrary to section 81 of the **EPA**[1], which prohibits such conduct.

12.27 GIVING OF CASH TO UPND SUPPORTERS IN KALOKO WARD

12.28 In support of the allegation that the appellant had given some money to UPND supporters in Kaloko ward, the 1st respondent called PW16 to testify. The sum total of PW16's evidence was that on 19th May, 2021 as he and the UPND aspiring councillor for Kaloko ward, Dennis Chanda, were

returning from filing nominations, they met the appellant. PW16 said the appellant who was driving a Toyota Landcruiser called him and gave him K1,200 and urged him to tell the UPND candidate and his supporters to vote for him (the appellant) and the PF. PW16 said he immediately informed Dennis Chanda and that the money was shared with other UPND supporters who were with him. Under *cross-examination*, PW16 admitted that he was a UPND member and that he had betrayed Dennis Chanda by voting for a PF candidate. He said he was a liar and insincere, a statement he repeated in *re-examination.*

12.29 The appellant denied the allegation, and stated that he and his campaign manager were on their way to Lusaka on that date.

12.30 The learned trial Judge found that PW16 had received some money from the appellant and voted for the appellant even though he (PW16) was a member of the UPND.

12.31 We have considered the above evidence and allegation. It is our firm view that the learned trial Judge ought not to have found that the appellant had given K1,200 to PW16 for the

reason that the allegation was not proved to the required standard. PW16 admitted that he was a liar and this admission rendered his evidence unreliable. Further, the 1st respondent's evidence on its own was hearsay and, thus, inadmissible for the reason stated in paragraph 9.13 above. On that score, we reverse the learned trial Judge as he ought not to have found that the allegation was proved as the same was not supported by any plausible evidence.

12.32 GIVING CASH AND PF REGALIA TO RESIDENTS IN LUBUTO DURING DOOR-TO-DOOR CAMPAIGNS

12.33 In support of the allegation that the appellant had given money to residents near United Church of Zambia in Lubuto during door-to-door campaigns whilst asking for votes, the 1st respondent called PW12. The sum total of PW12's evidence was that at 05:30 hours on 14th July, 2021 the appellant in the company of one Oscar Sinyinza and another had gone to her house and gave her K300 cash and PF chitenge and t-shirt. She said she voted for the appellant because of the kind gesture. During cross examination, PW12 said she had been a UPND member for 18 years.

12.34 The appellant told the Court below that he did undertake door to door campaigns in accordance with the ECZ campaign timetable but denied giving K300 to residents in Lubuto. Under *cross-examination*, the appellant said he did not personally conduct door-to-door campaigns as he only addressed centralised meetings organised by his campaign manager (RW2). When pressed, the appellant said ECZ discouraged small meetings due to Covid-19 and only allowed door-to-door campaigns. The appellant admitted that at the time of the alleged incident and in accordance with ECZ timetable, the PF were supposed to be campaigning in Skyways ward.

12.35 The learned trial Judge found that the appellant had personally given K300 to PW12 and that for that reason, PW12 voted for the appellant.

12.36 We have considered the evidence on record regarding the above allegation. We find that PW12, having been a member of UPND for 18 years, was a partisan witness, and therefore her evidence ought to have been treated with care and caution as guided in a plethora of our decided cases

including the **Masumba v Kamondo**[23] case. We find that the learned trial Judge did not at all caution himself on PW12 being a partisan witness. We thus find that the allegation was not proved to the applicable standard. We reverse the learned trial Judge's finding as regards this allegation.

12.37 ILLEGAL PRACTICE IN RESPECT OF THE POLL- CANVASSING FOR VOTES AND EXHIBITING A BILLBOARD ON VOTING DAY

12.38 Canvassing for votes on Election Day

12.39 In support of the allegation that the appellant was communicating with voters by chanting *"pamaka"* and *"pabwato"* whilst gesticulating with a clenched fist at Liyuni Primary School on election day, the 1st respondent called PW17 and PW18. The sum total of their evidence was that they saw and heard the appellant and a group of his supporters shouting *"pamaka"* whilst raising a clenched fist. PW17 went further and said the appellant was ejected from the premises by some angry youths.

12.40 The appellant admitted having gone to Liyuni Primary School polling station but denied canvassing for votes or communicating with voters within the precincts of the polling station. He said "UPND agents" blocked him at the

entrance. During *cross-examination*, the appellant denied raising a clenched fist to voters or that the slogan *"pamaka"* with a clenched fist was one of the PF symbols. The appellant's witnesses, RW4 and RW5, under *cross-examination,* denied that *"pamaka"* with a clenched fist was a PF slogan and symbol and maintained that the PF symbol during campaigns was a boat.

12.41 The 2nd respondent's witness, RW6's evidence was that the UPND's symbol was a raised palm while that of PF was a boat. He further stated that as returning officer for Kabushi Constituency, he presided over the filing of nominations for Kabushi Constituency and saw the PF raise a clenched fist while shouting *"pabwato"* and that it was not uncommon to see a raised fist on PF chitenge material.

12.42 The learned trial Judge made a finding and put it thus:

> **"I have no reason to doubt the evidence of RW6 particularly that this RW6 was a desired witness by both respondents. I, therefore, find that "dissociation" from the clenched fist as a symbol used by the PF was a blatant lie meant to mislead this Court. It is clear that the 1st respondent (the appellant) was economical with the truth. RW6 who was a Returning Officer established that a clenched fist is also used by the PF as their symbol although the 1st respondent denied it."**

12.43 We have considered the evidence and the allegations above. We find the evidence of PW17 and PW18, though partisan, was cogent and reliable. We say so because their evidence was supported by the appellant's own evidence in which he admitted going to the polling station at Liyuni Primary School and to being ejected from the premises. It is thus clear that the only reasonable inference to be drawn is that the appellant was ejected for canvassing for votes on election day. This gives credence to the allegation that he was ejected from the polling station in question because he was campaigning on voting day. Section 89(1)(e) of the **EPA**[1] prohibits campaigning or canvassing for votes on the election day.

12.44 As to the question whether or not the slogan *"pamaka"* with a raised clenched fist is a PF symbol, this is a subject of ground four of this appeal. We shall therefore address this issue under ground four.

12.45 Mounting of a billboard at the polling station

12.46 In support of the above allegation, the 1st respondent told the Court below that the appellant had mounted a huge

billboard of himself and other PF candidates with the inscription *"Vote PF"* within 100 metres of the polling station at Lubuto Secondary School.

12.47 The appellant admitted that a billboard had been mounted during the campaign period but denied responsibility for its removal. The appellant's witness, RW2, when asked under *cross-examination,* stated that the billboard was mounted by a company engaged by the PF Secretary General and that it was set alight between 8th and 11th August, 2021.

12.48 The 2nd Respondent's witness, RW6 told the court below that billboards or campaign messages were not supposed to be within 400 metres of a polling station and that it was the responsibility of concerned parties and stakeholders to remove posters by 18:00 hours on the eve of the election day.

12.49 The learned trial Judge found that it was the duty of the appellant and the PF party to remove the billboard at Lubuto Secondary School before election day and that by refusing, failing and neglecting to remove the billboard, the appellant had breached section 89 (1) (g) of the **EPA**[1].

12.50 We have considered the above allegations. We agree with the learned trial Judge's finding that the billboard was mounted within 100 metres of the polling station. In our view, the 1st respondent's evidence was sufficiently corroborated by the evidence of RW6 that the billboard was within metres of the polling station and that of the appellant and his witness, RW2 who both confirmed the existence of the billboard. The display of the billboard was contrary to section 89 (1) (g) of the **EPA**[1] which proscribes displaying of notices and signs other than official notices, within a radius of less than 100 metres of the polling station.

12.51 On the totality of the evidence, we find that save for the allegations that the appellant had given K1,200 to UPND supporters in Kaloko and that he had given K300 to a woman in Lubuto during door-to-door campaign which we have found were not supported by the evidence on record, the rest of the allegations namely violence in Kabushi and Skyways wards, bribery and corruption, treating and canvassing for votes on the voting day, were proved to the required standard. We therefore find no merit in ground one except to the extent elucidated above.

13,0 GROUND TWO OF THIS APPEAL

13.1 Ground two of the appeal assails the learned trial Judge's finding that failure by the appellant to dissociate himself from the violence or discourage or stop the violence meant that he consented or acknowledged it.

13.2 The crux of the appellant's argument in support thereof was that by requiring the appellant to distance himself from the violence the learned trial Judge effectively shifted the burden of proof from the 1st respondent, the petitioner in the Court below to the appellant, the 1st respondent in the Court below.

13.3 The kernel of the 1st respondent's response was that the learned trial Judge was on firm ground when he drew an inference that the appellant had knowledge and consented or approved of the violence because he had failed to dissociate himself. Further that the appellant's alibi and claim that he and his supporters were attacked by the UPND, also failed.

13.4 We have considered the submissions by Counsel for the respective parties. The question for determination is

whether or not the learned trial Judge was on firm ground when he concluded that the appellant was aware of or acquiesced to the violence because he had failed to dissociate himself from the violence, and that in so finding, whether the learned Judge shifted the burden of proof from the 1st respondent, to the appellant.

13.5 To ably determine the above question, it is necessary first to define the word "dissociate". The learned authors of **Black's Law Dictionary**[4] define "dissociate" in the following terms:

> **"To regard (two things or people) as separate and not connected to each other".**

13.6 From the above definition, the question therefore is, was the appellant separate or unconnected from the "Nato Forces." It is trite that in election matters, like in any civil actions, the burden to prove the allegations complained of rests with the petitioner. This Court, in this respect, reaffirms its decisions in the cases of **Mutapwe v Shomeno**[10], **Masumba v Kamondo**[23] and a host of other cases cited by Counsel. We also adopt the Supreme Court decision in the case of **Mohammed v Attorney-General**[29], to the effect 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."**

13.7 Applying the above authorities to the current case, the question is whether the 1st respondent as petitioner discharged his burden to prove all the allegations levelled against the appellant? The answer is, he did. Not just with respect to the violence in Skyways and Kabushi wards but also with respect to the other wrongful acts or misconduct that were proved to the required standard.

13.8 In terms of violence, the 1st respondent's witnesses PW20 and PW19 placed the appellant at the scene of the violence perpetrated by the "Nato Forces". The appellant was also associated to the violence by the pattern or *modus operandi* in which the appellant and his "Nato Forces" carried out the attacks against the 1st respondent, his campaign team and supporters. The learned authors of **Black's Law**

Dictionary[4], define *modus operandi*, a Latin phrase, as "a method of operation."

13.9 The 1st respondent having discharged his burden the learned trial Judge made a finding of fact that indeed violence occurred in Skyways and Kabushi wards and that the violence was perpetrated by the appellant and his "militia the Nato Forces". In his ruling, the learned trial Judge put it thus:

> **"I have also noted from the evidence that the 1st respondent (appellant) has not been disassociated (sic) from the "Nato Forces". There is not even an iota of evidence to show that he disassociated (sic) himself from those acts of violence at the scenes of violence or in any form thereafter. There is not an iota of evidence to show or suggest that the 1st respondent attempted to stop or discourage the violence during those incidences. The presence of the 1st respondent (appellant) during those incidences and his failure to discourage the violence or attempt to stop the violence suggested that:**
>
> **(a) he had knowledge of the violence**
>
> **(b) he either approved or consented to the violence.**
>
> **Am (sic), therefore, satisfied to a high degree of convincing clarity that the 1st respondent himself had knowledge of the violence and insofar as he did nothing to discourage or stop the violence, then he either approved the violence or consented to it. His alibi regarding those violent episodes have been challenged by the petitioner's (1st respondent) witnesses who gave**

clear accounts of how they identified the 1st respondent (appellant) at the scenes of violence."

13.10 The question that follows is, did the learned trial Judge by stating as above, shift the burden of proof from the 1st respondent to the appellant? The answer is, no. A distinction must be made between evidential burden and legal burden. Evidential burden constantly changes between the parties during trial and is distinct from the legal burden, which remains constantly on the party who as a matter of law will lose the case if he fails to prove the facts in issue. This, in our view, does not amount to a shifting of the legal burden of proof.

13.11 We are fortified in so finding by the decision of the Supreme Court of India in the case of **Partapa v State of Haryana**[30] which guided that:

> **"Generally, the burden of proof falls upon the party who substantially asserts the truth of a particular fact. A distinction is drawn between the permissive or legal burden, which is carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue; and the evidential burden (burden of adducing evidence or burden of going forward) which is the duty of showing that there is sufficient evidence to raise an issue fit for the consideration of the trier of fact as to the existence or non-existence of a fact in issue."**

13,12 Further, in the case of **Odinga and Others v Independent Electoral and Boundaries Commission and Others**[31], where the Supreme Court of Kenya put it thus:

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

13.13 The passage from the learned authors of **Halsbury's Laws of England Vol 12**[2] at paragraph 704 page 248 is apt in which it is stated that:

> **"The evidential burden or the burden of adducing evidence will rest initially upon the party bearing the legal burden. However, rather than referring to a shifting burden, it may be more accurate to say that it is the need to respond to the other party's case that changes as the trial progresses according to the balance of evidence given by each party at any particular stage."**

13.14 As per above authorities, the onus was on the 1st respondent as the petitioner to prove the allegations against the appellant (1st respondent in the Court below) to a standard higher than the balance of probabilities required in ordinary civil actions but lower than beyond reasonable

doubt required in criminal matters. Further, the 1st respondent was required to adduce evidence to prove the allegations to a fairly high degree of convincing clarity. Therefore, insofar as it relates to the allegation of violence in Skyways and Kabushi wards, the 1st respondent discharged his burden to the standard required by section 97(2)(a) of the EPA[1] and connected the appellant to the violence in question. At that stage, the appellant carried the evidentiary burden to respond to or rebut the allegations that he was associated to the "Nato Forces" and their activities by dissociating himself which he did not do. His attempt to dissociate himself by claims that at the time violence occurred in Kabushi ward he was at the airport with the then Republican President and the defence that the 1st respondent's team were the ones that attacked the PF entourage on its return from the airport, however, did not stand, and rightly so. The appellant's own evidence and that of his witness (RW2) was contradictory and placed him at the scenes of the violence.

13.15 Therefore, the learned trial Judge was on firm ground when he stated that the appellant had failed to dissociate himself

from the violence and consequently, there is no basis upon which this Court can agree with the appellant that the Judge in the court below shifted the burden of proof from the 1st respondent to the appellant as suggested by the appellant.

13.16 We thus find no merit in ground two of this appeal and accordingly we dismiss it.

14.0 GROUND FOUR OF THIS APPEAL

14.1 Ground four of this appeal assails the learned trial Judge's finding that the clenched fist is one of the PF symbols. Mr. Zulu's submission on behalf of the appellant under this ground was that the Court below did not take judicial notice of whether or not a clenched fist was a PF symbol. Further that it was erroneous for the Court below to rely on the evidence of RW6 when it was a notorious fact that the official PF symbol was a boat.

14.2 In response to the above contention, Mr. Magubbwi, Counsel for the 1st respondent, submitted that there was no argument as to whether or not the boat was a PF symbol. He submitted that the issue emanated from the evidence of

PW17 and that it was put to the appellant under *cross-examination* whether the clenched fist was *"one of the PF symbols"*. It was Mr. Magubbwi's further submission that the dictum of Chirwa J (as he then was) in the case of **The People v Shamwana and Others**[14] had been misconstrued. In that case, the Court stated that:

> **"I am entitled to refer to appropriate sources as Lord Summer stated in his definition of judicial notice in the case of Commonwealth Shipping v Peninsular Brand Services (1923) AC 191 HL -**
>
> > **'Judicial notice refers to facts, which as Judge can be called upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper to refer.'**
>
> **It would be folly for the Court in appropriate cases to keep aloof on facts of common knowledge. Again, as Lord Summer said in the same Commonwealth Shipping at p211 -**
>
> > **'My Lords, to require that a judge should effect a cloistered aloofness from facts that every other man in Court is fully aware of, and should insist on having proof on oath of what as a man of the world, he knows already knows better than any witness can tell him, is a rule that may easily become pedantic and futile.'**
>
> **Furthermore, this Court is entitled to look at its own record."**

14.3 Mr. Magubbwi argued that the principles in the above cited case did not preclude the Court from considering RW6's evidence. That to the contrary, RW6's evidence was an

appropriate source from which the Court could confirm a notorious fact.

14.4 We have considered the submissions of Counsel for the respective parties. We have also examined the record and we find that the evidence shows that PW17 and PW18 testified that they indeed did see the appellant raise a clenched fist whilst shouting *"pamaka"* and *"pabwato"* on the election day. The appellant denied that the slogan *"pamaka"* and a clenched fist was a PF symbol and so did the appellant's witnesses, RW4 and RW5.

14.5 The learned trial Judge, as can be seen from paragraph 12.42 above, found that the appellant was economical with the truth and, therefore, his evidence was not credible, preferring the evidence of RW6, who said the PF official symbol was a boat but as returning officer for Kabushi Constituency he had seen the PF raising a fist and shouting *"pabwato"* or *"pamaka"*. As an appellate Court, we cannot fault the learned trial Judge as he had the benefit of seeing the witnesses and assessing their demeanour. This is a settled principle of the law which we re-affirmed in

numerous of our decisions including the case of **Masumba v Kamondo**[23].

14.6 Save to state that the learned trial Judge was entitled to take judicial notice and find as a notorious fact that the PF use *"pamaka"* and a raised fist as one of their party slogans and symbols, based on the evidence of RW6 who was an independent witness. We observe also that the appellant denied that he raised his fist while saying *"ivote pamaka"* when he gave youths in Lubuto West cash. Further, PW7 and PW8, both independent witnesses, told the Court below that they saw and heard the appellant utter the slogan and use the symbol, a day before elections, which evidence was not shaken during *cross-examination.* We, therefore, equally take judicial notice of this notorious fact and thus see no reason to disturb the finding of the trial Judge.

14.7 We are fortified in so holding by the Supreme Court decision in the case of **Shamwana and Others v The People**[12] which defined judicial notice as referring to facts, which a Judge can be called upon to receive and act upon either from his general knowledge of them, or from inquiries to be made by

himself for his own information from sources to which it is proper to refer.

14.8 We, therefore, find no merit in ground four, and accordingly dismiss it.

14.9 Having found that violence in Skyways and Kabushi wards, and all but two of the other alleged electoral malpractices upon which the appellant's election as Member of Parliament for Kabushi Constituency was nullified were proved to the standard required by section 97(2)(a) of the **EPA**[1], the question that follows is whether the said violence and other illegal or wrongful acts or misconduct committed by the appellant in relation to the election in question were widespread such that the majority of the voters in Kabushi Constituency were or may have been prevented from electing a candidate of their choice.

14.10 We shall consider the above stated question as it has been raised and argued as a ground of appeal under ground three.

15.0 GROUND THREE OF THIS APPEAL

15.1 The appellant in ground three of this appeal alleges that the learned trial Judge erred in law and in fact when he held that the majority of the voters were or may have been prevented from voting for a candidate of their choice.

15.2 Mr. Zulu's submission in this respect was that it is not sufficient to prove that a candidate committed an illegal act or a misconduct without further proving that the act complained of was widespread and that it prevented or may have prevented the majority of the voters in the Constituency from voting for a preferred candidate. Mr. Maggubwi on the other hand argued that the learned trial Judge's finding on this aspect was factually and legally sound.

15.3 We agree with Mr. Zulu's submission above as that is the correct position of the law under section 97(2)(a) of the **EPA**[1]. In this case, the wrongful acts or other misconduct that we have upheld as having been committed by the appellant in connection with the election in question are that: there was violence in two of the eight wards in Kabushi Constituency; giving cash and mealie meal to the three choir

groups and promising a minibus to the UCZ choir group; giving cash to the congregants after mass at St. Kizito Catholic Church; treating the so called UPND defectors with food and cash at his residence and promising to give each K500 cash, 2.5 litres cooking oil and mealie meal once re-elected; giving cash to youths and promising employment at his slug dump; canvassing for votes on election day and failure to remove a campaign billboard from within 100 meters of a polling station.

15.4 The evidence as evaluated above in respect of these wrongful acts, in our view, shows that the wrongful acts committed by the appellant were widespread within Kabushi Constituency. In the case of violence, although the appellant has only been connected to three acts of violence in two out of eight wards in the constituency, the evidence shows that these acts of violence were committed in broad daylight in market places. This is so because even though the target may have been the 1st respondent and his campaign team and supporters with the intention of disrupting their campaigns so as to prevent the 1st respondent from reaching out to the electorate that were present in those areas, some

of those who were or may have been affected by these acts of violence were members of the public such as traders and their customers. This stems from the evidence of PW19 and PW20 who stated that immediately the appellant's convoy would be seen approaching, members of the public including the 1st respondent's campaign team would scamper in different directions for safety. Further, it cannot be said that the acts of violence in those areas only affected the appellant and his campaign team and supporters but also traders and their customers who may not only have come from those two wards.

15.5 As regards the giving of cash and mealie meal to the three choir groups, the evidence shows that there were a number of choir members with the UCZ choir group alone being put at 40-50 members and the cash given being put at not less than K20,000 to each of the three choir groups and a bag of mealie meal to each choir member. This clearly shows that this was a large sum of money and that the mealie meal given was also on a large scale because of the large number of choir members who must have come from various wards in Kabushi Constituency.

15.6 The same applies to the cash given to the congregants at the women's mass at St. Kizito Catholic Church. The evidence was that there were between 100 to 150 congregants who were given K300 each after mass.

15.7 As regards the treating to food of the so called "UPND defectors" at Bana Mpundu's house and giving them cash at the appellant's residence and promising to give each K500, 2.5 litres of cooking oil and mealie meal if re-elected, this evidence also shows that there were a number of people present who came from within the Constituency. PW4 put the number of those present at 200.

15.8 Similarly, the failure to remove the appellant's campaign billboard and canvassing for votes at a polling station while voting was ongoing was done with impunity.

15.9 In view of the highlighted wrongful acts and the sheer number of people present that were given cash, mealie meal and treated to food and promised cash, cooking oil and mealie meal if the appellant was re-elected coupled with the three acts of violence that were perpetrated in public places such as markets or near markets, these cannot be said to

have been isolated incidents. But that the wrongful acts were widespread within the meaning of section 97(2)(a) as read with sections 81, 83, 86 and 89 of the **EPA**[1]. These wrongful acts were done during the campaign period and in some cases, a few days or on the eve of elections and even on the election day, like in the case of campaigning and failure to remove a campaign billboard within 100 metres of the polling station. We note that Kabushi Constituency is situated in an urban area and thus densely populated. We therefore agree with the finding of the learned trial Judge that the wrongful acts committed by the appellant in connection with the election were indeed widespread.

15.10 In determining that the wrongful acts were widespread, we did take into account the hereunder stated authorities both by this Court and by the Supreme Court.

15.11 In the case of **Zulu v Kalima**[24], the Supreme Court nullified the respondent's election despite her having polled 18,650 votes on the ground that the distribution of chitenge materials and bicycles to the electorate and headmen was

systematic and on a large scale. The petitioner, in that case, had polled only 1,141 votes.

15.12 In the case of **Mwale v Kaunda**[32], the Supreme Court confirmed the High Court's decision nullifying the appellant's election on the ground that he had distributed 1,000 bicycles within the constituency when an election was imminent.

15.13 In **Chota v Mucheleka and Another**[33] the Supreme Court stated that the petitioner did not require to demonstrate how many people consumed the food and drinks to determine the level of influence the treating had on the electorate.

15.14 This Court in the cases of **Luo v Mwamba and Another**[9], **Siamunene v Sialubalo**[1] and **Masule v Kangombe**[19] found that there was violence of disturbing proportions. In the **Luo v Mwamba and Another**[9] case, this Court reversed the nullification of the appellant's election on the ground that the evidence did not connect her to the violence. While in **Siamunene v Sialubalo**[1] and **Masule v Kangombe**[19], confirmed the refusal by the Courts below to nullify the

election as the evidence did not connect the respondents to the violence.

15.15 In the current case, it was further argued by learned Counsel for the appellant that out of the 36,830 actual votes casts, the appellant polled 18,417 votes while the 1st respondent obtained 12,593, an indication that the majority of voters in Kabushi Constituency voted for their preferred candidate. Learned Counsel for the 2nd respondent's argument was that there was no cogent evidence that electoral malpractices were so widespread that they swayed the majority from electing their preferred candidate. Further that there was no evidence showing that the 2nd respondent breached any provision of the law in the conduct of the elections. Learned Counsel for the 1st respondent in opposition argued that there was no empirical test but where the wrongful acts were widespread, it followed that the majority of the voters prevented from voting for a candidate of their choice.

15.16 We have examined the record and find on the totality of the wrongful acts that the appellant has been connected to, that

the difference of the 5,824 votes cannot be said to have been so large that the wrongful acts had no impact on the electorate. We therefore do not agree with the contention by Counsel for the appellant that the margin of votes of 5,824 polled between the appellant and the 1st respondent was so wide as not to have affected the election result.

15.17 As to the question whether or not the said wrongful acts did prevent or may have prevented the majority of the electorate in the said constituency from voting for their preferred candidate, we wish to observe that there is no scientific formula for determining this question. This question, in our view, must be answered by the facts and the peculiar circumstances of each case.

15.18 In considering this issue, we have looked at the various authorities from within our jurisdiction as well as outside. One of the considerations is the timing of the act which in this case as highlighted above was done within the campaign period and in some cases a few days before the election day. These cases are:

15.19 **Mabenga v Wina and Others**[34] which involved the act of distribution of medical supplies;

15.20 **Mlewa v Wightman**[13] relating to distribution of exercise books; and

15.21 **Mumba v Daka**[8] concerning the reopening of a dysfunctional clinic a day before elections.

15.22 There is also the case of **Attorney General and Others v Kaboiron**[35] an example from outside our jurisdiction where the Court of Appeal in Tanzania held that because of the large number of the people who attended the campaign rallies, the defamatory statements uttered there must have affected the election results.

15.23 Clearly on the totality of the wrongful acts that have been connected to the appellant and having found that the wrongful acts were widespread, the inescapable conclusion is that the majority of the voters in Kabushi Constituency were or may have been prevented from electing their preferred candidate as found by the learned trial Judge.

15.24 For the reasons given above, ground three has no merit and we dismiss it.

15.25 Having dealt with the main appeal, we now move to the Cross-Appeal.

16.0 THE CROSS-APPEAL

16.1 The 1st respondent in his Cross-Appeal raised and argued one ground of appeal. This is to the effect that:

> **"The Court below erred in law and fact when it excluded the violence that was perpetrated by the appellant's self-styled "Nato Forces" against the 1st respondent's supporters and campaigners at the 1st respondent's home in its total aggregation of violence episodes that were committed by the appellant and/or his said supporters with his knowledge and consent in the subject constituency."**

16.2 THE 1ST RESPONDENT'S SUBMISSIONS IN SUPPORT OF THE CROSS-APPEAL

16.3 Mr. Magubbwi, Counsel for the 1st respondent, relied on the 1st respondent's heads of argument filed in support of the Cross-Appeal which he augmented with oral submissions.

16.4 The major contention by the 1st respondent in support of this ground of appeal was that the learned trial Judge ought not to have discounted the violence that occurred in Toka ward as no good reason was given. That this is so because the appellant did not challenge the 1st respondent's evidence that violence occurred when the UPND team was returning

to the 1st respondent's residence from campaigning in Toka ward.

16.5 Therefore, that the learned trial Judge, contradicted this finding when he went on to hold that the UPND clashed with PF in Kaloko ward as the UPND was going to the 1st Respondent's residence whilst the PF were heading to Kaloko ward for their scheduled campaigns. It was for this reason that he could not blame the appellant and the PF for the violence in question. Counsel submitted further that electoral and political violence regardless of the circumstances under which it was perpetrated is proscribed by section 83(1)(a) of the **EPA**[1].

16.6 Further that contrary to the learned trial Judge's decision to excuse or accommodate the appellant and the "Nato Forces" over the violence in Toka/Kaloko wards, the law in Section 83(1)(a) of the **EPA**[1] which proscribes the use of force, violence and restraint does not allow such excuse. He thus urged us to interfere with the finding of the Court below and to order that the violence in Toka/Kaloko wards was part of the widespread violence in the constituency that was

committed by the appellant and the "Nato Forces" with the appellant's knowledge and approval or consent. In support of this argument, counsel cited the case of **Zulu v Avondale**[21].

16.7 APPELLANT'S HEADS OF ARGUMENT IN OPPOSITION TO THE CROSS-APPEAL

16.8 In opposing the Cross-Appeal, counsel for the appellant relied on the heads of argument filed. The sum total of the appellant's arguments was that the learned trial Judge was on firm ground when he excluded the violence in Toka/Kaloko ward. Counsel thus urged us to dismiss the Cross-Appeal on ground that the 1st respondent had not demonstrated that the learned trial Judge made a finding of fact outside the evidence that he evaluated and therefore falls short of the requirements to warrant a reversal of findings as held in **Nkhata and four others v Attorney General**[36].

16.9 In augmenting the written oral submissions, Counsel for the appellant more or less repeated the arguments in the appellant's written submissions already summed up above and hence we shall not repeat them.

16.10 THE 1ST RESPONDENT'S REPLY

16.11 In reply, Mr. Magubbwi urged us to uphold the Cross-Appeal, as the Cross-Appeal meets the conditions for variation of a finding of fact of the Court below.

16.12 CONSIDERATION AND DECISION BY THIS COURT ON THE CROSS-APPEAL

16.13 We have considered the issues raised under the Cross-Appeal. It is our firm view that the Cross-Appeal attacks findings of fact made by the trial Judge. This requires us to review the evidence on record as regards this issue.

16.14 The 1st respondent's evidence was that on 14th July, 2021 he was informed that as the members of his campaign team was returning from Kaloko ward going to his residence in Kaloko township, they were attacked by PF members along Chitimukulu road and that the incident was reported to the police. He testified that Collins Kunda, Francis Chilumba and Prince informed him about another incident that had occurred on the same street whereby his campaign team members were assaulted.

16.15 The learned trial Judge considered this allegation together with the evidence adduced. He put it thus:

"I will discount the incident of 14th July, 2021 in Toka ward. I will do so because the evidence shows that on that day the UPND and its candidates were allotted to campaign in Toka ward between 06:00hrs and 12:00hrs. It was on their way from Toka ward in the afternoon as they were going to the residence of the petitioner in Kaloko ward that the UPND and PF clashed in Kaloko ward because PF and their candidate were allotted to campaign in Kaloko ward that afternoon. It is for that reason that I shall not accept the blame on the 1st Respondent and the PF for that incident. It cannot be said that the UPND went to attack the PF team in Kaloko ward because the evidence by the UPND that they were going to the residence of the petitioner who lives in Kaloko ward was not challenged."

16.16 We observe that the 1st respondent's evidence was based not on what he personally perceived but on what he was told by Collins Kunda, Francis Chilumba and Prince. None of the trio was called to testify. Therefore, the 1st respondent's evidence is hearsay evidence and therefore inadmissible under the rules against admission of hearsay evidence insofar as the purpose was to prove the truth of the allegation. This is an elementary principle under the law of evidence.

16.17 We thus find no merit in the Cross-Appeal. We dismiss it.

17.0 CONCLUSION

17.1 All the four grounds of the main appeal having failed, except to the extent highlighted, the sum total is that this appeal has wholly failed, and is accordingly dismissed. We confirm the Judgment of the Court below nullifying the election of the Appellant as Member of Parliament for Kabushi Constituency. The Cross-Appeal, having failed, is also dismissed. Since this appeal did raise the issues of public importance, we order that each party bears their own costs both in this Court and in the Court below.

.....
H. Chibomba
President
CONSTITUTIONAL COURT

.....
M. S. Mulenga
CONSTITUTIONAL COURT JUDGE

.....
P. Mulonda
CONSTITUTIONAL COURT JUDGE

.....
M. M. Munalula
CONSTITUTIONAL COURT JUDGE

.....
J. Z. Mulongoti
CONSTITUTIONAL COURT JUDGE