

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

2021/CCZ/A0036

IN THE MATTER OF: ARTICLE 47(2), 54, 68, 72(2) (C), 73(1) OF THE
CONSTITUTION OF THE REPUBLIC OF ZAMBIA
IN THE MATTER OF: SECTIONS 81, 83, 89, 97(1), 98 (C), 99 AND 10 (2)
(A) OF THE ELECTORAL PROCESS ACT NO. 35 OF
2016 OF THE LAWS OF ZAMBIA
IN THE MATTER OF: CODE OF CONDUCT RULE 15
IN THE MATTER OF: PARLIAMENTARY PETITION RELATING TO THE
PARLIAMENTARY ELECTION HELD IN
MPROKOSO CONSTITUENCY ON 12TH AUGUST,
2021

AND

IN THE MATTER OF: AN ELECTION PETITION BY JOHN SAMPA

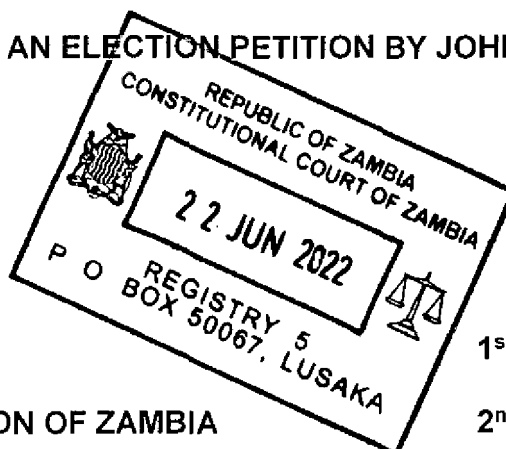
BETWEEN

SAMPA JOHN

AND

BRIAN MUNDUBILE

ELECTORAL COMMISSION OF ZAMBIA



Appellant

1st Respondent

2nd Respondent

Coram: Mulenga, Mulonda, Munalula, Chisunka and Mulongoti JJC on 21st April, 2022 and 22nd June, 2022.

For the Appellant: Mr B. Sitali of Butler and Company
For the 1st Respondent: Mr J. Tembo of Linus Eyaa and Partners with Mr L. Lemba of Mulungushi Chambers
For the 2nd Respondent: Mr B. Musenga with Mr M. Bwalya, In House Counsel, Electoral Commission of Zambia

JUDGMENT

Munalula JC delivered the Judgment of the Court.

Cases referred to:

1. Lewanika and Others v Chiluba S.C.Z Judgment No. 14 of 1998
2. Nkandu Luo and Another v Doreen Sefuke Mwamba and Another Selected Judgment No.51 of 2018
3. Michael Mabenga v Sikota Wina and Others (2003) Z.R. 110
4. Marcus Kampumba Achiume v Attorney General S.C.Z. Judgment No. 2 of 1983
5. Richwell Siamunene v Sialubalo Gift Selected Judgment No. 58 of 2017
6. Stephen Masumba v Elliot Kamwendo Selected Judgment No. 53 of 2017
7. Muhali George Imbuwa v Enock Kaywala Selected Judgment No.12 of 2018
8. Charles Changano Kakoma v Kundoti Mulonda Appeal No. 5 of 2017
9. Kufuka Kufuka v Mundia Ndalamei Appeal No. 15 of 2016
10. Dean Masule v Romeo Kangombe 2019/CC/A002

Legislation referred to:

The Electoral Process Act No. 35 of 2016

Introduction

[1] This is a Judgment in an appeal against a decision of the High Court delivered on 22nd November, 2021 dismissing an election petition filed by the Appellant (petitioner in the court below) challenging the election of the 1st Respondent (1st Respondent in the court below) as the duly elected Member of Parliament for Mporokoso Constituency.

[2] The Appellant's grounds of appeal which we quote verbatim read as follows:

Ground One

The learned judge in the court below erred in law and fact when he held that the discharge of a firearm by Wilbroad Musonda (the 1st Respondent's election agent) directed at the Appellant on the night of

12th August, 2021 around 20:30 hours had no bearing on the voting process and the results thereof.

Ground Two

The learned judge in the court below misdirected himself in law and fact when he failed to consider that counting of votes and announcing of results is part of the electoral process.

Ground Three

The learned judge in the court below misdirected himself in law and fact by glossing over the evidence showing that Wilbroad Musonda, (the 1st Respondent's election agent), pursued the motor vehicle in which the Appellant was and discharged a firearm at it on the night of 12th August, 2021.

Ground Four

The learned judge in the court below erred in law and fact when he ignored and disregarded evidence showing how Wilbroad Musonda (the 1st Respondent's election agent) was protected from prosecution by the police command for fear of victimisation by PF cadres, yet the same judge was quick to condemn similar victimization of police officers at the instance of PF party cadres in instances where the 1st Respondent or his election agent was not involved.

Ground Five

The learned judge in the court below erred in law and fact when he failed to distinguish between an election agent or candidate who voluntarily chooses not to attend the counting and announcement of election results, and one who is prevented by an opponent from attending the counting and announcement of election results.

Ground Six

The learned judge in the court below misdirected himself and law by only considering the flaws in the Appellant's witnesses' testimony while ignoring the flaws in Respondent's witnesses' testimony. (*sic*)

Background

[3] By way of brief background, the Appellant (who stood on the United Party for National Development - UPND ticket) and the 1st Respondent (who stood on the Patriotic Front – PF ticket) were candidates together

with two other persons in the Mporokoso Parliamentary election held on 12th August, 2021.

[4] On 14th August, 2021 the 1st Respondent was pronounced duly elected Member of Parliament for Mporokoso Constituency, having amassed 12,438 votes. The Petitioner received 5,765 votes. Dissatisfied with the results, the Appellant filed a petition in the High Court on 27th August, 2021 alleging that, the election was characterized by violence, bribery, corruption, and undue influence of voters as well as general violations of the Electoral Process Act the details of which were as follows.

[5] On the allegation of violence, it was claimed that on 29th June, 2021 the 1st Respondent's agents burnt a house and shed and a kitchen and toilet belonging to two UPND members, respectively. That on 1st July, 2021 the 1st Respondent's agents went to the house of a UPND member and beat up his wife for belonging to UPND.

[6] That on 26th June, 2021, the Appellant's campaign in Lumangwe, Mambilima and Njalamonesa Wards was disrupted when he and his supporters were attacked by the 1st Respondent's agents who fired three gunshots in Chikosa Village. That a UPND team member Martha Bwalya was hit by a car driven by the same agents, injuring her leg.

[7] That when the Appellant went to report the matter at the Police Station, the 1st Respondent's team followed them and an agent of the 1st Respondent emerged from the car that injured Martha Bwalya and started smashing the windows of the UPND team's car in full view of the Police. That when the Police tried to restrain him, he threatened them with dismissal. And that within a week of the incident, the Officer-in-Charge of the Police Station, Martin Katongo and the Criminal Investigations Officer Samakai, were transferred from Mporokoso.

[8] Further, on the allegation on violence, it was claimed that firearms were discharged at various voting locations on 12th August, 2021 in order to stop the Appellant and his agents from accessing the Civic Centre totalling site. That the Appellant was chased from the totalling centre where shots were fired at his vehicle and that the discharging of firearms continued until members of the Defence Forces apprehended and disarmed the culprits. That the 1st Respondent's agent threw tear gas at Bulangililo totalling centre in order to block the Appellant from attending the totalling session.

[9] On the allegation of bribery and corruption, it was claimed that the 1st Respondent and his agents facilitated the registration and

participation in the vote of underage voters who were given K5 each and instructed to vote for the 1st Respondent.

[10] Further, that the 1st Respondent commandeered social cash transfer in Mporokoso District, erecting and manning pay points to disburse cash to the electorate. That the pay points were on 11th and 12th August, located along routes to various polling stations and payments were made to persons whether entitled or not who were going to vote as an inducement to vote for the 1st Respondent.

[11] That the recipients were told that the money came from the 1st Respondent and that cameras in the voting booths would monitor the voting and those who did not vote for the 1st Respondent would lose their social cash transfer and youth empowerment funds. That feeding stations were placed along the routes to the polling stations at which persons going to vote were given K20 and given the same message.

[12] In relation to undue influence, it was alleged that the 1st Respondent's agents led a demonstration calling for the transfer of Police officers and civil servants who were targeted and transfers took place within days of the demonstration. That the transfers were meant to instil fear in civil servants and law enforcement officers and install compliant officers in place of those who were removed.

[13] Building on this, it was specifically alleged that the Council secretary Mr. Ndelema who refused to appoint a list of PF cadres as polling staff was put on forced leave at the instigation of the 1st Respondent and his agents and replaced with a Council Secretary who did what he was commanded by the 1st Respondent and his agents.

[14] Further that, the headmaster and a teacher at Sunkutu Secondary School who were viewed as sympathisers to UPND were transferred from the school at the instigation of the 1st Respondent and his agents. It was alleged that there was collusion between the 1st and 2nd Respondents to give undue advantage to the 1st Respondent because on 6th August, 2021 the ballot papers were taken to Kutemwa Lodge where the 1st Respondent and his agents were staying instead of the Council Offices.

[15] There was an allegation that a Toyota Landcruiser Reg. No. BAL 203 belonging to the 1st Respondent's campaign manager was hired by the 2nd Respondent to ferry election materials and the Appellant's complaint to the 2nd Respondent about the issue was ignored. That Government motor vehicles registration numbers GRZ 314 CH and GRZ 875 CE had their number plates replaced with private plates and used for campaigning.

[16] Finally, it was alleged, generally, that throughout the campaign period, the Appellant was not allowed to campaign freely as campaigns were disrupted by the 1st Respondent's agents. The UPND President was prevented from addressing any campaign rally to drum up support for the Appellant in the Constituency after the 1st Respondent's agents organized thugs to stop him.

[17] That the 1st Respondent's agents, his political party and its agents propagated hate speech accusing the Appellant's party's leadership of being tribal, which utterances influenced the electorate.

[18] The Appellant prayed for the nullification of the 1st Respondent's election and for costs. After considering the allegations and assessing the evidence before it, the trial court dismissed all the allegations, upheld the 1st Respondent's election as Member of Parliament for Mporokoso Constituency and made no order as to costs.

[19] Aggrieved by this decision, the Appellant appealed to this Court. The Notice and Memorandum of Appeal were filed on 20th December, 2021 and followed by the Record of Appeal together with the Appellant's Heads of Argument filed on 20th January, 2022.

[20] The 1st Respondent filed his heads of argument in response on 10th March, 2022. And on 21st March, 2022, the Appellant filed a further

record of appeal by way of consent order dated 14th March, 2022. There were no heads of argument or other process filed by the 2nd Respondent although they were represented at the hearing.

The Appellant's case

[21] The Appellant argued grounds 1 and 2 together. It was submitted that the incident of 12th August, 2021 and the impact that it had on the Appellant can be appreciated by taking into account the atmosphere of violence that preceded it. Reference was made to an incident on 26th June, 2021 where it was alleged that the Appellant and his team whilst campaigning were accosted by PF cadres, who fired twice, and drove their car over the leg of one Martha Bwalya who testified as PW2.

[22] That after this attack the Appellant and his supporters were pursued by the same PF cadres as they went to report the accident to the police station. It was also alleged that the cadres smashed the Appellant's vehicle in front of police officers and when the officers tried to restrain a PF cadre by the name of Ernest Musonda who was driving the car that ran over the leg of PW2, the said Ernest Musonda threatened the officers with transfer from the Police station.

[23] That other witnesses who testified to the discharge of gun shots on that day were PW3 and PW4 and their evidence was corroborated by PW8, the Detective Chief Inspector who led the team of officers sent to investigate the incident.

[24] The Appellant, referred to a second instance of violence which allegedly occurred at Nimbwe. It was contended that when the Appellant went to Nimbwe Police Station on 12th August, 2021 (polling day), he found a PF cadre firing gunshots and threatening voters. It was averred that these acts of violence continued throughout the campaign period.

[25] That the court below acknowledged that in the 12th August, 2021 poll the Appellant and his supporters were assaulted by PF cadres as shown starting from page 53 of the record of appeal. That the court held that the assault of the Appellant and his supporters particularly PW2, whose leg was broken, the malicious damage of the Appellant's vehicle in full view of the police officers and the acts of terror through the discharge of a firearm on June 26 by named PF cadres was not only unacceptable in the electoral sense but criminal as well.

[26] The Appellant contended that whilst he is mindful that a candidate is responsible for the commissions or omissions of his election agents

and not his party cadres as held in the case of **Lewanika and Others v Chiluba**¹ the acts of violence against the Appellant and his supporters illustrated the violent atmosphere that characterised the Mporokoso election.

[27] It was averred that on 12 August, 2021 Wilbroad Musonda , the 1st Respondent's election agent, chased the car the Appellant was in and fired shots at it. That, the violence by Wilbroad Musonda on 12 August, 2021 whilst counting of ballots was still being done, made the Appellant so afraid for his life that he decided not to witness the tabulation of the ballots or visit the polling stations where counting was still going on.

[28] It was contended that the question of a candidate accessing the polling station was an issue in the case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General**.² It therefore goes without saying that a candidate has a right to access not only a polling station but also the totalling centre. It was contended that from the evidence on record, by reason of the vehicle that he was in being chased and fired at, the Appellant failed to attend the announcement of results at the totalling centre and other polling stations where counting was still going on.

Reference was made to the Appellant's testimony at page 325 to 326 of the Record of Appeal.

[29] The Appellant submitted that counting of votes is part and parcel of the electoral process so the discharge of gunshots during the process is a malpractice and illegality which should not be entertained. That the Election process commences with the registration of voters and ends with the announcement of results.

[30] It was contended that after the electorate have voted, their votes can still be changed between the polling station and the totalling centre. And even at the totalling centre there is still scope for persons to announce wrong or different results. Therefore, the court below erred in law and fact when it held that the discharge of the firearm in the incident of 12th August, 2021 had no bearing on the voting process and the results thereof.

[31] In essence, two questions were posed: First, whether a candidate has a right to access a polling station and totalling centre and secondly, whether vote counting is part of the election process.

[32] In ground 3, the Appellant contended that there was a minimizing by the trial court of the seriousness of the alleged offence of discharging a firearm. That the court below misdirected itself in law and

and corroborated the evidence of PW1 and PW5, meant that the Appellant had established the alleged offence to the required standard of proof, of a fairly high degree of convincing clarity as held in the case of **Michael Mabenga v Sikota Wina and Others.**³

[36] In ground 4 it was contended that the trial court ignored the evidence showing that the alleged perpetrator was protected by the Police so that it would not be obliged to condemn it in the manner that other incidents of violence were condemned and thereby avoid nullifying the election.

[37] The Appellant contended that the court below erred in law and fact by ignoring and disregarding the evidence that Wilbroad Musonda was protected from prosecution by the police command for fear of victimisation by PF party cadres.

[38] It was contended that the trial court was quick to condemn similar victimization of police officers by PF cadres where the 1st Respondent or his agent were not involved. We were referred to page 46 of the record of appeal in support. That the only reason that the court below displayed the double standard was that, had it applied the earlier standard it would inevitably have had to conclude that the election was null and void on account of the 1st Respondent's actions.

[39] In ground 5 it was argued that the trial court had treated a situation in which a person is prevented from accessing the totalling centre and one in which they voluntarily fail to do so as the same, in order to rely on section 36 of the Electoral Process Act (henceforth "the EPA") which provides that the absence of a candidate or polling agent does not invalidate the totalling of ballots or announcement of results. That there is a distinction between the two situations with the former justifying nullification of an election.

[40] In ground 6, it was contended that the trial court applied selective consideration of the evidence in that the Applicant's evidence was questioned whereas the 1st Respondent's evidence was accepted. It was contended that the court below misdirected itself by only considering the flaws in the Appellant's witnesses' testimony while ignoring those in the Respondent's witnesses' testimony and that the Appellant's evidence was viewed unfavourably but there was no similar evaluation of the Respondents' evidence. That there was inconsistency, improbabilities and outright lies in the evidence of the 1st Respondent's agent which was allegedly not evaluated by the Judge.

[41] An example was given that Wilbroad Musonda had testified that he took a taxi home on the night of 12th August, 2021 when during the entire campaign period he had been assigned a vehicle by the 1st Respondent and had left 7 cars at the 1st Respondent's house.

[42] The Appellant submitted that the court's unbalanced evaluation of the evidence offends the guidelines set out in the case of **Marcus Kampumba Achiume v The Attorney General**.⁴

[43] In addition, it was submitted that as was held in the **Michael Mabenga**³ case, satisfactory proof of one corrupt illegality or malpractice is sufficient to nullify an election. That the use of the firearm by Wilbroad Musonda against another deserves the maximum sanction by the court. Such an action need not be widespread for the election to be nullified.

[44] At the hearing, it was underscored that the Appellant was prevented from accessing the totalling centre whilst counting of votes was ongoing by the actions of Wilbroad Musonda. That the significance and impact of this one isolated incident of discharging a firearm was so great, in that it prevented one candidate from attending the counting of votes, that this Court should depart from the principle that a

malpractice must be geographically widespread in order for an election to be annulled.

1st Respondent's case

[45] The 1st Respondent began with the legal principles at play. We were referred to the case of **Nkandu Luo and Another v Doreen Sefuke Mwamba and Another**² to show that this Court has already guided that there are two thresholds which must be surmounted before an election can be nullified. First that the malpractice must be proven to have been committed by the candidate or his agent and secondly that it was so widespread that it swayed or could have swayed the majority of the electorate from electing a candidate of their choice.

[46] It was contended that election petition matters are *sui generis* and the standard of proof is higher than on a balance of probabilities, specifically the requirement for a high degree of convincing clarity. The case of **Lewanika and Others v Chiluba**¹ was cited in support.

[47] The 1st Respondent also argued grounds 1 and 2 together. It was contended that the Appellant needed to prove to the required standard that the alleged incident took place and secondly that it was widespread enough to sway the electorate from electing their

candidate of choice. The 1st Respondent averred that he had appointed only one election agent who was Wilbroad Musonda and none of the Appellant's witnesses had tied the 1st Respondent or Wilbroad Musonda to the violence of 26th June, 2021 as they testified that the violence was perpetrated by PF cadres. We were referred to the case of **Richwell Siamunene v Sialubalo Gift**⁵ in support.

[48] We were further referred to the case of **Stephen Masumba v Elliot Kamwendo**⁶ to make the point that the evidence of partisan witnesses needed something more to prove an allegation to the required standard.

[49] The 1st Respondent agreed with the principle that a candidate has a right to access the totalling centre or polling station and that the counting and totalling of results are part of the electoral process, but contended that it had not been proved that the alleged firing of a gunshot at the Appellant did occur so as to say that he was prevented from accessing the totalling centre for that reason.

[50] That his failure to attend cannot be a reason for nullifying an election. That he was at liberty to appoint any number of agents to represent him at the totalling of results. We were referred to page 327

and 178 of the record of appeal to show that UPND members did witness the event.

[51] In relation to the incident at Nimbwe, it was contended that this was hearsay as the Appellant did not witness it. Further that none of his witnesses had tied the 1st Respondent or Wilbroad Musonda to the incident. That the sole incident to which Wilbroad Musonda is linked was not proved to the required standard as the only two witnesses to it were the Appellant (PW1) and his driver (PW5) who were both witnesses with an interest to serve. That PW1 cannot be corroborated by PW5.

[52] We were referred to the case of **Muhali George v Enock Kaywala Mundia**⁷ and **Changano Charles Kakoma v Kundoti Mulonda**⁸ in support of the principle requiring independent corroboration of the testimony of a partisan witness.

[53] It was contended that the only independent evidence, which was that of PW10, could not corroborate the evidence of PW1 and PW5 as PW10 did not witness the incident or find any evidence at the alleged crime scene that a shot was in fact fired. Further, on the authority of **Kufuka Kufuka v Mundia Ndalamei**⁹ it was pointed out that reporting a matter to the Police and having a docket opened and an entry made

in the Occurrence Book does not by itself mean that the offence has been proved to have been committed.

[54] In response to ground 3, the 1st Respondent reiterated the arguments raised in response to grounds 1 and 2. It was added that the trial court saw the alleged shooting as an extraneous matter that could have no bearing on the election because it occurred after voting had ended and counting of votes was taking place. That it could not be brought within the sphere of section 97(2)(a) of the EPA.

[55] That if the shooting did take place it only affected 3 people and could not have persuaded the majority of voters not to vote for the Appellant. That the absence of the Appellant at the totalling centre could not be used to nullify the election.

[56] In response to ground 4, it was contended that the evidence relating to the alleged protection from prosecution of Wilbroad Musonda was a misnomer as his prosecution could have no bearing on the outcome of the election. That PW10 testified that the case was under investigation and Wilbroad Musonda was released because no gun or cartridges were found at the crime scene.

[57] In response to ground 5, it was argued that the claim that the Appellant was prevented from attending the totalling centre as

opposed to voluntarily choosing not to do so was irrelevant because there was no evidence on record that he was prevented from attending. That he was at liberty to not attend and to appoint other persons to stand in for him, which is what happened.

[58] That the trial court observed at page 55 of the record of appeal that the Appellant's claim that his absence at the totalling centre created an opportunity for the 1st Respondent to steal his votes was speculative as there was no evidence that either of the Respondents altered the results to such effect. It was averred that the meaning of section 36 which the Appellant was proposing would lead to absurdity.

[59] In response to ground 6 it was contended that the evaluation of witnesses is a preserve of the trial court and its findings of fact cannot be easily vacated without proof that the said findings were perverse or reached without any evidence on record. It was averred that it was the Appellant's duty to prove his case to a higher degree of convincing clarity and that the principle in the **Mabenga**³ case was insufficient as there are two elements which must be proved under section 97(2)(a).

[60] At the hearing, the 1st Respondent relied on the filed heads of argument and reiterated his argument that neither he nor his agent had been found to have committed any misconduct. On the issue of re-

visiting the majoritarian principle in deciding whether to nullify an election, it was contended that this is the wrong forum in which to raise the issue as it is for law makers to amend section 97(2)(a) of the EPA.

Reply

[61] In his oral reply, counsel for the Appellant, Mr Sitali, maintained that the failure of the court below to establish the fact of the alleged incident of discharging a firearm is one of the grounds of appeal. That the trial court glossed over the evidence because the incident was considered to be extraneous to the voting process. That it is not the number of witnesses which matters but the evidence of PW10 to the effect that after charging the 1st Respondent's agent, he received instructions to release him.

[62] In response to the point that the Appellant chose to stay away from the totalling centre Mr Sitali argued that the genesis of that decision was the alleged shooting incident in issue.

[63] On the majoritarian principle, he contended that even without wide geographical spread an isolated incident may be found to have prevented the majority from electing a candidate of their choice. That it should not be a case of one size fits all.

Consideration and Decision

[64] We have considered the grounds of appeal, the judgment appealed against, the heads of argument filed by both the Appellant and the 1st Respondent as well as their oral submissions.

[65] Although the Notice of Appeal expressed the intention to appeal against the whole judgment of the trial court, Grounds 1, 2, 3, 4 and 5 as framed and argued relate to the findings of fact and law in relation to one alleged incident of discharging a firearm by the 1st Respondent's agent Wilbroad Musonda on 12th August, 2021 during the counting of votes and announcement of election results, which action allegedly prevented the Appellant from witnessing the results process. Ground 6 is framed in general terms but was argued in relation to the said incident. It follows that this appeal relates only to the said incident.

[66] Since the grounds are closely inter-twined, we find it convenient to deal with all the grounds together. More so as the portion of the Judgment relating to the incident and therefore, the source of the appeal is quite concise. It appears at pages 54 to 55 of the record of appeal and it reads:

Turning to the alleged discharge of a firearm by Wilbroad Musonda directed at the Petitioner on August 12, around 20:30; the Petitioner said this act consumed him with fear and prevented him from attending to the totalling of results at Bulangililo. The assault or threatening violence regardless of who did it, assuming it happened, is in my considered opinion an extraneous matter, as it were. It has no bearing on the voting process and the results thereof, as envisaged by section 97(2)(a) of the EPA, because as the Petitioner pleaded in paragraph 34 of his petition, the incidence allegedly happened when the counting of votes in various polling stations was taking place rather than during voting. In fact, by the Petitioner's own acknowledgment, it only affected him in the sense that he feared for his life, and opted not to witness the totalling of results, upon being persuaded by his team to stay away from the totalling centre.

Nevertheless, it was argued that the Petitioner's absence may have afforded an opportunity to the first Respondent to steal his votes. The default assumption is speculative. There is no evidence that the first Respondent or/and the ECZ altered the results by taking advantage of the Petitioner's absence. And it is not true that the Petitioner's representative as alleged in his petition were not at the totalling centre, because the testimony of RW3, Raphael Chansa was clear that, the declaration of the results of the poll document for Mporokoso Constituency otherwise dubbed 'Gen 21' was signed by two of the Petitioner's representatives, including Ronald Mushikiti.

And most importantly, under section 36 of the EPA, it is stated that, absence of an election agent or polling agent from a gazetted or prescribed place where an electoral proceeding is being conducted shall not invalidate the voting or/and counting of ballot papers or/and announcement or /and declaration of results. It follows, the absence of the Petitioner at the totalling centre cannot be used as basis to annul this election. (*emphasis added*)

[67] The six grounds of appeal stem from the quoted portion of the court's judgment. The sum of the Appellant's argument on the grounds as read together, is that the alleged incident in which the 1st Respondent's

agent discharged a firearm at him was part of an orchestrated pattern of violence intended to intimidate him and his supporters and it prevented him from attending the counting of votes and announcement of results. That his absence at the results stage created an opportunity for his votes to be stolen and therefore cannot be said to have no bearing on the election.

[68] That his forced absence was reason for nullifying the election because a candidate had a right to be present during vote counting. That resort to section 36(2) which states that the absence of an election agent from the results centre does not lead to a nullification had been read in a manner that does not distinguish between a voluntary and a forced absence.

[69] That the incident itself had been proved to a fairly high degree of convincing clarity. That the court was not even handed in its consideration of the evidence. It was therefore contended that despite it being an isolated incident, it was so egregious that this Court ought to treat it as sufficient to nullify the 1st Respondent's election.

[70] In response, the 1st Respondent contended that the alleged incident had not been proved to the required standard. That the witnesses involved were partisan and contradicted each other in a material particular. That PW10 could not corroborate PW1 and PW5 as he did not find any evidence

of a shot being fired. That the alleged incident took place after voting had closed so it was extraneous to section 97(2) (a) of the EPA.

[71] It was further argued that it was not proven that the alleged incident prevented the Appellant from accessing the results centre. That his representatives were present and there is no evidence that the results were altered. That the incident only affected three people. That Wilbroad Musonda was released because there was no evidence and his arrest was not relevant to the petition.

[72] The issue as we see it is whether the trial court misdirected itself in holding that the incident of an alleged shooting on the night of 12th August, 2021 at the Mporokoso constituency totalling centre allegedly perpetrated by the 1st Respondent's election agent Wilbroad Musonda and which allegedly prevented the Appellant from attending at the totalling centre was extraneous to the election process, did not affect the election, and was therefore not a ground for nullifying the election. The Appellant has raised the issue in the context of the trial court's alleged biased assessment of the evidence in favour of the 1st Respondent.

[73] It is helpful to begin with the law. Section 97 of the Electoral Process Act which governs election petitions provides as follows:

97. (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –

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

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

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

.....

[74] From the provisions of section 97(2) (a) and (b), it is clear that an election petition will only be nullified where it is proved that a candidate committed an election offence either directly or through his agent or in the case of another perpetrator, that the person acted with the knowledge and consent or approval, of the candidate. However, this is only the first element to be proved. Once it is proved, it is critical to further prove that the majority of voters were or could have been swayed by the illegal practice, from choosing their preferred candidate.

[75] This effect on the majority distinguishes an election petition from other processes censuring electoral misconduct. An election petition is about the voters being swayed or prevented from electing a preferred candidate. Where the majority are not swayed or could not have been swayed, then ordinary civil and criminal processes maybe engaged in the resolution of electoral misconduct. The election petition process is only available to determine not just any swaying of minds but the swaying of minds on such a scale that the election could not be said to have been free and fair.

[76] Where the malpractice in issue does not relate to the campaign or voting process but to the results process, that allegation may be raised under section 97(2) (b). Once again, this is only the preliminary element to be proved. Once it is proved, it is critical to further prove that the results were affected. We therefore hasten to categorically state that the Appellant's argument that a single malpractice can be found to be so egregious that an election may be nullified without clear and convincing proof that it may or did prevent the majority of voters from exercising their free choice is not tenable. Such an approach would undermine the essence of an election petition.

[77] Coming to the standard of proof which is applicable, it is higher than on a balance of probabilities and lower than beyond reasonable doubt. Both the offence and the swaying of voters must be proved clearly and convincingly. The standard is high for good reason.

[78] A nullification of an election is only justifiable where the majority have or are likely to have been prevented from electing the candidate of their choice.

[79] Having stated the law on the legal issues which were raised, we now turn to the facts that gave rise to the appeal. We wish to say right from the outset that the lower court was on firm ground in finding that the incident, was alleged to have occurred after voting had closed and could therefore not have impacted the voters by swaying them from their preferred choice. It was indeed extraneous to the campaign and casting of votes when voters exercise their choice of who to vote for. We say so because of the wording of section 97(2) which distinguishes between malpractices which relate to the swaying of minds of voters in subsection (a) and malpractices that relate to the results process in subsection (b).

[80] We want to clarify therefore, that the timing of the alleged discharge of a firearm, did not remove the incident from the ambit of

the electoral process as a whole. We agree with both parties that the counting of votes and announcement of results are part of the electoral process, and to the trial court's credit, at no point did it say it was not. The trial court confined its remarks to section 97(2) (a). It said the incident had **no bearing on the voting process and the results thereof as envisaged by section 97(2) (a)**. It is therefore clear that the trial court was alive to the fact that the incident was not excluded from a related provision on post voting processes of vote counting and announcement of results namely section 97(2) (b).

[81] In the case of **Dean Masule v Romeo Kangombe**¹⁰ this Court held that section 97 (2) (b) relates to the non-compliance with the law in the conduct of elections and calls for the annulment of an election in the event of such non-compliance which affects the result.

[82] With regard to the assessment of the evidence, we are mindful that election petitions involve a large number of vested interests in a highly charged atmosphere in which conclusive resolution of the issues is necessary for communities to find acceptance and move on; we shall therefore proceed to assess the evidence on record.

[83] The evidence on the incident begins at pages 323 and continues to page 326 of the record of appeal. The Appellant testified to the incident as PW1. At pages 324 to page 325, the transcription reads:

He just parked parallel with us then we saw it that it's Wilbroad Musonda then I told the guys, start moving! Then we started moving then he fired one gun shot, then I told the guys just make a turn so that we go to Mporokoso instead of where we going to Kasama here, we just make a turn we go to inside Mporokoso where there is liberty station, that road will lead us to the police station, when the driver said, no he will kill us because he was coming very fast, then I said just turn he is not going to kill us then we turned and applied emergency brakes, then the land cruiser stopped then he started following us, as he was following us he wanted to overtake us, then I told my driver that start moving like that (describes zigzag movement) when he want to come our vehicle comes like this, when he went to his side, our vehicle comes like this that's when we went to the police station.(sic)

[84] Cross-examination of the Appellant on the said incident runs from pages 353 to 354 of the record of appeal. The transcription reads:

Q. ... firstly what was the registration number of that vehicle?

A. It was at night, so I could not see the number plate but I saw the person chasing me.

Q. You did not see the number plate but you saw the person chasing you? .

A. Yes I saw him.

Court: Who was chasing you?

A. Wilbroad Musonda, the agent for, I even reported to the police and the documents are there.

Q. Before Court, have you brought those documents?

A. They are in the car.

Q. So let us understand, counting is going on and this person just decides to chase you?

A. Yes that was the nature of PF, they were chasing us with guns and that was the 4th incident of gun shots.

Q. Kindly tell the Court that in fact there has never been an arrest of this person on the allegation that you made?

A. No, because they were feared.

[85] Other testimony on the incident came from PW5 at pages 393 to 394 of the record of appeal. The transcription reads:

A. When I looked in the side mirror, I saw a vehicle coming.

Q. What time was this?

A. Around 20.30 hours.

Q. Yes?

A. When I saw that vehicle it had full light flashed, My Lord, then I thought this vehicle is very busy then I had to give chance I indicated so that it could pass through, My Lord.

Q.(sic) So I moved along the side of the road and then vehicles came there and parked side by side?

Q. And then?

A. Kokai then dropped the side mirror and then produced a firearm, My Lord.

Q. What is the name of that person you are talking about?

A. Wilbroad Musonda Kokai the one I am talking about, My Lord

Q. Then what happened?

A. Then where I wanted to go through there was another vehicle canter coming through there, that's how I just went like that, Mr. Kokai was disturbed by that canter.

Q. what's the name of this Kokai you are talking about?

A. Wilbroad Musonda Kokai.

Court: Yes

A. After being disturbed by that canter, I went through and then he followed me behind and he wanted to overtake me, My Lord.

Court: Yes

A. And then he discharged a firearm three times and he started now following me behind and that's how I started driving the vehicle like that.

Q. What happened after that?

A. He switched off the lights on his vehicle and then I went straight to the police station, My Lord.(sic)

[86] The cross-examination of PW5 runs from pages 395 to 398 and is too long to reproduce here. However, the gist of it is that the witness denied being a UPND cadre and said he was just a driver. He described the weapon used as black pistol which he saw because there was a light on in the car which was driven by Mr Kokai who was alone in the car. He too did not see the number plate of the car but based on the colour he testified that it was owned by Mr Kokai. That he drove off after he saw Mr Kokai produce the gun but admitted that the said gun was never recovered. He also testified that there were three gunshots and if someone told the court that there was one gunshot, that person would be lying. There was no re-examination of the witness.

[87] The third witness to testify on the incident was PW10 a police officer at the rank of Assistant Superintendent. His testimony on the incident which begins at page 448 of the record of appeal was that around 20.00 hours on 12th August, 2021 he received a telephonic report from the Appellant that he had been shot at by Wilbroad Musonda who was driving a white land cruiser registration number not mentioned.

[88] That at 20.03 hours he instructed his officers from the C.I.D section to go and visit the scene but no cartridge or firearm was recovered. That a docket was opened and Wilbroad Musonda was arrested but released upon instructions from the provincial police command. In cross-examination he testified that he was aware of only one witness who reported the alleged discharge of a firearm and identified the witness as the Appellant. He admitted that he had no proof that a firearm was discharged.

[89] We have carefully considered the evidence above. We find that there are several weaknesses. First PW1 and PW5 were both witnesses with an interest to serve because PW5 is an employee of PW1. They could not corroborate each other. Some other independent evidence was required to corroborate their evidence. The Appellant contended that independent evidence was provided by PW10. While we agree that PW10 was indeed an independent witness, he was not an eye witness to the incident and his knowledge of it was based solely on the report made by the Appellant. Therefore, he did not provide any corroboration on the occurrence of the alleged event. In fact, he testified that his efforts to search the location where the incident

allegedly took place yielded no physical evidence of the alleged shooting incident.

[90] Secondly, the three witnesses contradicted themselves in a material particular on a number of points. Firstly, PW1 testified to one gunshot whereas PW5 testified to three. Each witnesses' narration of the events as they unfolded was markedly different. There was a discrepancy in relation to the timing of the events. Further, PW10 testified that there was only one witness to the incident namely PW1. That the report was made by phone and that he advised PW1 to follow up the following day whilst both PW1 and PW5 testified to driving to the police station to report after they were shot at.

[91] Even without going to the evidence of the 1st Respondent we are inclined to the view that this is weak evidence which is far from the high degree of convincing clarity that is required.

[92] We have nevertheless examined the evidence in defence. The evidence of the 1st Respondent who testified as RW1 is at page 464 where the transcription reads:

A. My Lord, my agent being Wilbroad Musonda was at all times from 09.00 hours in the morning of the 12th with me sitting at Misokolo Village to monitor the election activities throughout the Constituency, My Lord, we were together until 01.00 hours the following day which was the 13th of August. My Lord it is therefore not true that he would have left Misokolo to go and discharge a

The 1st Respondent in cross-examination at pages 494 to 496 of the record of appeal, denied that Wilbroad Musonda was ever arrested for the offence of wilful discharge of a firearm and subsequently released. [93] Wilbroad Musonda was RW2. At page 503 of the record of appeal, he denied, during examination in chief, ever discharging a firearm or being arrested and branded the allegation a big lie. During cross-examination at pages 506 to 507 of the record of appeal he reiterated that he was never arrested. RW2 maintained a blanket denial of the incident. He denied knowing who the UPND candidate was. He said he was not a PF member even though he had been appointed the election agent for 1st Respondent. With the exception of the 1st Respondent, he did not know the people he spent the whole day and evening with at Misokolo on 12th August, 2021. He did not know the polling agents who were stationed at the totalling centre. His narration of how he left Misokolo is troubling enough for us to quote relevant portions of the transcription.

Q. On 12th August were you driving this Land Cruiser?

A. No, My Lord, they were parked.

Q. You walked home?

A. My Lord, when it was dawn I was taken home by a driver who was driving a Toyota Corolla.

Q. Witness let's get this clearly you are saying every day you used to knock off late from Misokolo, right? You said when you used to

knock off late you would go to your home at night, that's what you told this Court.

A. Yes, My Lord.

Q. As an agent for Mr. Mundubile who had all these seven vehicles. Then on 12th after midnight or whatever time you said it was, when you finished and the results were out you decided to hire a Corolla, that's what you want the Court to believe?

A. Yes My Lord that is what I mentioned.*(sic)*

[94] Wilbroad Musonda was the 1st Respondent's campaign manager. His evidence does not point to his being a credible witness because of his blanket denial of not just the events of 12th August, 2021 but also of notorious facts and events related to his job and circumstances, such as the name of the opposition candidate, the names of the 1st Respondent's polling agents at the totalling centre and so on.

[95] Further, both RW1 and RW2 were also witnesses with an interest to serve therefore they could not corroborate each other on the point that RW2 spent all of 12th August at Misokolo. They also contradicted each other in a material particular as RW1 testified that RW2 left Misokolo at 1am whereas RW2 said he left at dawn.

[96] Having considered the evidence on the issue in its entirety, it is our position that regardless of what might be said about the 1st Respondent's evidence, it was incumbent upon the Appellant to prove clearly and convincingly that the incident he alleged did occur. It is our finding that he did not do so. The court's omission to make a finding as to whether the alleged incident had been proved or not does on the one hand give ground 3 some merit but only to that extent. We are not convinced that the incident which was the basis of the entire appeal was proven to the required standard of a high degree of convincing clarity. Grounds 1, 2, and 3 therefore fail to the extent to which they assume that the alleged incident was proved by the evidence on record.

[97] Grounds 4, 5 and 6 we find to have no merit whatsoever. Ground 4 alleged that the trial court ignored evidence related to the arrest of Wilbroad Musonda. This claim has no relevance because the incident itself has not been proved to the required standard. It follows that there is no basis for the accusation directed at the trial court.

[98] Ground 5 alleged that the court mis-applied section 36 by failing to distinguish between an agent or candidate who voluntarily stays away from the totalling centre and one who is prevented from doing so by his opponent. Since it has not been proved that the alleged incident did take place, there is no basis upon which this ground can be considered. It has no merit and is dismissed accordingly.

[99] Ground 6 alleged bias by the court. This ground has no merit as the evidence from the 1st Respondent which was accepted by the court relates only to the finding that two of the Appellant's representatives were present at the totalling centre during the counting and announcement of results. The finding has not been challenged by the Appellant. The rest of the evidence on the alleged incident was not evaluated as the court held that the incident was not within the ambit of section 97(2) (a). Ground 6 is accordingly dismissed.

[100] This means that the Appellant's substantive case which was founded on an incident which has not been proven to have taken place

must fail. The appeal is dismissed and we uphold the holding of the lower court that the 1st Respondent was duly elected Member of Parliament for Mporokoso Constituency.

[101] We order each party to bear their own costs both here, and in the court below.



M.S. Mulenga
Constitutional Court Judge



P. Mulonda
Constitutional Court Judge



M.M. Munalula (JSD)
Constitutional Court Judge



M.K. Chisunka
Constitutional Court Judge



J.Z. Mulongoti
Constitutional Court Judge