

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

**2021/CCZ/A0029**

**IN THE MATTER OF: THE PARLIAMENTARY ELECTION RELATING TO  
MFUWE CONSTITUENCY HELD ON 12<sup>TH</sup> AUGUST,  
2021**

**IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, THE  
CONSTITUTION OF ZAMBIA ACT, CHAPTER 1,  
VOLUME 1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: ARTICLES 1, 2, 5, 8, 9, 45, 46, 48, 49 AND 50, 54,  
70, 71, 72 AND 73 OF THE CONSTITUTION OF  
ZAMBIA, CONSTITUTION OF ZAMBIA ACT,  
CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTIONS 29, 37, 38, 51, 52, 55, 58, 59, 60, 66, 68,  
69, 70, 71, 72, 73, 75, 76, 81, 83, 86, 87, AND 89 OF  
THE ELECTORAL PROCESS ACT NO. 35 OF 2026**

**IN THE MATTER OF: SECTIONS 96, 97, 98, 99, 100, 106, 107 AND 108 OF  
THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

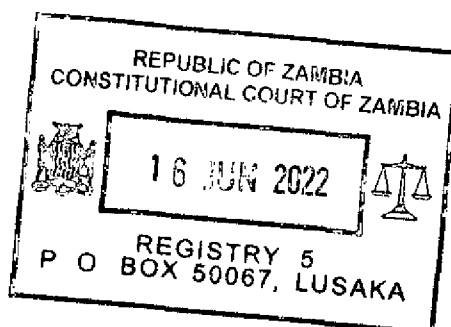
**AND IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016**

**BETWEEN:**

**NEWTON ISAIAH NG'UNI**

**AND**

**MAUREEN MABONGA  
ELECTORAL COMMISSION OF ZAMBIA.**



**APPELLANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

Coram: Sitali, Mulenga, Mulonda, Munalula and Chisunka, JJC on 21<sup>st</sup> April, 2022 and on 16<sup>th</sup> June, 2022

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

For the 1<sup>st</sup> Respondent: Mr. L.C. Lemba of Mulungushi Chambers  
Mr. J. Tembo of Linus E. Eyaa and Partners

For the 2<sup>nd</sup> Respondent: Mr. B.M. Musenga and Mr. M. Bwalya – In House Counsel

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## JUDGMENT

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Mulenga, JC delivered the Judgment of the Court

### Cases cited:

1. *Nkandu Luo and Another v Doreen Sefuke Mwamba and Another CCZ Selected Judgment No. 51 of 2018*
2. *Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014*
3. *Sikota Wina and Others v Micheal Mabenga SCZ Judgment No. 15 of 2003*
4. *Mususu Kalenga Building Ltd and Winnie Kalenga v Richman's Money Lenders Enterprises (1999) Z.R. 27 (SC)*
5. *Kufuka Kufuka v Mundia Ndalamei CCZ Appeal No. 8 of 2007*
6. *Lewanika and Others v Chiluba (1998) Z.R. 79*
7. *Abuid Kawangu v Elijah Muchima CCZ Appeal No. 8 of 2017 (2016/CCZ/A039)*
8. *Richard Sikwebele Mwapela v Miyuyi Chinga CCZ Appeal No 14 of 2017 (2016/CCZ/A037)*
9. *Margaret Mwanakatwe v Charlotte Scott and Attorney General CCZ Selected Judgment No. 50 of 2018*

### Legislation referred to:

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Electoral Process Act No. 35 of 2016*
3. *The Constitutional Court Act No. 8 of 2016*

## **Introduction**

- [1] This is an appeal against the Judgment of the High Court dated 23<sup>rd</sup> November, 2021 which dismissed the Appellant's petition challenging the election of the 1<sup>st</sup> Respondent.

## **Background**

- [2] The Appellant was among eight (8) candidates who contested the Parliamentary elections for Mfuwe Constituency, in which election the 1<sup>st</sup> Respondent who stood on for the Patriotic Front (PF) ticket emerged winner after polling 5,101 votes while the Appellant who stood on the United Party for National Development (UPND) ticket came out third and polled 1,809 votes. The Appellant petitioned the election of the 1<sup>st</sup> Respondent before the High Court alleging that the 1<sup>st</sup> Respondent conducted widespread electoral malpractices during the campaign period. The electoral malpractices complained of comprised allegations of distributing of money and bicycles; intimidating voters using threats; campaigning on polling day; and abusing government resources through the District Commissioner by the use of the government vehicle and the social cash transfer programme to the 1<sup>st</sup> Respondent's advantage. With regard to the 2<sup>nd</sup> Respondent, the Appellant alleged that it did not

conduct the election in accordance with the electoral laws as it allowed its motor vehicle to be used by PF officials for campaigning and ferrying voters on polling day.

[3] During the trial, the Appellant testified as PW1 and called thirteen (13) other witnesses. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent relied on their respective answers and affidavits in opposition to the petition and did not call witnesses.

[4] After reviewing the evidence on the various allegations and the submissions, the trial Judge considered the following three broad clusters:

- i. Whether the 1<sup>st</sup> Respondent committed any corrupt practice or illegal practice within the meaning of section 97 of the Electoral Process Act, either by herself or through her election agent or polling agent or any other person with her knowledge and approval or consent.
- ii. If so, whether the majority of voters in Mfuwe Constituency were or may have been prevented from electing the candidate whom they preferred; and
- iii. Whether the 2<sup>nd</sup> Respondent did not conduct the elections in accordance with the electoral laws and if so whether the non-

compliance affected the results of the said election in a substantial manner.

- [5] The trial Court evaluated the evidence and set out its findings. With regard to the issue of distribution of money, the trial Court stated that in the absence of corroboration or physical, pictorial or video evidence, the allegations had not been proved to a fairly high degree of convincing clarity. Further, that it was not clear that the alleged distribution of money affected the majority of registered voters in the Constituency by preventing them from electing their preferred candidate especially since the Appellant came out third in the polls.
- [6] Regarding the distribution of bicycles, the trial Court found that PW3 and PW 8 linked the 1<sup>st</sup> Respondent to the distribution of some bicycles but that the second element on the majority or widespread requirement of section 97 (2) (a) of the Electoral Process Act No. 35 of 2016 (hence forth EPA) had not been met and that the impact it had on the majority of voters in the constituency had not been outlined. As regards the evidence of PW2 to PW8, the trial Court found that only one claimed to have been given a bicycle by the 1<sup>st</sup> Respondent while the others received the bicycles from persons who were not election agents of the 1<sup>st</sup>

Respondent. Further, that a good number of these witnesses stated that it was the Chief (PW3) or other PF party officials who instructed them to vote for the 1<sup>st</sup> Respondent and not the 1<sup>st</sup> Respondent herself or her agent.

- [7] The trial Judge found further that the allegations relating to the social cash transfer had not been proved owing to the absence of corroboration of the evidence of PW9 and PW14. With regard to the allegation of threats, the trial Court found that even though there was evidence that threats were made by and on behalf of the 1<sup>st</sup> Respondent, the evidence was not sufficiently clear to prove that the majority of the electorate were prevented from electing a candidate of their choice. The trial Court further found that there was insufficient evidence to show that the 1<sup>st</sup> Respondent was campaigning on election day. The evidence of PW10, PW11 and PW12, who testified on this aspect, was found to lack corroboration and that PW11 gave contradictory evidence. The allegations relating to the use of government resources by the District Commissioner and the vehicle alleged to belong to the 2<sup>nd</sup> Respondent were equally found not to have been proved to the required standard.

[8] The learned trial Judge therefore determined that although there were instances of electoral malpractice, there was overall no evidence to show the impact or widespread nature of the alleged malpractices on the majority of voters. The trial Court thus declared the 1<sup>st</sup> Respondent as duly elected Member of Parliament for Mfuwe Constituency.

[9] Being dissatisfied with the Judgment, the Appellant lodged this appeal on the following eleven (11) grounds:

1. The Court below erred in both law and fact when it dismissed the Appellant's petition despite the fact that all the Petitioners witnesses linked the 1<sup>st</sup> Respondent to the commission of electoral offences and misconduct.
2. The Court below erred in both law and fact when it held that the electoral misconduct and malpractices perpetrated by the 1<sup>st</sup> Respondent were not widespread and did not affect the majority of the voters.
3. The Court below erred in both law and fact when it awarded costs to the Respondents despite the facts of the case and in violation of the precedent on costs.
4. The Court below erred in law and in fact when it held that in the absence of any physical, pictorial or video evidence, the evidence adduced did not establish to a fairly high degree of convincing clarity that there was distribution of money for the purpose of winning the election and that the distribution did not affect the majority of registered voters in the constituency.

5. The Learned Court below erred in law and fact when it held that the distribution of money did not affect the majority of registered voters in the constituency by preventing them from electing their preferred candidate especially that the Petitioner came out third in the polls.
6. The Court below erred in law and in fact when it failed to connect the evidence of PW3 and PW8 which directly linked the 1<sup>st</sup> Respondent to the distribution of the bicycles as corroboration of the evidence that the distribution of the bicycles by PW3 and the District Commissioner was part of the 1<sup>st</sup> Respondent's campaign and done under her instruction and with her knowledge and consent.
7. The Court below erred in law and fact when it held that the evidence presented by the Petitioner failed to outline the impact the distribution of the bicycles by the 1<sup>st</sup> Respondent had on the majority of the voters in Mfuwe constituency.
8. The Court below erred in law and fact when it held that the evidence submitted on the allegation of abuse of social cash transfer did not discharge the high burden of proof placed upon the Petitioner.
9. The Court below erred in law and in fact when it held that there was no sufficiently clear evidence showing that as a result of the threats or misconduct complained of or even lack of voter education, the majority of the voters in Mfuwe constituency were or may have been prevented from electing the candidate they preferred.
10. The Court below erred in law and fact when it held that the Petitioner had not presented enough evidence to prove to the requisite high standard of proof the allegation that the 1<sup>st</sup> Respondent was campaigning on election day contrary to evidence on the record.
11. The Court below erred in law and fact when it held that there was no evidence which showed that the 1<sup>st</sup> Respondent, her election or polling agent abused government resources leading to the majority of voters in Mfuwe Constituency being prevented from electing the candidate of their choice contrary to evidence on the record.



### **Appellant's arguments in support of the appeal**

[10]The Appellant relied on the heads of argument filed on 10<sup>th</sup> January, 2022 in which he argued grounds one, two, four and five together. He submitted that he had discharged the burden of proof under section 97(2) of the EPA by linking the 1<sup>st</sup> Respondent to the electoral malpractices. The case of **Nkandu Luo and Another v Doreen Sefuke Mwamba and Another**<sup>1</sup> was cited to the effect that a candidate is only answerable for those things which he has done. It was the Appellant's contention that he had shown before the trial Court that the 1<sup>st</sup> Respondent flouted sections 14, 15(1)(a), (h), (i), (k) and (o) of the Electoral Code of Conduct and sections 81, 83(1)(c) and 89(1)(e) of the EPA.

[11]The Appellant highlighted some portions of the testimonies of PW2 to PW14 as directly linking the 1<sup>st</sup> Respondent to issuing threats and distributing bicycles and money in her campaign. The Appellant posited that the veracity of their testimonies was not challenged in cross examination but that it was only the lack of documentary, picture, video or other evidence and failure to report the malpractices that was questioned.

[12]The Appellant submitted that the testimony of a witness is sufficient without supporting documentary evidence as long as the weight of evidence is not diminished by contradictions, poor demeanour or falsities. He argued that the witnesses were from two chiefdoms and different villages who represented the whole constituency hence that the majority of polling stations were covered. This was based on the fact that many of the polling stations were close to the villages and six of the polling stations were bearing the same names as some villages. It was submitted therefore that the lower court's decision that the misconduct was not widespread was misguided.

[13] It was the Appellant's further contention that all the witnesses apart from PW3 confirmed that the 1<sup>st</sup> Respondent had given them money. The Appellant added that the fact that he came out third in the polls was not ground for the trial Court's decision not to nullify the election when the 1<sup>st</sup> Respondent committed malpractices.

[14] With respect to ground three challenging the award of costs by the trial Judge, the Appellant contended that the grant of costs to the 1<sup>st</sup> Respondent was erroneous as the matter before the court was not

frivolous or vexatious. He added that condemning the Appellant in costs went against the public interest of enabling people to exercise their rights in constitutional matters as held in **Saul Zulu v Victoria Kalima**<sup>2</sup>.

[15] The Appellant's argument on grounds six and seven was that the court below erred when it held that the evidence of PW3 and PW8 did not corroborate that of PW2, PW4, PW5 and PW6 that the 1<sup>st</sup> Respondent was leading the distribution of bicycles in Chief Chindaponde's area. It was submitted that these witnesses stated that the 1<sup>st</sup> Respondent said she would bring bicycles for distribution to headmen in the chiefdom. Even if she did not personally distribute the same, this showed a direct link between the 1<sup>st</sup> Respondent's words or intention and subsequent distribution of bicycle. Further, that PW3, the chief, indicated that the 1<sup>st</sup> Respondent took the bicycles to the palace and PW8 testified that he was personally given a bicycle together with three other headmen by the 1<sup>st</sup> Respondent. PW8 further testified that nearly a hundred headmen received the bicycles and were ordered to inform residents in their villages to vote for the 1<sup>st</sup> Respondent. The Appellant further contended that the bicycle distribution had an effect on the majority of the electorate in the

constituency who were induced by persons in authority to vote for the 1<sup>st</sup> Respondent.

[16] Grounds eight and nine were also argued together. The Appellant contended that the 1<sup>st</sup> Respondent issued threats to villagers of Salamu and Spooni villages that they would not receive the social cash transfer money as testified by PW9 and PW14. These threats, it was contended, had an effect on the majority of the electorate. The Appellant added that the villagers who were threatened with being captured by a computer during the voting were intimidated based on the testimonies of PW6, PW9, P10, PW13 and PW14. The other threat was that the 1<sup>st</sup> Respondent stated that the bicycles given out would be grabbed if the headmen did not do as they were told as testified by PW6. The Appellant argued that these threats by the 1<sup>st</sup> Respondent were exacerbated by the lack of voter education and the fact that the 1<sup>st</sup> Respondent instructed the headmen to write the national registration card (NRC) and voter card numbers of the people in the constituency.

[17] The Appellant posited that the failure by the witnesses to report the threats was proof of lack of voter education rather than untruthfulness. It was the Appellant's final submission on these grounds that the trial court

erred when it found that there was no clear evidence of threats, and that the lack of voter education had no effect on the elections.

[18] Under ground ten, the Appellant submitted that three witnesses, PW10, PW11 and PW12, saw the 1<sup>st</sup> Respondent give money to voters and PW11 was actually given K50.00 while standing at the end of the queue at Mabonga Primary School polling station. Further, that the evidence of PW10 and PW11 was not challenged and did not require corroboration. He contended that the lower court therefore misguided itself in holding that the Appellant had not proved the allegations to the required standard.

[19] Arguing ground eleven, the Appellant contended that the fact that the District Commissioner was part of the 1<sup>st</sup> Respondent's campaign team showed abuse of government resources since she was a government employee. He added that the 1<sup>st</sup> Respondent also relied on a government project, under a presidential initiative, for the distribution of the bicycles contrary to the EPA and the holding of the Supreme Court in the case of **Sikota Wina and Others v Michael Mabenga**<sup>3</sup> that prohibited use of government facilities for political purposes.

[20] In the oral augmentation of the heads of argument at the hearing, learned counsel for the Appellant, Ms Mwiinga, emphasised the Appellant's position that there was overwhelming evidence before the trial Judge which justified the nullification of the election. It was her further contention that the Appellant's evidence showed the widespread nature of the electoral infractions proved to have been perpetrated by the 1<sup>st</sup> Respondent in that witnesses were drawn from various villages in all parts of the constituency. Counsel submitted that this was enough for the trial Judge to find that the majority of the voters may have been swayed to vote for the 1<sup>st</sup> Respondent as opposed to their preferred candidate. She urged us to uphold the Appeal.

### **1<sup>st</sup> Respondent's arguments in opposition to the appeal**

[21] The 1<sup>st</sup> Respondent filed heads of argument in opposition to the Appeal on 7<sup>th</sup> April, 2022 in which she emphasised the requirement set by section 97 (2)(a) of the EPA to the effect that once electoral offences have been proved as being linked to the candidate, a petitioner has to further prove that the electoral offences prevented the majority of voters from electing their preferred candidate. This, in the 1<sup>st</sup> Respondent's view was not done

by the Appellant as no evidence was led to show that the majority of voters were prevented from voting for their preferred candidate. The 1<sup>st</sup> Respondent further argued that the evidence tendered by the Appellant's witnesses was fraught with inconsistencies, contradictions and was hearsay in nature and lacked corroboration by way of video, pictorial or audio evidence. Hence, that the burden of proof was not discharged by the Appellant.

[22] With specific reference to the allegation of distribution of bicycles by the Chief (PW3), the District Commissioner and the former President on behalf of the 1<sup>st</sup> Respondent, it was contended that there was no evidence that the three people were election agents of the 1<sup>st</sup> Respondent as defined by section 2 of the EPA. Further, the testimonies of PW2, PW3, PW4, PW5, and PW8 were extensively quoted to highlight their contradictions on the issue of bicycles.

[23] With respect to the allegation regarding the distribution of money, the 1<sup>st</sup> Respondent argued that the evidence of PW9, PW10, PW13 and PW14 did not conclusively establish the allegation against the 1<sup>st</sup> Respondent or that the said distribution affected the majority of voters. Regarding the allegation of issuing threats, the 1<sup>st</sup> Respondent submitted that the

testimonies of PW6, PW9 PW10, PW13 and PW14 did not prove the allegation to the required standard.

[24] The 1<sup>st</sup> Respondent implored us to ignore the Appellant's assertion that there was low voter education in Mfuwe and the regard to the number of voters in chiefdoms on the basis that the issues were not pleaded. The cases of **Mususu Kalenga Building Limited and Winnie Kalenga v Richman's Money Lenders Enterprises**<sup>4</sup> and **Saul Zulu v Victoria Kalima**<sup>2</sup> were cited as authority for the position that an appellate court should not entertain any matters that were not raised in the lower Court.

[25] With regard to ground three, the 1<sup>st</sup> Respondent supported the trial judge's award of costs against the Appellant based on the fact that the Court had the discretion to award costs pursuant to section 30 of the Constitutional Court Act No. 8 of 2016.

[26] Addressing grounds six and seven, the 1<sup>st</sup> Respondent pointed out that the evidence of PW3 and PW8 did not link her to the alleged distribution of bicycles as the act was allegedly done by individuals who were not her election agents and there was no evidence of the majority of voters being prevented from electing their preferred candidate. The 1<sup>st</sup> Respondent further outlined the inconsistencies and contradictions in the testimonies



of PW2, PW4, PW5 and PW6. It was added that the issue of about hundred village headmen attending the alleged meeting was not pleaded.

[27] In respect of grounds eight and nine, the 1<sup>st</sup> Respondent argued that there was no evidence showing that the alleged threats to do with social cash transfer were made to the majority of registered voters as evidenced by the testimonies of PW9 and PW14 which were recounted on this issue. It was further submitted that none of the alleged threats were reported to the 2<sup>nd</sup> Respondent.

[28] Arguments on ground ten regarding the allegation of campaigning on election day impugned the evidence of PW10 and PW11 on the grounds that it was inconsistent, contradictory and not supported by concrete evidence. In the 1<sup>st</sup> Respondent's view, the trial judge was right to hold that the Appellant had not furnished cogent evidence showing that the 1<sup>st</sup> Respondent was campaigning on election day.

[29] Lastly, on ground eleven, the 1<sup>st</sup> Respondent submitted that she did not use government resources as a campaign tool and any evidence furnished by the Appellant on this issue was not linked to her. Further, that the Chief (PW3) and the District Commissioner were not her election agents.

[30] By way of oral augmentation, learned counsel for the 1<sup>st</sup> Respondent, Mr Lemba, begun by conceding to ground three of the Appeal. In so doing he noted the provisions of section 109 of the EPA and our decision in **Kufuka v Mundia Ndalamei**<sup>5</sup>.

[31] Responding to the oral submissions made on behalf of the Appellant, Mr Lemba contended that the threshold for nullifying an election was high and the Appellant carried the burden of proving that the alleged electoral offences had the effect of swaying the majority of voters from electing the candidate of their choice. Mr Lemba proffered that to satisfy the threshold the Appellant was required to prove that the misconduct was widespread and that in this case the Appellant did not furnish statistical information indicating that the majority of the electorate in Mfuwe District were swayed by the electoral offences. He thus urged this Court to dismiss the appeal for lack of merit.

## **2<sup>nd</sup> Respondent's arguments in opposition to the appeal**

[32] The 2<sup>nd</sup> Respondent, in opposing the Appeal, relied on its heads of argument filed on 4<sup>th</sup> March, 2022. The gist of their arguments was that

the standard of proof set out in **Lewanika and Others v Chiluba**<sup>6</sup> and **Saul Zulu v Victoria Kalima**<sup>2</sup> is higher than on a balance of probabilities and as such the allegations are required to be proved to a high degree of convincing clarity.

[33] The 2<sup>nd</sup> Respondent cited section 97 (2) of the EPA and the case of **Nkandu Luo v Doreen Sefuke Mwamba**<sup>1</sup> as setting out the threshold to be achieved by the Appellant, who was the petitioner, to prove the case in an election petition. It was contended that the burden of proof lies on the party alleging, as held in the case **Abuid Kawangu v Elijah Muchima**<sup>7</sup>, to show the court that a candidate personally or through his or her agent committed an illegal practice which was widespread or that there was non-compliance in the conduct of the election which affected the results.

[34] At the hearing of the Appeal, learned counsel for the 2<sup>nd</sup> Respondent, Mr Musenga, relied on the heads of argument and urged us to dismiss the appeal for lack of merit

### **Appellant's arguments in reply**

[35] The Appellant filed arguments in reply on 21<sup>st</sup> April, 2022, in which he argued that the allegations proved affected or may have affected the majority of voters. In countering the argument advanced by the 1<sup>st</sup>

Respondent, the Appellant maintained that there was cogent evidence linking the 1<sup>st</sup> Respondent to the electoral offences. The Appellant pointed out that the 1<sup>st</sup> Respondent was party to the conduct of the District Commissioner and PW3 (the chief) of distributing bicycles. Further, that the evidence of PW2 and PW4 to PW11 was sufficient and, in the Appellant's view, did not need corroboration as the witnesses had no interest to serve. He added that the testimonies of PW3 and PW4 were consistent, on the distribution of bicycles to 83 headmen who presided over the majority of the electorate, despite giving varying figures on the number of headmen. The Appellant maintained that the distribution of bicycles was widespread as the bicycles were distributed in two chiefdoms, namely, Chiundamponde and Mpumba.

- [36] On the aspect of the Appellant's evidence being hearsay, the Appellant submitted that all his witnesses spoke to perceived facts. The Appellant noted that the 1<sup>st</sup> Respondent failed to challenge the evidence on the distribution of money in a meeting attended by 3000 people and thus it was an established fact which she could not challenge it on appeal. Concluding arguments on grounds one, two, four and five, the Appellant conceded that he bore the burden of proving that the electoral offences were widespread and potentially affected the majority of the electorate.

[37] On grounds six and seven, the Appellant maintained that the 1<sup>st</sup> Respondent was linked to the distribution of the bicycles as per testimony of PW3. The Appellant's arguments on grounds eight and nine pointed out that there was ample evidence that the 1<sup>st</sup> Respondent wantonly issued threats to the majority of voters in Mfuwe Constituency according to PW9 and PW14.

[38] The Appellant argued in respect of ground ten that there was cogent evidence speaking to the allegation that the 1<sup>st</sup> Respondent had campaigned on election day. He pointed out the testimony of PW10 and PW11. Lastly on ground eleven, the Appellant maintained that the 1<sup>st</sup> Respondent made use of government resources in her campaign as there was evidence that as she distributed the bicycles she was in the company of the District Commissioner and PW3.

[39] In reply to the oral submissions made by the learned counsel for the 1<sup>st</sup> Respondent, Ms Mwiinga, reiterated the position that section 97 (2)(a) of the EPA did not require the Appellant to provide statistical evidence on the aspect that the majority of voters were affected by the electoral offences. Rather, it was enough to lead evidence showing the widespread nature or

scale of the offences so as to indicate to the court that the majority of voters may have been affected by the electoral offences. This, according to Ms Mwiinga, was what the Appellant had established. She thus urged us to uphold the Appeal.

### **Determination of the Court**

[40] We have considered the grounds of appeal, the judgment of the court below and the respective submissions of the parties. The appeal essentially challenges the findings of fact in relation to the allegations of electoral malpractice which were raised against the 1<sup>st</sup> Respondent only. Section 97 (2) of the EPA stipulates the grounds under which an election can be rendered void. The allegations against the 1<sup>st</sup> Respondent were based on section 97 (2)(a) of the EPA.

[41] Section 97 (2)(a) of the EPA provides:

**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.**

[42] Section 97 (2)(a) relates to the commission of a corrupt practice, illegal practice and other misconduct by a candidate or with the candidate's knowledge and consent or approval or with the knowledge and consent or approval of the candidate's election or polling agent. The said corrupt practice, illegal practice or misconduct must have prevented or have been capable of preventing the majority of voters from electing a candidate of their choice.

[43] In establishing whether the burden of proof was indeed discharged there must be cogent evidence of the commission of the corrupt or illegal practices or misconduct and that the same were widespread. We stated in the case of **Richard Sikwebele Mwapela v Miyuyi Chinga**<sup>8</sup> that:

**It is therefore not sufficient for the petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without further proving that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of voters from electing a candidate of their choice.**

[44] Therefore, for an allegation to succeed under this section 97 (2)(a) of the EPA, both aspects must be proved to the required standard, that is, a fairly high degree of convincing clarity.

[45] We now turn to consider the grounds of the appeal.

[46] Grounds four to eleven challenge the findings by the trial Judge that the Appellant did not prove the electoral malpractices attributable to the 1<sup>st</sup> Respondent to the required standard or that they were widespread and affected the majority of the electorate in the constituency as required by section 97 (2)(a) of the EPA. Grounds one and two are general grounds challenging the dismissal of the petition and the findings by the trial Judge that the electoral misconduct or practices perpetrated by the 1<sup>st</sup> Respondent were not widespread and did not affect the majority of the voters. These two grounds were argued together with grounds four and five relating to the issue of distribution of money and will therefore be addressed together. Ground three challenges the awarding of costs against the Appellant.

[47] We will first consider ground three which challenges the condemning of the Appellant in costs following the dismissal of his election petition. The Appellant submitted that this was erroneous as his petition was not frivolous or vexatious. The 1<sup>st</sup> Respondent has conceded this ground. We reiterate what we stated in the case of **Kufuka Kufuka v Mundia Ndalamei**<sup>5</sup>



that in election petitions, the guide on the awarding of costs is section 109 of the EPA which extensively deals with the issue of costs and how or when they may be awarded. In this case, the trial Judge did not make a finding before awarding costs against the Appellant. We therefore find merit in this ground of appeal and it is upheld. Accordingly, we set aside the order of costs by the court below.

[48] Ground one, two, four and five challenge the trial Court's finding in relation to the allegations of distribution of money to the electorate by the 1<sup>st</sup> Respondent. In particular, the finding that the evidence did not prove the allegations to a fairly high degree of convincing clarity and that it was equally not proved that the same was widespread or that the majority of voters in the constituency were affected.

[49] The Appellant argued that the testimonies of PW2 to PW14 directly linked the 1<sup>st</sup> Respondent to the distribution of money and only the lack of documentary, pictorial, video or other evidence and the failure to report the malpractices was questioned. Further, that the witnesses' testimonies were sufficient as they were not diminished by poor demeanour or contradictions and the two affected Chiefdoms covered the majority of the polling stations and therefore the misconduct was widespread.

[50] The 1<sup>st</sup> Respondent contended that the evidence proffered was fraught with inconsistencies, contradictions, hearsay and lacked corroboration. In particular, that the evidence of PW6, PW9, PW10, PW13 and PW14 did not conclusively establish the allegation against her on the distribution of money and issuing of threats.

[51] The issue for determination in grounds one, two, four and five is whether the Appellant discharged the burden of proof under section 97(2)(a) of the by proving that the 1<sup>st</sup> Respondent distributed money to the electorate and that this alleged electoral malpractice was widespread in the constituency. In the case of **Abuid Kawangu v Elijah Muchima**<sup>7</sup>, we stated that an appellate court will not lightly interfere with findings of fact of the trial judge that had the benefit of seeing and evaluating the witnesses unless it is shown that the findings of fact were either perverse or made in the absence of any relevant evidence or on misapprehension of the facts.

[52] We have considered the evidence on record. This relates to alleged incidents which occurred on 17<sup>th</sup> July, 2021, 21<sup>st</sup> July, 2021, 27<sup>th</sup> July, 2021, 31<sup>st</sup> July, 2021 and 5<sup>th</sup> August, 2021.

[53] As regards 17<sup>th</sup> July, 2021, PW14, Coillard Chita, stated that on 17<sup>th</sup> July, 2021 the 1<sup>st</sup> Respondent gave out K150.00 to each group of ten women while Chibesa Kabomba was giving out K100 to each group of ten men. This was after a meeting.

[54] With respect to 21<sup>st</sup> July, 2021, PW8, Selisho Yumba, said he and three others were given K200.00 each by the 1<sup>st</sup> Respondent on 21<sup>st</sup> July, 2021. PW9, Precious Bwalya Bowa, narrated that on 21<sup>st</sup> July, 2021 she was given K150.00 together with other people by the 1<sup>st</sup> Respondent. Further, that on 31<sup>st</sup> July, 2021 the 1<sup>st</sup> Respondent distributed K50.00 and K20.00 notes at Brian Saili's house.

[55] PW4, Douglas Bwalya, said he was among the 46 headmen who were given K200.00 each on 27<sup>th</sup> July, 2021 after being addressed by Prof. Nkandu Luo. The money was distributed by the 1<sup>st</sup> Respondent. In cross examination, PW4 said that the meeting with Prof. Nkandu Luo was on 27<sup>th</sup> August, 2021. In re-examination, he said it was on 26<sup>th</sup> August, 2021 and later said that he did not know the exact date but it was in August.

[56] PW2, Christopher Chisenga, stated that on 31<sup>st</sup> July, 2021 he was among 42 headmen who were addressed by Prof. Nkandu Luo and other PF party officials. Prof. Nkandu Luo later gave an envelope containing cash to the 1<sup>st</sup> Respondent who gave each of the headmen K150.00. That he later saw the 1<sup>st</sup> Respondent give unknown amounts of money to church leaders. PW5, Ng'andwe Mulima, and PW6, Chanda Kabula, echoed PW2's evidence of being given K150.00 on 31<sup>st</sup> July, 2021. The only difference was that PW5 said it was the 1<sup>st</sup> Respondent who distributed the money while PW6 said it was both Prof. Nkandu Luo and the 1<sup>st</sup> Respondent.

[57] Regarding 5<sup>th</sup> August, 2021, PW2 testified that on 5<sup>th</sup> August, 2021, Joe Malanji and other PF officials landed at Muwele Primary School. Joe Malanji then gave K20.00 notes to the 1<sup>st</sup> Respondent and another man and they gave the 300 people gathered K40.00 each. PW7, David Ndashe, said Joe Malanji gave money to the 1<sup>st</sup> Respondent and the two distributed it to about 300 people at Chanda Nkonde Primary School. PW13, Ivy Mushili, testified to the events similar to that of PW2 but stated that K40.00 was given to each of the 3,000 or more people by the 1<sup>st</sup> Respondent and two men.

[58] The trial Judge considered the evidence and stated that in the absence of any physical, pictorial or video evidence, the evidence had not established the allegation to the required standard. Further, that there was no clear evidence that the distribution of money affected the majority of votes. The trial Judge, at page J40 of the Judgment, added that no evidence was properly led on how many people attended the various meetings and in some cases there were contradictions in the material particular. The trial Judge summed at page J42 of the Judgment that although he had found instances of malpractice, there was no material to support the second element on the impact on the majority of voters.

[59] We note that regarding the allegation of distribution of money, PW2 said he was in the company of 42 headmen from chief Chiundaponde's chieftdom who were addressed by Professor Nkandu Luo and were each given K150 to vote for the PF on 31<sup>st</sup> July, 2021. PW5 and PW6 echoed this evidence although they did not give the number of headmen in attendance. This was at Muwele Primary School.

[60] PW9's evidence related to the distribution of K50.00 and K20.00 notes by the 1<sup>st</sup> Respondent at Brian Salli's house and being given K150.00 but did

not give the number of people concerned in both incidents. PW2, PW7 and PW13 said they witnessed the 1<sup>st</sup> Respondent distribute money with two other people. PW2 and PW7 stated that there were 300 people while PW13 said there were 3000 people or more. PW2 and PW13 said this was at Muwele Primary School while PW8 said it was at Chanda Nkonde Primary School. The evidence of PW8 related to four people.

[61] The trial Judge did not state which incidents of distribution of money were proved but only stated that it was more probable than not that the distribution of money was done. However, there is no explanation on which particular incidents were proved. We wish to guide that where a number of incidents of corrupt or illegal practices or misconduct are alleged as was the case in this matter, the trial court must always state in clear terms which incidents they consider to have been proved or not proved.

[62] The trial Judge at pages J31-J32 of the Judgment stated that:

**In my considered view, it can be discerned from the evidence that it was more probable than not that there was distribution of money done by and with the knowledge and consent of the 1<sup>st</sup> Respondent..... I find that the evidence adduced has not established to a fairly high degree of convincing clarity that there was distribution of money for the purpose of winning the election. Additionally, the evidence does not clearly convince me that this distribution affected the majority of the registered voters in the constituency by**

**preventing them from electing their preferred candidate especially that the petitioner came out third in the polls.**

[63] This shows that the trial Judge did not find that the allegations were proved to the required standard. The lower Court further stated that it was not clear that the distribution of money affected the majority of voters in the constituency. The lower Court added that none of the witnesses showed that the Appellant was their preferred candidate. This remark was of no consequence because what the trial court is required to do is to evaluate the evidence on an allegation and state whether it has been proved to the required standard and whether the same was widespread as to have prevented or may have prevented the majority of the electorate from electing a candidate of their choice.

[64] Having considered the testimonies of the witnesses that testified on the allegation of distribution of money on the record of appeal, we cannot fault the trial Judge in finding that there was insufficient evidence regarding the scope of the electoral malpractice in the constituency.

[65] It is settled law that allegations in election petitions must be proved to a higher standard than a balance of probabilities. We find that in the absence of cogent evidence as to the widespread nature of the alleged acts of distribution of money, the allegations were not proved to the

required standard in terms of section 97 (2) (a) of the EPA. Consequently, grounds one, two, four and five fail and are dismissed.

[66] Grounds six and seven impugn the trial Judge's finding that the evidence of PW3 and PW8 did not corroborate that of PW2, PW4, PW5 and PW6 that the 1<sup>st</sup> Respondent was leading the distribution of bicycles in Chief Chiundamponde's area. They also impugn the further finding that the Appellant had failed to prove the impact of the bicycle distribution by the 1<sup>st</sup> Respondent on the majority of the voters in the constituency.

[67] It was the Appellant's contention that there was a direct link between the 1<sup>st</sup> Respondent's words or intention and the subsequent distribution of bicycles which were received by nearly a hundred headmen. The 1<sup>st</sup> Respondent on the other hand submitted that the evidence of PW3 and PW8 did not link her to the distribution of bicycles as the act was done by third parties who were not her election agents. Further, that the testimonies of PW2, PW4, PW5 and PW6 had inconsistencies and contradictions and there was no evidence of the majority being affected.

[68] To consider the challenge on the findings of fact, we will first outline the summary of the evidence of the witnesses in issue.



[69] PW2, Christopher Chisenga, testified that he was assured by the 1<sup>st</sup> Respondent on 31<sup>st</sup> July, 2021 that she would deliver bicycles to them at a later date. On 6<sup>th</sup> August, 2021 the Chief (PW3) sent word that bicycles had arrived and on 9<sup>th</sup> August, PW3 and his retainer distributed them to headmen, in the presence of the District Commissioner. He stated that it was the Chief who instructed him to vote for the 1<sup>st</sup> Respondent's party and not the 1<sup>st</sup> Respondent. PW2 said he was unable to verify that the high-level party officials were acting on behalf of the 1<sup>st</sup> Respondent.

[70] PW3, Lagern Lexton Mumba, the Chief, testified that he met the former Republican President with other traditional leaders at Chitulika village where he promised them bicycles. The said bicycles were later delivered to his palace by the 1<sup>st</sup> Respondent and he later distributed bicycles to 83 headmen in the presence of the District Commissioner. His further evidence was that the 1<sup>st</sup> Respondent was not present when the bicycles were being distributed.

[71] PW4, Douglas Bwalya, said 87 bicycles were distributed to village headmen by the District Commissioner, in the presence of the Chief (PW3) who instructed the headmen to vote for a PF candidate including

the 1<sup>st</sup> Respondent. He admitted that he did not know if the District Commissioner was working under the instruction of the 1<sup>st</sup> Respondent.

[72] PW5, Ng'andwe Mulima, said he was among the 84 headmen who were given bicycles at the Chief's palace in the presence of the District Commissioner. PW5 added that he saw the 1<sup>st</sup> Respondent deliver the bicycles at the palace. PW6, Chanda Kabula, also a village headman, repeated the evidence of PW4 and PW5 on the distribution of bicycles. PW8, Selisho Yumba, testified that on 21<sup>st</sup> July, 2021, the 1<sup>st</sup> Respondent gave a bicycle each to him and three other headmen from Chief Mpumba's chiefdom at the roadside and asked them to campaign and vote for the PF.

[73] The evidence before us relates to the distribution of bicycles to village headmen in the presence of the District Commissioner. The evidence on record shows that PW2 to PW6 were village headmen or assistant headmen from various villages who all gave testimony relating to the distribution of bicycles. The summary of their evidence is that the bicycle distribution was done by PW3 and the District Commissioner. Of these five (5) witnesses who testified about the bicycle distribution at the Chief's palace, only PW3 (Chief) and PW4 mentioned that the 1<sup>st</sup> Respondent was

the one who made the delivery of the bicycles some days prior to the distribution. PW3 said he was alone with his family when the bicycles were delivered and the trial Court questioned the evidence of PW4 (who was erroneously referred to as PW5) on this aspect.

[74] From the facts on the record 83 headmen received bicycles which were distributed by the Chief (PW3) and the District Commissioner and were told to vote for the PF candidates. The trial Judge found that the allegation was proved. The Appellant had alleged in paragraph 6 of the petition that the District Commissioner distributed bicycles to headmen and campaigned to induce voters to vote for the 1<sup>st</sup> Respondent.

[75] The further finding of the trial Judge at page J42 of the Judgment was that there was no evidence to prove that the action and remarks or instruction by PW3 and the District Commissioner were made with the knowledge and consent or approval of the 1<sup>st</sup> Respondent. This finding cannot be faulted. Clear evidence was required on this aspect as even the Appellant acknowledged that the distribution of bicycles to the headmen was a government program under the presidential initiative. This was also confirmed by PW3, the Chief. The Appellant thus did not show that the distribution of bicycles to the village headmen by PW3 and the District

Commissioner was proved to the required standard as against the 1<sup>st</sup> Respondent.

[76] The trial Judge's further finding was that the incident of distribution of four bicycles involving PW8 and the subsequent request for PW8 and three (3) others to campaign and vote for PF was proved against the 1<sup>st</sup> Respondent.

[77] The other evidence of bicycle distribution was tendered by PW12 George Bwalya, who stood as a councillor on the UPND ticket. He said that he saw the bicycles for the presidential empowerment program at the PF command centre, at the 1<sup>st</sup> Respondent's house. He said he saw the 1<sup>st</sup> Respondent giving bicycles to some headmen. The trial Judge noted that PW12 was partisan and that his evidence was not corroborated and thus not proved to the required standard.

[78] In light of his findings, the trial Judge held that the distribution of bicycles by the 1<sup>st</sup> Respondent was not widespread and did not affect the majority of the electorate. The trial Judge cannot be faulted on this finding as it was supported by the evidence on record. It follows that grounds six and seven fail and are dismissed.

[79] With regard to grounds eight and nine, the Appellant argued that the testimonies of PW9 and PW14 proved that the 1<sup>st</sup> Respondent issued threats relating to social cash transfer in Salamu and Spooni villages and that these had an effect on the majority of the electorate. The 1<sup>st</sup> Respondent on the other hand contended that there was no evidence showing the alleged threats or that these were made to the majority of the electorate.

[80] We have considered the evidence on record. PW9, Precious Bwalya Bowa, stated that on 21<sup>st</sup> July, 2021 at Salamu Village, the 1<sup>st</sup> Respondent issued threats to the effect that the social cash transfer funds and fertiliser support benefits would be withdrawn if they did not vote for the PF. PW14, Coillard Chita, testified that the 1<sup>st</sup> Respondent on 17<sup>th</sup> July, 2021 at Spooni school issued threats that the social cash transfer funds would be withdrawn if they did not vote for the PF.

[81] The trial Judge's finding at page J34 of the Judgment was that the evidence tendered did not discharge the high burden of proof in the absence of corroboration. He further held that since the first element for nullification had not been proved, there was no need to interrogate the

second one on the effect on the majority of the voters. The trial Judge was on firm ground in holding as he did as it was incumbent on the Appellant to prove both elements to the required standard which the evidence of PW9 and PW12 did not discharge.

[82] The Appellant's further contention on this issue in ground nine is that due to lack of voter education the majority of the electorate in the two villages were prevented from voting for a candidate of their choice because of the threats. The trial Judge's finding on this aspect was that the Appellant did not provide sufficiently clear evidence to prove his assertion on the lack of voter education.

[83] As already stated above, the trial Judge was on firm ground in holding that once the alleged misconduct has not been proved to the required standard by a petitioner, there is no need to consider the second limb on the effect of the alleged misconduct on the majority of the electorate.

[84] In light of the evidence on record, it is our considered view that grounds eight and nine lack merit and are hereby dismissed.

[85] The Appellant's contention on ground ten is that PW10, PW11 and PW12 proved that the 1<sup>st</sup> Respondent campaigned on polling day and gave

money to voters at Mabonga Primary School polling station because the evidence of PW10 and PW11 was not challenged and did not require corroboration. The 1<sup>st</sup> Respondent's position was that the evidence of PW10 and PW11 was inconsistent, contradictory and not supported by concrete evidence.

[86] We have considered the evidence on record. PW10, Constance Chilufya, said she was a polling agent for an independent parliamentary candidate and had followed the 1<sup>st</sup> Respondent and saw her give k100.00 to a person at Mpumba polling station for the person to vote for all PF candidates but did not report the incident to either the police officer or ECZ officials. PW12, George Bwalya, a UPND councillor candidate, stated that while attempting to take a video of PF members at Mpumba Polling station he saw the 1<sup>st</sup> Respondent at the barrier of the polling station who appeared to be giving people K100.00 but could not get a clear shot because he was threatened. He did not state who threatened him.

[87] PW11, Peggy Mwale, said that whilst she was queuing to vote at Mabonga Primary School, she was given K50.00 by the 1<sup>st</sup> Respondent to hand over her National Registration and voters cards to some young men and to vote for the PF. She later stated that she was given the K50.00 by the

four young men who were given K100.00 notes by the 1<sup>st</sup> Respondent. She added that the four young men were recording the details in a book. She said the book was later grabbed from the young men by police officers.

[88] The trial Judge's finding on the three witnesses' evidence was that it did not prove the allegation that the 1<sup>st</sup> Respondent was campaigning on polling day to the requisite standard and that the evidence of PW12, a partisan witness, was not corroborated. The trial Judge also questioned the evidence of PW10 and PW11 who both stated that they did not report the alleged incidents which were said to have taken place right at the polling station and on the queue and despite PW10 being a polling agent.

[89] We cannot fault the trial Judge's finding that the allegation of campaigning on polling day was not proved to the requisite high standard of proof required in election petitions. Ground ten fails and is dismissed.

[90] Ground eleven attacks the finding on abuse of government resources. The Appellant posited that the 1<sup>st</sup> Respondent abused government resources because the District Commissioner was part of her campaign team and further that she relied on the government project of distribution of bicycles under the presidential empowerment initiative. The 1<sup>st</sup>



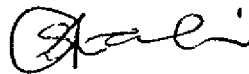
Respondent argued that the District Commissioner and the Chief were not her election agents and no evidence was adduced linking her to the use of government resources.

[90] We have considered the evidence on record on this allegation. In the case of **Margaret Mwanakatwe v Charlotte Scott and Attorney General**<sup>9</sup>, we stated that an election will be nullified under section 97 (2) (a) of the EPA where cogent evidence is provided to show that a candidate or the candidate's election or polling agent committed an electoral offence or that the offence was committed with their knowledge and consent or approval. This requirement was not satisfied by the Appellant. As already stated under the allegations relating to the distribution of bicycles, there was no evidence proving that the District Commissioner's activities were undertaken with the knowledge and consent or approval of the 1<sup>st</sup> Respondent. The trial Court at pages J38 and J39 of its Judgment found that there was no cogent evidence that the 1<sup>st</sup> Respondent used government resources in connection with the election or that these were used with her knowledge and consent or approval even in relation to the District Commissioner as required by section 97 (2) (a) of the EPA. The

trial Court was on firm ground in its finding. Ground eleven fails and is dismissed.

[91] In sum, only ground three on costs has succeeded. As the ten substantive grounds out of the Appellant's eleven grounds of appeal have failed, we accordingly dismiss the appeal.

[92] Each party is to bear its own costs in this Court and in the court below.



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**A.M. SITALI**  
**CONSTITUTIONAL COURT JUDGE**



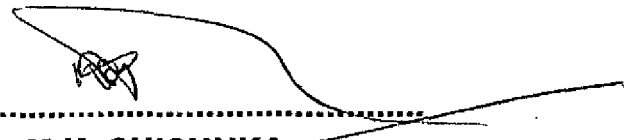
.....  
**M.S. MULENGA**  
**CONSTITUTIONAL COURT JUDGE**



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**P. MULONDA**  
**CONSTITUTIONAL COURT JUDGE**



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**M. M. MUNALULA J.S.D**  
**CONSTITUTIONAL COURT JUDGE**



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**M.K. CHISUNKA**  
**CONSTITUTIONAL COURT JUDGE**