

For the Petitioner: Mrs. S. Chabanenge Chazanaga of Messrs KBF and Partners and

For the Respondent: Mrs. L. Mushota of Messrs Mushota and Company

JUDGEMENT

Cases referred to:

1. *Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungiombe, Sebastian Saizi Zulu, Jennifer Mwaba v. Frederick Jacob Titus Chiluba (1998) ZR 49*
2. *Michael Mabenga vs. Sikota Wina, Mafo Wallace Mafiyo and George Samulele (2003) ZR 110*
3. *Khalid Mohamed v The Attorney General (1982) ZR 49*
4. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172*

Legislation referred to:

1. *The Constitution (amendment) Act No. 2 of 2016*
2. *The Electoral Process Act No. 35 of 2016*
3. *The Electoral (Code of Conduct) 2016*

This is a petition by Samuel Mukwamataba Nayunda who, together with the Respondent, Professor Geoffrey Lungwangwa, were the only two parliamentary candidates in the election for

Nalikwanda Constituency held on 11th August, 2016. The Returning Officer declared the Respondent Professor Geoffrey Lungwangwa as duly elected.

The Petitioner seeks to challenge the said election and his Petition states that the campaign in the said elections was characterized by acts of intimidation and violence against the Petitioner and bribery and corruption by the Respondents contrary to the provisions of the Electoral Process Act No. 35 of 2016(**hereinafter referred to as “Act No. 35 of 2016”**).

It was stated that during the campaign period the Respondent caused delivery of culverts, crushed stones and sand for the construction of Sasenda Bridge near Luatembo Polling Station in Siyowe Ward on Lui River. It was contended that a contractor was taken on site to start construction arrangements.

The Petition further states that on election-day, the Respondent was seen around the vicinity of Nakato Polling station with a vehicle laden with mealie-meal which was used to feed voters after the polls as gratification for voting for the Respondent at a location 400 meters from Nakato polling Station.

The Petition also states that the Respondent's agent known as Muleta Muimanenwa was engaged in acts of bribery and corruption and was seen by the Patriotic Front aspiring Councillor distributing money to voters at Lukweta on voting day.

It states that Mr. Gift Limpo and Joe Mubita had written and signed confessions of being paid inducements to vote for the Respondent at Nakanya Polling Station on voting day.

The Petitioner contends that as a result of the said illegal practices committed by the Respondent and his agents, the majority of the voters in the affected areas and/or polling stations were prevented from electing the candidate they preferred. He contended that the Respondent was not validly elected in terms of the Constitution and the Electoral Process Act.

The Petitioner prays that it be determined that the said Professor Geoffrey Lungwangwa was not duly elected or returned and that the election was null and void. He asked for the following reliefs:

- i. A declaration that the election of the Respondent as a Member of Parliament for Nalikwanda Constituency is null and void.*
- ii. A declaration that the illegal practices committed by the Respondent and/or his respective agents so affected the election result that the same ought to be null and void.*
- iii. An order that costs occasioned by the Petition be borne by the Respondent.*

The Respondent filed an Answer to the Petition on 29th September, 2016.

At trial the Petitioner gave oral evidence and called five witnesses in support of his Petition. In his evidence the Petitioner stated that he was the parliamentary candidate for Nalikwanda constituency contesting under the Patriotic Front ticket (**hereinafter referred to as the "PF"**) during the 11th August 2016 general elections. He brought this Petition before this Court so that the Court could nullify the election of Professor Geoffrey Lungwangwa who stood under the United Party for National Development ticket (**herein after referred to as "UNPD"**).

It was his testimony that there were only two candidates contesting for the Nalikwanda Constituency seat which were himself and Respondent. The constituency consists of 9 wards and out of the 11, 662 ballots cast he received 1,621 votes while the Respondent received 9,814 votes. 227 of the votes cast were rejected and the said results were contained in the bundle of documents.

It was his testimony that the Respondent was involved in massive intimidation, violence, bribery and corruption against the Electoral Code of Conduct. He also testified that he received numerous reports that the Respondent was engaged in various activities of which he caused delivery of culverts, crushed stones and sand to Lui River adjacent to Luatembo Polling Station in order to lure the electorate to vote for him and not the Petitioner. He stated that he had witnesses who would testify to that effect.

It was his evidence that prior to the elections, on 3rd August 2016, the Respondent while in a convoy of vehicles coming from Kaoma where the President of the UPND had a rally stopped at Nalweyi ward in Nalikwanda Constituency. The Respondent and his agents proceeded to the office of the PF along the Lusaka/Mongu Road and pulled down PF party chitenge materials and burnt them and entered the office where they found Kaselo Kayeye and attacked him. Upon hearing this report, his father PW3 went to his rescue and was also attacked and knifed by the Respondent and his agents. The matters were reported to the police and the police reports were before this Court.

On a date unknown but between the 1st and 11th August 2016, the Respondent and his agents did attack one PF member in Siyowe ward and caused fear and intimidation to on lookers because he was perceived to be a PF supporter.

With regard to the acts of bribery and corruption, the same were done with the view of influencing the electorate not to vote for the Petitioner but for the Respondent at Nakanya ward. This was reported to him and he had witnesses who would testify to that effect.

He further testified that he, while in the company of PW6 personally saw the Respondent distributing mealie-meal on polling day. The Petitioner said he did not do anything as the

Respondent quickly ran away. He added that he received complaints from people from the electorate who were on the queue and were addressed by the Respondent. He received further complaints from Mbekise ward and Mr. Sililo would testify to that effect.

It was his testimony that Mr. Muleta Muimane, an agent of the Respondent, was engaged in acts of bribery and corruption by distributing money to voters at Lukweta. This was witnessed by Mr. Muyunda, the PF aspiring councillor for Mutondo ward and Mr. Mukanwa. Mr. Muyunda was willing to testify to this effect.

The Petitioner testified that PW5 and Joe Mubita had written and signed statements admitting receipt of inducements to vote for the Respondent. On polling day the Petitioner was called between 12:00hrs and 13:30hrs and was advised that the Respondent was at Nakanya where he was busy carrying out these activities.

He testified that the loss that he suffered in the election, under normal circumstances he would not have lost because he was the most popular candidate. His popularity was due to the fact that the Respondent had been a Member of Parliament for the past 10 years without delivering in his constituency and as such people wanted change to someone like him. According to him the majority of voters were prevented from choosing a candidate of their choice.

He stated that he had not met the Respondent anywhere until polling day when he saw him at Nakato Primary school. He stated that while the Respondent's Answer denied holding rallies and the Presidential running mate ever setting foot in Nalikwanda constituency, it was his testimony that the rallies were held in Kaoma and thereafter the Respondent and the running mate went to Mongu and stopped over at Nalwei. He stated that when they stopped over at Nalwei they caused havoc where PW3 and his son Kayeye Kaselo were attacked and the matter was reported to the police.

The Petitioner denied being engaged in violence throughout the campaigns and stated that the PF leadership had been on record in denouncing violence or defaming their opponents. He stated as he was a Christian, he did not engage in any violence in his campaign following a directive from the party President to denounce all forms of violence.

He stated that while the Respondents denied any involvement in the construction of the Sasenda Bridge, he had witnesses who would testify to that effect. He asked the Court to move to the site to see that crushed stones and sand were delivered at Luatembo during the month of July.

He stated that during the campaigns there were no activities done by the Petitioner to lure the electorate to vote for him. The bicycles that were distributed by him were given to party officials

such as those standing as councillors to assist them as a means of transport to their various wards. Further, what was distributed were PF party Chitenges that were distributed to party members and not to lure the electorate to vote for him.

With regard to paragraph 9 of the Respondent's Answer, the Petitioner stated that he received a report that Muleta Imanenwa who works in the Parliamentary office in Nalikwanda under the supervision of the Respondent had been taken advantage of by sending him on the Respondent's errands. He further testified that the Petitioner did not engage the Mongu District Commissioner to distribute sums of money to lure people to vote for the PF nor did he campaign on his behalf as alleged by the Respondent.

With regard to paragraph 10 he stated that the Respondent engaged in the election malpractices contrary to the Electoral Code and he had witnesses to testify to the foregoing.

He stated that it was due to the Respondents malpractices that he lost to the Respondent by huge margins. Under paragraph 11 of the Respondent's answer, the Petitioner testified that neither he nor his agents engaged in activities defying the electoral process rules, guidelines and procedures to lure the electorate to vote for him as alleged by the Respondent. He stated that the Respondent had not availed the Court with any evidence that any of the activities alleged were reported to the police anywhere.

He asked the Court to nullify the election of the Respondent as the Respondent did not follow the Electoral Commission Code of Conduct.

In cross examination the Petitioner told the Court that the reason he brought this matter to Court was because the Respondent was engaged in a number of malpractices and because of this the Court should declare the elections null and void. He stated that he was from Namatenge village in Nakato ward chief Mukulambula's area Mongu District. He stated that he left his village to live in Lusaka in 1971 and he had never been back to stay in his village.

With regard to PW4 and PW5's confession statement he told the Court that he prepared their confession statement.

He stated that he did not know the Electoral Code of Conduct very well and would not know which particular regulation talked about massive intimidation and violence. He admitted that most of his evidence was hearsay as he did not personally witness any acts of violence as well as other reports. He further stated that he did not know the Respondent as he only saw him in Nakato nor did he witness the Respondent getting involved in acts of violence. According to him, the Respondent parked his car about 100 metres from the polling station and when he saw the Petitioner approaching he drove off. He admitted that the Respondent could have left for any other reason and not

necessarily because he saw him. He also admitted that the reports he received about delivery of culverts and intimidation of PW3 were all hearsay but stated that he had witnesses who would testify to this information given to him. He agreed that based on the reports he got he was asking the Court to nullify the election of the Respondent.

In re-examination the Petitioner told the Court that he had made periodical visits to his village having been working in Lusaka. He stated that the hearsay evidence was the reports he was receiving from across Nalikwanda but emphasized that the witnesses who were on the spot would be called to testify.

PW2 was **Njamba Kayeye** of Luatembo area in Kayongo village, who testified that in the year 2011 the Respondent won the Parliamentary seat in Nalikwanda Constituency and in the past five years there had been complaints that the Respondent should construct a bridge. The Respondent told them that the PF Government had not released the money for the Constituency Development Fund (CDF) in order to construct the bridge.

In July 2016, the Respondent brought culverts, crushed stones and sand saying he was building a bridge. PW2 went to the bridge where the Respondent, the councilor and the ward chairman for UPND were present and he asked why the money had been released during election campaigns. The Respondent told him that since he was investigating the matter, the Petitioner would

find jobs for them. He further told them that the jobs would only be given to UPND supporters and according to him the youths were discouraged that if they did not support UPND they would not have jobs. The young men were scared to go and vote as they thought that even if they went to vote for other candidates, the Respondent would think they had voted for the PF. A week before polls, the Respondent brought a contractor on site.

In cross examination the witness told the Court that he joined the PF in January 2015. He stated that he did not know the Petitioner and only got to know him when he came to contest the seat in June 2016. He stated that he knew the Respondent as he the winning candidate for Nalikwanda Constituency in the 2006 and in 2011 elections. He stated that he was a member of the branch for MMD up to the time he defected to the PF in 2015. He stated that he did not have any position in the PF but he used to investigate about what would happen in the constituency as he was part of the Area Development Committee (**ADC**).

He stated that on the material day in July, he heard the sound of a big motor vehicle and he rushed there as this was something new. When he reached there he found people offloading culverts. While there he stated that he spoke to the Respondent whom he knew to be a member of the UPND. It was his evidence that the contractor, Mrs. Sakala, was taken to the site by the Respondent in the same week of the elections.

He further stated that it was the responsibility of the ADC, which is comprised of all political parties, to build the bridge but the UPND went behind the ADC's back for the construction of the said bridge. The Respondent and the area councillor only chose people from the same party to work on the bridge namely the foreman Mubita Simasiku, Wamundila Lubinda and eight others. He also told the Court that once the Contractor won the contract, they employed people to work on the project and paid them for the work.

He stated that the one who awards the contracts to the contractor is the tender board and once awarded it was not up to the contractor to choose who should work for them. He stated that in the present case it was not true that it was up to Ms. Sakala, the contractor, to choose who should work for her in the construction of the bridge. He however did not know if the contractor was a member of the UPND. He denied that it was the contractor who took the people to work at the site but the Respondent. The materials were taken to the ward councillor's house.

He stated that the bridge was currently just being constructed and as of ten days before trial commenced the culverts had not yet been put. He did not see the Respondent as the contractor was taken to the site by representatives.

He stated that he was aware that an MP brought development in a particular area. He further stated that all the materials needed for the works were not delivered within one week and they were delivered using trucks. He restated that it was the Respondent who took the contractor to the construction site.

In re-examination the witness told the Court that the MP for the constituency was the one who solved all the problems relating to development. The witness clarified that the ADC comprised of non-partisan members of the community as well as a representative from each political party.

He further clarified that it was the ward chairperson for the UPND who selected the people to work at the bridge construction site. He stated that he could not know whether the trucks which delivered the materials were booked or not because he was not present when the transaction for transporting the culverts was taking place. It was his testimony that the culverts were brought in the month of July and delivered in two days. Days later the contractor was taken to the site and then returned to Mongu. After the culverts were brought he saw a motor vehicle at the construction site delivering crushed stones. It was the same truck that later went to take the sand to the construction site.

PW3 was **Luka Kaselo** of Nalwei area in Kakunde village who testified that he was the Vice Chairperson for the PF in Nalikwanda Constituency and the Petitioner's Assistant

Campaign Manager in the constituency. It was his testimony that between the 30th and the 3rd August 2016, while at home in the village between 16:00 to 17:00, some young men came from the station and informed him that his son had been attacked and was lying on the ground at the station. He stated that the men told him that the people who attacked his son were wearing red caps and came with a vehicle coming from Kaoma. He realized it was party members of the UPND and he immediately started off for the station. When he arrived there he found his son lying down at the PF offices in Nalwei. They were burning the office and the members of the PF wearing PF regalia were being chased and their attires were being removed.

When they realized that he was the father to the victim, they ran away. A few men by the names of Musole Lunda, Masozi Kwandu, Lumwayi Tiango, Masozi Mukisi the UPND Councillor, Mutanuka, Munyanyaand Gideon Mulonda started charging at him. They started fighting the witness and Masozi Kwandu knifed him on his hand. Upon realizing that he had sustained an injury they ran way. He was rescued by his relatives and his son and in the evening he was taken to the village.

The following morning they went to Nalwei Police Post where he and his son were given Medical Reports in order for them to seek medical attention. He was sent to Lewanika General Hospital for treatment where they were given medication. They took the

medical report signed by the doctor to Nalwei Police Post. His Medical Report was at page 6 of the Petitioners bundle of documents.

He stated that while waiting for his hand to heal and awaiting the fast approaching August General Election, the threats of assaulting him and attacking him by the UPND members continued. He was accompanied by his friends to go and vote at Nalwei and even when the voting came to an end the threats continued. These threats according to the witness caused many people not to vote for the Petitioner.

It was his testimony that from the registered voters about 949 did not vote. He stated that the attack that happened to him happened in 5 other wards in Nalikanda and some of the polling agents were being threatened with violence. To date people still leave in fear that they could be attacked.

In cross examination he stated that as Vice Chairperson he was disappointed that the Petitioner lost the elections. He however stated that he would not do anything to have the Respondent removed from his seat. He stated that the station was about a kilometer away from his place which is about 20minutes away and that he could not have heard the noise from the station because it was not very near. He further told the Court that he was sure that the UPND attackers were coming from Kaoma and he was not aware that they could have come from elsewhere.

He stated that the distance from the station to the PF offices was less than 100 meters but he did not know the distance between the police post and the office. He confirmed that he was injured between 30th July and 3rd August, 2016. He reported the people who attacked him escaped when he went to the police to collect the Medical Report form but he did not know the people who attacked his son. He denied that he was only attacked in self defence and stated that much as he had resolved the issue of his injury with the person who injured him, the issue found its way into this Court for purposes of the Petition before the Court.

It was also his evidence that despite the continued threats, he did not report the matter to the District Conflict Management Committee as the committee does not exist in their locality and as such the matter was only reported to the police. He stated that whether the Respondent was present or not, he was aware of the violence and was answerable for the acts of his agents.

With regard to the people who did not vote in the elections, he stated that he did not know if some people failed to vote because they were sick. He added that he knew that no one had relocated from that ward to another nor was there any report of death. He further denied that it was possible to have voter apathy with 949 voters refusing to vote. He added that he was not aware that the voter turn-out was 46% both at constituency and national level.

In re-examination the witness told the Court that he was testifying on account of him being attacked and threatened because he was a PF member. He stated that he took the medical report to the police and the police gave them some time to resolve the matter. Once they resolved the matter he got back the medical report because the petitioner wanted to use the same as part of the evidence.

It was his testimony that the agents of the Respondents conducted public meetings and rallies and were the ones who promised the electorate what the Respondent would do for them once elected. He knew his attackers to be agents because when the Respondent went for meetings he went with them.

PW4 was **Mubita Mukosiku** of Nalikwanda, Kakuyu village who testified that on 11th August 2016, he woke up in his home village in Kakuyu and told his parents to go and vote at Nakanya polling station. He left his parents at the polling station and he went to collect his voters' card and NRC which he left at his shop in Nakanya area.

When he got back to the polling station he found his father had voted and was given K100 by Pumulo Samazuka who assisted him to vote. His father disclosed that the money came from the Respondent. He then approached Pumulo to ask him why he had given his father the money as if he was the one who took care of him. There was a fracas and the secretary for the

Respondent, Mr. Patrick Muzuki Masisani, called the police who in turn chased him from the queue at the polling station. The Respondent at this time was still at the guest house of RW5. It was his testimony that the Respondent had given the money to Pumulo who was the Youth Chairperson for the UPND.

When he was chased he asked his child to take back his father home while he proceeded to his shop where he continued selling. He later went back to vote and when he got out of the polling station he found the Respondent's motor vehicle loaded with mealie-meal. The Respondent was also in the motor vehicle who then went in the voting room and the people standing in the queue went to the vehicle chanting the UPND slogans.

When he saw this he took a photo of the motor vehicle with his phone and went back to the shop. Ten minutes later, while at the shop, he saw a group of people from the UPND charging towards him who started struggling with him and grabbed his phone from him. The Respondent was also there together with the Pumulo. The Chairman then went to the police who went to apprehend him and his brother and took them into police cells.

Whilst at the police they accused him of having thrown portraits of the then PF Presidential Candidate Edgar Chagwa Lungu in their respective yards. The police investigated the matter and found him without any fault and released him. Due to the fact that he wanted his phone, he went to Pumulo Samazuka who

was at Mr. Libuho's guest house to request for it. When he got there they accused him of having called them wizards and insulting them. The police officers apprehended him again and put in police cells after having sprayed him with tear gas. He was in the cells at Nalikwanda Police Post for some time and around 17:00hrs he was released.

To date his phone was still in the custody of the Respondent and his fellow UPND members. He did not take any further steps in attempting to retrieve the phone as he felt he did not want to die over the phone.

In cross examination the witness told the Court that he was the Youth Secretary for the PF. He stated that the Petitioner did not win in his ward and he was not happy that his father's vote was bought. He stated that Mr. Pumulo was the one who voted on behalf of his father but he did not know whether he was a polling agent. He stated that he saw Pumulo assisting his father to vote and he knew that his father voted for the Respondent because Pumulo was the Respondent's agent and he assisted the father to vote.

With regard to his phone he stated that he did not know who exactly took his phone but that the Respondent was in the forefront when he was accosted. He said he did know when the Respondent voted but that he saw the mealie-meal. He was aware that mealie-meal was not allowed at the polling station.

He stated that the police officers chased him because they were supporters of the Respondent and that he did not tell the ECZ officials because he was chased.

PW5 was **Gift Limpo Mubita** of Simbai village in Nalikwanda Constituency who testified that on 11th August 2016, he left his house at around 11:00 to 12:00 going to vote at Nakanya polling station. When he approached the polling station he found three men one of whom he knew as Boniface Samazuka who was the Youth Chairperson for the UPND. Boniface offered him money so that he could vote for the Respondent. He told them to give him money in advance so that he could go and vote in the event he didn't find them after he voted. He gave the witness K100 and told him he would find a man and woman who would give him a pen for voting purposes. He cast his vote as he was told and when he came out he found a white Land cruiser belonging to the Respondent. The Respondent was going to also cast his vote. He stated that he took the pen he was given to vote and went home.

In cross examination he told the Court that he had no position in the PF. He stated that he left home between 11:00hrs and 12:30 but did not know what time exactly he got to the polling station. He confirmed that he received K100 for purposes of voting for the Respondent and that the pen he was given to go and cast his vote was blue in colour. No one stopped him from using the said pen

and he voted for the Respondent as instructed. He added that he did not know that his vote was his secret.

He maintained that when he came out of the voting room he found a motor vehicle white in colour which belonged to the Respondent and that he saw the driver of the vehicle in the car with the Respondent. As he left the classroom from voting the Respondent was going in.

He stated that he used the money he was given to buy food as there was hunger in the village and he could do anything for money as hunger was painful.

In re-examination he told the Court that he did not know that voting was a secret as he was not very educated.

PW6 was **Mukuti Mubiana** of Lushi area in Mwale Village who testified that he was an aspiring Ward Councilor in Nakato ward on the PF ticket and he spent a night in Mongu on the night before the elections. The Petitioner asked him to go with him and vote at Nalikwanda. He went to Nakato and when he got to the polling station he found the Respondent in a motor vehicle which was carrying mealie-meal and heads of cabbages. The Petitioner asked him if he knew whose car this was and he told him that it belonged to the Respondent. When the Respondent realized that the Petitioner's vehicle had arrived he got into his car and drove off.

In cross examination the witness told the Court that he started campaigning in June 2016 with the Petitioner. The vehicle that the Respondent was in was a Land Cruiser and was white in colour. He stated that he remembered seeing the Respondent at around 07:00hrs in the morning but they did not talk to him. The Petitioner said they should leave him even though he had mealie-meal for campaigns. He told the Court that during their campaigns they did not give anything to the electorate.

The Petitioner knew the Respondent and the Petitioner only asked because he was surprised that there was a vehicle with bags in it. He stated that he wouldn't know if the Respondent went back to the polling station after he left. He and the Petitioner did not alert the ECZ and the police as the Vehicle that had the mealie meal near the polling station as the vehicle was parked only about 10 metres from the polling station. He felt that the people could have been influenced by the mealie-meal that was at the polling station in the vehicle.

The Petitioner closed its case and the Respondent gave evidence on oath and called four witnesses to support his case.

RW1 was **Professor Geoffrey Lungwangwa** of Lusaka West in Lusaka, the Respondent herein, who testified that he was validly and duly elected as MP for Nalikwanda Constituency. He stated that he won with overwhelming landslide victory which was captured by form 14. Out of 50 polling stations he had 9,815

votes while the petitioner only had 1,821 votes with a total of 11,662 votes cast and 200 rejected voted. From this document he stated that he was an extremely popular candidate in Nalikwanda while the Petitioner was very unpopular.

It was his testimony that the reason for his popularity was because he had served the people of Nalikwanda diligently who he had represented for the past 10 years as a Member of Parliament. They had seen development in various aspects such as building a number of new schools which were recently completed and almost every polling station has a new classroom block. He stated that additionally other development blocks included construction of health centres, Local Courts, deployment of banana boats at various crossing points, construction of bridges, network connection and many other development blocks the people of Nalikwanda had never seen before. He was the 9th Member of Parliament for Nalikwanda and all his predecessors only served a term each. He was the first to be elected three times due to his selfless service, commitment and diligence in serving the people of Nalikwanda.

With regard to the allegation that the Respondent's agents with his knowledge engaged in intimidation against PW3, he testified that he had no knowledge of the stabbing of PW3. He only came to know of this incidence from the Petitioners allegation.

With regard to the allegation of the Respondent's agents' intimidation tactics against the Petitioner, he denied the allegation and stated that they had a very strict campaign tour program. On the date in question he and the campaign team were on a short break. He had no knowledge of this allegation. He stated that he had never and would never engage in any form of intimidation of any citizen both in his constituency and any part of the Country and as such the said allegation in this paragraph was totally baseless and false. He stated that he had a reputation to protect professionally, politically and academically and he would not engage in such vices. His stand in the political arena is that there must be decency and high level of integrity and he adhered to these principles in his political campaigns generally.

With respect to the allegation on the bridge construction, he denied all the allegations as a total fabrication. He stated that with respect to the delivery of culverts, the same was done from 1st May to 5th May, 2016. This project had been pending for two years and after allocating funding to it the culverts were delivered to the site. The Councilor in this ward, Simangolwa Akalilwa, informed him of this development as he was very excited when he spoke to him while the Respondent was in South Africa attending the Pan African Parliament. The delivery of the culverts was not during the campaign period. He stated that he was not aware of

any crushed stones which were delivered at Sasenda Bridge construction site.

With regard to the allegation that he took a contractor to the construction site, he denied taking a contractor to a construction site to start construction arrangements. He testified that he had never personally met the same contractor of this bridge and that they had such a strict campaign program that there was no way he could have been involved in these activities.

Further, he testified that it was not the work of a Parliamentary candidate or MP as projects like these were the work of the councilor and as such these allegations were false.

It was his further testimony that one of the responsibilities of an MP was lobbying for finances for various developmental projects. His role in the developmental projects for Nalikwanda has been to lobby the various offices of Government. In this case what he had lobbied on behalf of the people of Nalikwanda was implemented. This is what he meant when he said he built schools, health centres and bridges because he lobbied for these constructions. Once the lobbying had taken place, Government departments and the Council follows with implementation.

With regard to the allegation of bribery and corrupt practices, he denied the allegation and stated that no such acts of bribery and corruption were done by the Respondent or his agents. He did

not give any pen to any voter nor did he promise any voter with any monetary token. He advised his election team that during election even giving a needle to anyone would be sufficient grounds for nullifying the election. There was no way he could have engaged in any bribery on that date even after he had campaigned.

He stated that his agents were RW5, the Constituency chairperson, Muzuki Masisani, the Vice Secretary for UPND in the Constituency and Maswabi Mashangi the District Coordinator for UPND whom he travelled with during campaigns and to the best of his knowledge none of them engaged in any act of bribery and corruption.

With regard to the allegation that he was seen around the vicinity of Nakato polling station with a vehicle laden with mealie meal to feed the voters after polls, he explained that the registers of voters from the ECZ were received by him in Mongu on the evening of the 10th August, 2016. He therefore had to distribute the said registers to various councilors for their party.

On his way he stopped at Nakato ward to deliver the register to the party agents. He never carried mealie meal to lure voters to vote for him. He stated that the bags of mealie meal were for his campaign team. He stated that he never saw the Petitioner there and only knew him in Court. He only stayed there for 5 minutes to deliver the register of voters.

With regard to the allegation that Muleta Imanenwa, was engaged in acts of bribery and corruption and was seen distributing money to voters at Lukweto, he stated that that he was never his agent as he works for the National Constituency Office in Nalikwanda. All members of Parliament know that those who work in the National Constituency Office are civil servants who are not allowed to participate in elections. He denied having involved the named person as an agent in the ward.

With regard to the allegation that PW5 and Joe Mubita had signed confessions of being paid inducements to vote for the Respondents, he stated that this was totally false and the highest level of deceit and dishonesty. No inducement was ever paid to PW5 or his father and he therefore lied before this Court. He did not know these people and only saw them for the first time in Court. He further stated that the document on page 7 to page 10 of the Supplementary Bundle of documents stated what he did in all his previous election campaigns. The said program enabled them to reach all the polling stations so that people could see him and nearly all the days of the campaign were accounted for. There was no space in the campaign to do any other activity than what was stated in the program as the focus was to win the election convincingly and in all the polling stations. The program was testimony of the landslide victory in Nalikwanda.

He did not know the Petitioner and only came to see him when the trial commenced. With regard to the malpractices he stated that every election had a District Conflict Management Committee (DCMC). If at all there were these malpractices during the campaign, the Petitioner should have taken the Respondent to the DCMC. Secondly, if these things were happening on the polling day, he should have been reported to ECZ on that day or the Zambia Police. Since no such action was taken these allegations were an afterthought to try and implicate him in the Petitioners imaginary malpractices.

It was his testimony that his witnesses would testify to the various election malpractices carried out by the Petitioner and his agents. He stated that the allegations were frivolous and vexatious and lacked merit and prayed that the Petition be dismissed

In cross examination the witness told the Court that he served as MP for Nalikwanda Constituency under MMD and joined the UPND officially in May 2016. On the polling day he stated that he delivered the voters registers personally to seven polling stations while the other registers were delivered by the UPND candidates for councillorship in other wards. He started these deliveries after he started off from Mongu at 06:00hrs. He stated that because voting in the polling stations started at 06:00hrs and was to end at 18:00hrs, his agents had no choice but to allow the votes to

commence as he had not yet delivered the registers to all the polling stations. The voters were recorded on pieces of paper until the registers were delivered.

He stated that he was well known as he had been an MP for two terms but despite this, there was no reaction from the voters when he passed through the polling stations as he only stopped by for a few minutes. He did not greet anybody at any polling station as he was only there to leave the registers. With regard to the mealie-meal that was in the vehicle, he stated that the mealie-meal and the heads of cabbage were for the agents of the party. The same was delivered at Nakanya to the home of RW6. Before delivering the mealie-meal no one asked for it and it was dropped off at around 10:00hrs.

With regard to the issue of culverts he stated that the bridge in question became disfunctional around 2012 and in 2013 some money was allocated from the CDF. In 2014 money was also allocated for the rehabilitation of the same bridge. He stated that when money was allocated and inquiries were made, he would inform the people what was being done. He did not know when the works commenced but culverts were delivered in the first week of May 2016 by the Councilor for Mongu Municipal Council and he was away at the Pan African Members of Parliament when this was done

He did not know who was present when the culverts were being delivered. He stated that he did not have any documentary proof of this construction as he was not involved in the implementation of any project nor could he show that the culverts were delivered in May and not in June.

With regard to the construction, he told the Court that he would go there to see how the developments were going on and report the findings to the Council. He stated that Parliament was dissolved on 11th May 2016 and from that date on he had nothing to do with developmental projects in the Constituency.

He further stated that the campaign program was made in the second week of June by the Respondent. The program was approved by the police who received it and filed it but he had no written statement to show such approval. The copy of the said program did not have any date stamp to show that it had been received by the police.

The witness told the Court that the last day of his campaign was the 10th of August, 2016 at Nalwei Ward and Nakanya ward and the meetings were held in the morning. He stated that while the document said they were supposed to be at Nalwei on the 8th of August, the PF were also having a meeting there on the same day so they changed the program and moved their meeting to the 10th of August to avoid conflict. He insisted that that the program was just a guide and adjustments were made if there were problems.

These adjustments were made throughout the campaign as such the program was not strictly followed.

He stated that he visited his constituency on average of about three times a year and before the last election campaign period he was in the constituency in May. He knew that the petitioner was not known because the Respondent had visited most of the polling stations in the Constituency and the reaction from the people was that he was not known.

In re- examination the witness told the Court that he went to serve the registers at Nakato polling station, Lukulo polling station, Nakanya polling station, Situmba polling station, Litawa polling station, Liyande polling station, Namengo polling station and Lwandui polling station. What was meant when he said he visited parts of Mbekise ward was that he did not go to all the polling stations in Mbekise and only went to Lukulo and Lwandui.

He testified that he took two copies of the campaign program to Mongu police station one for the police and the other for the campaign team and personally requested that his copy be date stamped by the police. However, the Police Officer in Charge told him that there was no need to do that because the said document was only for the information of the police. He therefore left without the document being stamped.

He stated that the police never interfered with the use of this program. The program was a guide which had to be followed as much as possible. However, if there were extenuating circumstances such as break down of vehicles or illness, the program had to be adjusted.

He testified that after voting at Nakanya, RW5 and himself proceeded to other polling stations to go and deliver the voters registers. He stated that he was not aware of the fracas that took place between the Petitioner and Muzuki because it never took place.

RW2 was **Mundia Mundia** of Musa village in Mongu District who testified that he was a party member of the PF and he knew the Respondent and the Petitioner in this matter. On 11th August, 2016 he was at Nakanya polling station where he was observing the people and youths in particular on how they would vote. He stated that he was with Tobias Chipapa, **Kebby** and Joe. He was given this responsibility by the Petitioner and a ward Councilor by the name of Mr. Kabutu. He stated that he knew PW4 as they lived in the same locality and were in the same party.

He denied that there was any fracas at Nakanya polling station and denied that the Respondent got the phone belonging to PW4. He testified that he was with PW4 and did not know of any violence or fracas on voting day while they were stationed at Nakanya polling station. He told the Court that the PF was

working in harmony and they used to go on campaign tour with Councilor Kabutu and stated that the program for the campaign was in the bundle of documents.

He further testified that in Nakanya ward there were six polling stations which were all visited by them. The Petitioner only visited Nakanya polling station. He stated that the Respondent was not giving anything such as mealie-meal or bribes to the electorate but the Petitioner and his colleagues were giving bicycles, clothes and nshima. It was his testimony that the bicycles and clothes were given to both the PF party members and the electorate and he was part of the team that distributed the clothes and other materials to members of the public.

He stated that it was true that the Petitioner was distributing bicycles and other materials in order to lure people to vote for him and that the Petitioner gave the Chief Lyambango money. The Petitioner was just alleging that the Respondent bought people in order to win election when this was not true.

The reason the Petitioner did not win was because he was not popular. He stated that he knew the Petitioner in June, 2016 at Nakanya polling station when he introduced himself to members of the public. He then turned back to Lusaka.

The Petitioner could not win against the Respondent as the Respondent was more popular than the Petitioner. He stated

that the popularity of the Respondent in Nalikwanda Constituency was due to the development he brought to the Constituency. Even when the Petitioner lost the election he called him and told him that he had lost the election. He responded saying that Edgar Chagwa Lungu would win and that meant Nalikwanda was not going to have development. If the Respondent was giving people material for purposes of buying their votes how didn't he see it as the witness was there at Nalikwanda Centre. If the PF official noticed that the elections were marred with corruption they should have reported the matter to the police.

In cross examination the witness stated that he was a member of the PF with a position in the party but he had left the combat and other evidence to show that he was indeed a PF member. He stated that the Respondent arrived at Nakanya between 10:00 and 11:00hrs and he saw him when he entered and cast his vote. According to him no one was shouting for the Respondent at Nakanya polling station. He was there to observe any electoral malpractices which were to be reported to the police officers. He stated that he was outside throughout the day and he saw the respondent go inside the voting room but did not know what he did inside the voting room.

He told the Court that he voted at 08:00hrs and on that day the petitioner did not go to Nakanya and he last saw the Petitioner

on the 9th August, 2016. It was his testimony that the Petitioner used to call him to conduct rallies in the Constituency despite him not being his campaign manager.

He stated that he did not know when the petitioner filed his nomination neither did he know the Petitioner's campaign program outside Nakanya because he was only based at Nakanya ward. He said it was not correct to say that the bicycles were only for PF officials because these were not used in the campaigns. He explained that two of people who received the bicycles were not PF officials. According to him, he did not know that Pumulo was the Youth Chairperson for the PF and he denied that Maate who also received a bicycle was the ward chairperson. He admitted that Mubita Brazil was the Constituency secretary and Oscar Chabutu was also a party official.

He maintained that he was a member of the PF but did not know the number of wards that were in Nalikwanda because he was only based at Nakanya and not at constituency level. He denied that the bicycles in issue were given for campaign programs as they used to walk on foot.

The witness claimed that he was in the same vehicle with the Petitioner when he went to give money to the Chief together with Silishebo, Muukwa, one induna Lyambango and some small children going to school. He stated that they were in one of the Petitioner's two Hilux cars when the Petitioner went to collect the

Chief so that he could attend a public rally. He refused having being paid any money to testify on behalf of the Respondent and stated that he saw what was happening between the Petitioner and the Chief in the car as he sat behind and the windows were not tinted.

RW3 was **Siumbwa Nayunda** of Namakenge area in Nokubonda Village who testified that he is a member of the UPND and was a polling agent at Nakato on 11th August 2016. It was his testimony that on that day they were two polling agents from the PF, two from the UPND and one from the Rainbow party. He was working from outside while the other polling agent, Lisimba Kafungula, was inside the polling station. From PF the one who was inside was Nayunda Lisimba while the one outside was Akamonwa Mundia. At around 08:00hrs the Respondent came with his vehicle from Mongu and parked his vehicle at a distance of about 400meters from the polling station.

He left the car carrying the register for Voters which he gave to him. He was there for less than three minutes and went back to his vehicle. He denied that there was a fracas as he was outside and there was a PF agent as well as a police officer outside. At around 12:00hrs, the Petitioner arrived at the polling station since that's where he was voting from and parked his vehicle between the ribbons. The Petitioner came with Mukuti the Councilor for PF and Muhau.

When he arrived at the polling station, his group of about 10 to 15 people rushed to his vehicle and found that the European observers had already arrived. The observers inquired over what was happening and they were informed that the group was rushing for their candidate. When the petitioner disembarked, he had a discussion with his members and then with the observers. He however did not hear what was discussed and the police officer told the group to go back to the polling station. The Petitioner then entered inside the polling station and voted and subsequently left the polling station.

He testified that the Petitioner was his elder brother and came to know him in April 2016. On the said date the Petitioner arrived at his village at around 14:00hrs. A little while later he saw someone call the villagers to gather at the village headman's house. The witness went there together with everyone else and found the Petitioner, the Secretary for Chief Mukulwambula, Mukumbela Silishebo and Martha Kashina. The person who started the introduction was Silishebo who told the witness that the Petitioner was his relative and he had been away for some time. From what he knew that was the first time he was visiting the village.

After introducing himself, the village headman was satisfied that he was a son. The Petitioner said he had come so that they could show him a place to build. He also told them that he wanted to

be an aspiring candidate for PF as MP. Imakando told him that they did not know why he was there as in one breath he wanted to be introduced, in another that he wanted to be shown where to build and also that he wanted to Stand as an MP.

They asked him how he would manage to stand in Nalikwanda when he was not known and why he didn't contest under Mongu Central or Nambowata where he was known. The Petitioner stated that he wanted to contest under Mongu Central but he found that there were many who were contesting and he would not have been adopted as he was not known. The Petitioner said he thought of Nalikwanda as being a friend of President Edgar Chagwa Lungu and as there was no aspiring candidate under the PF ticket and that's why he was told to contest the seat in Nalikwanda. That was why he came to his family so that they could attest to the fact that he was from Nalikwanda.

The Petitioner was told by Imakando that a bull, the Respondent, which was contesting on Nalikwanda seat would be difficult to defeat. The witness told the Petitioner that in that area they liked the UPND. If he was contesting under UPND he would not have discouraged him. The Petitioner said they would be strong enough and he subsequently left.

The second trip was when he came to hold meeting at Nakato School as an aspiring candidate under PF. At around 15:00hrs he came with the same councilor and the Petitioner told him that

they should vote for him. He then distributed chitenge for the Golden Jubilee, 25kg bags of mealie-meal and fish so that people could cook and be fed.

The third trip was the month of July where he went to hold a meeting at Lushi in Nakato and in their village. He was in the company of the Councilor and Muhau. There was a celebration and the Petitioner left PF branded material and K2000 cash to be distributed. When he came on the fourth trip the Petitioner held a meeting at a school. On coming from the meeting he found Mukela, Simasiku, Kapapa Siyunji and Edina Nayunda pushing new bicycles and on inquiry they informed him that they were given the bicycles at a meeting addressed by the Petitioner.

When they announced the results at Nakato, the Petitioner lost and the witness' opinion was that the reason for this was that he was not known by the people. Even in the village where he gave out things no one voted for him because the people wanted someone who would bring development not just someone who gave them food.

The Petitioner went back to the village between the 20th and the 25th of August and thanked them despite having lost and informed them that he would petition the results.

In cross examination the witness told the Court that he had been a member of the UPND for the past six years and the aspiring

candidate in 2011 was Sibote Sibote. The reason why Sibote did not win was because he was competing against someone who brought development and in this case it was the Respondent. He stated that the Respondent was the campaign manager for UPND during the by-election.

He confirmed having seen the Petitioner with the bag of mealie meal and the chitenge material. He stated that he was just informed that those things were just brought by the Petitioner. He knew that he used to come with those things and he saw the things removed from the car. He confirmed that there were bales of Chitenge material which were brought of which he still had some. He stated that he had evidence to show that the PF brought chitenge material but that he did not bring in any evidence in Court to show this.

He stated that he did not know how the UPND registers were delivered to other wards. He stated that he did not know who the presiding officer was as he had forgotten.

He told the Court that the Petitioner arrived at around 12:00hrs. He denied that the Petitioner was at Nakato at 07:00 and stated that if that was what he said then the Petitioner was in fact lying. He stated that the Petitioner parked his vehicle 30metres from the polling station while the witness was by the door side. He stated that the Petitioner followed the observers in a class.

In re-examination the witness told the Court that in the 2015 by-election the Respondent was campaign manager for the UPND. According to his knowledge the people who were given the bicycles were not party officials.

RW4 was **Namangolwa Sitali** of Kalungwana Village who testified that on 1st May 2016 there were eight culverts which were taken at Luatembo by a company called Blue Nile and Mukelebai, the stores officer at the Council. She said she came to know about this because she was the Vice Chairperson under the Constituency Development Fund. She was not aware of anything that was taken Sasenda neither stones nor sand and the money was still in the CDF account.

She knew that the money was in the account because that was what her job entailed as she worked hand in hand with the Mongu Municipal Council. She said it was not true that the Respondent was the one who delivered the culverts to Luatembo for him to start building that bridge. The Respondent was not a part of the programs or the delivery team for projects. She further stated that at the time the Culverts were delivered she was there.

With regard to the construction of Sasenda bridge there was an advertisement for a contractor to come and work on it but no contractor had not worked on it yet. To date the money was still in the CDF account.

In cross examination the witness said she had been a member of CDF for the past five years. There are four members from Nalikwanda four members from the Council. When there is CDF fund and when they are trying to allocate funds for different projects they normally meet. They had one meeting before the money could be released for the Luatembo Bridge in March 2016. The money allocated for the culverts was K300,000. The Respondent went there in January but he did not go there to lobby for fund but came to witness how funds are allocated. The allocation is done together with the Council. The members of the constituency merely benefit from the said projects. The money that the funding came from was for 2014 CDF but this funding was delayed.

The culverts that were bought she was around but she did not know where the culverts were sourced from but they were picking them from Luandui. The culverts were not being bought they were just picked from Luandui to Luatembo. The money from the fund was used to transport the same culverts. The culverts were transported with Saula Vehicle in four trips from 1st May 2016 to 5th May 2016. She was not there when they delivered the culverts as she was in Mongu. She saw the agents from the Blue Nile on 5th May 2016 when they came to follow up payments for delivery of the culverts. They started off from Mongu to Luandui on 1st May, 2016 where they were ferrying the culverts to Luatembo. They came back to Mongu on the 5th of

May, 2016. She was not there when the culverts were delivered but the stores officers confirmed that they were delivered.

She said she knew that the Respondent was not present when the culverts were being delivered as it was not his job to ensure their delivery but that of the Council. She stated that they were able to ensure that the CDF was used for its intended purpose by meeting with colleagues from the Council to see how the money had been used. Construction did not start when the culverts were delivered. According to the rules when there was a project, they normally choose a project chairman who receives such materials. She maintained that the Respondent was not present when the culverts were delivered.

She stated that the contractor phoned her when he started off and when he came back. He was taken to the site by Mr. Zulu. From the fund for the construction K28,000 was used to ferry the culverts and the rest was still in the account. She did not know who paid for culverts but she denied that they were bought by the Respondents.

In Re-examination she stated that the reason there was no contractor working on the bridge, they were told that they could not take a contractor to begin works since he went there during the campaign period. Mr. Zulu who took the contractor on site was the surveyor employed by the council.

RW5 was **Libuo Samazuka** of Nalikwanda area in Mongu Village who testified that on 11th August, 2016 he left Mongu for Nakanya in the Respondent's vehicle for his candidate and in that vehicle he loaded the mealie-meal for his family. He was in the vehicle with the Respondent and Patrick Muzuki, the Secretary and election agent. The vehicle stopped at the polling station at a distance from the polling station. The Respondent took the voters register and took it to the polling station. The witness and the others remained in the car. After a short time the Respondent came back and they started off for Lukulo where the Respondent again disembarked and took the Register of voters at the polling station and they proceeded to Luandui.

Similarly there the Respondent within a short time took the register to the polling station and proceeded to Nakanya where the candidate was voting from but before they could reach Nakanya he offloaded his mealie meal and one bag of cabbages at his house. They went to Nakanya and parked the vehicle at a distance. The respondent voted and he also voted at around 10:00 to 11:00hrs, they stayed there for approximately 10 to 15 minutes.

There was no confusion neither was there any giving of things. It was a peaceful day as the police and ECZ were also there.

In cross examination he told the Court that there were 10 bags of mealie meal six of which were his and the other four for the

secretary. The car had 14 heads of cabbage which all belonged to him as he had a large family of five wives and 28 children. He stated that on polling day he and the Respondent were coming from the Mongu where they started off at 05:00 hours.

He stated that the reason they were delivering the registers in the morning was because they received them from Lusaka at around 22:00hrs on the 10th of August, 2016. He stated that it wasn't his job to ensure that the registers were gotten earlier as that was the Respondent's job.

The mealie-meal belonging to the secretary was collected from the witness' home three days after elections as he lived at quite a distance from his place. He did not recall when the mealie-was delivered but recalled when they were at the school. He stated that the reason the mealie meal was a lot because he was married to five women and 28 children and all of them stay at his house.

The meal that was prepared that day was for his family and not for anyone else. He went back home at 04:00am the following day after elections.

He stated that they were supposed to have had a meeting on the 9th at Nalwei but because the PF were having a meeting at the same time so they moved their meeting to the 10th of August, 2016. He stated that he stayed in Mongu from the 6th to the 10th

August, 2016 when they went for the meeting and his wives and children also attended the meetings.

He denied that the register of voters was delivered to all polling stations on 10th August 2016. He also denied that the mealie meal was meant to entice voters to vote for the Respondent. He stated that it was only the Respondent who knew when he received the registers and he was not with him when receiving the said registers. He stated that the Respondent told him that he received the registers at 22:00hrs and asked the councilors to come and collect and the rest he would take in the morning.

In re- examination he stated that he was not at Nakanya at 05:00hrs. He stated that it was impossible for him to disembark from the car as they were rushing to go and deliver registers and thereafter to vote so that was why the Respondent was the one who was delivering them personally.

The Petitioner filed in his submissions and skeleton arguments on 14th October 2016 while the Respondent filed in theirs on 25th October, 2016.

In the Petitioner's submissions it was submitted that based on the evidence of the Petitioner it had been proven that the Respondent and his agents were engaged in violence, corruption, bribery and malpractices which influenced the voters to vote for the Respondent. Counsel for the Petitioner cited sections 81 and

89 of the Electoral Process Act on what constitutes corrupt and illegal practices.

It was submitted that from the evidence of the Petitioner's witnesses, the Respondent and the Respondent's witnesses it was undisputed that the Respondent was going around polling stations with a motor vehicle laden with mealie-meal. She submitted that because the Respondents agents were giving money and pens to people on polling day contrary to Act No. 35 of 2016, they engaged in election malpractices. It was further submitted that the Respondent and his agents' actions during election campaigns and voting day impacted or affected the electorate.

It was also submitted that the evidence of PW2 that the Respondent had taken culverts, crushed stones and sand to the bridge in Luatembo was unchallenged. Further, RW4's testimony that the culverts were delivered in May could not be relied on as the evidence was hearsay. It was her submission that the Respondents agents were engaged in violence and PW3 identified them.

She cited the cases of *Mlewa v Wightman (1995-97) Z.R. 171 and Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela (SCZ Judgment No. 15 of 2003)* where it was held to the effect that in order to nullify elections any

corrupt practice, illegal practice or misconduct in any election Petition there must be proof to the satisfaction of the Court.

It was Counsel's submission that the Petitioner had proved the allegations against the Respondents. She cited the case of **Misheck Mutelo v Eileen Mbuyana Imwae SCZ Appeal No. 113/2012** where it was held that:

"In developing countries the voters are vulnerable to surrender their choice to the highest bidder which undermines their badge of dignity and freedom, which their right franchise represent, free and fair elections are a foundations function of a viable plural democratic system"

She also cited the case of **Alex Codman Luhila v Batuke Imenda 2002/HP/0012** where the High Court held that:

"Those who think they can find themselves in Parliament on the platform of bribery and corruption the message is this: the Court will not hesitate to show them the door"

She submitted that the evidence before Court clearly connected the Respondent to the electoral malpractices which acts he was directly involved in. Further, that because of the said acts, the majority of the voters in the affected area and/or polling stations were prevented from voting for the candidate whom they preferred.

She cited section 97 of Act No. 35 of 2016 which provides for when the election of a candidate can be challenged. She submitted that the acts complained of were done directly by the Respondent and his agents with the knowledge of the Respondent. It was the Petitioner's submission that the Court should declare the election of the Respondent void as the acts by the Respondents prevented many voters from electing a candidate of their choice.

She cited the case of **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and Others** where it was held that:

"the proven defects must be such that the majority of the voters are prevented from electing the candidate whom they preferred; or that the election is so flawed that the defects seriously affect the result which can no longer reasonably be said to represent the true free choice and will of the majority of the voters"

Counsel submitted that the Petitioner had proved his case and his prayer be granted.

In the Respondent's submissions it was stated from the onset that the Respondent was not served with the Petitioner's submissions and as such they were not responding to the said submissions. This Court takes note of the growing practice amongst Advocates of not serving proceedings on the other party.

This practice is highly disapproved as there is no place in our jurisprudence that allows ambushing of opponents in the Court.

It was the Respondent's submission that with regard to the evidence of PW2 whose testimony was that he saw the Respondent deliver culverts, crushed stones and sand at Sasenda bridge, the same was false and was a wild allegation. It was submitted that the witness further alleged that the contractor was taken to the site in the week of voting by the Respondent to show her where she was going to work but later stated that construction began 10 days before this evidence was given. It was further submitted that the issue of transporting sand to the bridge was laughable as sand in Mongu district was everywhere.

The Respondent submitted that PW2 as a member of the Area Development Committee, he ought to have known other members of the ADC who he claimed were all members of the UPND. It was further submitted that the campaign program shows that the Respondent was busy campaigning and his activities restrictive which evidence was not challenged.

With regard to the evidence of PW3 it was submitted that it was odd that the witness did not know exactly when the attack on him and his son occurred as he gave dates between the 30th of June and 3rd August, 2016. Further, the Respondent submitted that if the people who allegedly assaulted his son wore red caps,

red T-shirts and trousers the witness' informers would have said so but they did not. What he said was simply that he knew the attackers were members of the UPND and therefore the witness was lying.

It was the Respondent's submission that Nalwei Police Station is very close to the PF offices and as such the alleged attack on Kaselo Kayeya would have alerted the police. To the contrary no arrests were ever made. Not even the informers informed the police and instead ran one kilometer from the alleged attack to inform PW3. The Respondent also stated that there was no police medical report for Kaselo Kayeya that was produced to support the allegation of the attack on him. With regard to the medical report of PW3, the police report says that a knife was alleged to have been used and was not conclusive that a knife was in fact used. It was contended that a look at the medical report of PW3 showed that the findings were not consistent with the allegation.

It was submitted that there was no proof that PW3's attacker, Misozi Kwandu did in fact pay K600 for the injury inflicted on him. It was further submitted that it was not possible that all vehicles that moved on the Mongu Lusaka road could have only come from Kaoma and as such the attackers were coming from a rally in Kaoma. There was further no evidence to link the Respondent to these allegations. It was the Respondent's submissions that there was no witness who was called to

corroborate the testimony regarding the other allegations in his testimony. It was the view of the Respondent that the witness engaged into a common fight with another person and not necessarily that it was a political clash.

The Respondent submitted that the evidence of PW4 was hearsay as he told the Court that his father was paid K100 to vote for the Respondent. His father did not testify to this himself and there was no evidence to corroborate his evidence in that regard. It was also the Respondent's submission that the evidence of PW4 with regard to the Respondent grabbing his phone did not add up as he also claimed that there were false allegations against him which led to his arrest but was later cleared. The Respondent also found that it was not possible the witness' eight year old son was the one who took his father home as an eight year old could not identify his grandfather from among hundreds of people.

With regard to the evidence of PW5, it was submitted that there was no evidence to corroborate his evidence that he was given K100 and a ball pen to vote in favour of the Respondent as there would have been a number of people also being waylaid to be given K100 notes and ball pens.

With respect to the evidence of PW6, it was submitted that the fact that the police officers and officials from the ECZ were present when the Respondent came to the polling station and no alarm was raised meant that there was nothing that the

Respondent did. It was therefore submitted that the evidence of PW6 that the Respondent parked a vehicle loaded with mealie-meal near the entrance of the classroom was false.

It was submitted that according to ***Woolmington V DPP (1935) AC 462*** the burden of proof lay on the Petitioner. The Judge must be satisfied that there is sufficient evidence to justify a finding in favour of the Petitioner. Counsel for the Respondent cited the case of ***Michael Mabenga v Sikota wina*** also cited by the Petitioner where it was held that one single illegal act if proved was sufficient to nullify an election. In this case the Court also held that the burden of proof was on the challenger of the election to prove the matter on a standard higher than a “mere balance of probabilities”.

Counsel submitted that since the enactment of Act No. 35 of 2016, a single act of bribery or corruption was no longer sufficient in itself to nullify an election unless it was proven that the same had widespread effect on the electorate by preventing the majority of voters from choosing a candidate of their choice. It was the Respondent’s submission that the Petitioner had failed to do so.

Counsel further cited the case of ***Mbikusita Lewanika and Others v Fredrick Titus Jacob Chiluba*** where the Supreme Court held that in election petitions, the burden of proof is higher

than a mere “balance of probabilities” though less than “beyond reasonable doubt”.

It was submitted that PW2 and PW3 were not truthful and shifted their positions several times. Counsel cited the case of ***Simasiku Namakando v Eillen Imbwa*** also cited by the Petitioner. It was submitted that the Petitioner also told lies to the Court on the allegation of massive intimidation and violence. He failed to adduce cogent evidence required. Counsel restated that PW3’s evidence was uncorroborated and there was no evidence of the arrests nor was there evidence to prove reconciliation with the alleged assailant. It was argued that there was no evidence to prove that that the assailants were the Respondent’s agents. Further no police officers were called to testify to the violence and/or malpractices.

She cited the case of ***Simasiku Kalumiana v Geoffrey Lungwangwa and Electoral Commission of Zambia (ECZ)*** where it was held that:

“the testimony of witnesses such as police officers and monitors during an election is more credible than that of party officials and election officers.”

It was the Respondent’s submission that neither him nor his agents were involved in acts of violence or malpractices and cited the case of ***Banda v Siliya and Mbikusita Lewanika and***

others v Fredrick Jacob Titus Chiluba. Counsel also cited section 2 of Act No. 35 of 2016 on the definitions of election agent and polling agent. It was submitted that based on section 97(2) it was established that the corrupt or illegal practices were by either the Respondent or his agents.

It was submitted that he who comes to equity must come with clean hands as is stated in the cases of *Sibongo v Shankanga and Development Bank of Zambia and Livingstone Saw Mills Ltd. V Jet Cheer Development (Z) Ltd SCZ No. 33 of 2000*. It was further submitted that the Petitioner lost with a large margin because he was new to the Constituency. According to the Respondent, the Petitioner lost even in his own village despite bribing and corrupting people with food, money, chitenges, bicycles and beer and promises to build the elderly people better houses.

It was submitted that the Court must dismiss the Petition and uphold the Respondent as duly and validly elected. The Petitioner should be condemned in costs.

I have considered the evidence on record and submissions by both parties. I must take this opportunity to thank both Counsel for their industry. The starting point in parliamentary election petitions is Article 73 of the Constitution of the Republic of Zambia which gives the High Court power to hear and determine election petitions. The Article provides that:

"73 (1) A person may file an election petition with the High Court to challenge the election of a Member of Parliament.

(2) An election petition shall be heard within ninety days of the filing of the petition."

Further, section 96(1) of Act No. 35 of 2016 provides as follows:

"(1) A question which may arise as to whether—

(a) a person has been validly appointed or nominated as a Member of Parliament;

(b) the seat of an elected or nominated Member of Parliament, mayor, council chairperson or councillor, has become vacant, other than a question arising from the election of a candidate as a Member of the Parliament; or

(c) a petition may be heard and determined by the High Court or tribunal upon application made by—

(i) any person to whom the question relates; or

(ii) the Attorney General;

may be determined by the High Court or a tribunal, as the case may be."

Section 97(2) of the same Act highlights instances when the High Court can nullify or declare void the election of a candidate. The section provides as follows:

“(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; or

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

Based on the Petitioner's allegations set out in the Petition the, Petitioner seeks to have the election nullified based on the provisions of section 97(2) (a) Act No. 35 of 2016.

It must be stated that the burden of proving the case in civil matters lies on the Plaintiff or Petitioner as is the case in this matter. The case of ***Khalid Mohamed v The Attorney General (1982) ZR 49*** is quite instructive where Ngulube D.C.J as he then was held as follows:

"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should

nevertheless be given to him on the ground that defence set up by the opponent has also collapsed."

Similar sentiments were echoed in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)** Ngulube D.C.J as he then held as follows:

"I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponents case."

For the Petitioner to succeed in his petition, he must prove the allegations set out in the petition "to a fairly high degree of convincing clarity" because an election petition is required to be proved to a standard higher than a mere balance of probability. In the case of **Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungiombe, Sebastian Saizi Zulu, Jennifer Mwaba v. Frederick Jacob Titus Chiluba** which was cited by counsel for the Respondent, the Supreme Court held that:

"Parliamentary election petitions were required to be proved to a standard higher than a mere balance of

probability ... the issues raised were to be established to a fairly high degree of convincing clarity”.

Similarly, in the case of **Michael Mabenga vs. Sikota Wina, Mafo Wallace Mafiyo and George Samulele** cited by both parties it was held that:

“an election petition like any other civil claim depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a mere balance of probability.”

Lastly for the Petitioner to succeed he must show that based on the acts by the Respondents and his agents, 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.

VIOLENCE AND INTIMIDATION

The first allegation upon which this Petition is based is that Respondents’ agents with the knowledge of Respondent did engage in intimidation and violence contrary to section 83 of Act No. 35 of 2016. The Petitioner relied on the evidence of PW3 whose testimony was mainly that he and his son Kaselo Kayeya were attacked by members of the UPND between the 30th of July and the 3rd of August 2016. The gist of his testimony was that the two were attacked by virtue of them being members of the PF.

According to him the attackers also burnt material and regalia belonging to the PF and went on to injure him with a knife from which he sustained a cut on his right hand. A medical report was produced on page 6 of the bundle of documents.

The Respondent on the other hand denied having any knowledge of such violence and according to his submissions he stated that there was no evidence to corroborate PW3's evidence. It was further submitted that there was no evidence that the issue of the injury was settled between the attacker and PW3 where the attacker paid K600 to PW3. Counsel added that the evidence of PW3 was questionable because he did not even state when exactly the attack occurred.

With regard to this submission I must state that the Supreme Court in the case of **James Kappe v The People (1977) 192 ZR** approvingly referred to **R v Turnbull (1976) 3 ALL ER 537at 553** where Lord Widgery, CJ observed that inter alia that:

"witnesses can make genuine mistakes about dates and occasions like any other witness can."

Following the observation in the case above I find no merit in this submission.

With regard to the submission by Counsel that there was no corroboration to the evidence of PW3, I agree that there is no other supporting evidence to show that on the day alleged there

was politically motivated violence that occurred resulting in the witness' injury.

However, I do find as a fact that PW3 was attacked between the 30th of July and 3rd of August, 2016. I must now state that while corroboration is desirable in establishing a case of this nature, it not a critical part in establishing this allegation. I have considered the evidence of PW3 both in chief and in cross examination and I am satisfied as to the credibility of the witness and his evidence. I therefore agree that he was attacked by people who wore red barrettes, t-shirts and trousers who he believed were agents of the Respondents.

Having said this, what is left to establish is whether the attackers were in fact agents of the Respondent and that the Respondent was aware of the said attacks. The evidence to PW3 is that he was attacked by the people he knew to be agents of the Respondents but conceded that the Respondent was not there when he was attacked. He insisted that the Respondent must have been aware of these attacks despite him being present.

Counsel for the Respondent cited section 2 of Act No. 35 of 2016 which defines an election agent as follows:

“election agent” means a person appointed as an agent of a candidate for the purpose of an election

and who is specified in the candidate's nomination paper"

Section 83(1)(a) and (c)(iv) of Act No. 35 of 2016 is also very clear. It provides that:

"(1) A person shall not directly or indirectly, by oneself or through any other person—

(a) make use of or threaten to make use of any force, violence or restraint upon any other person;

(c)do or threaten to do anything to the disadvantage of any person in order to induce or compel any person—

(iv) to support or not to support any political registered party or candidate;

There was no evidence that was led to show that the people who attacked PW3 were actually his agents. I further do not find any evidence that the Respondent was directly or indirectly involved in the violence suffered by the PW3 as submitted by Counsel for the Petitioner. While I agree that PW3 suffered violence by people who appeared to be UPND supporters, there has been no clear evidence brought before this Court to prove the Respondent's knowledge of the political violence other than the fact that he was a Parliamentary candidate under the UPND.

In view of this I find that the Petitioner has not proved that the violence suffered by PW3 was upon the Respondent's instance. This allegation therefore fails.

BRIBERY

Another allegation upon which the Petition is based is that the Respondent and his agents engaged in corruption and bribery contrary to section 81 of Act No. 35 of 2016.

According to the evidence of PW4 and PW5 the Respondent's agents paid K100 to PW4's father and to PW5. This was so that they vote for the Respondent. It was also alleged by PW5 that he was additionally given a pen to use for voting by the Respondent's agents.

From the evidence already outlined PW4 stated that he left his father at the polling station to vote and when he came back he found that the Respondent's agent had helped him vote in favour of the Respondent and was paid K100 for doing so. These allegations were denied by the Respondent. In his submissions it was stated that the evidence adduce by PW4 was hearsay because he was speaking on behalf of his father who was not called to testify to the alleged bribe.

I totally agree with the submission by counsel for the Respondent that the evidence with regard to the alleged bribe is actually hearsay. The Petitioner has not shown why PW4's father could

not come to testify to this himself. The law is very clear that as a general rule hearsay evidence is not admissible unless it fulfills certain conditions. I have found nothing to warrant this evidence as admissible and as such I find that is not admissible before this Court.

With regard to the evidence of PW5, he claimed to have been offered K100 to vote for the Respondent and was also given a ball pen. He emphasized that the reason he received the money he was offered was because he was not educated and did not know that his vote was secret. While I do agree that there is a possibility that the witness could have been given the K100 note to vote for the Respondent and indeed he could not have been aware that he was not supposed to sell his vote, the Petitioner has not shown any other evidence to show that the Respondent was through his agents giving out K100 notes to voters.

I agree with the submission by Counsel for the Respondent that there were so many other people who could have testified to having been given such an amount to vote for the Respondent. As the evidence stands it was PW5's word against that of the Respondent who completely denied having knowledge of bribery.

From the cases cited above it has been stated that the standard of proof in election petitions is very high even though it is not as high as "beyond reasonable doubt". On the evidence adduced by the Petitioner's witnesses on this issue I find that the Petitioner

has not proved, to the required standard of proof, the allegation that the Respondent through his agents K100 to the electorate in Lukweto and Nakanya on polling day to induce them to vote for him.

BEING IN THE VICINITY OF THE POLLING STATION

Another allegation in the Petition was that the Respondent was seen in the vicinity of Nakato polling station with a vehicle laden with mealie-meal which was meant to feed voters after polls contrary to section 89(1)(f) of Act No. 35 of 2016. PW6 was the Petitioners witness who testified that he saw the Respondent's vehicle at Nakato polling station. PW4 and PW5 also testified to having seen the Respondent at Nakanya Polling station. The Respondent in his evidence admitted to having gone to Nakato polling station to deliver the voters registers to his polling agents as the same were received late from the ECZ.

He also conceded to being at Nakanya polling station because that was where he was registered to vote. He further stated that he did not stay long at Nakanya as he proceeded to go and deliver voters registers which he delivered personally in 8 polling stations and the rest were given to the councillors to deliver.

According to the Respondent in cross examination he was with RW5 in the car as he delivered the registers. RW5 stated that the

reason the Respondent delivered the registers himself and not him was because they were rushing to other polling stations.

Counsel for the Petitioner submitted that the Respondent was in contravention of section 89(1)(e) and (f). Further that the Respondent's actions during campaigns and on polling day impacted and affected the Electorate.

Section 89(1)(f) provides that

"A person shall not—

(e) on any polling day, at the entrance to or within a polling station, or in any public place or in any private place within four hundred metres from the entrance to such polling station

(i) canvass for votes;

(ii) solicit the vote of any person;

(iii) induce any person not to vote; or

(iv) induce any person not to vote for a particular candidate;

(f) on any polling day loiter in any public place within four hundred metres from the entrance to any polling station;"

It has not been disputed that the Respondent did visit 8 polling stations for purposes of delivering voters registers. It was also not disputed by the Respondent that the Vehicle he was in carried bags of mealie-meal which he said belonged to his agents.

I will begin by addressing the issue of the mealie-meal. The evidence of the Respondent and that of RW5 is that the mealie-meal and the heads of cabbage that were in that vehicle on polling day belonged to him as he had a big family. There is no sufficient evidence on record adduced by the Petitioner to show that the mealie-meal was for purposes of feeding voters after the polls. In his evidence the Petitioner alleged that he personally saw the Respondent giving out mealie-meal at Nakato polling station which evidence is unsupported by any of his witnesses. As such this allegation by the Petitioner has not been proven

Secondly, from the evidence on record, I am left without any doubt that the Respondent did in fact visit 8 polling stations on polling day. He has justified this by saying he was delivering voters registers personally to his polling agents. Having said this there has been no evidence adduced by the Petitioner to show that the Respondent while at the 8 polling station was doing any of the following:

- (i) canvassing for votes;
- (ii) soliciting the vote of any person;
- (iii) inducing any person not to vote; or

(iv) inducing any person not to vote for a particular candidate.

All of which are contrary to section 89(1) (e). The allegation that the Respondent contravened section 89(1) (e) is therefore not proven. It has further not been proven that the Respondent was loitering in all the 8 premises as his evidence that he was dropping of voters registers has not been challenged and neither is there proof that he was standing idly at the polling stations. Even if it were to be held that there was no need for the Respondent to be anywhere near the polling stations except where he was voting, I will still hold that the brief appearances of the Respondent at various polling stations (8) in number could not have influenced the voters to vote for the preferred candidate.

CONSTRUCTION OF BRIDGE DURING ELECTION CAMPAIGNS

The Petitioner also alleged that the Respondent during election campaigns did the following:

- a) Delivery of culverts for the construction of a bridge near Luatembo polling station in Siyowe ward on Lui River.
- b) Delivery of crushed stones and sand for Sasenda Bridge Construction on Lui River near Luatembo.

- c) Took a contractor to the site to start construction arrangements.

According to the evidence of PW2 he saw the Respondent sometime in July 2016 at the construction site in Luatambo where culverts, crushed stones and sand were being delivered. He also told the Court that he confronted the Respondent as to why the money had been released during election campaigns. The Respondent told him that since he was investigating the matter the Petitioner would find jobs for them and that the jobs would only be given to UPND supporters. The youths were discouraged that if they did not support UPND they would not have jobs. A week before polls, the Respondent brought a contractor on site to show her the work site.

The Respondent however completely denied having visited the site at the alleged time and emphasized that he was not even present when the culverts were being delivered as he was in South Africa attending a Pan African Parliament. According to him his work in relation to the construction of the bridge ended at him lobbying the government for funds. Once the funds were released the implementation was up to the Mongu Municipal Council working with the CDF Committee.

I have considered the submissions by Counsel for the Respondent. I will firstly point out that I do not agree with the submission that sand in Mongu is everywhere and therefore it

was not possible to deliver the same to the construction site. Much as it is well established Mongu is well endowed with sand, it would be incorrect to assume that the construction area had all the sand that could possibly be needed for the entire construction. That would be in the realm of speculation and as such dismiss the said submission

With regard to the Respondent being present at the time of delivery of the stated materials, the Respondent's claim that he was away at the said time has not been substantiated by any proof apart from his own word. Documentary evidence of this would have been most appropriate at this stage.

Having said this, the evidence of PW2 that the Respondent told him that he would only give jobs to UPND supporters is also not supported by any other evidence. He stated that based on that statement the youths shunned away from voting because they thought the Respondent would think they voted for the PF. No evidence has been brought by the Petitioner of any youth having heard the offer.

Further, assuming the Court was to agree with this evidence, the question would be whether based on that statement to PW2 alone, the majority of the voters were prevented from voting for their preferred candidate. I think not. I therefore find that this allegation also fails as there was no sufficient evidence to show that based on the statement alleged to have been made to PW2

alone most of the young men, youths or indeed other voters shunned from voting for their preferred candidate.

On the totality of the evidence and given the standard of proof required to prove an allegation in an election petition, I find that this allegation regarding the bribery contrary to section 81 and the construction of the bridge have not been proven.

With regard to the allegations of bribery against the Petitioner, the only evidence heard in this regard was the unsupported evidence of RW3 who was a member of the UPND and polling agent. Because the said allegations were unsupported by any independent evidence, the Court finds the same allegation unproven.

A careful consideration of the evidence adduced by PW3 shows that he did in fact suffer violence but the evidence suffered by PW4 has not be proven. Further having found that PW3 did suffer violence at the hand of people he believed to be UPND supporters, the Petitioners allegation that the violence was occasioned by the Respondent and his agents with his knowledge has not been proven on the high standard of proof required in this case.

On the totality of the evidence before me, I am not satisfied that the Respondent committed the corrupt practices of bribery or caused bridge construction materials to be delivered during the

campaign period or that he engaged in violence and intimidation that caused the majority of the voters not to vote for the Petitioner.

I therefore declare that having regard to all the evidence before me, the Respondent, Professor Geoffrey Lungwangwa, was duly elected as the Member of Parliament for Nalikwanda Constituency. I accordingly dismiss the Petition.

With regard to costs, ordinarily costs are suffered by the losing litigant unless cause is shown why the successful litigant should be deprived of the same. The costs are in the discretion of the Court but that discretion should be judiciously exercised.

In the case in casu, the action relates in respect of Parliamentary Elections. Just like any qualified citizen can contest Parliamentary elections, a person with locus standi aggrieved of the results of the election has the right to challenge the same in the High Court.

It is in Public interest that citizens should exercise their rights when they perceive that a civil wrong or wrongs might have been suffered at the instance of another person. Automatic condemning of an unsuccessful litigant in an election petition would in my view tend to have the effect of discouraging aggrieved citizens from seeking redress from the Courts.

In the circumstances of the case, I am of the considered view that this is a fit and proper case that I make no order as to costs. Put differently, each party shall bear its own costs.

Leave to Appeal to the Constitutional Court is granted

**Delivered under my hand and seal at Lusaka this 7th day of
November, 2016.**



**Mwila Chitabo, S.C.
Judge**