



**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)**

2016/HP/EP/0063

IN THE MATTER OF: THE PARLIAMENTARY PETITION RELATING TO
THE PARLIAMENTARY ELECTIONS HELD ON
THE 11TH DAY OF AUGUST, 2016.

IN THE MATTER OF: ARTICLES 1, 2, 5, 8, 9, 45, 46, 47, 48, 49, 50,
54, 70, 71, 71 AND 73 OF THE CONSTITUTION
OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF
THE LAWS OF ZAMBIA

IN THE MATTER OF: SECTIONS 29, 37, 38, 51, 52, 55, 58, 59, 60,
66, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83,
86, 87 AND 89 OF THE ELECTORAL PROCESS
ACT NO. 35 OF 2016

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

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016

BETWEEN:

**BELINDA MOOLA MUTANGA LWEENDO
AND
GEORGE MUHALI IMBUWA
ENOCK KAYWALA MUNDIA
ELECTORAL COMMISSION OF ZAMBIA**

**PETITIONER
1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

**Before the Hon. Mr. Justice Mathew L. Zulu in Open Court on
the 21st day of November, 2016.**

For the Petitioner: Mr. M.M. Munansangu of AMC Legal Practitioners
For the 1st Respondent: Mr. G Locha of Mweemba & Company
For the 2nd Respondent: Ms. D. Mwewa of KBF & Partners
For the 3rd Respondent: Mr. W. Mweemba of Mweemba & Company

J U D G M E N T

Cases cited

1. *Batuke Imenda v. Alex Cadman Luhila* (SCZ No. 5 of 2003).
2. *Mateo B. Mwaba v Anthony Kunda Kasolo* (Appeal No. 27 of 2003).
3. *Mlewa v. Whightman* (1995/1996) ZR 171
4. *Benson Chola and others v. The People* (1988-89) ZR 103.
5. *Chikuta v. Chipata Rural Council* (1983) ZR 26
6. *Anderson Kambela Mazoka and Two Others vs Levy Patrick Mwanawasa and Two Others* (2005) ZR 138.
7. *Mabenga v Sikota Wina* (2003) ZR 10
8. *Lewanika and others v. Chiluba* (1998) Z.R. (S.C.)
9. *Kamanga v. Attorney General and another* (2008) ZR 7.
10. *Khalid Mohammed v. The Attorney General* (1982) ZR 49.
11. *Lazarous Chota v. Patrick Mucheleka* (SCZ NO. 18 of 2015).

Legislation referred to:

1. *The Constitution of Zambia Amendment Act No. 2 of 2016*
2. *The Electoral Process Act No. 35 of 2016*
3. *The Electoral (General) Regulations, 2006.*

The Petitioner, Belinda Moola Mutanga Lweendo, presented this Petition with an Affidavit Verifying Facts on 29th August, 2016 seeking the following reliefs:

(a) Interim Remedies

- (i) An order that pending the hearing and determination of this Petition, all ballot paper accounting forms, polling station record of proceedings at the court forms, statements of rejected ballot forms, record of proceedings at the totaling center and or other documents and/or material used in the election wherein the proceedings and results of the poll were recorded and/or can be ascertained and which are, or ought to be, in the custody of the 2nd Respondent be preserved and that they be

delivered by the 2nd Respondent to the custody of the registrar of the Court for detention and safe keeping pending final determination of this Petition.

- (ii) An order, by way of interim relief, that the 2nd Respondent, its servants agents or whomsoever, be restrained from altering, destroying, tampering with, accessing or in any way dealing with the documents and materials subject to the application for relief set in item (i) above, save to the extent necessary to secure compliance with any order this Court might make pending the final determination of this Petition.

(b) Substantive Remedies:

- (i) A declaration that the 1st Respondent herein, was not validly elected as Member of Parliament for Nalolo Constituency as such the election was void.
- (ii) An order of recount, verification and scrutiny of the votes cast in the Parliamentary Elections for Nalolo Constituency on the 11th August, 2016 to ascertain the real winner.
- (iii) An order that the ballot papers in relation to the Parliamentary Election for Nalolo Constituency be recounted, scrutinized and verified and any votes found not to be invalid after that are added back to the total of the valid votes cast in favour of the affected candidate.

- (iv) In alternative, in the event that a recount and scrutinisation is ordered and the resultant recount of the ballot cast shows that the Petitioner obtained more valid ballots cast for the elections as Member of Parliament for Nalolo Constituency, declaring the Petitioner the duly elected Member of Parliament for Nalolo Constituency, declaring the Petitioner the duly elected Member of Parliament for Nalolo Constituency.
- (v) An order that the Respondents herein bear the costs of this cause.
- (vi) Any other relief that the Court may deem fit.

The Petition discloses that the Petitioner, the 1st Respondent and the 2nd Respondent were candidates in the Nalolo Parliamentary Election held on 11th August, 2016. The three contested the election on the UPND ticket, independent ticket and Patriotic Front (PF) ticket respectively. The other candidates were Akayombokwa Catherine of Forum for Democracy and Development (FDD) and Imalimbila Namabunga of United National Independence Party (UNIP). After the results were announced by the Returning Officer, the 1st Respondent emerged winner and was declared the duly elected Member of Parliament for Nalolo Constituency. The Petitioner alleges that he was not duly elected because the 1st, 2nd and 3rd Respondent's clandestinely involved themselves in corrupt, illegal practices and other misconduct committed in relation to the election against the spirit of the Constitution, the Electoral Process Act and the Electoral Code of Conduct.

The 1st Respondent filed an Answer and Affidavit in Opposition to the Petition on 25th October, 2016 denying the Petitioner's claims.

The 2nd Respondent also filed an Answer to the Petition on 14th September, 2016. The 2nd Respondent denied the Petitioner's claims, save for the allegation under paragraph 8 (d) of the Petition. The 2nd Respondent categorically states that he agrees with the Petitioner that the 1st Respondent told people during campaigns that he was the officially adopted candidate for UPND and not the Petitioner.

The 3rd Respondent did not file in any Answer or Affidavit in Opposition but they appeared during trial and gave evidence.

The background to this matter is that a Petition under cause number 2016/HP/EP/0013 (hereinafter the 'first Petition') was commenced between Enock Kaywala Mundia and George Muhali Imbuwa relating to Nalolo Constituency. I heard the first Petition at Livingstone High Court from 5th October to 12th October, 2016 and reserved the matter for judgment. After the close of the first case, I was alerted of this Petition which was filed in Lusaka relating to the same Constituency under cause number 2016/HP/EP/0063 (hereinafter 'the second Petition'). The second Petition had been initially allocated to Judge D. Mulenga and was scheduled for hearing on 17th October, 2016. However, by the Order dated 17th October, 2016 and in accordance with Section 23 of the High Court, Mr. Justice D. Mulenga transferred the matter to this Court.

On 19th October, 2016, Counsel for the Petitioner in the second Petition applied to have the two Petitions under cause numbers 2016/HP/EP/0013 and 2016/HP/EP/0063 consolidated. In my Ruling dated 19th October, 2016, I noted that in the two Petitions, the Petitioner under cause number 2016/HP/EP0013 is also the 2nd Respondent under cause number 2016/HP/EP/0063. I ruled that two actions could not be consolidated because the Petitioner in the first Petition is also the 2nd Respondent in the second Petition. However, having noted some common questions of law and fact in the two Petitions coupled with the fact that the first Petition was heard and pending Judgment, I ordered a stay of the first Petition pending the hearing of the second Petition after which I would render judgment.

At trial, the Petitioner gave oral evidence and called 8 witnesses. PW1 was the Petitioner, Belinda Moola Mutanga Lweendo who stated that during campaigns in Nalolo Constituency, vote buying was unprecedented. She testified that the 1st Respondent invited all the UPND Ward Chairmen from all the 10 wards of Nalolo with their Secretaries on various dates to a lodge in Lusaka where he entertained them and gave them money to coerce voters in Nalolo to vote for him.

It was her testimony that the 1st Respondent bought two cows. The first cow was given to the UPND District and Constituency officials in Nalolo in order to entice them to vote for him. That she learnt about the first cow at a full packed meeting at Sikana during the

UPND primaries and that the first cow had not been shared properly which led to the suspension of their Constituency Ward Chairman because the cow was meant to be distributed to the District and Constituency officials to entice them to vote for the Respondent. They made inquiries as to why no action was taken against the Respondent but no action was taken and the UPND District Chairman advised them to ignore the issue. The second cow was distributed to the electorate at Sikana Primary School.

Further, PW1 testified that the 1st Respondent gave out cash at all his meetings and boasted to the electorate that while he gave out cash, the Petitioner only distributed papers.

She, however, disclosed that she did not witness these incidences of vote buying but would call witnesses in her aid.

Regarding the use of UPND party regalia, PW1 testified that during campaigns, her team would campaign in the same areas as the 1st Respondent. That the 1st Respondent caused a lot of confusion because he was accompanied by cadres dressed in UPND regalia, he used the UPND campaign posters and stuck his poster next to their presidential candidate's portrait and used their party slogans. And that he claimed at all his meetings that he was the official parliamentary candidate for UPND. She added that her campaign team was queried at all her campaign meetings on who the official candidate for UPND was. She, however, revealed that she did not witness the incidences she referred to.

On allegations of hate speech, PW1 testified that during campaign meetings, the 1st Respondent and his team maliciously referred to her as a thief who had stolen money for polling agents, which was untrue. She stated that the 1st Respondent asked people if they could entrust Constituency Development Fund to her who was a thief. That the 1st Respondent told people that she burnt her late father's clothes after his death, chased her 81 year old mother from the matrimonial house and that she threw away mealie meal for mourners during the funeral. He also told the electorate not to vote for her as woman because they needed to vote for a man for a change as the previous MP was female. She also disclosed that she did not attend any of the meetings at which these words were allegedly uttered.

As against the 2nd Respondent, PW1's evidence was that the 2nd Respondent paid out money to churches, community school teachers, widows of deceased teachers and built houses at some community schools. At one polling station called Kashitu, her team was not allowed to hold a campaign meeting because the 2nd Respondent paid off the owner of the village. She testified that the 2nd Respondent bought foot balls, and jerseys imprinted with his name which he distributed to most schools in Nalolo.

As against the 3rd Respondent, PW1 testified that she was disadvantaged because her strongest hold in Nalolo was Silwana Ward where voting was delayed. In that ward, polling stations opened between 16:00 and 18:00 hours. As a result, voters who had walked

up to 15 kilometers to the various polling stations left without voting. She stated that Silowana polling station has over 800 registered voters but only slightly over 200 people voted out of which she polled 178 votes. In her view had voting commenced at 06:00 hours, a lot of voters would not have been disenfranchised.

In cross examination by counsel for the 1st Respondent, she testified that the incidences she referred to on vote buying occurred before nominations and they were targeted at the UPND officials and not the people of Nalolo. She stated that at all the meetings she addressed, people told her that unlike her, the 1st Respondent knew how to take care of them because he slaughtered two animals.

Further, that she neither witnessed the 1st Respondent wearing UPND regalia nor character assassinating her.

In cross examination by counsel for the 2nd Respondent, PW1 confirmed that her evidence regarding the 2nd Respondent was based on what she was told by her witnesses. She agreed that her evidence was hearsay.

In cross examination by counsel for the 3rd Respondent, PW1 testified that she was aware that the vehicles ferrying ECZ officials to various polling stations in Silowana Ward ran out of fuel along the way and that voting ended around 04:00 hours at the last polling station. She conceded that she was not the only one disadvantaged by the delay but insisted that she was the one who was mainly disadvantaged.

In re-examination, PW1 clarified that she said she was disadvantaged because if all the eligible voters had voted, she would have won the election with a landslide since Silowana Ward was her stronghold.

PW2, Nyambe Kaywala, the UPND Chairman for Kambayi Ward testified that he received transport money in the sum of K350.00 from the 1st Respondent which he used to travel from Nalolo via Mongu to Lusaka with his secretary, Kanjambo where they met with the 1st Respondent. The Respondent booked accommodation for them at a lodge called Red Sun in Lusaka. During the meeting, the 1st Respondent told him that he had called him so that he could go and tell people to vote for him under the UPND ticket. After the meeting, the 1st Respondent gave them K1, 000.00 in K100.00 notes so that they could induce people to vote for him.

When they returned, they went to Makoka Ward where the primary elections were held. PW2 testified that on the 1st Respondent slaughtered two cows. The 1st Respondent called them as leaders in the Ward to go and receive the meat in the village, the other cow was slaughtered at Muoyo village in Nalolo to sway them as leaders to vote for him during the primary elections. The 1st Respondent also requested the leaders to list 10 people whom he gave K100.00 notes each. PW2 stated that when he saw that, he withdrew.

PW2 testified that on 9th August, 2016, he attended a campaign rally at Mwandu Primary School which was addressed by Namaya Kamonga and the 1st Respondent at which they used the UPND

party slogan 'Zambia Forward' and UPND materials. In their address, they told people that the Petitioner is a thief who had stolen K10,000.00 for polling agents and was cursed because she burnt her late father's clothes after his death and chased her mother from the matrimonial house. PW2 stated that he was surprised that the 1st Respondent was assisted by UPND members and officials in his campaign. He knew this fact because some of them were in his Ward and held respectable positions. He also stated that he was also surprised because the 1st Respondent was holding a poster of himself on one side and that of the UPND presidential candidate Hakainde Hichilema on the other side. He added that the words referred to were repeated by all the speaker including the 1st Respondent.

When cross examined by counsel for the 1st Respondent, PW2 stated that the incidents referred to that he received transport money and met with the 1st Respondent in Lusaka and the distribution of meat took place before nomination day. Whereas, the campaign meeting he referred to was held after the nominations. He also stated that the animals were bought for UPND officials.

PW2 disclosed he attended the meeting at Mwandi which took place after nominations. He stated that the 1st Respondent had his own symbol of the 'mortar'. He was conducting all these meetings as an independent candidate.

PW3 was Muleta Kalima, a 54 year old peasant farmer of Mutabelwa village who was the UPND Chairman for Ukolo Ward.

His testimony was that in March, 2016 the 1st Respondent facilitated his travel to Lusaka with his Ward Secretary, Reuben Silumesi Ngela, with permission from the UPND Constituency Chairman, Mr. Charles Mulonda. While in Lusaka, they held a meeting with the 1st Respondent who asked them to assist him in his campaign and promised them a reward if he won. The 1st Respondent gave him a wallet containing K800.00 as an incentive. He nonetheless refused to campaign for him.

Under cross examination by counsel for the 1st Respondent, PW3 testified that the incident he referred to occurred before the nominations and was meant to assist the 1st Respondent to secure adoption as a UPND candidate.

PW4 was Inambao Polota, a 44 year old peasant farmer of Kabele village in Nalolo. His evidence was that the UPND Ward Secretary, Silumesi Ngelawa, introduced him and 9 other members of Ukolo Ward to the 1st Respondent who gave them K100.00 notes each and told them to vote for him during the primaries. The 1st Respondent also gave them meat from his vehicle at Likombe village. After the primary elections, the 1st Respondent won.

He testified that on 9th August, 2016, he attended a campaign rally held at Kalamba village in Ukolo Ward by the 1st Respondent and his team among them, Mulonda Malimba. During the meeting, they used the UPND party slogan 'Zambia Forward!' and told people not to vote for the Petitioner alleging that she was a thief who had

stolen money for the UPND party in 2015. The 1st Respondent also told people that he would bring electricity to the school

In cross examination by counsel for the 1st Respondent, PW4 testified that the animals were slaughtered in April, 2016 before nominations. He stated that it was wrong for the 1st Respondent to use the UPND party slogan 'Zambia Forward!' because he was an independent candidate. According to him, the meeting which the 1st Respondent held was for UPND because the 1st Respondent was seen with a poster of HH and himself on the other side. However, the said poster was not produced in Court. He further stated that he was a resident of Nalolo and that it was not wrong for the 1st Respondent to say he would electrify Nalolo School.

PW5, Mwangala Mwandawamufu, a 60 year old peasant farmer of Ndeko village testified that in July, 2016, he attended a campaign rally in Siyanda area of Mangongo village which was addressed by Namaya, Nyumbu, Mulonda and the 1st Respondent himself. In their address, they all told people that they should not vote for the Petitioner because she is a thief who had stolen money. Then Mulonda went further to state that the Petitioner was cursed because she had brunt her late father's clothes and chased her mother from the matrimonial home. They also told people that the 1st Respondent was also a member of UPND. One of the people at the gathering asked them why they were confusing people because it appeared as though UPND had fielded two candidates. Mulonda who wore both the UPND and the 1st Respondent's regalia said yes.

The 1st Respondent confirmed that he was also contesting the election on the UPND ticket. She went on to testify that people were confused because the 1st Respondent said that people should vote for him as MP and HH as president. They also used the UPND campaign material and wore UPNF regalia.

She went on to testify that during the meeting, Mulonda began his address by shouting the UPND party slogan 'Zambia Forward!' She also stated that the 1st Respondent confirmed what the other speakers had said at the meeting and added that they should vote for him because he hails from their area in Kapolota village.

PW5 further testified that the 1st Respondent told people that they should not vote for the Petitioner because that they would disturb a lot of programs. The 1st Respondent also told people that if they voted for him, he would renovate the schools and upgrade the roads.

Under cross examination by counsel for the 1st Respondent, PW5 testified that the 1st Respondent himself never wore the UPND party regalia at that meeting and that there was nothing wrong for the 1st Respondent to support HH as a presidential candidate.

PW6 was Namasiku Masheke, a 34 year old peasant farmer of Nang'andwe village in Nanjucha area. Her testimony was that in July, 2016, she attended a campaign rally at Liyomboko village for the 1st Respondent. The 1st Respondent and his team which included Namaya whom PW6 found delivering a speech. He was followed by Mulonda and the 1st Respondent himself. The speakers

gave the addressees the same message they delivered at the meeting referred to by PW5 on hate speech against the Petitioner.

In cross examination by counsel for the 1st Respondent, PW6 testified that at the meeting, it was explained that both the 'hand' and 'mortar' were symbols for UPND. She believed the message because the 1st Respondent's supporters also wore the UPND party regalia. Further, that the 1st Respondent was confusing the electorate by telling them to vote for the 'hand' because the electorate thought UPND had fielded two candidates.

PW7, George Nawasiisii, of Mutongo village testified that in July, 2016, he attended a campaign rally for the 1st Respondent at Mangongo village at which the 1st Respondent and his team delivered the same message of hate speech referred to by PW5 and PW6. In cross examination by counsel for the 1st Respondent, his testimony was that the 1st Respondent only distributed his own T-shirts and chitenge materials but told people that he was standing on the UPND ticket. In his view, although the 1st Respondent used the symbol of the 'mortar' he did not win by using that symbol. He added that many people heard when someone at the meeting told the 1st Respondent that he was confusing people.

PW8, Mufalali Imboela, a 33 year old peasant farmer of Kobya village in Nalolo testified that in August, 2016, he attended a campaign meeting for the 1st Respondent at Nasita. The 1st Respondent's team used the UPND party materials, slogans and campaign songs and two flags; one use of UPND Chitenges

materials. They delivered the same message they delivered at other rallies referred to by PW5, PW6 and PW7. He added that people were confused because they did not know who the official parliamentary candidate for UPND was since the 1st Respondent was also campaigning to be a UPND candidate.

In cross examination by counsel for the 1st Respondent, PW8 disclosed that the 1st Respondent was not wearing UPND regalia at the said meeting. However, that he learnt that the 1st Respondent was UPND because that is what he said at the meeting. In his view, it was wrong for the 1st Respondent to support UPND because he was an independent candidate.

PW9 was Mubiana Munyindei of Nambuya village who was a polling agent for UPND tasked to patrol Wards in Nalolo on Election Day. His testimony was that on 11th August, 2016 voting commenced late in Silowana Ward where Kaungalueti, Maombe, Namabunga, Kaanda and Silowana Polling Stations are situated. The earliest polling station opened around 16:00 hours. As a result of the delay, many voters, including the Petitioner's supporters who had gathered very early in the morning went back without voting due to the long distances they had to cover.

In cross examination by the 1st Respondent's Counsel, PW9 testified that both the Petitioner and the 1st and 2nd Respondents were affected by the delay.

Under cross examination by Counsel for the 3rd Respondent, PW9 testified that in all the polling stations he referred to, voting was

extended beyond 18:00 hours and the last one closed after 02:00 hours. However, that he found voters at all polling stations he visited after 17:00 hours. Further, that he informed the Petitioner that voting started late but that the reason was not known. He also informed the Court that they informed the Petitioner over the delay in the 5 Polling Stations.

PW9 further testified that Silowana has between 3,000 to 5,000 voters and a good number of those people went away without voting. He insisted that Silowana was a UPND stronghold.

That was the Petitioner's case.

RW1 was the 1st Respondent, George Muhali Imbuwa. He testified that he was a member of UPND until he resigned on 26th April, 2016. Prior to that, he used to participate in UPND branch structure organization. Along the way he developed an interest to aspire as an MP for Nalolo under UPND. To that end, he printed a lot of fliers which he distributed in Nalolo with the help of his relatives. In response, the people of Nalolo demanded to meet him but he could not find time to meet them. He then called all the UPND Chairmen and Secretaries of the respective Wards to meet him in Lusaka at different times. He paid their transport expenses in amounts ranging between K300 and K400. He accommodated them in a hotel called Red Sun and as they went back he gave them a stipend of K500.00 each for their appreciation and cooperation. The purpose of those meetings was to sell himself for adoption as Member of Parliament for Nalolo and to explain his predicament of

being unable to visit the Constituency because he was in employment. Before he visited the Constituency, they slaughtered one cow and dry it for use during the meetings because there is usually a challenge with relish in the month of March in Western Province.

On 26th April, 2016, all the 11 aspiring candidates for MP for Nalolo were summoned by the UPND party leadership to Sikana and requested to contribute food because the party did not have sufficient funds. Following the request, he donated some food. He testified that the animal the Petitioner's witness referred to was purchased by the Constituency.

The following day, elections were conducted and he won. However, he heard that the National Management Committee for UPND which was the final body was considering to adopt another candidate. He wrote to the party president, HH, reminding him of the party constitution and urged him to uphold the outcome of the elections. He promised him that he would look into the issue positively. He waited until the party announced that they had decided to adopt the Petitioner who had emerged fourth during the primaries.

He testified that he resigned from the party through a letter dated 20th May, 2016. He referred to page 4 of the 1st Respondent's Bundle of Documents. After consulting his colleagues in the Constituency, he decided to contest the election as an independent candidate and filed in his nomination on 31st May, 2016. He proceeded to form campaign teams in almost all the wards. He

recruited the Constituency Chairman, Mulonda as campaign manager, Namaya Kamonga as Secretary, and Joseph Chizyuka as youth Chairman and Nyumbu Chikapa as treasurer.

He denied that he engaged in vote buying. He stated that the only money he gave out was given to the team to run his campaigns. He stated that he only campaigned for three weeks before the elections because he was waiting for his campaign material to be ready. He stated that he had enough T-shirts and Chitenge materials which he distributed to every person who attended his meetings such that he did not need to use the UPND party materials. That his material was imprinted with a message to vote for him as an independent candidate. He denied that any of his material had a message for people to vote for UPND. He referred to his flier and manifesto on pages 1 and 2 of his bundle of documents to support his evidence.

RW1 denied that he engaged in hate speech. He stated that he never spoke about any of the other candidates during his meetings because they were issue based.

In cross examination by counsel for the Petitioner, RW1 testified that the primary elections at which he emerged winner were never nullified. When referred to page 4 of his Bundle of Documents, he testified that the secretariat received the resignation letter. When further cross examined whether the letter was acknowledged, he stated that the letter he wrote remained at the office of the Secretary General. He added that the letter he produced was not the copy he produced in Court. He insisted that he had proof in

form of a document between the UPND and himself that he resigned but it was not before Court.

He agreed that the members of his campaign team were actually members of UPND. He maintained that they were no longer members of UPND when he recruited them to his campaign team but had no evidence to show that they resigned.

Referred to page 2 of the 1st Respondent's Bundle of Documents. He stated that he campaigned for HH as President and for himself as MP. He denied that he used the UPND party as a platform to succeed as an independent candidate. He stated that he was contesting the election as an independent candidate and did not subscribe to other political parties' ideologies.

In cross examination by counsel for the 3rd Respondent, RW1 testified that his polling agents informed him that voting started late in Silowana Ward due to delay in delivery of ballot papers. As a result, a lot of his supporters went back home without voting because they were hungry. He was also informed that voting was extended. He went on to testify that he was personally disadvantaged because he could have received more votes. He discovered that the vehicles delivering the ballot papers were stuck because Nalolo has a sandy terrain.

In re-examination, RW1 confirmed that he delivered his resignation letter to the Secretary General of the UPND and kept a copy. He explained that the members of his campaign team were not members of UPND at the time they were campaigning. He further

clarified that was telling people to vote for him as an independent candidate and HH as president. He denied that the message on his flier depicted that he was contesting the election under UPND.

RW2 was Charles Mulonda Malimba, a peasant farmer aged 54 years old of Nalolo. His evidence was that the 1st Respondent won the primary elections for UPND but UPND adopted the Petitioner. The people of Nalolo requested the 1st Respondent to contest the election as an independent MP. In the process, the UPND membership split up; some followed the 1st Respondent while others remained in the party. He decided to follow the 1st Respondent.

During campaigns, they told people to vote for the 1st Respondent using the symbol of a 'mortar'. Wherever they went, people received their campaign message warmly and promised to vote for him. According to him, that is how the 1st Respondent as emerged winner.

RW2 denied that the 1st Respondent engaged in vote buying. He also denied that the 1st Respondent used the UPND party regalia during campaigns. He testified that after resigning from UPND, the 1st Respondent made his own T-shirts and chitenge materials which he used during when campaigning. The 1st Respondent had no power to chase people who attended his meeting wearing UPND or PF regalia. He denied that the 1st Respondent told people that he was also the candidate for UPND. He also denied allegations of hate speech. He maintained that the 1st Respondent never mentioned any of the other candidates during his campaign meetings. He

added that at the end of their campaign meetings, the headmen would thank the 1st Respondent and endorse his candidature as MP. That is why he won the election.

Under cross examination by counsel for the Petitioner, RW1 testified that he was under the UPND but he resigned in July / May, 2016 but had no proof of his resignation. He started working with the 1st Respondent as campaign manager in July, 2016.

In cross examination by counsel for the 2nd Respondent, RW1 testified that as campaign manager he was the 1st Respondent's right hand man and that he attended all the campaign meetings. He remembered what transpired at the different meetings they held at Kataba, Nasita, Mangongo and Liyomboko villages. Although he did not know all the people who attended the meetings, he heard what was said.

In re-examination, RW2 reiterated that at the time he was campaigning for the 1st Respondent, he had already resigned from UPND.

RW3 was Joseph Chiyuka Chiyuka, a 35 year old business man of Moyo Royal village. During campaigns, he campaigned for the 1st Respondent who won the elections. According to him, there was no vote buying stating that the electorate were elderly and could not be bribed. He denied all the allegations against the 1st Respondent that he used UPND regalia, told people that he stood on the UPND ticket or engaged in hate speech against the Petitioner.

In cross examination by counsel for the Petitioner, RW3 testified that he once belonged to UPND where he served as Vice District Youth Chairman until he resigned in April, 2016 but had no proof of his resignation. He agreed that he was part of the 1st Respondent's campaign committee where he served as Chairman together with RW2 who was the Campaign Manager, Namaya Pumulo Kamonga who was the Secretary, Nyumbu Chikapa who was the Treasurer and Zedi who was the Assistant Secretary. As chairman he attended all the 1st Respondent's campaign meetings during which he noticed that some attendants were wearing their own political party regalia.

In cross examination by counsel for the 2nd Respondent, RW3 maintained that the 1st Respondent's had his own material but there was no sample of the material they used to campaign before Court.

In re-examination, RW3 clarified that he did not know whether the other members of the campaign team belonged to UPND because they never asked them.

RW4, was the 2nd Respondent, Enock Kaywala Mundia. He testified that he used to live in China from 1988 to 2012. During that period, he visited his village in Nalolo from time to time. In January, 2009, he visited his former school, Sefula Secondary School, in Mongu District where he donated football jerseys from China. He stated that he owned a clothing factory in China so he could afford to give back to his community by donating to his former school.

In 2010, he donated jerseys to Lukulu Secondary School, Kaoma Secondary School in Kaoma, Kambule Secondary School in Mongu, Holy Cross Secondary School in Mongu, St Johns Secondary School in Mongu, Kalabo Secondary School in Kalabo, Senanga Secondary School in Senanga, Sesheke Secondary School in Sesheke and Sioma Secondary School in Sioma. Later that year, he bought football jerseys for Litoya Primary School, Namatwambo Primary School, Litufa Primary School in Senanga, Suunda Primary School in Senanga, Moyo Primary School in Nalolo, Liyangati Primary School in Senanga, Lipuma Primary School in Nalolo, Nanjucha Primary School in Nalolo and many other schools. During that period, he was not affiliated to any political party. The last donation he made was in 2015 before nominations.

He denied that he made the donations of K2, 000.00 to community schools and churches as alleged in the Petition. He stated that he does not know the headman Muliwana referred to in the Petition or that he gave him any money as alleged. All candidates were allowed to hold meetings at any place in Nalolo and it was the Petitioner who won the elections in Shekela ward. He denied that he won at Kashitu polling station because he bribed the headman. He referred to the schedule of results for Shekela Ward on page 3 of the Petitioner's Bundle of Documents.

He stated that he was in Mongu so it was not possible that he was dishing out money as alleged. He denied that he bought roofing sheets at Lwiimba and Siyanda because the churches still had

thatched roofs at the time of trial. He referred to the pictures of the two churches on pages 1 and 3 of his Bundle of Documents.

RW5 was Kambole Kalaluka, of Senanga who was the District Elections Officer for Nalolo District. His role was to receive election materials from ECZ from Lusaka such as ballot papers, training manuals, ballot boxes and computers. He was also in charge of recruiting poll staff and distributing election materials and poll staff to all polling stations in the District.

It was his evidence that the polling staff designated for Silowana Ward were not deployed on time because the vehicle that was sent to take fuel got stuck in the sand at Nasilima area. They walked to an area where there was network and called in that the vehicle was stuck. The first vehicle was carrying fuel. They deployed a second vehicle to collect the fuel but it also experienced a break down on the way. Then they sent a third vehicle which retrieved the fuel. Thereafter, the polling staff were deployed to all the 6 polling stations in Silowana Ward. The first polling station opened at 14:07 hours while the last polling station opened at 16:05. The hours lost were compensated by extending voting until the designated number of voting hours were covered. They also informed the electorate in Silowana ward that voting had been extended through the people that were on the queues. Eventually, voting took place in Silowana ward.

According to RW5, none of the candidates obtained an advantage over others as a result of the delay.

In cross examination by counsel for the Petitioner, RW5 stated that Silowana has 6 polling stations including Kaungalueti, Namabunga, Silowana, Maombe and Ilalamupa which opened between 14:00 hours and 16:05 hours. The last polling station closed around 04:00 hours the following morning. He was not aware that because of the delay, some voters went back without voting because it was getting late and they had to walk for long distances. However, that to the best of his knowledge, it was possible that some voters would have left while some might have returned to vote.

He testified that to access Nalolo Civic Centre, one has to pass through Mongu and Kalabo in heavy sand which covers about 70 kilometers. He added that Nalolo is all rural and Silowana Ward is not electrified by the National Grid. Some villages are near while others are far away from the polling stations.

In cross examination by counsel for the 1st Respondent, RW5 stated to the best of his knowledge, none of the 5 candidates benefited from the delay in opening the polling stations. He was unable to state that those people who went away without voting intended to vote for a particular candidate.

It was his testimony that at the time they were preparing for elections, he was aware of the terrain in Nalolo. They dispatched election material to Nalolo three days before elections from Muoyo Royal Palace where the Civic Centre is located. He maintained that despite the delay, ECZ did not fail in its duties because they had

put alternative measures in place to ensure that the materials reached Silowana on time.

In re-examination, RW5 stated that he did not fail in his duties because the breaking down was an unforeseen circumstance.

At the close of the hearing, learned counsel for the Petitioner filed written submissions dated 31st October, 2016 in support of the Petitioner's case. It was submitted that the Petition was premised on four grounds, namely; vote buying, use of UPND party slogan and regalia, hate speech and delayed opening of polling stations.

As regards vote buying, learned counsel submitted that them prior to visiting the Constituency, the 1st Respondent invited all the UPND Ward Chairmen to Lusaka and gave them money for transport and accommodation for the sole purpose of enticing them to convince the electorate to vote for him at the primaries. Counsel stated that this was the evidence of PW2 and PW3 which was confirmed by RW1.

As regards the use of UPND party slogan and regalia, it was submitted that the Petitioner had proved to the requisite standard that usage of the UPND slogan, the portrayal as a UPND member and UPND aspiring candidate as well as the directive to the electorate to vote for UPND Presidential candidate was a practice master minded to woo the electorate from voting for the Petitioner.

Counsel submitted that the commonality of the testimonies of PW5, PW6, PW7 and PW8 is that the 1st Respondent's campaign team

used the UPND party slogan and told people to vote for the UPND Presidential candidate and the 1st Respondent as MP at the meetings held at Liyomboko village, Mangongo village and Nasita area. Counsel submitted that the 1st Respondent had no proof before Court that he resigned from UPND because the letter he relied upon was not acknowledged and the one he said he left at the UPND secretariat was different from the one he produced before Court. That the people who were in his campaign team were all UPND members who failed to show proof of their resignation before Court. Counsel argued that the recruitment of another political party members in his campaign is a corrupt and illegal practice and a serious misconduct intended to confuse and induce members of UPND to vote for an independent candidate masquerading as a member of UPND. He added that the use of fliers containing that campaign message influenced the majority of voters.

He further submitted that the 1st Respondent was not eligible to contest the election because he was and still is a member of the UPND contrary to Article 51 of the Constitution of Zambia.

On allegations of hate speech, counsel referred the Court to the evidence of PW2, PW5, PW6 and PW7 who stated that the 1st Respondent and his campaign team referred to the Petitioner as a thief and a cursed woman. Counsel stated that the Petitioner's witnesses were credible and sound. Counsel submitted that these disparaging remarks regarding the Petitioner and her family were contrary to Section 84 (1) of the Electoral Process Act. He argued

that the reference to the Petitioner as being cursed portrayed her to the electorate as being ill and disenfranchised her thereby influencing the voting pattern to her disadvantage. He quoted the Concise Oxford English Dictionary, 11th edition (revised) at page 352 on the definition of the word 'curse; to mean "a solemn appeal to a supernatural power to inflict harm on someone or something."

Learned counsel drew the Court's attention to the cases of **Batuke Imenda v. Alex Cadman Luhila** ⁽¹⁾ and **Mateo B v. Anthony Kunda Kasolo**⁽²⁾ regarding nullification of an election on ground of illegal publication of false statements.

Regarding the delayed opening of polling stations, it was submitted that 5 out of 6 polling stations in Silowana Ward opened late, a fact which RW5 conceded in cross examination. Counsel that the delayed opening of polling stations in Silowana Ward by the 3rd Respondent might have prevented the majority of voters from voting for a candidate of their choice. Citing the case of **Mlewa v. Whightman**⁽³⁾, counsel argued that an election will be nullified if there is wrong doing of the type and scale which satisfies the Court that it adversely or may have affected the election.

Learned counsel prayed for a declaration that the 1st Respondent was not duly elected.

In response, learned counsel for the 1st Respondent, Mr. Locha filed written submissions dated 2nd November, 2016. The gist of his submissions was that the Petitioner had failed to prove her case to

the standard required in election petitions which is higher than a mere balance of probabilities but not beyond reasonable doubt.

It was submitted that the alleged acts of vote buying referred to by the Petitioner's Witnesses happened between March and April, 2016 before the 1st Respondent filed in his nominations as an independent candidate during the primary elections.

Learned counsel submitted that the Petitioner did not witness any of the incidences regarding the use of UPND regalia. He argued that none of her witnesses were able to show that the 1st Respondent was claiming to be the official UPND candidate for the office of MP. He added that none of the witnesses gave evidence to show that the 1st Respondent's campaigns were conducted in such a manner which resulted in people not voting for the Petitioner.

As regards hate speech, Counsel submitted that the Petitioner's testimony on that ground was hearsay. That PW2, Nyambe Kaywala, who said he heard those allegations of hate speech at a meeting at Mwandia did not disclose who uttered those words. He submitted that PW4 also did not disclose where the meeting he attended was held, who attended, who uttered the words complained of and did not have any proof in form of a recording. He stated that PW5 did not disclose who attended the meeting he said he attended at Muoyo village and who uttered the words complained of. Further that PW6 and PW7 equally did not produce any proof of their testimony or call witnesses who attended the meetings they claimed to have attended. He went further to submit

that the Petitioner's Witnesses were not independent. They were UPND members and thus were witnesses with an interest to serve who may have given false evidence such that their evidence should be excluded. He relied on the case of **Benson Chola and others v. The People**⁽⁴⁾ to support his assertion.

It was further submitted that the 1st respondent did not engage in any of the illegalities. He added that the 1st Respondent had proved that he had resigned from UPND by delivering his resignation letter to the secretariat. He cited the case of **Chikuta v. Chipata Rural Council**⁽⁵⁾ and argued that by its nature a resignation letter is unilateral and does not require acknowledgement.

Counsel submitted that the 1st Respondent and his witnesses denied that they engaged in hate speech because their campaign was issue based.

Learned counsel further submitted that the 3rd Respondent's witness showed delay in opening polling stations in Silowana Ward neither benefited nor disadvantaged any particular candidate. Counsel, however, submitted that the delay was compensated for by extending the voting period. He added that the 1st Respondent had no control over the management of the elections which was the 3rd Respondent's responsibility such that any shortcomings in the process cannot be blamed on him.

He urged the Court to dismiss the Petition with costs to be taxed in default of agreement.

Learned counsel submitted that the Petitioner called a total of 9 witnesses and that the 2nd Respondent does not dispute the evidence of those witnesses but for PW1 the Petitioner herself whose evidence they did dispute to the extent of the allegations against the 2nd Respondent. Counsel pointed out that the 2nd Respondent was not the winner of the election in question but equally lost the election. They referred the Court to the grounds as against the 2nd Respondent under paragraphs 9 to 12 of the Petition as follows;

- *Your petitioner states that the 2nd Respondent bought football jerseys and balls for all schools of Nalolo Constituency. He also paid community school teachers their outstanding salary arrears at various community schools. At Kaanda school the 2nd Respondent gave out K2, 000 each to the church, school and for building a teacher's house there.*
- *Your Petitioners states that the 2nd Respondent at Kashitu School in Shekela ward gave out Five Thousand to Headman Baggrey Muliwana of Kashitu Village to induce him to ensure that all his subjects joined and voted for PF and that the Headman should not allow other political parties to hold their meetings anywhere near his village which houses kashitu Polling station*
- *That on 11th July 2016 at a campaign meeting held at Mwandu School, the 2nd Respondent paid out a total amount of ten thousand K10, 000 to two widows of the late headmaster and another teacher as repatriation allowance from his pocket.*

- *Your Petitioner states that the 2nd Respondent further bought iron/roofing sheets for the New Apostolic Churches at Siyanda-Simbule Village and at Lwiimba. In Nalolo Constituency people reported that the 2nd Respondent constantly dished out cash money to the electorate in various forms.*

On the first allegation, counsel submitted that the contents of all of the Petitioner's statements was hearsay. That the fact that the Petitioner did not even call any witness to prove these claims, they therefore remain unproved.

Counsel argued that the 2nd Respondent cleared up any allegations, which were not even proved, in that he indeed gave out football jerseys to different schools in Western Province more than 7 years prior to the campaign period and also in Nalolo of which he made his last donation in the year 2015, all periods away from the campaign time. Counsel argued that to allege that the football jerseys he donated in the form of social cooperate responsibility to the children of the places where he schooled years ago and others at the various schools own request through their own academic structures is not only misplaced but also frivolous.

On the second allegation, counsel submitted that the Petitioner specifically pleaded the name and place of the person allegedly bribed and influenced by the 2nd Respondent as Baggrey Muliwana, who was not called to testify.

Learned counsel submitted that the Petitioner cannot claim to have been disadvantaged by the delay in opening of polling stations because she actually emerged winner at 4 out of the 6 polling stations and the 1st Respondent at the other while the 2nd Respondent only won at Kashitu by 10 votes more than her.

Counsel also submitted that as testified by the 2nd Respondent there was no candidate who had been stopped from holding a meeting anywhere in Nalolo constituency. Further, that the allegations by the Petitioner were untrue because she never complained about it to the Electoral Commission of Zambia. Counsel contended that the Petitioner was not prevented from holding meetings because she could not have sat and done anything when the elections were hotly contested. Counsel submitted that these allegations are false, untrue and frivolous;

As regards the third and fourth allegation, counsel submitted that the contents of paragraph 11 the Petition unsubstantiated, more so, that on the alleged date the 2nd Respondent was not even in Nalolo but in Mongu preparing for his campaign activities.

With regards to the contents of Paragraph 12 of the Petition, counsel submitted that the allegations are untrue because RW4 testified that he visited the churches with his communications manager Muhau Anayau at Siyanda-

Simbule and Lwiimba in Nalolo and found that that these churches were actually thatched houses with grass roofs. They took photographs appearing on pages 3 and 4 of the 2nd Respondent's Bundles of Documents showing that the churches were still thatched and had no iron sheets as alleged.

Learned counsel further submitted that the 1st Respondent was not entirely disagree with the Petition as shown by his Answer on record.

They urged the Court to make a declaration nullifying the election of the 1st Respondent as Member of Parliament for Nalolo Constituency.

Learned counsel for the 3rd Respondent, Mr. Kamwi, filed written submissions dated 7th November, 2016. This gist of his submissions was that although voting was delayed, it was extended to compensate for the lost hours, with some of the polling stations remaining open past midnight to allow voters to cast their votes and that the Petitioner has failed to establish how the delay affected her. He submitted that the extension was in pursuance of Regulation 23 of the Electoral (General) Regulations.

Relying on Sections 97 (2) (b) and 97 (4), counsel submitted that the Petitioner had failed to prove that there was non-compliance with any provision of the Act which affected the results to warrant

nullification. He argued that the Petitioner could only estimate how many votes she would have obtained had voting commenced on time. However, that she has not established convincingly how the delay affected the results. He cited the case of **Mazoka and others v. Mwanawasa and others**⁽⁶⁾ on page 226 wherein the Supreme Court stated that “there is no way that one can conclude that all those voters that came after the closure of the poll could have voted for a particular candidate.” Further that:

“We accept that there were flaws, incompetently and dereliction of duty on the part of the Election Commission of Zambia. This is exemplified by the late delivery of election materials and insufficient supply of Presidential ballot papers which led to delays and extension of the gazette voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st Respondent.”

Learned counsel added that it was wishful thinking for the Petitioner to allege that those voters who did not vote due to time constraint could have voted for her only, had the polling commenced on time.

He further submitted that the allegations in paragraph 14 of the Petition that results at Nambwae and Sinungu Polling Stations was delayed was not substantiated by either the Petitioner or her witnesses during trial.

The 3rd Respondent prayed that the Petition be dismissed as the issues raised have not been established to a fairly high degree of convincing clarity.

I have considered the Petition, the Answers, the Affidavits, the evidence on record and the submissions by Counsel.

The following facts are not in dispute and thus proved:

1. That prior to the Nominations, the 1st Respondent Mr. George Muhali Imbuwa, was a UPND member and campaigned to be adopted on the UPND ticket for the Nalolo Constituency elections. But instead the Petitioner was adopted to stand on the UPND ticket.
2. That after the UPND primaries, the 1st Respondent opted to contest the election as an Independent Candidate.
3. That the Petitioner, the 1st Respondent and the 2nd Respondent were candidates in the Nalolo Parliamentary election held on 11th August, 2016. The three contested the election on the UPND ticket, independent ticket and Patriotic Front (PF) ticket respectively. The other candidates were Akayombokwa Catherine of Forum for Democracy and Development (FDD) and Imalimbila Namabunga of United National Independence Party (UNIP).

4. That on 14th August, 2016 the Returning Officer, Mr. Kangongo Sladen, declared the results of the election as follows; the 1st Respondent, George Muhali Imbuwa, 5060 votes; the Petitioner, Belinda Moola Mutanga Lweendo, 4879 votes; the 2nd Respondent, 4455 votes; Akayombokwa Catherine, 590 votes, and Imalimbila Namabunga, 114 votes.
5. Following the announcement of results, the Returning Officer proceeded to declare the 1st Respondent as the duly elected Member of Parliament for Nalolo Constituency.

The Petition seeks to nullify the election of the 1st Respondent as MP for Nalolo Constituency. The Petitioner claims that the 1st, 2nd and 3rd Respondents' agents clandestinely involved themselves in corrupt, illegal practices and or other misconducts committed in relation to the Nalolo Constituency elections held on 11th August, 2016 against the spirit of the Constitution, the Electoral Process Act and the Electoral Code of Conduct of 2016.

Therefore, the issue that falls for determination is whether on the facts and evidence before me, the Petitioner has proved the allegations raised in the Petition to the required standard to warrant nullification of the Respondent's election as Member of Parliament for Nalolo Constituency.

The law that governs the avoidance or nullification of parliamentary elections is contained in Section 97 of the Electoral Process Act No. 35 of 2016, which provides as follows:

“97 (1) An election of a candidate as a Member of Parliament, Mayor, Council Chairperson or Councillor shall not be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a Member of Parliament, Mayor, Council Chairperson or Councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—

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

(i) by a candidate; or

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

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

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

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

(3) Despite the provisions of subsection (2), where, upon the trial of an election petition, the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the

High Court or a tribunal further finds that such candidate has proved

that—

(a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;

(b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent;

the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election."

Thus, the present law under Section 97 (2) (a) requires that the alleged malpractices or misconduct must have been committed in connection with the election by the candidate or with his knowledge and consent or approval or of his election agent or polling agent. The agents being those persons appointed by a candidate pursuant to Regulations 50 and 51 of the Electoral (General) Regulations, 2006 as election agent or polling agent.

Thus, the law no longer allows the Court to nullify an election merely by finding that there were electoral malpractices, irrespective of who the wrongdoer was as long as the majority were or may have been prevented from electing their preferred candidate. That is to say, the wrong doing must be attributed to the candidate or his election or polling agents and that the majority were or may have been prevented from electing a candidate whom they preferred. Under Section 97 (2) (b) the Petitioner must prove that there was non-compliance with any of the provisions of the Electoral Process Act relating to the conduct of elections which affected the election results in order to warrant nullification.

As regards the burden of proof, it is settled law that in an election Petition, the burden on proof lies with the Petitioner to prove his case. The Supreme Court has on several occasions made pronouncements on the standard of proof in election petitions. In the cases of **Mazoka and others v. Mwanawasa and others, supra, Lewanika and others v. Chiluba⁽⁷⁾, Mabenga v. Wina⁽⁸⁾ and Kamanga v. Attorney-General and Another⁽⁹⁾**, among others, the Supreme Court stated that election petitions are required to be proven to a standard higher than on a mere balance of probabilities and that the issues raised are required to be established to a fairly high degree of convincing clarity. In the case of **Khalid Mohammed v. Attorney General⁽¹⁰⁾** the Supreme Court held the plaintiff cannot succeed automatically if a defence fails. The Petitioner must prove his whatever may be said of the Respondent's case.

In view of the foregoing, I am of the considered view that in order to succeed with this Petition, the Petitioner must prove the allegations raised in her Petition in line with the provisions of the Electoral Process Act set out above to the requisite standard.

I shall now turn to consider the grounds raised by the Petitioner in the manner that they have been presented in the Petition and apply the law as set out above.

I wish to point out that after hearing the evidence of the witnesses called by the parties, I have come to the conclusion that the evidence adduced by most of the witnesses was largely subjective. They were either Party members with positions in their Party structures or were Cadres. As such, the issue of credibility is paramount in this matter. I shall consider the evidence before me with great care and caution.

Allegations against the 1st Respondent

(a) Vote Buying / Corruption (Bribery)

The allegations of vote buying are contained in paragraph 6 of the Petition which states as follows:

“Your Petitioner was buying votes by doing the following:

- a. Taking some ward chairmen and other ward officials to Lusaka and keeping them in a lodge and entertained them. The 1st Respondent also gave these people money for shopping and also money for enticing the electorate to vote for him.**

- b. It was announced at the primary election meeting held at Sikana School that the 1st Respondent corruptly bought a cow for Mr. Mulonda who was the UPND Constituency Chairman for Nalolo. The issue resulted in the suspension of Mr. Mulonda. The 1st Respondent bought the cow to make the Mr. Mulonda in his capacity as Constituency Chairman entice the party structures to vote for him.**
- c. The 1st Respondent again bought a cow during the primary elections to entice the electorate to vote for him at the primaries and he was seen dishing out cash throughout the primaries at Sikana School to entice delegates to vote for him. Food was adequately provided for by the party and his actions showed a strong corrupt alignment.**
- d. The 1st Respondent was giving out a lot of money to the electorate during his campaign meetings boasting that 'the Petitioner gives you papers (fliers) only, while I am giving you cash...'**

It is worth noting that PW1's testimony on allegations of vote buying was primarily hearsay. She out rightly stated that she did not witness the incidences she referred to and stated that she would call witnesses to support her averments. In her aid, she called PW2, PW3 and PW4 who revealed that the allegations that the 1st Respondent called the UPND leadership to Lusaka at Red Sun Lodge and gave them money in addition to paying for their transport and accommodation occurred sometime in March, 2016 prior to nominations. They also disclosed that the two cows referred to were slaughtered during that period. Their testimony including that of PW1 was also that they all knew that the 1st Respondent was

campaigning for adoption at primary level in order to contest the election as a UPND parliamentary candidate.

The evidence of PW1, PW2, PW3 and PW4 that the 1st Respondent called UPND leaders to Lusaka and met with them was confirmed by the 1st Respondent (RW1) himself. However, RW1 testified that the meetings were all conducted before nominations for campaign during the primaries and had nothing to do with the parliamentary elections for Nalolo Constituency.

It is my considered view that the Petitioner did not adduce any evidence to show that the 1st Respondent in so doing was canvassing for votes relating to the parliamentary elections held on 11th August, 2016. The Petitioner and her witnesses all agreed that the allegations were in relation to the primary elections for the adoption of the UPND parliamentary candidate to contest the elections on 11th August, 2016. It is immaterial that the 1st Respondent denied that he bought the cow; all the witnesses on that allegation agreed that the incidences occurred before nominations. As such, I find that the allegations of vote buying as raised by the Petitioner under paragraph 6 (a) to (c) in her Petition have not been proved to have been committed in connection to the parliamentary election held on 11th August, 2016 for Nalolo Constituency as required by Sections 81 s read with Section 97 (2) (a) of the Electoral Process Act.

Further, after careful scrutiny of the evidence on record, I am of the considered view that the Petitioner did not call any witnesses she

undertook to call to substantiate the allegation that the 1st Respondent gave out cash money at all his meetings and boasted about it. PW1's evidence on that allegation was equally hearsay. In the absence of independent evidence to support it, I find that she has failed to prove the said allegation and I dismiss it accordingly.

**(b) Use of UPND Party Regalia and Campaign Slogans
(Impersonation)**

This allegation appears in Paragraph 7 of the Petition as follows:

“Your Petitioner states that the 1st Respondent was using UPND party regalia. This misled voters by making cadre wear UPND regalia and claiming at all his meetings that he was the official UPND adopted candidate while he stood as an independent candidate. He did this, to cause confusion in the minds of voters. The 1st Respondent also used the UPND portrait and stack his on the other side to deceive voters that he was the officially adopted UPND candidate for Nalolo Constituency.”

On this ground, the relevant evidence was that of PW1, PW2, PW4, PW5, PW6, PW7 and PW8. However, the evidence of PW1 was hearsay and she told the Court that she would call other witnesses to validate her statement. Upon careful analysis of the evidence, I am of the view that all the witnesses including the 1st Respondent himself testified that they knew that the 1st Respondent was contesting the election as an independent candidate but was supporting and also campaigning for the UPND Presidential candidate Hakainde Hichilema. PW2 stated that the 1st Respondent

was campaigning using the symbol of the 'mortar'. PW6 also stated that the 1st Respondent was campaigning for the 'hand' and the 'mortar.' PW7 also testified that the 1st Respondent distributed his own Chitenge materials and T-shirts. As such, I find that the 1st Respondent was campaigning as an independent candidate using the symbol of the 'mortar' and also for the UPND Presidential candidate Hakainde Hichilema.

Counsel for the Petitioner argued that the 1st Respondent's conduct was confusing to the electorate. I do not agree with that submission because it is a notorious fact that the UPND party symbol of the 'hand' and the campaign slogan 'Zambia Forward' has been in use for a long time now and the 1st Respondent used the symbol of the mortar during his campaign. All the witnesses knew that fact. Although they alluded to the allegation that the 1st Respondent's manner of campaign brought confusion, there was no evidence adduced to sufficiently prove the allegation. From the evidence on record, I accept that the 1st Respondent was campaigning as an independent candidate using the symbol of the 'mortar' and for Hakainde Hichilema as President. I am also mindful that the electoral laws do not preclude a candidate from campaigning for a presidential candidate of their choice. I am fortified by the decision of the Supreme Court in **Lazarous Chota v. Patrick Mucheleka**⁽¹¹⁾ wherein they stated at page J29 as follows:

“We have considered the arguments in respect of ground three of the appeal. The fact that some members of the 1st

Respondent's campaign team wore PF regalia while on the 1st Respondent's campaign trail was not in dispute. RW2, Hellen Kaluba, admitted that despite being suspended from the PF, she continued wearing the PF Chitenge as a way of campaigning for Mr. Micheal Sata while at the same time, campaigning for the 1st Respondent using the 1st Respondent's symbol of an axe. The appellant contended that the conduct of the PF members who were campaigning for the 1st Respondent was confusing to the electorate. We do not agree with him. As the learned trial Judge noted, the PF symbol of the boat had been in use for a long period of time and was well known to the electorate at the time of the elections. The evidence also clearly showed that the appellant was not using the PF symbol of the boat to canvass for votes, but was using his own symbol of an axe. The appeal to the electorate was to vote for Mr. Micheal Chilufya Sata as Republic President and the 1st Respondent as Member of Parliament for Lubansenshi. The 1st Respondent's message could not, in any way be said to have been confusing to the electorate of Lubansenshi Constituency. In any event, there is no provision in the electoral laws which prevented the 1st Respondent, an independent candidate or members of his campaign team, from campaigning for a presidential candidate of their choice. This ground of appeal lacks merit".

In view of the foregoing I find that the Petitioner has failed to prove the allegations as contained in paragraph 7 of her Petition as required by Sections 82 as read with Section 97 (2) (a) of the Electoral Process Act to the requisite Standard. I also dismiss it.

(c) Hate Speech

Under paragraph 8 of the Petition, it is alleged as follows:

“Your Petitioner states that the 1st Respondent used hate speech. His theme was based on character assassination by saying the Petitioner was a thief who has stolen money for polling agents. The 1st Respondent and his campaign team led by Mr. Mulonda who was Nalolo UPND Constituency Chairman and was suspended for corrupt practices he performed with the 1st Respondent used a lot of hate speech during their campaigns. They maliciously called the Petitioner a thief who did not deserve a vote and created a traditional / cultural shock in the minds of the voters by saying at their meetings:

- a. That your Petitioner burnt her late father’s clothes during his funeral in November, 2011 instead of giving them to relatives. The administration of her father’s estate was done by elderly people and nothing of this sort happened.**
- b. That your Petitioner poured mealie meal and emptied a whole sack on the ground. This was a lie, fabricated to create hate against her from the voters.**
- c. At the 1st Respondent’s meetings together with his campaign team, they kept on telling voters that the Petitioner was badly beaten and that her leg was broken**

at the primaries because the Petitioner was a thief who had stolen polling agents' money.

- d. The 1st Respondent told people during his campaigns that he was the officially adopted candidate for UPND and not the Petitioner. At one of his campaign meetings at Nasita Polling Station in Makoka Ward, the 1st Respondent distributed UPND Chitenges and T-shirts in order to further mislead the electorate.**
- e. The 1st Respondent and his team vigorously campaigned that the voters should vote for a man and not a woman.”**

As regards the above allegations, the relevant evidence was that of PW1, PW2, PW4, PW5, PW6, PW7, PW8. They all maintained that the 1st Respondent and his campaign team at his meetings held at Mwandi in Kambayi Ward, Ukolo in Ukolo Ward, Siyanda in Muoyo Ward, Nanjucha in Nanjucha Ward, Matongo in Nanjucha Ward and Nasita Ward told the electorate that the Petitioner was a thief and was cursed. Upon careful analysis of the evidence on record, I note that PW1 who said that these allegations were common to all the 1st Respondent's meetings did not attend any of those meetings and she did not hear the 1st Respondent or his campaign team saying those words. The evidence of the other witnesses is limited to about 6 Polling Stations out of the 53 Polling Stations in Nalolo Constituency. Of all the witnesses, it was only PW2 who gave an indication on the number of people who attended the meeting at Mwandi when he stated in cross examination that the meeting was attended by many people. The Petitioner has also not shown the extent of the influence, if any, which these allegations had on the

voters. The Petitioner emerged second and lost by a small margin of about 181 votes. In consequence, I find that the Petitioner has not proved that the allegations of hate speech were so widespread such that it did or may have prevented the majority of voters in Nalolo Constituency from voting for their preferred candidate in accordance with Section 97 (2) (a) of the Electoral Process Act. This allegation fails and is accordingly dismissed.

Allegations against the 2nd Respondent

(a) Vote Buying / Corruption (Bribery)

As against the 2nd Respondent, the allegations are contained in Paragraph 9 - 12 of the Petition. Under paragraph 9 of the Petition, the Petitioner alleges that:

“9. Your Petitioner states that the 2nd Respondent bought football jerseys and balls for all schools in Nalolo Constituency. He also paid community school teachers their outstanding salary arrears at various community schools. At Kaanda School, the 2nd Respondent gave out K2,000.00 each to the Church, School and for building a Teacher’s house there.”

During trial, the 2nd Respondent admitted that he made donations of football jerseys to various schools located in various Districts in Western Province. However, that the said donations were conducted as part of corporate social responsibility for his Textile in China and the last donation was made sometime in 2015. He also stated that during that period he was not affiliated to any political party. His

evidence was not challenged in cross examination. Although PW1 raised this allegation in her evidence, she admitted that she did not witness any of it and none of her witnesses spoke about the donations. I, therefore, find that the 2nd Respondent made donations of football jerseys to various schools but all the donations were made before he was adopted to contest the election and as such are not in connection with the election held on 11th August, 2016 for Nalolo Constituency. The Petitioner has failed to prove the allegation as required under Section 97(2) (a) and of the Electoral Process Act to the requisite standard of proof. I accordingly dismiss it.

Under paragraph 10 of the Petition, it is alleged that:

“10. Your Petitioner states that the 2nd Respondent at Kashitu School in Shekela Ward gave out K5,000.00 to Headman Baggrey Muliwana of Kashitu village to induce him to ensure that all his subjects joined and voted for PF and that the headman should not allow other political parties to hold their meetings anywhere near his village which houses Kashitu Polling Station.”

As regards the allegation in paragraph 10 that the 2nd Respondent paid Headman Baggrey at Kashitu School, the Petitioner (PW1) conceded that she did not witness the incident. In addition, she did not call any further evidence to support the allegation.

I take judicial notice of the ECZ Register of Voters for 2016 that Shekela Ward has 2,572 total number of registered voters out of which about 1, 422 voted representing more than 50 percent. Of

those votes, all the candidates received some votes. As correctly pointed out by the 2nd Respondent, I note that the Petitioner in any case won the election in Shekela Ward with about 679 votes as shown by the Record of Proceedings in her Bundle of Documents. This allegation, therefore, has not been proved to the requisite standard and lacks merit. I accordingly dismiss it.

The allegation in paragraph 11 is couched as follows:

“11. That on 11th July, 2016 at a campaign meeting held at Mwandi School, the 2nd Respondent paid out a total amount of K10,000.00 to two widows of the late headmaster and another teacher as repatriation allowance from his pocket.”

Upon careful examination of the evidence on record, I find that the Petitioner did not lead any evidence to prove the allegation under paragraph 11 of the Petition. PW1 did not even make reference to it in her evidence or call any witnesses to substantiate it. She has therefore, failed to prove the said allegation to the satisfactory standard and I accordingly dismiss it.

Further, under paragraph 12 of the Petition, the Petitioner has alleged the following:

“12. Your Petitioner states that the 2nd Respondent further bought iron / roofing sheets for the New Apostolic Churches at Siyanda – Simbule village and at Lwiimba. In Nalolo Constituency, people reported that the 2nd Respondent constantly dished out cash money to the electorate in various forms.”

However, it came out at trial that the Churches still had thatched roofs. Pictures were produced to this effect by the 2nd Respondent and no objection was raised by the Petitioner to deny this position. I have already stated that in cases of this nature, it is cardinal that issues raised are proved to a fairly high degree of convincing clarity. This has not been done.

In view of the above, I find that the allegations raised as against the 2nd Respondent by the Petitioner in paragraphs 9 to 12 of the Petition have not been proved to the requisite standard. I accordingly dismiss them for lack of merit.

Allegations against the 3rd Respondent

As against the 3rd Respondent, the allegations are contained in paragraphs 13 – 15 of the Petition.

(a) Delay in Opening Polling Stations in Silowana Ward

Under paragraph 13 of the Petition, the Petitioner has alleged as follows:

“13. Your Petitioner states that the 3rd Respondent’s Officers on 11th August, 2016 on the polling day, the polling stations opened after 16:00 hours at all polling stations in Silowana Ward. This forced voters to vote at night while the majority of the voters were disenfranchised because they came from far away villages and could not make it at night. This being my stronghold as evidenced by the vote results disadvantaged the Petitioner.”

Although the 3rd Respondent did not file in an Answer to the Petition or an Affidavit in Opposition, it came out clearly at trial that the 3rd Respondent delayed to open all the 6 polling stations in Silowana Ward. Their witness, the District Election Officer, RW5, confirmed the delay and went further to explain that the delay was occasioned by unforeseen circumstances. He also disclosed that voting was extended to compensate the hours lost. This evidence was in tandem with what PW1 and PW2 stated in their testimonies. I, therefore, accept and find as a fact that the 3rd Respondent delayed to open all the 6 polling stations in Silowana Ward but voting was extended to meet the designated number of voting hours.

The question that arises is whether the delay affected the result as contended by the Petitioner. In addressing this issue, the 3rd Respondent's Witness, RW5 explained that although voting commenced late in Silowana Ward, voting was extended beyond the scheduled closing time to compensate the hours lost. Both PW1 and RW1 claimed that they lost out on votes because the people who did not vote would have voted for them. I opine that the views held by both the Petitioner and the 1st Respondent as to whom the voters would have voted for are purely speculative. The voters were entitled to a secret ballot and the result could only be determined after the votes were cast. The Petitioner cannot claim to have been affected alone because all the candidates polled some votes from Silowana Ward. All those people whom she stated had failed to vote and went back were not called to attest to her assertions. I find that

the claim that she was disadvantaged is speculative and has not been proved to the satisfactory standard of proof required in election petitions.

I have also taken note from the evidence on record that Nalolo has a sandy terrain and I accept the 3rd Respondent's explanation for the delay. I must nonetheless state that the 3rd Respondent was not conducting elections for the first time in Nalolo Constituency and ought to have taken precautionary measures to ensure that materials and personnel were deployed in good time for voting to commence and conclude on time. However, I note that despite the delay, the election was eventually conducted and the number of allocated hours were covered and all the candidates polled some votes in Silowana Ward after which the Petitioner emerged winner. I opine that the Petitioner's argument that she was disadvantaged because Silowana was 'her stronghold' is untenable because there was no way of ascertaining which candidate the voters who did not turn up to vote would have voted for or indeed if they intended to turn up at all. In addition, Silowana was not the only Ward in which the Petitioner won. I am thus of the considered view that the Petitioner has failed to prove that the delay in opening the polling stations in Silowana Ward disadvantaged her and affected the result of the election as provided by Section 97 (2) (b) of the Electoral Process Act to a fairly high degree of convincing clarity. In addition, I opine that the election cannot be avoided merely that voting began late in Silowana Ward in accordance with Section 97 (4) of the Electoral Process Act. The Petitioner has failed to prove

the allegation under paragraph 13 of the Petition to the requisite standard.

(b) Delay in Releasing Results and Failure to Provide GEN 12 Forms

Under paragraphs 14 and 15 of the Petition, the Petitioner alleges as follows:

“14. Your Petitioner states that the 3rd Respondent’s officers delayed to release the results at Nambwae and Sinungu Polling Stations where voting was completed on 11th August, 2016. The results were only released to the Totaling Centre after 23:00 hours on Saturday 13th August, 2016. This raises a lot of suspicion.

15. Your Petitioner states that the 2nd Respondent did not provide the GEN 12 Forms or at least, where they were produced they were not being signed by its agents or relevant signatories in the polling stations...”

I note that the Petitioner did not lead any evidence at trial to substantiate the allegations under paragraphs 14 and 15 of her Petition. That being the case, I find that the Petitioner has failed to prove the said allegations to the requisite standard.

Reliefs

The Petitioner did not make any application relating to the Interim reliefs sought in paragraph 19 (a) (i) and (ii) of the Petition.

The said reliefs cannot either be considered or granted at this stage. I accordingly dismiss them.

As regards the substantive remedies, the Electoral Process Act has limited the scope of reliefs that the Court may grant in an election petition under Section 99 which states that:

“99. Any of the following reliefs may be claimed in an election

petition:

(a) a declaration that the election was void; or

(b) a declaration that any candidate was duly elected.”

Thus, as ably argued by counsel for the 2nd Respondent, the other remedies which the Petitioner seeks such as an order of recount and verification of results, among others, are untenable at this stage. They ought to have been made at an interlocutory stage. I shall therefore only consider the remedies set out in Section 99 of the Electoral Process Act.

Having dismissed all the allegations. The net result of this Petition is that it is unsuccessful. Be that as it may, having determined in the first Petition under Cause No. 2016/HP/EP0013 relating to this very Constituency that George Muhali Imbuwa's election was void, I declare that George Muhali Imbuwa was not duly elected as Member of Parliament for Nalolo Constituency.

This being a Constitutional matter, I order that each party bears own costs.

Leave to appeal is granted.

Dated the 21st day of November 2016



Mathew L. Zulu
HIGH COURT JUDGE