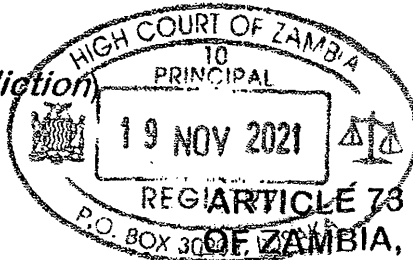


Christ Mweh

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2021/HP/EP/0011

(Constitutional Jurisdiction)



IN THE MATTER OF:

ARTICLE 73 (1) OF THE CONSTITUTION
OF ZAMBIA, CHAPTER 1 OF THE LAWS
OF ZAMBIA AS AMENDED BY ACT NO. 2
OF 2016

AND

IN THE MATTER OF:

SECTION 97(2) OF THE ELECTORAL
PROCESS ACT NUMBER 35 OF 2016

AND

IN THE MATTER OF:

SECTIONS 81, 83, 84, 87, 98, 99, 100(2),
106 AND 108 OF THE ELECTORAL
PROCESS ACT NUMBER 35 OF 2016

AND

IN THE MATTER OF:

THE PARLIAMENTARY ELECTION FOR
MATERO CONSTITUENCY OF THE
DISTRICT OF LUSAKA HELD ON THE
12TH DAY OF AUGUST, 2021

BETWEEN:

TOM MICHELO

PETITIONER

AND

**MILES SAMPA
ELECTORAL COMMISSION OF ZAMBIA**

**1ST RESPONDENT
2ND RESPONDENT**

**BEFORE: THE HONOURABLE MR. JUSTICE D. MULENGA THIS 19TH
DAY OF NOVEMBER, 2021.**

For the Petitioner : Ms. M. Mushipe of Mesdames Mushipe
and Associates, Mr. W. Chitungu of Messrs
Wallace and Company and Mr. Cheelo of
MAK Partners

For the 1st Respondent: Mr. P. Chibundi of Messrs Mosha and
Company

For the 2nd Respondent: Mr. P. Chulu of Messrs. Kalokoni and
Company

JUDGMENT

Cases referred to

1. Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Electoral Commission of Zambia (2005) ZR 138 (SC)
2. Mubika Mubika v Poniso Njeulu Appeal No. 114 of 2007
3. Jonathan Kapaipi v Newton Samakayi CCZ Appeal No 13 of 2017
4. Mubita Mwangala v Inonge Mutukwa Wina Appeal No. 80 of 2007
5. Nkandu Luo (Prof) and Electoral Commission of Zambia v Doreen Sefuke Mwamba & The Attorney General Selected Judgment No. 51 of 2019
6. Margaret Mwanakatwe v Charlotte Scott & The Attorney General Selected Judgment No. 50 of 2018

7. *Sibongile Mwamba v Kelvin Sampa and Another* CCZ Appeal No. 2 of 2017
8. *Brelsford James Gondwe v Catherine Namugala* Appeal No. 175 of 2012
9. *Chizonde v The People* (1975) ZR 16
10. *Abuid Kawangu v Elijah Muchima* Appeal No.8 of 2017
11. *Chrispin Siingwa v Stanley Kakubo* Appeal No. 7 of 2017
12. *Sunday Chitungu v Rodgers Mwewa and the Attorney General*
13. *Fairfax Media Publications Pty Ltd & Others v Dylan Voller* [2021] HCA 27
14. *Austin C. Liato v Sitwala Sitwala* Selected Judgment No. 23 of 2018
15. *Col Rtd Dr. Kizza Besigye v Museveni Yoweri Kaguta and Electoral Commission*
Election Petition No. 1 of 2006
16. *Lewanika v Chiluba & Others* SCZ Judgment No. 14 of 1998
17. *Steven Masumba v Elliot Kamondo* Selected Judgment No. 53 of 2017
18. *Mwiya Mutapwe v Dominic Shomeno* Appeal No. 19 of 2017
19. *Giles Chomba Yambayamba v Kapembwa Simbao & 2 Others* Selected
Judgment No. 6 of 2018
20. *Mushemi Mushemi v The People* (1982) Z.R. 71 (S.C)
21. *Nana Addo Akufo Dankwa Addo & 2 Others v John Dramani Mahma & 2*
Others Writ No. J1/6/2013
22. *Christabel Ngimbu v Prisca Chisengo Kucheka & Electoral Commission of*
Zambia Selected Judgment No. 2 of 2018

Legislation referred to:

1. *Constitution of Zambia (Amendment) Act* No. 2 of 2016
2. *Electoral Process Act* No. 35 of 2016

1.0 INTRODUCTION

- 1.1 Tom Michelo petitioned this Court, challenging the declaration of Miles Sampa by the Electoral Commission of Zambia, as duly elected Member of Parliament for Matero Constituency after the General Elections held on 12th August, 2021 (Tom Michelo is hereinafter referred to only as the Petitioner, Miles Sampa as the 1st Respondent and Electoral Commission of Zambia, the 2nd Respondent).

2.0 BACKGROUND

- 2.1 The Petitioner herein participated as a candidate in the parliamentary election for the Matero Constituency of the Lusaka District, of the Lusaka Province of the Republic of Zambia which was held on 12th August, 2021, on the United Party for National Development (UPND) ticket.
- 2.2 The Petitioner polled 33, 598 votes and the 1st Respondent contesting on the Patriotic Front (PF) ticket polled 55, 612, votes thereby resulting in a difference of 22, 014 votes between the two candidates. Other candidates who participated namely Barbra Maramwidze from Socialist Party (SP) polled 1, 721 votes, Sam Mbewe from People's Alliance for Change (PAC) 1, 026, Andrew Zyambo from United National Independence Party

(UNIP) 732, and Susan Mulenga from Democratic Party(DP) 577 votes

- 2.3 Consequently, the 2nd Respondent declared the 1st Respondent as duly elected Member of Parliament for Matero Constituency and the Petitioner being dissatisfied with the said declaration, filed into Court a Petition with an Affidavit Verifying Petition on 26th August, 2021.

3.0 GROUNDS FOR THE PETITION

- 3.1 The grounds for the petition can be summarized as follows:

- (i) That the campaigns and elections were characterized by undue influence in the form of violence on the part of PF cadres who were part of the 1st Respondent's campaign team led by Chileshe alias 'Cash Money' under the instructions of the 1st Respondent and Lee Mukupa. The said attacks resulted in injuries being sustained by UPND members including Steven Malali and Gilbert Chilemba who were part of the Petitioner's campaign team, as well as damage to property or motor vehicles namely a Toyota Vitz Registration number BAP 2140 and a Nissan Hard Body registration number BAC 172 belonging to Edwin Kafula.

- (ii) Further that between April and 12th August, 2021 a young disgruntled man under the instructions of Cash Money in possession of dangerous weapons was sent to the UPND Constituency office to cause bodily harm to a named official.
- (iii) That there was publication of a false statement on or about 12th or 13th July, 2021 on a facebook page named BOBA TV owned by the 1st Respondent informing the public that the Petitioner had withdrawn as a parliamentary candidate for the Matero Constituency and had endorsed the 1st Respondent.
- (iv) That the 1st Respondent engaged in bribery or vote buying by distributing campaign materials, bags of mealie meal, and handing out money to entice the electorate in Muchinga, Kapwepwe and other Wards of Matero Constituency. That Ms. Edith Nawakwi affiliated with the PF and who was part of the 1st Respondent's campaign team sneaked in a large number of bags of mealie meal at the UCZ Matero Congregation Center to entice the electorate
- (v) That the 1st Respondent engaged in electoral misconduct and illegal practices by consistently pulling down UPND posters in Matero Constituency,

disregarding the campaign ban imposed by the 2nd Respondent on 15th June, 2021, continuing to campaign beyond 18:00 hours on 11th August, 2021, and storming George Central Primary School Polling Station on 12th August, 2021 with intent to attack one George Liswaniso, thereby instilling fear in would be voters.

- (vi) That there were illegal practices relating to polls in that the 1st Respondent committed electoral offences in the capture and entry of valid votes cast at the totaling center (Matero Boys hall). The Petitioner's party agents were consistently not availed GEN 20 forms, vote counting in most polling stations was not transparent as pro-PF polling staff added vote tally figures to the 1st Respondent's votes. Polling agents kept writing and filing in GEN 20 forms at the totaling center and that raised a lot of suspicion. Further, a GEN 20 form was produced by poll staff which did not have details of the polling station and was not signed by relevant signatories.

3.2 The Petitioner contended that by reason of the foregoing, the 1st Respondent was consequently irregularly declared winner of the Matero Constituency Parliamentary Election.

4.0 RELIEF SOUGHT BY THE PETITIONER

- (a) A declaration that the 2nd Respondent did not conduct the elections with due diligence and care.
- (b) A declaration that the election of the 1st Respondent as Member of Parliament for Matero Constituency is null and void.
- (c) A declaration that the illegal practices committed by the Patriotic Front Party and/ or its agents, so affected the election result in Matero Constituency and that the same be nullified.
- (d) An order for the ballot papers relating to Matero Constituency Parliamentary elections to be scrutinized, verified and recounted.
- (e) An order for costs
- (f) Any other relief that the Court may deem fit.

4.0 1ST RESPONDENT'S ANSWER

- 4.1 The 1st Respondent filed into Court an Answer and Affidavit in support of the same on 10th September, 2021.
- 4.2 The 1st Respondent denied the contents of paragraph 5 of the Petition and contended that the Petitioner would be put to strict proof. The 1st Respondent also denied the contents of paragraph 6 and stated that he was validly elected as Member of Parliament for Matero Constituency.

- 4.3 The 1st Respondent denied the contents of paragraph 6 (1) (a) and added that in relation to the incident of 10th June, 2021, the Petitioner had not identified any of the purported PF cadres alleged to be part of the 1st Respondent's campaign team, hence a comprehensive answer cannot be offered to those allegations.
- 4.4 The 1st Respondent stated that in relation to the incidents of 14th June, 2021 and 10th July, 2021 the 1st Respondent did not have any persons named Chileshe alias 'Cash Money' or Lee Mukupa on his campaign team or registered as his election or polling agents. Neither was the 1st Respondent nor his official election or polling agents aware of any plans of the alleged attacks, hence did not consent or approve of the same.
- 4.5 The 1st Respondent denied the contents of paragraph 6(1) (b), 6(1) (c) and 6(3). The 1st Respondent also denied the contents of paragraph 6(1) (d) and 6(2) and stated that he did not have any person known as "Cash Money" on his campaign team or registered as his election or polling agent therefore, he was not aware and did not consent or approve of the alleged attacks.
- 4.6 The 1st Respondent denied the contents of paragraph 6(4) and stated that he complied with the programme drawn by the police and that on the day in question, he and his official campaign team were not in Mwembeshi Ward. Neither was he or

his official election or polling agents aware of the alleged attacks nor consent or approve the same.

4.7 The 1st Respondent denied the contents of paragraph 7 and stated that the Petitioner would be put to strict proof as he does not own the facebook page 'BOBA TV', and did not publish or cause to publish the alleged content as he has no control over what is published on the said page.

4.8 The 1st Respondent denied the contents of paragraph 8(1) and averred that he did not distribute any campaign materials to the public during the suspension of campaign activities by the 2nd Respondent and he strictly adhered to the restrictions. The 1st Respondent also denied the contents of paragraphs 8(2) and (3) and stated that neither he nor his official election agents distributed money to the public.

4.9 The 1st Respondent denied the contents of paragraph 8(4) and averred that Ms. Edith Nawakwi was not a member of his campaign team or registered as his election or polling agent. Neither was he or his official election or polling agents aware of any plans of the alleged activities of the said Ms. Edith Nawakwi, therefore he did not consent or approve the same.

4.10 The 1st Respondent vehemently denied the contents of paragraph 9(1) and averred that he strictly adhered to the

suspension of campaigns and rallies and did not at any point during the said ban campaign, distribute campaign materials or hold any public meetings.

4.11 The 1st Respondent denied the contents of paragraph 9(2) and averred that he adhered to the agreement drawn by the Police in which he and the Petitioner were not to hold campaigns in the same Wards on the same days.

4.11 The 1st Respondent denied the contents of paragraph 9(3) and stated that there was no public rally on 11th August, 2021, the 1st Respondent did not address the public and his campaign team did not hold any campaigns on the said date. The former Republican President Edgar Chagwa Lungu held a walk in Mwembeshi Ward to raise awareness on Covid-19 and provide face masks to the public.

4.12 The 1st Respondent strongly denied the contents of paragraph 9(4) and averred that it was the Petitioner's cadres who incited violence and caused chaos at George Central Primary School Polling Station which resulted in the 1st Respondent and his security guard Gilbert Banda being seriously injured.

4.13 The 1st Respondent also denied the contents of paragraph 9(5) and stated that to date there are UPND posters and flags hanging in Matero Constituency.

5.0 2ND RESPONDENT'S ANSWER

5.1 The 2nd Respondent denied the contents of paragraph 3 of the petition and stated that these proceedings were commenced against the 2nd Respondent for the role it plays in conducting elections, not because it was a participant or candidate in the elections.

5.2 The 2nd Respondent denied the contents of paragraph 6 and averred that the Petitioner would be put to strict proof. The 2nd Respondent made no comments to the contents of paragraphs 6(1) to 6(4), 7(1), 8(1) to 8(4) and 9(1) to 9(5) and averred that the same were within the peculiar knowledge of the Petitioner.

5.3 The 2nd Respondent denied the contents of paragraphs 10(1) to 10(5) and 11, and further stated that the Petitioner would be put to strict proof.

6.0 THE PETITIONER'S CASE

6.1 The Petitioner called twelve witnesses hereinafter referred to only as PW1 to PW12.

6.2. PW1 was the Petitioner, Tom Michelo, he averred that he was the UPND parliamentary candidate for Matero Constituency in the 2021 general election. During the campaign period, PF cadres in

large groups armed with firearms, machetes, golf sticks, tear gas canisters, catapults and other weapons would attack them. The 1st Respondent's lead security officer Chileshe alias 'Cash Money' hacked a number of people including John Boma who was attacked in Mwembeshi Ward, and a person nicknamed 'HH Aisha' in the video at page 58 of the Petitioner's Bundle of Documents.

6.3 PW1 testified that Cash Money was known for distributing cash to entice the electorate to vote for the 1st Respondent and the 1st Respondent cannot deny being affiliated to Cash Money because page 4 of the Petitioner's bundle of documents is a photo of 1st Respondent's facebook page where as guest of honour at Cash Money's wedding, he posted a congratulatory message to the said Cash Money.

6.4 PW1 averred that there were attempts to burn down the UPND Matero Constituency office on several occasions between 20th May, 2021. According to PW1, on three occasions, 'Cash Money' led a team with an attempt to burn down the said office, and he was in the company of Lee Mukupa the PF councilor for Muchinga Ward 24. The incidents were reported at Matero Police Station and the police officers responded positively.

6.5 PW1 testified that on one occasion, a certain disgruntled man with a small bag entered the UPND office premises, upon suspicion of his appearance and movements, his bag was searched and a very sharp machete, knife, scissors, military belt, police coat and the 1st Respondent's flyers were found. When questioned, he confessed that he and Cash Money were given an assignment to attack PW1. He was taken to Matero Police Station where he was charged and detained. However, the 1st Respondent had him released. The said man is being prosecuted in the Subordinate Court.

6.6 According to PW1, the environment in Matero was hostile such that UPND members feared to clad in UPND regalia or get onto a taxi because even taxi drivers feared victimization. It was the testimony of PW1 that he was informed that the UPND Lima Ward councillor one Humphrey Sindawa, saw a group of PF cadres led by Cash Money at Choppies Matero, who damaged a motor vehicle namely a Toyota Vitz.

6.7 It was the testimony of PW1 that on 12th July, 2021, he was in South Africa when his Manager contacted him and informed him that his media team personnel one Lukundo reported that the 1st Respondent had posted on his Boba TV facebook page, an incorrect statement purporting that PW1 had withdrawn his candidature as UPND Matero MP, and endorsed the 1st Respondent's candidature.

6.8 According to PW1, the 1st Respondent had on 8th July, 2021 issued a statement that his media coverage would only be through Boba TV, which he had personally styled and not any other media house. PW1 testified that when it was posted on Boba TV that he was no longer in the race, there was a negative impact and he was cyber bullied.

6.9 PW1 averred that from 15th June 2021 to 11th July, 2021 the 2nd Respondent effected a campaign ban for Lusaka and other areas. Surprisingly, the 1st Respondent deliberately disregarded the campaign ban and continued campaigning. They were invited at civic center where the town clerk who was the district electoral officer advised all aspiring candidates that one Marglorious Shepe should be contacted for all concerns in Matero Constituency.

6.10 He reported the issue of campaigning during the ban, but did not get any formal feedback. PW1 referred to page 61(video 4) of the Petitioner's bundle of documents and stated that in the said video the 1st Respondent was distributing campaign materials in Desai Compound, Kapwepwe Ward 29. He also referred to page 59(video2) and stated that the 1st Respondent was distributing campaign materials on 15th July, 2021 in Muchinga Ward 28, Matero Constituency.

6.11 It was the testimony of PW1 that during the campaign ban, the 1st Respondent pulled down his campaign posters and flyers and this affected him negatively

6.12 According to PW1, there was a campaign timetable availed to the police to avoid clashing with the PF and the police were fully aware that he would be carrying out door to door campaigns in Mwembeshi Ward on 10th August, 2021. However, despite the timetable, they were attacked by PF cadres led by Cash Money. When they attempted to escape, a motor vehicle namely a Nissan Hard Body belonging to Edwin Kafula was burnt beyond recognition.

6.13 PW1 averred that the 1st Respondent was distributing bags of mealie meal branded '*ECL 2021 powered by Miles Sampa*' as per pictorial evidence at pages 39 to 41 of the Petitioner's Bundle of Documents. According to PW1, distribution of money was a trend throughout the campaigns and the 1st Respondent gave out money in homes and night clubs where he would play music as '*DJ Alola.*'

6.14 PW1 averred that 11th August, 2021 was the last day of campaigns, surprisingly, he received a call from his campaign manager that their campaign programme was unable to take off because Matero police officers advised against the same, as Former Republican President Dr. Edgar Lungu would be in

Matero Constituency. When the Former Republican President left the Constituency, the 1st Respondent continued distributing bags of mealie meal and money beyond 18:00 hours.

6.15 It was the testimony of PW1 that on 12th August, 2021, the 1st Respondent was moving around with cadres in various polling stations. He was informed by one Mr. Ntilima that the 1st Respondent forced his way into George Central Polling Station in Lima Ward, despite being stopped by police officers. The general public on the queue waiting to vote expressed displeasure, and there was commotion.

6.16 During the fracas, people on the queues scampered for safety as cadres were armed with machetes. According to PW1, the police officers were overpowered and only Zambia army officers controlled the situation. The 1st Respondent's motor vehicle a White Range Rover was driven out of the premises by police officers and cadres were apprehended.

6.17 It was the testimony of PW1 that upon closing of polling stations, counting of votes commenced and all represented parties witnessed the counting. It was discovered that some pro PF presiding officers in some polling stations refused to give GEN 20 forms to UPND polling agents. That made it very difficult for PW1 to verify what was counted at the polling

station and what was being recorded at the totaling center at Matero Boys Secondary School.

6.18 According to PW1, a number of challenges were encountered at the totaling center as the Returning Officer Marglorious Shepe was found with GEN 20 forms with the 2nd Respondent's seal, names of parliamentary candidates, results figures but without the name of the polling station or presiding officer.

6.19 PW1 averred that the 2nd Respondents officials were altering figures at the totaling center. He cited an example at page 49 of the Petitioner's bundle of documents which is the record of proceedings at the totaling center showing that at Kizito East 1 polling station, 370 ballots were cast with 9 rejected ballots. However, page 53 which is a GEN 20 form for Kizito East 1 shows 6 rejected ballots. In one instance, he got 382 votes and 1st Respondent 184, the said figures were swapped by the 2nd Respondent's officials.

6.20 PW1 averred that over 60 polling stations out of the total 177 in Matero Constituency were affected. Upon realizing that the returning officer was not giving any explanation on the distortion of figures, suspicion was raised. A complaint was lodged in with the returning officer. While verification was on going, the returning officer went ahead and declared the 1st Respondent as duly elected Member of Parliament for Matero

Constituency on 15th August, 2021. According to PW1, the electoral malpractices negatively impacted his election results as there was no accuracy.

6.21 It was the testimony of PW1 that the issue of manipulation of figures was also reported at Lusaka Central Police Station. A bunch of GEN 20 forms not signed by agents were seized by the police officers. Some GEN 20 forms that were witnessed by agents were found torn in the dustbin. The police officers informed him that there was fraud as some GEN 20 forms had similar hand writings, when only one GEN 20 form is supposed to be filled in by one particular presiding officer.

6.22 In cross-examination by Learned Counsel for the 1st Respondent, PW1 admitted that he last resided in Matero Constituency in 2016 and does not have any commercial interests in the constituency, while the 1st Respondent was once a member of parliament for the constituency and was born and raised there. PW1 admitted that in 2016, the 1st Respondent emerged victorious in the mayoral by-election and the people who voted for him may have been from Matero. He stated that he first participated as a parliamentary candidate for the constituency on the UPND ticket in 2016, but lost to PF's Lloyd Kaziya and did not petition the same. He admitted that he performed better in the 2021 elections where the voter turn-out was 67.79% than he did in 2016 where the turn-out was 59%

6.23 PW1 admitted that in the 2021 elections he got 33, 598 votes, the 1st Respondent got 55, 612. PW1 admitted that the difference in votes between him and 1st Respondent was about 22,000 votes. PW1 also admitted that in the 2021 elections, presidential votes in Matero Constituency were in favour of Dr. Edgar Lungu, and he has not heard anyone complain about those presidential results.

6.24 PW1 denied being present when Steven Malali got injured or witnessing PF cadres hack or attack the said person. He admitted that he did not see Cash Money or Mukupa lead the cadres. He admitted that in the report he received concerning the incident, the 1st Respondent was not mentioned. He stated that his election agent in 2021 was Mr. Mzinga and he registered him with the 2nd Respondent. He admitted that each candidate could only register one agent and he did not know the 1st Respondent's election agent. He admitted that page 1 of the 1st Respondent's bundle of documents shows only one election agent namely Mike Gura. He denied ever coming across that name during the campaigns.

6.25 PW1 admitted that his campaign team wore UPND regalia when conducting door to door campaigns and the campaigns were from 12th May, 2021. He stated that he also distributed UPND regalia. He denied meeting the 1st Respondent or his election

agent during the door to door campaigns. He denied having ever seen 'Cash Money' obtain instructions from the 1st Respondent or his election agent. He admitted that Lee Mukupa is the Muchinga Ward 24 Councillor in Matero Constituency. He also admitted that Edwin Kafula contested in Muchinga Ward 24, lost the elections, petitioned in the Local Government Elections Tribunal and lost the petition.

6.26 PW1 denied that the signatures of polling agents on the record of proceedings translates into the acceptance of the results therein. PW1 admitted that Teddy Chingu (PW10) was his agent at the totaling center and he signed the record of proceedings at the totaling center on behalf of UPND.

6.27 He denied being present when Gilbert Chilembo was assaulted or having knowledge of who assaulted him. He denied having ever seen the said disgruntled young man obtain instructions from Cash Money. He denied that the disgruntled young man is being prosecuted for threatening his life. He admitted that a person is normally released from police cells by way of police bond. He denied knowledge of whether the 1st Respondent signed as a surety on the police bond.

6.28 He stated that he was just told that the 1st Respondent tried to bribe police officers to release the young man but the officers declined the bribe. He admitted that the said young man is

Emmanuel Katiba and is charged with criminal trespass and possession of offensive weapons. He admitted that the person who sent him should have also been charged but neither the 1st Respondent nor 'Cash Money' are his co-accused persons.

6.29 Further in cross-examination, PW1 admitted that Katiba is still in custody as he has been remanded, therefore, he was not released and the matter is still in Court. He however maintained that the statement in the petition that the 1st Respondent had him released, is consistent with his testimony. He admitted that he did not witness the attack on the motor vehicle that Sindawa and other councilors were supposed to use. He denied knowledge of whether any of those councilors failed to vote. He admitted that in the video he referred to at page 60 of his bundle of documents, he cannot tell the make of the vehicle burning or who torched it. He also admitted that the video does not show anyone wearing PF regalia.

6.30 When referred to page 14 of the Petitioner's bundle of documents, he denied knowledge that a facebook page can be created on his behalf by someone else, however, he stated that he has heard of the same happening. He admitted that the post on BOBA TV was in the second person and not written directly by the 1st Respondent. He admitted that the post stated that he had allegedly withdrawn and endorsed the PF candidate. He admitted that anyone who read the post would have to verify

the same, as it was not confirmed that he had withdrawn. He admitted that there were 352 likes and he responded that he was still in the race.

6.31 PW1 admitted that he rebutted the allegation within 22 minutes. He admitted that the 1st Respondent has his own facebook page and has 335,000 followers while BOBA TV has 114,946 followers. He also admitted that he has 3, 790 followers on his facebook page and the election was won on the ground and not on facebook. PW1 admitted that the youth vote had a strong bearing and that increased his vote in 2021.

6.32 PW1 admitted distributing campaign materials to his supporters and that in video 4, the 1st Respondent was also distributing campaign materials. He maintained that the said video was taken on 1st July, 2021 but the date did not reflect in video. He admitted that there is no proof that the video was taken during the ban. He admitted that the incident in Mwembeshi Ward was on 10th August, 2021 and he had a fruitful door to door campaign as the ban had been lifted at the time. He denied sustaining any injuries. He denied that all UPND cadres and members were under his control. He admitted that some would do things not sanctioned by UPND leadership, but would not comment if that was the case with the PF.

6.33 PW1 denied having seen the 1st Respondent or Mike Guru distributing mealie meal or money to individuals. He admitted that UPND provided food for the foot soldiers who were campaigning for adopted candidates during campaigns. He denied seeing the 1st Respondent with Edith Nawakwi during the campaign period.

6.34 He admitted that the label on the mealie meal at pages 39 and 41 of the Petitioner's Bundle of Documents was soliciting for votes for Dr. Edgar Lungu, and there is no one receiving mealie meal in the said pictures. He admitted that on 11th August, 2021 when Dr. Edgar Lungu visited Matero Constituency, the ban had already been lifted. PW1 denied being present at George Central Primary School on polling day. He admitted that he heard that the 1st Respondent was stabbed on that day.

6.35 PW1 admitted that he attended a function at Royal Park and DJ Alola was playing, he was denied entry for being UPND. He admitted that he was not denied entry by the 1st Respondent and he did not go to that place to campaign. He denied having any evidence showing that the 1st Respondent was campaigning during the ban. He admitted that the date in video 2 is 15th July, but there is no year, it also shows 13th 2021 without a month, so it is difficult to decipher what date it is, he however maintained that it was during the ban.

6.36 Still under cross-examination, PW1 admitted having polling agents in all the 177 polling stations. He stated that in some polling stations, his agents were not given GEN 20 forms but the said information is not in his bundle of documents. He also did not know the number of polling agents who were not given GEN 20 forms.

6.37 PW1 admitted that figures kept changing at the totaling center before the record of proceedings at the totaling center was signed, and Chingu was aware of his objections. He stated that he did not have proof that he was leading at some point then votes were altered. He denied accosting Teddy Chingu for signing on the record of proceedings.

6.38 When referred to video 4 in the 1st Respondent's bundle of documents, He stated that the same was taken on 8th August, 2021 and he was walking back to the office after the door to door campaign. He admitted that there are people clad in UPND regalia in the said video. He admitted that Video 3 was taken in Kapwepwe Ward and in Video 4 he was addressing a crowd. PW1 denied having proof of when the ban was lifted. He admitted that the said videos do not depict any attacks by the PF.

6.39 In cross-examination by Learned Counsel for the 2nd Respondent, PW1 admitted that the 2nd Respondent is the only

public body mandated to register voters, count votes cast and declare the winner. He admitted that voters were registered, votes counted and the 1st Respondent was declared as winner. He stated that he only heard of the conflict management committee after the elections and was advised that they resolve electoral disputes. He admitted that he did not make any complaint to the conflict management committee.

6.40 PW2 was Elias Siwale, he averred that he is the PF vice chairperson for dolphin branch under ward 28, Matero Constituency. Between 11th May, 2021 and 11th August, 2021, he was a member of the 1st Respondent's campaign team and was the administrator for the campaign whatsapp group which was the planning center for political activities. They would distribute branded t-shirts, chitenge materials and mealie meal branded '*ECL 2021 powered by Miles Sampa*'. The distribution under the instructions of the 1st Respondent was across all the five (5) wards of Matero Constituency namely Muchinga, Kapwepwe, Lima, Ward 24 and Ward 28.

6.41 According to PW2, from 15th June, 2021 to 11th July, 2021, there was a campaign ban but they continued with the campaign activities like distribution of mealie meal under the instructions of the 1st Respondent. The said distribution was done in secured or enclosed places and people would be invited. The residents

of Matero Constituency were taught on how to vote and to vote for Dr. Edgar Chagwa Lungu, the Mayor, PF councilors and the 1st Respondent as area Member of Parliament. They distributed about 3000 bags of mealie meal.

6.42 In cross-examination, PW2 denied ever being a member of FDD. He admitted that he voted for the 1st Respondent, he however denied that the 1st Respondent had a wide following. He admitted that the picture at page 39 of the Petitioner's bundle of documents was taken on 10th August, 2021 after the ban had been lifted. He admitted that he is a trained accountant. He stated that he resigned from Honda Zambia where he worked since 2011 but could not remember when he resigned. He denied being charged with misappropriation of funds.

6.43 He admitted that in the pictures, there is no distribution of mealie meal and he did not personally take any pictures of distribution, the same were captured by Steven Musonda. He maintained that they took photos of the distribution and posted the same on the whatsapp group.

6.44 PW2 admitted that he received some photos of the distribution of campaign materials but the same were not before Court. He admitted participating in the door to door campaigns and being provided with food during the said campaigns.

6.45 PW3 was Steven Musonda, he averred that he is PF chairperson for dolpin branch in Matero. He was involved in a number of activities in the 1st Respondent's campaign team like mobilization of youths. His role was to ensure that materials like PF branded t-shirts, caps, chitenge materials and mealie meal were available. They identified households in all the wards and mobilized people so that they could educate them on how to vote and who to vote for. Each participant was thereafter given a bag of mealie meal branded '*ECL 2021 powered by Miles Sampa*'. Other bags of mealie meal were branded APG mealie meal.

6.46 In cross-examination by Learned Counsel for the 1st Respondent, PW3 denied personally attacking any UPND office. He denied being the 1st Respondent's election agent. He denied being responsible for capturing pictures and videos as stated by PW2. He admitted that he captured some pictures and videos. He denied being a supporter of UPND. He admitted having posted on facebook that "*My only prayer is that the President HH should not make any mistake of appointing anyone or anything in PF. PF should be allowed to rest in peace...*"

6.47 He admitted that he despises some of the PF members and their decisions. He admitted that despite being a PF member, he is a

disgruntled member. PW3 admitted that he was happy that the 1st Respondent was adopted as a parliamentary candidate, however, he regretted that decision later on. He admitted that he is saddened that the 1st Respondent won the election and it would please him if 1st Respondent lost the parliamentary seat. He admitted that his testimony is to achieve that the 1st Respondent loses his seat.

6.48 PW4 was Patricia Mutwale, she averred that she resides right opposite the UPND office in Matero Constituency. On 4th July, 2021 as she was leaving her yard, she found some men holding a man and she asked them not to beat him up but inquire why the said man was in the premises. The said man was in possession of a Zambia National Service(ZNS) belt, knife, Zambia Police coat, machete, scissors and PF flyers.

6.49 As they were taking him to the police station, the man confessed that he was just sent on a mission to kill the Petitioner, and works as security personnel at the 1st Respondent's camp. The police officers at Matero Police Station opened a docket and matter is ongoing in the Subordinate Court.

6.50 In cross-examination by Learned Counsel for the 1st Respondent, PW4 denied being a UPND member. She stated that she spoke to Petitioner before coming to Court but was not coached on what to say. PW4 admitted that the person who was accused is

Emmanuel Katiba and is charged with criminal trespass as well as being found in possession of offensive weapons. PW4 denied that Katiba trespassed on her premises despite the documents stating that she is the complainant in that case. She admitted that Katiba does not have any co-accused persons as he was just alone.

6.51 PW5 was McDonald Ntilima, he averred that on 11th August, 2021 he had a meeting with the Petitioner and they agreed that all UPND polling agents, monitors and everything should be well organized at the polling stations. He was stationed at George Central Polling Station, voters turned out in large numbers and the polling station was filled to capacity. Around 12:00 to 13:00 hours Dr. Nevers Mumba of the Movement for Multi-Party Democracy (MMD) arrived, considering that vehicles were not allowed inside the premises of the polling station, he was instructed to park outside the gate and his bodyguard voted from the said polling station.

6.52 According to PW5, around 16:00 to 17:00 hours, he was standing at a shop 10 metres away from the main gate when he saw a blue vehicle driving at high speed. Other vehicles followed behind and they were a total of nine (9). There was a white Range Rover registration number "M1" and it parked right at the entrance where the Zambia army personnel was. The vehicles were denied access into the premises. However, the Range Rover

managed to enter the premises, the other vehicles followed and people disembarked. He saw the 1st Respondent and people in the bus were singing '*Alebwelelapo Miles Sampa*'.

6.53 PW5 told the Court that the people who disembarked from the vehicles started chasing people on the queue and beating them with fists and stones. Most voters ran away and he phoned the Petitioner. Some Zambia army officers arrived and the 1st Respondent who was being held on both sides by two men while running, jumped into a Toyota Corolla and drove off.

6.54 In cross-examination by Learned Counsel for the 1st Respondent, PW5 admitted that he was a UPND monitor and is still a member of the UPND. He denied being happy that the Petitioner lost the elections. He admitted that he is sad and angry that UPND lost the parliamentary election. He denied being attacked personally. PW5 stated that the registered voters at George Central Primary were over 18,000. He maintained that people turned out in large numbers to vote and were not intimidated.

6.55 PW5 stated that he did not know the number of ballots cast or votes that the Petitioner or the 1st Respondent got at George Central. He stated that he did not vote and inquire about when voting closed. He denied being in the voting queue at time of incident.

6.56 He admitted that he could not hear the conversation between the officers at the gate and the occupants of the white vehicle. He denied knowledge that 1st Respondent was stabbed at that polling station. He admitted that he could not see the Range Rover when it was parked inside as the gate was closed and people disembarked from inside. He admitted that he knows Gilbert Liswaniso who was inside at the time of the incident.

6.57 PW6 was Margaret Njovu, she averred that on 12th August, 2021 she was at George Central Primary School in Lima Ward around 16:00 to 17:00 hours when the 1st Respondent's motor vehicle a Range Rover entered the premises. The 1st Respondent who was with a mob of men proceeded to the class being used for voting. The 1st Respondent was asking a certain lady in a low tone to enter the white vehicle because if he left her behind, people would kill her. PF cadres started beating and chasing a certain man with different weapons. At that point, a PF cadre shouted to the 1st Respondent that the man was running to where Gilbert Liswaniso was. She held Liswaniso on the hand and told him that they were after him so he had to leave.

6.58 PW6 averred that Liswaniso jumped over the wall fence and ladies on the queue started screaming '*what has our son done?*'. The PF cadres then started beating people at random. The 1st Respondent was being held on both sides and told to calm

down, he jumped in a vehicle that was outside and left his vehicle behind which was driven out by police officers. When Police officers and soldiers arrived, PF cadres started jumping over the wall fence and ran away. All the people waiting to vote including herself also ran away.

6.59 In cross-examination by Learned Counsel for the 1st Respondent, PW6 denied taking part in any campaign activities or having any political affiliations. She admitted that she supports the Petitioner and was not happy that he lost. She admitted that she would be happy if 1st Respondent lost his parliamentary seat.

6.60 She denied having heard everything the 1st Respondent said to the lady she referred to. She stated that she knows Gilbert Liswaniso as a UPND youth leader and her former tenant. She denied being a UPND member. PW6 denied knowledge that the 1st Respondent was stabbed in the back on that day. PW6 stated that there was violence caused by PF cadres. She denied seeing any people in red barrets.

6.61 PW7 was Lukundo Simwanza, he averred that he was part of the Petitioner's media team and between 12th and 13th July, 2021 he came across a post on an online publication called BOBA TV, which suggested that the Petitioner had withdrawn from the Matero parliamentary race. He took a screen shot which he shared with his fellow media team members. He contacted the

Petitioner's campaign manager one Teddy Chingu to seek guidance on how to proceed with the matter. Teddy Chingu instructed him to comment on the post on behalf of the Petitioner refuting the allegation.

6.62 PW7 averred that he had access to Petitioner's (social media) facebook accounts as head of the media team. He created a facebook account on behalf of the Petitioner which was run by him and he had all the log in credentials. The post on BOBA TV had a negative impact on the Petitioner's campaign as it affected the Petitioner's integrity.

6.63 It led to the loss of following on the Petitioner's side and a change of mind on would be voters. The post got 353 likes and 122 comments but does not mean it was only viewed by 353 people but close to 144,000 people following the said page. The Post was shared by three other unknown people or pages that might have a larger following and was viewed by more than 144,000 people.

6.64 In cross-examination by Learned Counsel for the 1st Respondent, PW7 admitted that he responded within 15 minutes of the said posting. He admitted that he did not personally form an opinion that Petitioner is not a man of integrity when he saw the post as he did not believe the post. He admitted that the word 'allegedly'

in that post meant it was not a fact, hence he reached out to the campaign manager for facts.

6.65 PW7 admitted that the 1st Respondent may have engaged someone to write that post on his behalf and did not personally post the same. He admitted that he opened a facebook account for the Petitioner and had the log in credentials which he shared with the Petitioner and Teddy Chingu. He admitted that provided the names do not conflict with an already existing page, he could create a Tom Michelo facebook account.

6.66 PW7 admitted that anyone can create a BOBA TV facebook account without permission of the official owner of BOBA TV. Once the page is created, such a person can post anything as long as the same is permitted on facebook. He denied knowledge of whether there is any registered media entity called BOBA TV. He stated that the Petitioner's facebook page has 3,790 followers. He admitted that a following reflects a person's popularity.

6.67 PW7 admitted that the post on BOBA TV was between 12th and 13th July, 2021, about one month before the elections. He admitted having posted something campaign related on the Petitioner's facebook page after the post on BOBA TV and that the Petitioner continued campaigning.

6.68 Still under cross examination, PW7 admitted that any rational person following media events knew that the Petitioner was still a candidate on 12th August, 2021. He admitted that he does not know anyone who did not vote because they saw the post on BOBA TV.

6.69 In re-examination, PW7 explained that the elections were greatly influenced by social media which was used to reach out to the masses, and there are some gullible voters who could have been influenced by the post.

6.70 PW8 was Thomas Nyingika a police officer stationed at Matero Police Station. He averred that on 12th June, 2021 as deputy operations officer at Matero Police Station, he was assigned to lead a team to police campaign activities for UPND. The President Mr. Hakainde Hichilema was scheduled to be in Matero Constituency for campaigns with the Petitioner. Around 11:30 hours, they received information that Chileshe Mwila alias "Cash Money" who was youth chairman for PF and his colleagues had blocked the Common Wealth Road with burning tyres and stones. They found Chileshe Mwila and his team at Choppies Matero. They put up a barricade and engaged Chileshe Mwila so that he could unblock the road.

6.71 PW8 averred that Lee Mukupa the PF aspiring candidate for Muchinga Ward 24 was seated in his PF branded motor vehicle. They just saw a number of buses with a lot of youths dressed in PF regalia who disembarked armed with machetes, wooden sticks and stones. They overstepped the police barricade and advanced towards the UPND campaign center. He called for reinforcement from Lusaka Division and the PF youths were repelled.

6.72 The 1st Respondent then visited Matero Police Station where he had a meeting with Chief Inspector Chalwe. PW8 expressed dissatisfaction and a team was constituted to do 24 hours surveillance. On numerous occasions around mid- night and 01:00 hours, the 1st Respondent's campaign team would pretend to be putting up posters while they were actually removing the Petitioner's posters.

6.73 On 12th August, 2021, a taskforce was created as a reinforcement team to help maintain law and order on polling day. He led the team and around 14:00 hours, they received information that the 1st Respondent had peacefully voted at Chitanda Primary School and was heading to George Central Primary School with huge security detail. His team went to said school where a known UPND member Gilbert Liswaniso was voting from.

6.74 The 1st Respondent's security detail caused commotion as they tried to harass Liswaniso and the same led to suspension of voting. People on the voting queue had to run for their safety. Normalcy was only restored after Zambia army officers intervened.

6.75 In cross-examination by Learned Counsel for the 1st Respondent, PW8 stated that he does not know the number of people who scampered and did not return to vote, but they were over 40. He stated that he does not know anyone who was injured during incident at the polling station. He only learnt of the 1st Respondent's stabbing on facebook but has not seen any paper work at his office relating to that incident of assault. He denied knowledge of any police officer scheduled to appear as witness in assault case.

6.76 PW8 denied knowledge that UPND posters are still stuck up in Matero. He admitted that he did not know the 1st Respondent's election agent. He denied having seen the 1st Respondent pulling down any campaign posters or hear anyone instruct people to remove campaign posters. He admitted that under the 2nd Respondent's guidelines, an owner of private property can pull down campaign posters. He denied receipt of any complaint from private property owners that without their authorization, flags and posters had been removed.

6.77 PW9's evidence was expunged from the record for being out of the ambit of pleaded allegations.

6.78 PW10 was Teddy Chingu, he averred that he was Petitioner's campaign manager. PW10 told the Court that he drew up the campaign programme which he shared with the police command at Matero Police Station and the Petitioner organized an office in Ward 24 for campaigns. On 10th June, 2021, PF members launched an attack at the office spearheaded by Chileshe alias 'Cash Money' and Mr. Mukupa under the instruction of the 1st Respondent. UPND members were injured and they reported the matter to Matero Police Station. There was also an attack on UPND members at Buseko Market. He took Steven Malali to the police station to report an assault case.

6.79 PW10 averred that Cash Money an agent of the 1st Respondent was one of the assailants. On 12th June, 2021 he received a report from people manning the UPND office that there was a meeting at one of Lee Mukupa's houses addressed by the 1st Respondent. Lee Mukupa then drove past the UPND office and stated that UPND is non-existent so they did not want the UPND office in Matero.

6.80 PW10 stated that PF cadres were on the way to attack them at the office and he informed the officers at Matero police station. He called the returning officer Marglorious Shape and informed her of the pending attack. The said PF cadres were led by Cash Money, the police officers were overpowered and they sought reinforcement. UPND members were injured and one was hacked on the head as per video 1 at page 58 of the Petitioner's bundle of documents which he shared with the said Marglorius Shepe.

6.81 On 4th July, 2021 a young man called Emmanuel Katiba who was clad in a green track top and carrying a bag entered the UPND office premises. People guarding the office became suspicious and asked him what he wanted. Katiba responded that he had been sent to harm someone and he was from the 1st Respondent's camp at Buseko Market. PW10 averred that Katiba had a machete, scissors, military belt and the 1st Respondent's flyers. Katiba was taken to the police station.

6.82 According to PW10, on 23rd June, 2021, Mr. Gilbert Chilembo was assaulted and the environment became so hostile that anyone clad in UPND regalia would be attacked. The Police drew up a programme for UPND and PF to campaign in different wards on particular days to avoid clashes, however, PF did not adhere to the police programme.

6.83 On 10th August, 2021, UPND was supposed to campaign in Mwembeshi Ward. They just saw PF cadres throwing stones at them and UPND members scampered. One Prisca Chobe was seriously injured and rushed to the hospital by police officers. A motor vehicle belonging to Edwin Kafula was burnt

6.84 PW10 testified that on 19th July, 2021 there was another attack at the office. A motor vehicle hired by the UPND councilor was damaged by Cash Money and his team. On 12th July or 13th July, 2021, there was an article on BOBA TV purporting that the UPND parliamentary candidate who is the Petitioner herein had withdrawn from the race and endorsed the 1st Respondent who was a favourite. He received a number of calls from supporters and members who expressed disappointment with the decision made by the Petitioner. The Petitioner was in South Africa at the time and responded that he had not withdrawn.

6.85 According to PW10, the allegation had a negative impact on the Petitioner as some UPND members thought he had sold his position. Upon the Petitioner's return, it was agreed that they visit the media and dispel what was posted on BOBA TV.

6.86 PW10 averred that the 2nd Respondent suspended campaigns from 15th June to 11th July, 2021, however, PF continued campaigning and holding meetings with large numbers of

people. The 1st Respondent was giving out chitenge materials in Kapwepwe Ward, distributing mealie meal and money. The PF campaigned in all the wards and the Petitioner was deprived of the opportunity to meet the electorate. He brought the same to the attention of the returning officer who advised him to report to the conflict management committee.

6.87 PW10 told the Court that on 11th August, 2021, the UPND was supposed to campaign in three wards. However, he was informed by the officer in charge at Matero Police Station to cancel the said programme as the former Republican President Dr. Edgar Lungu would be campaigning in Matero and this had a negative impact on the Petitioner's campaign. Around 19:00 hours he found PF branded motor vehicles playing loud campaign songs at a place called Pamakofi when campaigns had closed at 18:00 hours

6.88 According to PW10, on 12th August, 2021 he received a complaint from George Central Polling Station that the voting was disturbed because the 1st Respondent and some cadres stormed the polling station. The said disturbance caused some voters to run away and not cast their votes. He reported the matter to the police. He also received a complaint that UPND polling agents at Kizito East 2 had not been availed GEN 20 forms. When he rushed to the said polling station, he was informed that the presiding officer had recorded thirty(30) more

votes in favour of the 1st Respondent. After addressing the presiding officer, the figures were corrected and he was availed GEN 20 forms.

6.89 It was the testimony of PW10 that he was one of the monitors at the Matero Boys Secondary School Totaling Center where he noticed some people moving around with GEN 20 forms and he brought that to the attention of the returning officer. He also noticed that the results for Mosen 7 polling station were not recorded on the wall. When he queried the returning officer, he was informed that the GEN 20 form for the said polling station had gone missing. A certain lady from the PF then produced a copy of the GEN 20 form which was rejected.

6.90 PW10 averred that figures were constantly being changed by the 2nd Respondent's officials and this raised a lot of suspicion. PW10 told the Court that he signed the record of proceedings at the totaling center because he was given a condition to sign the same before he could be availed a copy.

6.91 In cross-examination by Learned Counsel for the 1st Respondent, PW10 admitted that he was Petitioner's election agent together with Charles Mizinga. He did not know the agents of the 1st Respondent. He admitted that page 1 of 1st Respondent's bundle of documents, is the nomination paper used by aspiring candidates and the 1st Respondent's election agent is listed as

Mike Gura. He denied that Lee Mukupa and Chileshe 'Cash Money' were listed as agents.

6.92 PW10 admitted that his actions as election agent have an impact on the aspiring Member of Parliament. He admitted that Lee Mukupa was campaigning as a candidate for the position of councilor. He denied ever being in the presence of the 1st Respondent and Lee Mukupa. He stated that on 10th June, 2021 he saw the 1st Respondent at Lee Mukupa's house and he heard the 1st Respondent giving instructions to the said person. He admitted that in examination in chief, his testimony was that the meeting at Lee Mukupa's house was on 12th June, 2021. He denied having seen the 1st Respondent with Cash Money on 10th June, 2021.

6.93 He denied having attended the meeting at Lee Mukupa's house on 12th June, 2021 or having seen the 1st Respondent addressing the meeting. He admitted that he just heard that the 1st Respondent addressed a meeting from a Mr. Sunday. He admitted that he saw Lee Mukupa drive past the UPND office after the meeting, however, he did not speak to the said Mukupa. He just heard Mukupa speaking to the boys at the UPND office.

6.94 He admitted that he saw Cash Money leading the group of PF cadres. He denied seeing the 1st Respondent. He admitted that

the office was secured by Zambia police officers. Over six people were injured in the incident and there is a video to that effect. When referred to page 58 (video 1) he admitted that the man in the video has a headsock on and one cannot see which part of the head was hacked. He admitted that the said man was walking unaided and clad in UPND regalia despite him having stated that no one could put on UPND regalia.

6.95 He denied there being a medical report from Chingwere Clinic relating to the said man in the video, and no one was arrested. He admitted that the video does not show who hacked him.

6.96 Still in cross-examination, PW10 admitted that on 10th June, 2021, there were attacks at the UPND office and some members were injured. However, only Steven Malali's police report had been produced. PW10 denied stating in examination in chief that the assailants were arrested. He admitted that in the video relating to Kapwepwe Ward, the 1st Respondent was alone when distributing campaign materials, and there is no proof before Court that he was at any point with a security team.

6.97 He admitted that page 4 of Petitioner's bundle of documents does not depict anyone wearing security attire as the same was at a wedding and not a campaign event. He admitted that the said picture was obtained from the 1st Respondent's facebook page. He admitted that other than that picture, there is nothing

to show that Cash Money was providing security to the 1st Respondent.

6.98 PW10 denied possessing any other evidence at the time of preparing the petition affiliating Cash Money with the 1st Respondent. PW10 admitted that in video 4, the 1st Respondent was campaigning on 1st July, 2021, however there is no date on that video. The date is on the original video but only a part of it was brought before Court.

6.99 PW10 admitted having met the Petitioner on 4th July, 2021. However, he could not remember if he met him on that date considering that the Petitioner testified that on the said date, he was in South Africa. He admitted that he saw the suspicious bag belonging to Emmanuel Katiba and Patricia Mutwale took Katiba to the police station. He admitted that the owner of the premises where Katiba trespassed is not Patricia Mutwale as she resides next to the UPND office.

6.100 He admitted that Patricia Mutwale is named as complainant in the criminal trespass and possession of offensive weapons charge, and not the UPND. He admitted that conspiracy to murder was not part of charges. He admitted that 1st Respondent and Cash Money are not co-accused persons in that charge. He admitted that Katiba had flyers but the same were not part of the tools of the

attack. He denied there being a picture of the Petitioner in the bag.

6.101 PW10 denied that it was amateurish to send an assailant with one's identity document. He denied being in the company of Gilbert Chilemba on 23rd June, 2021 or being present when the said person was assaulted. He denied being with the Petitioner in Mwembeshi Ward on 10th August, 2021. He admitted that he was not present when Edwin Kafula's motor vehicle a Nissan Hard Body got torched and did not see who torched it. He admitted that in the video relating to the incident, he cannot see the type of vehicle burning. He does not know anyone who has been arrested for arson or malicious damage to property relating to that incident.

6.102 PW10 admitted that he was with Humphrey Sindawa on 19th July, 2021 but did not see the 1st Respondent. He admitted that he did not see who damaged the vehicle, and did not see Cash Money.

6.103 When referred to the facebook post at page 14 of the Petitioner's bundle of documents, he stated that the word 'allegedly' connotes an assumption and cannot be taken as a fact, he stated that his first impression after reading the

post that Petitioner had withdrawn from race was that it was cheap propaganda. PW10 stated that the person responsible for the Petitioner's social media accounts was Lukundo Simwanza (PW7) and he responded to the post within 15 minutes.

6.104 PW10 admitted that the campaign ban related to only two political parties and the 2nd Respondent is mandated to impose a ban for breach of electoral rules. He admitted that the ban was due to electoral violence and breach of covid-19 regulations. He admitted that the ban was challenged by UPND, but not in Court. He admitted that the ban was in writing, however the challenge was not in writing. He admitted that 1st Respondent was campaigning in Kapwepwe ward during the ban, however, the date on the video cannot be seen.

6.105 He denied having videos of the 1st Respondent distributing mealie meal or cash. He admitted that he would accept a UPND chitenge if he was offered one. He maintained that he saw PF branded vehicles around 19:00 hours on 11th August, 2021 but did not see the 1st Respondent.

6.106 PW10 admitted having witnessed Shepe sign the record of proceedings and he also signed. He admitted that the document is a summary of votes counted at each polling

station. The information on the GEN 20 forms is reflected on the said document. He admitted that the signing was witnessed by himself and others.

6.107 He did not agree with the entry for Mosen 7 as the GEN 20 form went missing so figures entered by the returning officer were from unknown source. When referred to page 49 of the Petitioner's bundle of document, he admitted that if the total 572 votes cast at the said polling station were removed from 56, 200 votes that 1st Respondent got, the Petitioner would still have not won the election.

6.108 PW10 admitted that the person who filled in the GEN 20 form at Kizito East 2 was personally known to him, and after PW10's intervention, the figures balanced. The Petitioner got 110 and 1st Respondent 242. PW10 admitted that the winner at Kizito East 2 was the 1st Respondent after his intervention. He admitted that he is not happy that the 1st Respondent won the elections. He admitted that it is not first time that the Petitioner lost the parliamentary election.

6.109 In cross-examination by Learned Counsel for the 2nd Respondent, PW10 admitted that he was Petitioner's campaign manager and election agent. He admitted that

Shepe was introduced to him as representative of 2nd Respondent and all the allegations were brought to her attention before the elections. Shepe advised him to report to the conflicts management committee but he did not report to the committee as that was not his duty. He admitted that he did not see anyone changing figures at the totaling center. He admitted that the 2nd Respondent has power to correct typographical errors before the winner is declared.

6.110 PW11 was Ackson Sinyiza Banda, he averred that he is a police officer at Lusaka division headquarters. He came to Court by way of subpoena because of a matter being investigated which relates to documents dated 12th August, 2021 and were taken to his office through a complaint alleging forgery, altering, tampering or falsifying of documents.

6.111 The said are electoral documents namely GEN 20 (a) and GEN 18. Upon receipt of the complaint, he interviewed the complainant who is the Petitioner so that he could identify the documents alleged to have been tampered with. There were 21 sets of documents and two pieces of torn paper. The 2nd Respondent was engaged to help with investigations but there has been no feedback.

- 6.112 In cross-examination by Learned Counsel for the 1st Respondent, PW11 admitted that he is a detective. He denied ever being requested to come to Court before a subpoena was issued. He stated that E. Mutale was the Divisional Criminal Investigations Officer who authored the letter dated 3rd September, 2021 "TM3" addressed to the 2nd Respondent. He admitted that he understands the contents of the said letter and she was forwarding to the 2nd Respondent documents received along with a complaint from UPND candidates Aaron Mulope (Mandevu), Tom Michelo (Matero) and Portifer Tembo (Chawama), against Marglorious Shepe, Christine Siatalimi and Joseph Tanganyika.
- 6.113 He admitted that the letter does not mention any Matero Constituency GEN 20 forms. The only documents relating to Matero are councilor and mayoral documents. He admitted that there is nothing relating to Matero parliamentary elections. He admitted that all the eight documents were handed over to the 2nd Respondent and only the GEN 18 form was withheld by the police and kept in the docket. He stated that "TM2" is a torn document that is not mentioned in the letter.
- 6.114 PW12 was Phinnias Kazongo, he averred that he was part of the electoral process. On 11th August, 2021 they were

taken to the polling centers by the 2nd Respondent and he was a presiding officer. Between 22:00 to 22:30 hours, he was visited by Lee Mukupa who informed him that someone wanted to meet him outside. He went to where the motor vehicle namely a black Range Rover was parked. There were three people inside the vehicle including Geoffrey Bwalya Mwamba (GBM).

6.115 PW12 averred that GBM greeted him and handed him a box of pre-marked ballot papers stating that they were 8000 in total, 3000 presidential, 3000 mayoral, and 2000 for national assembly. GBM told him to convince his fellow presiding officers to fuse in all the ballot papers as people were voting and if he did not manage, even two would make a difference. According to PW12, he declined to do that. GBM then asked Mukupa where he had picked PW12 from and insulted PW12. GBM slapped him and the person in the back seat pointed a gun at him. GBM offered a token of K530,000.00 but he still declined and GBM told him that he would die poor.

6.116 He reported to the police officer who was at the polling station, but the officer seemed unconcerned . On 12th August, 2021 in the afternoon, the 1st Respondent visited the center at Matero Community Hall and he was chanting

6.119 PW12 stated that following RW4's instructions, he generated a new GEN 20 form and the old one was shredded. The new form was not signed by witnesses. He also generated new GEN 20 forms for Emmasdale 2 where total ballots cast were 599 and 3 votes were added to 1st Respondent. He generated for Kizito East 1, ballots cast were 370, 6 votes rejected however there was an addition of 3 to the same, to make it 9. 3 votes were added to the 1st Respondent. For Yotam Muleya known as Villa Park 1, there is a difference of one between the ballots cast, and what was recorded on record of proceedings.

6.120 For Emmasdale (a) 2, the record of proceedings had 542 and what was in ballot was 530, there was a difference of 12. For mosen 7, the presiding officer packed all the documents in ballot box and sealed the box. He only presented presidential results at the totaling center. Mosen 7 and 6 results were lost and could not be found. One person in the audience stated that he witnessed the same and he availed a copy of the results with 180 for the Petitioner and 365 for the 1st Respondent. It was later discovered that results were swapped but the swap was maintained and a new GEN 20 was generated to that effect.

6.121 According to PW12, PF had GEN 20 forms even before elections and 67 polling stations had irregularities. Matero

(a) 2, Matero (b) 2, and Kashita had figures swapped, a new set of documents was generated. "TM1(i)" is the new GEN 20 for Matero (d) 2 after the figures were swapped hence the same was not signed by any witnesses. At Lumumba 4, 64 votes were added to the 1st Respondent.

6.122 At Barlastone (a) 1, Barlastone (a) 4, Galco (b) 1 and St Monica's 1 and 2 results were swapped. At Mavuto (c) 2, 2 votes were added to 1st Respondent as there were only 500 votes cast but 502 was recorded in record of proceedings. Signatures on some of the new GEN 20 forms were forged. This was partly done at the totaling center and concluded at Nakatindi Hall.

6.123 According to PW12, RW4 and himself gave a condition to the witnesses to sign before the record of proceedings was availed to them, in order to make the document official. The 2nd Respondent rejected what was submitted and called them jokers. They were told to reconcile the record of proceedings at the polling stations with GEN 20 forms, and the record of proceedings at the totaling center.

6.124 They hid at Matero Girls Secondary School on 17th August, 2021 to undertake a reconciliation by writing new documents all together. After re-writing they made another attempt to submit the same but they were told to

wait. On 25th August, 2021 they were called and informed that the documents needed further reconciliation as they had irregularities.

6.125 On 26th August, 2021, they went to Nakatindi Hall and as they were busy re-writing, police officers pounced on him and the returning officer. Others ran away. They had a bunch of GEN 20 forms and they destroyed the old ones which they threw in the dustbin. According to PW12, the instruction to shred old GEN 20 forms and create new ones was from the Town Clerk Mr. Alex Mwansa who was instructed by 1st Respondent.

6.126 In cross-examination by Learned Counsel for the 1st Respondent, he denied appearing as a witness in the petition lodged in the Local Government Elections Tribunal involving Lee Mukupa. He admitted appearing as a witness in Local Government Elections Tribunal petition for the mayoral election. He denied stating to the tribunal that he saw GBM in a white range rover.

6.127 He stated that the 1st Respondent was not in the vehicle and he did not see him on that particular day. He admitted having seen the gun and the incident instilled fear in him. GBM offered him money but he refused to collect the same,

despite him not having earned that type of money before. He admitted that he reported the matter at Matero police station but not on 11th or 12th August, 2021 as he was in fear.

6.128 He stated that the 1st Respondent was at Matero Community Hall on 12th August, 2021 between 16:00 and 17:00 hours. He denied being issued any threat by RW4 when she called him on 13th August, 2021.

6.129 He denied having spoken to the 1st Respondent on that day. He denied being offered any money, incentive, pointed at with a gun or threatened in any way by RW4 for him to make the changes. He admitted that both RW4 and himself were temporarily engaged by the 2nd Respondent for the purpose of elections.

6.130 PW12 averred that information from the polling stations to the totaling center is transmitted manually using four forms namely GEN 20(announcement of results at polling station), ballot paper account form, record of proceedings at the count and the statement of rejected votes. The results are transmitted to the record of proceedings at totaling center.

- 6.131 He maintained that the total ballots cast at Salima (b) 1 were 492 but two more were added to the 1st Respondent's votes. He denied changing the presidential or mayoral results. PW12 denied being asked by anyone else apart from RW4 to make the changes. He admitted that the original GEN 20 forms with correct figures were shredded or destroyed by him. He admitted that the document at page 51 was destroyed but the same is before Court as it was in three sets, only the original got destroyed.
- 6.132 PW12 stated that he questioned the instruction from RW4 and the discussion was between him, RW4 and Justin but denied protesting to tampering of results. He admitted that polling agents were present when the exercise was on going.
- 6.133 He admitted that with respect to each polling station, he was making changes on all four forms and after the changes no one signed as a witness. He denied counting the votes in ballot box relating to kizito east 1 at the totaling center, he only referred to what was recorded on the GEN 20 form. He admitted that there were 6 rejected votes but he added 3 more. The said 3 votes were added to 1st Respondent. He stated that winner was announced on 15th August, 2021.

6.134 PW12 admitted that there is a printer at the totaling center to print documents. He admitted making alterations to Villa Park 1 in favour of 1st Respondent. The Petitioner got 281 and 1st Respondent 256. He admitted that the Petitioner got more votes at that polling station. He denied reporting the instructions he was given to the police. He stated that he was threatened by the 1st Respondent. He denied being pointed at with a gun or offered money by 1st Respondent. He stated that the figures he manipulated were more than 17,000. He stated that he was not motivated to make the changes but was threatened by 1st Respondent over the phone.

6.135 He admitted that by 20th August, 2021 he was aware of who had won the presidential elections and he reported the threats at Matero Police station. He stated that on 25th August, 2021 he did not refuse, but protested when RW4 called him to go with her. On 26th August, 2021, he continued the reconciliation exercise, and when the police arrived, he wanted to run away despite having already reported the matter to the police. PW12 denied reporting RW4 to the police for any offence. He admitted that he aspires to be a returning officer one day and it is helpful for him to be in good books with the current government.

6.136 He admitted that RW4, himself and others were apprehended by the police, despite his name not being mentioned in the letter written by police. Among the documents listed, the documents in his possession were other forms and posters. He denied that the reason Matero GEN 20 forms were not listed on letter is because they were not among the documents.

6.137 Still in cross-examination when an arithmetic exercise was done relating to the polling stations he had mentioned namely Emmasdale c 2, 3 votes, kizito east 1, 2 votes, salima b1, 2 votes, barlastone (a) 1 swap difference of 24, barlastone (a) 4 difference of 56, galco b 1 difference of 170, st monica's 1 difference of 135, st monica 2 difference of 184, Lumumba 4 difference of 247, matero d 2 difference of 31, villa park 1, one vote, villa park 2 difference of 57, mosen 6 and 7, the total came to 1, 233 votes. He admitted that the difference in announced votes between the Petitioner and 1st Respondent was 22000. 1,233 as a percentage of 22,000 is 5.6%.

6.138 PW12 denied receiving a letter from the 2nd Respondent appointing him as assistant returning officer. PW12 stated that only him and Hangoma were tasked to manipulate votes.

6.139 In cross-examination by Learned Counsel for the 2nd Respondent, PW12 admitted that he was presiding/assistant returning officer. He admitted that when vacancies are announced for the said positions, candidates apply and the applications are processed by 2nd Respondent. Returning officers are interviewed and successful candidates' names are stuck up on the board. He stated that he was appointed as presiding officer verbally by the returning officer. He admitted that technical support staff are trained to enter results in the system and are the only ones with the password to the system.

6.140 He admitted that after results are entered by technical support staff, the record of proceedings at the totaling center is printed out and given to observers and party representatives. He admitted that the 2nd Respondent announces results for the polling stations received thus far. He admitted that a candidate or polling agent can object to the results announced. He admitted that a candidate is entitled to file a complaint before the conflicts management committee. He admitted that after declaration of the winner of a parliamentary seat, all the documents are taken to nakatindi hall for them to be sorted out.

6.141 Further in cross-examination, PW12 admitted that he applied for the position of presiding officer and was trained as a presiding officer. He admitted that he was changing results at the totaling center without anyone pointing a gun at him. He admitted that what he was allegedly doing at the totaling center is an offence but he went ahead and made the alterations.

7.0 1ST RESPONDENT'S CASE

7.1 The 1st Respondent called three witnesses hereinafter referred to only as RW1 to RW3.

7.2 RW1 was Ndaba Zulu, he averred that he is an Information Computing Technician holding a double major in Information Systems and Economics and a Masters Degree in Global Affairs and Finance, as well as certifications in CISCO device networking. He stated that facebook is a social media application that acts as a public platform for users anywhere to follow each other individually and or public pages.

7.3 There is a difference between a personal facebook account and a public facebook page. A Public page is managed by administrators who allow users to have access and monitor how or what they can post and there is no limit to the amount of administrators a public page can have. A person who is not an

administrator cannot specifically know who the other administrators are, but a person following the page is able to see the number of administrators.

7.4 When referred to page 14 of Petitioner's bundle of document, RW1 stated that the same is a facebook post relating to BOBA TV being followed by the Petitioner. The post was liked by 353 including the Petitioner. RW1 told the Court that BOBA TV is a public page that can be followed by anyone. RW1 averred that on the page, there is a transparency icon just under the video tab and when one clicks on it, it brings about public information of that page including the number of public administrators.

7.5 It also shows the history of the said administratorship including who was added and removed. He added that there is a disclaimer to the effect that because it is a public page, the views and opinions expressed on the page are those of the original authors and do not necessarily reflect the official policy or views of the administrator or Miles Sampa in his capacity as former mayor or any other capacity.

7.6 According to RW1, the disclaimer is available to the general public and is accessible to the people who viewed or liked the post and commented on the same. He stated that BOBA TV has nine(9) administrators, and all users can post and comment. He

stated that he was unable to tell who posted the article on BOBA TV. It could have been anyone who favours the 1st Respondent or does not like the Petitioner. According to RW1, the trend in the general elections was that wherever the leader of a political party won, the member of parliament also won.

7.7 In cross-examination by Learned Counsel for the Petitioner, RW1 stated that he attended a CISCO specialization course that deals with networking devices at UNZA and obtained a certificate. He stated that he has a Degree from University of Buckingham and has worked for four institutions. He stated that he was not fired from those institutions but left on his own free will as he was offered a better package, and wanted to pursue further studies.

7.8 RW1 admitted that one can create a facebook account with their personal name or business name. He admitted that page 14 shows BOBA TV as a name and the post was responded to by Tom Michelo Matero UPND. He admitted that the said page does not show administrators or who created the account. He admitted that 353 people liked the post, 122 commented, and not everyone who opened the post had to like the same as a particular icon has to be pressed to indicate that one likes the post.

7.8 He admitted that people who shared the post could also share with individuals and groups and the same goes viral within seconds. He denied seeing any disclaimer on page 14. He admitted that social media is a powerful tool for communication and can be used for political campaigns. He admitted that facebook has a wider coverage as compared to television viewers. He admitted that page14 does not show how many people viewed the post. He admitted that BOBA TV is very popular and viewers would not know who the administrators are. He admitted that Miles Sampa is a public figure and very well known.

7.9 RW1 admitted that as a public figure if an insult is posted on BOBA TV and 1st Respondent does not distance himself, then it will be taken as coming from him. He admitted that the names Miles Sampa are mentioned in the disclaimer because he is affiliated to BOBA TV. He admitted that the posting went viral and anyone would have seen the same. He denied that the posting would influence a voter. He denied being a member of the PF. He admitted that majority of voters tend to vote on party lines but a few logical ones depart from that trend. He admitted that as per trend, there would be very little differences between Presidential and Parliamentary votes.

7.10 In re-examination, RW1 averred that it followed that if President under a certain party wins in a constituency, the MP also wins.

In Matero Constituency, the said Member of Parliament is the 1st Respondent. He stated that the rest of the world that viewed the post does not vote in Matero Constituency.

7.11 RW2 was Moses Zimba, he averred that he is a fire fighter employed by Lusaka City Council and was an election monitor under a non-governmental organization called Touching People's Lives. He voted from George Central Primary School where he was stationed as an election monitor. On 12th August, 2021, he was at the said polling station and he saw the 1st Respondent around 15:00 hours accompanied by three people. He arrived in a motor vehicle namely a White Range Rover Registration Number "M1".

7.12 The soldiers and police officers opened the gate, and a group of people clad in red t-shirts and black coats followed the said vehicle. One was wearing a red barret. When the 1st Respondent disembarked from the vehicle, he went in the first classroom and interacted with a relief PF polling agent who was outside. He inquired from the lady if they had been given food and she responded in the negative.

7.13 RW2 stated that a police officer approached the 1st Respondent and informed him the officer in charge at Matero Police Station wanted to speak to him over the phone. The 1st Respondent got

the phone from the police officer which was on loud speaker, and he was informed to leave as the place was not safe.

7.14 The 1st Respondent responded that he would leave immediately. UPND members then started screaming '*leave this place!*' and they were insulting the 1st Respondent. The situation became tense, UPND members started pushing the 1st Respondent and throwing stones at him. The 1st Respondent started running towards the gate together with the three people who accompanied him.

7.15 RW2 averred that a tall man in a red UPND t-shirt removed an axe from his black leather coat and hit two people who were with the 1st Respondent. He followed the 1st Respondent and threw the axe at the 1st Respondent, it landed on his back. The people on the queue scampered and the 1st Respondent was taken away by police officers. The commotion was controlled by the soldiers and the police officers. People went back to the queues and continued voting up to 18:00 hours.

7.16 In cross-examination by Learned Counsel for the Petitioner, RW2 admitted that he did not have any proof that he was an election monitor. He denied being a PF cadre. He admitted that he was not present when ballot boxes were opened. He stated that there were so many polling agents but denied lying to the Court. He stated that there were two monitors, one inside and one outside.

7.17 RW2 admitted that the non- governmental organization he mentioned was registered but does not know the founder or where it is located. He stated that he registered as a monitor from civic center and went for orientation, but did not receive any certificate of attendance or get to know which institutions the other participants represented. He denied that a certain political party was registering non-governmental organizations in order to have more monitors. He admitted that he is aware that political party regalia is not allowed at any polling station on polling day. He denied lying to the Court when he stated that he saw people in red t-shirts.

7.18 RW2 admitted that he was aware that no vehicles were allowed inside the polling station. He admitted that he did not see what was happening outside the gate and did not see any people chanting slogans. He admitted that the vehicle that drove into the premises of the polling station was the 1st Respondent's vehicle and that was the only vehicle he saw. He admitted that he saw the MMD president around 12:00 hours but was not aware if he was told to park outside. He denied that PF cadres caused commotion and forced entry in the premises or attacked people.

7.19 RW2 stated that he does not know George Liswaniso and admitted that he could not have seen everything that happened. He denied knowledge that Gilbert Liswaniso was targeted by people who forced their entry. He admitted that a tall man in UPND regalia produced an axe from the inside pocket of his leather coat. He denied knowledge that soldiers and police officers were called in to curb the situation. He admitted that some people sustained injuries and were taken to the hospital by the police.

7.20 He admitted that he likes the 1st Respondent as a member of parliament. He stated that there are 10 polling stations in matero constituency which has five wards. He admitted that the 1st Respondent served as Lusaka mayor. He denied testifying because the 1st Respondent was his boss.

7.21 RW3 was Chaze Mwale. He averred that he is a social media blogger and runs a personal facebook page as well as BOBA TV. BOBA TV is an online media platform that shares news, trending stories and entertainment. He and his colleague Nando Sebitwane own BOBA TV. He stated that when they were creating the facebook page, they used the name BOBA TV because it was already in public domain and affiliated to Miles Sampa who was using the name, so they sought his permission to use the name. According to RW3, BOBA means home. A post on that page can be originated by administrators and page followers.

7.22 It was the testimony of RW3 that the post at page 14 was authored by him and the source of the information was what was trending on whatsapp groups. He was not under the instruction of anyone. There was a comment by Tom Michelo and he saw the comment after 25 minutes. After seeing the comment, he quickly deleted the post because he became aware that the same was false as the Michelo confirmed that he was still in the race. The word 'allegedly' was used because the information was not confirmed yet. RW3 stated that after deleting an article or post, it ceases to exist.

7.23 In cross-examination by Learned Counsel for the Petitioner, RW3 admitted that he is a social media blogger and anyone can register a facebook account. He admitted that credentials used are only accessible by facebook and the account holder. He admitted that there is no proof before Court that he is proprietor of BOBA TV. When referred to page 14 he admitted that his name or that of his colleague do not appear on the said page. RW3 stated that the intention of the post was to share a trending story. He denied that the post was damaging to the Petitioner as he refuted the same. He admitted that the post went viral.

7.24 RW3 maintained that Petitioner refuted the allegation and he deleted the posting. RW3 maintained that BOBA TV was inherited from 1st Respondent's initiative hence the name. He stated that the request to use the name BOBA TV was verbal. He admitted that it is in public domain that name BOBA TV belongs to 1st Respondent and popularity of a page depends on how often it is used. He admitted that no apology was rendered for the post.

8.0 2ND RESPONDENT'S CASE

8.1 The 2nd Respondent called one witness hereinafter referred to only as RW4.

8.2 RW4 was Marglorius Shepe, she averred that she is a teacher by profession and was the returning officer for Matero Constituency. Prior to that, she was assistant returning officer in 2008 presidential by election. In 2010 she was assistant supervisor for voter registration in matero constituency, in 2011 she was assistant returning officer in matero constituency in the tripartite elections.

8.3 In 2014 she was appointed assistant returning officer in matero constituency in the presidential by-election and in 2015 she was assistant supervisor for voters card replacement. In 2016 she was assistant returning officer for matero constituency in the general elections and in 2018 she was returning officer for

Kabwata Constituency mayoral elections. In 2019 she was resource person for delimitation exercise in Kabwata Constituency. In 2020 she was appointed as supervisor for voter registration in Matero constituency.

8.4 RW4 stated that the 2nd Respondent advertises the positions through the district elections officer who is the Town Clerk. There is a committee that sits to select and the successful candidates' names are placed on the notice board at civic center. They are then invited for a training and given an assessment. Those who qualify are issued appointment letters by the district elections officer. The returning officer is in charge of the constituency and receives all the security and non-security materials.

8.5 RW4 averred that the returning officer is responsible for the recruitment of poll staff including the presiding officers. Nominations of candidates were in May, 2021 and that was the opening of the campaign period. She had the duty to brief the political agents, election monitors and observers on what is allowed to be done and what is not.

8.6 She also briefed police officers on how to carry out their duties. In the briefing, what was of paramount importance is that peace needed to prevail. She called the candidates for Matero Constituency and asked them to send their representatives. The

turn-out was very good, she shared her phone number and asked them to contact her whenever the 2nd Respondent's protection was required.

8.7 RW4 stated that she informed them about the conflict management committee which settles election disputes. The said committee has all political party representatives and is the best channel for resolution of disputes. She also encouraged them to report occurrences to the police. On 11th August, 2021 she went to civic center to collect the ballot papers and took them to the totaling center at Matero Boys Secondary School where all the presiding officers, state police, political party representatives and other stakeholders witnessed the arrival of the same.

8.8 RW4 stated that she distributed the ballot papers according to polling stations and deployed the presiding officers to the polling stations with a police escort. By 18:30 hours all the poll staff had been deployed. RW4 and her five assistant returning officers Mr. Justine Munkombe, Mr. Mwamba Mwangwa, Miss Christine Siatalimi, Mr. Joseph Tanganyika and the technical support officer Mr. Chilufya Kapembwa went back to the totaling center to wait for the poll staff to settle. Around 22:00 hours they went around the polling stations to check on the layout and ensure that it was uniform. They finished inspections after mid-night and went back to the totaling center.

8.9 RW4 averred that around 05:30 hours on 12th August, 2021 they went around various polling stations to witness the opening of the poll. Around 16:00 hours, they went back to the totaling center where she assigned duties to her assistant returning officers. Mr. Munkombwe and herself were in charge of receiving materials, Mr. Mwamba and Miss Siatalimi were announcing and recording results on the tally sheet that is a big paper placed on the wall. It has name of the polling station, candidate, type of election and the figures for each candidate. Mr. Tanganyika was verifying the results by going through all the four forms. Mr. Tanganyika was giving the results to Mr. Kapembwa to enter in the system as he was the only one allowed to enter the results and had the code which is given by the Information Technology personnel at the 2nd Respondent's headquarters. As returning officer, she does not know the code. Around 22:00 hours she showed all the stakeholders were to sit and explained the process to them that when results are received, the same would be verified, announced, entered in the system and written on the wall.

8.10 Results come from polling stations on four forms namely the ballot paper account form where presiding officer indicates ballot papers received, used and unused and the spoilt ballot papers. Record of proceedings at the count (polling station) shows results for a candidate as they appear on the ballot paper,

it also shows rejected ballots. There is also a statement of rejected ballot papers. The announcement of results (GEN 20) is where results are recorded starting with the highest, the information is obtained from the record of proceedings at the count.

8.11 When the presiding officer finishes counting, he fills in the four forms and gets the announcement form (GEN 20) which he sticks on the wall outside the polling station. All those who have witnessed the count are given copies of the announcement form (GEN 20) and they sign, even if they do not sign, they are still availed copies.

8.12 RW4 stated that the record of proceedings at the count is used to enter results in the system. Results started coming in around 23:30 hours and after handing over the same, presiding officers proceeded to Mr. Tanganyika's table to have his results verified. Mr. Tanganyika gave the results to Miss Siatalimi who was announcing. Results were then given to technical support officer to enter in the system and he gave the results back to be recorded on the wall. On 13th August, 2021, they continued with the same process.

8.13 Around 11:00 hours while receiving and recording results, she was approached by the UPND chairperson expressing concern that he was not comfortable with too many people surrounding

the 2nd Respondent's table where results were being received and all doing some writing. She explained that the same were presiding officers bringing in results, but that did not go well with him. He alleged that they were changing figures and most of them were PF cadres. RW4 averred that the electoral process is very transparent, hence she invited him to sit at the table to observe that forms were just being completed and mistakes corrected, he sat for a few minutes and left.

8.14 Around 14:00 hours, the PF candidate for Mwembeshi Ward approached her and stated that the figures recorded on the wall were different from what he had. He was referring to Salima polling station. They proceeded to where the results were recorded and did a comparison. It was discovered that the results were the same but the person who was adding at the polling station missed a two when totaling the results.

8.15 RW4 averred that on 14th August, 2021 in the afternoon, the UPND candidate(Petitioner) entered the totaling center seemingly upset. He stood where Mr. Phinnias Kazongo (PW12) a presiding officer was standing and she noticed raised voices. She asked the Petitioner what the problem was. He responded that his votes had been stolen and she told him that was impossible. He took her to where results were stuck on the wall and stated that results had been erased.

8.16 She got her copy of the record of proceedings at the count and discovered that initially, results for Galco (a) had been recorded on Galco (b) and they erased the same. The Petitioner was satisfied but stated that there was another problem. He produced a GEN 20 which did not have delimitation information (polling station, constituency, name of presiding officer, signature) except candidates figures with interlineations. She responded that the same could not have been written by a presiding officer. She asked for the same copy but he declined to give it to her, so she just took a photo of the same.

8.17 RW4 stated that she looked for her copy and observed that the figures were the same and neatly written. She approached the Petitioners campaign manager Mr. Chingu and showed him her copy. She called the Petitioner who had left but he refused to return.

8.18 On Sunday, 15th August, 2021 around 08:00 hours, as they were about to announce the winner, they discovered that they had not recorded presidential results for mosen 7. They attempted to look for their copy but because of exhaustion, they could not locate it. She addressed the stakeholders and asked them for a copy of the announcement form for mosen 7. Two election from Transparency International Zambia and FODEP volunteered to avail her copies. She made a comparison and they were the same.

8.19 RW4 stated that she called the presiding officer for mosen 7 on loud speaker who forwarded the same on whatsapp, in the process, her five assistants managed to find the copy and she announced to the stakeholders. The results were entered and she closed the process of entering of results. Copies of record of proceedings at the totaling center were printed out and given to stakeholders to check for errors and they all confirmed that there were no errors. She informed the District Elections Officer that she had concluded the process and he went to the totaling center to collect the results so that he could take them to the 2nd Respondent. The stakeholders were asked to sign. She declared and announced the winners at 10:00 hours.

8.20 She took all the ballot boxes to Nakatindi Hall at Civic Center to secure them. On 18th August, 2021 they started the process of verification of ballot paper account forms in the presence of all stakeholders. Stakeholders and returning officers from the seven constituencies in Lusaka were part of the verification, reconciliation process, sorting and packing in readiness for delivery of the materials to the 2nd Respondent.

8.21 On 26th August, 2021, the Petitioner went to Nakatindi Hall. While she was in the cashier's office Siatalimi called her and asked her to rush to Nakatindi Hall. She entered Nakatindi Hall and found Petitioner on the Matero table with election

documents for Matero Constituency in his hands. The Petitioner was screaming that figures were being changed.

8.22 RW4 asked him what the problem was and he told her not to say a word. She asked him to put the documents down so that they could talk but he refused. In a short while she saw the presence of police officers and media houses including ZNBC. The Petitioner was screaming that they should be arrested and some presiding officers ran away. The Petitioner's team got all the documents, put them in boxes and carried them. She followed him and jumped in his vehicle together with three assistant returning officers and presiding officers for both Matero and Mandevu. At central police station, they were taken to the conference room. The Petitioner started putting people in groups to go and record statements.

8.23 RW4 averred that the Police officers never recorded any statements. They insisted she was changing figures but she maintained that she was not even inside Nakatindi Hall at that time. The 2nd Respondent's officials arrived and after the meeting it was agreed that the documents collected from Nakatindi Hall should be sealed and left at the police station. They were then asked to leave.

8.24 RW4 stated that the following day, all the seized documents were taken back to Nakatindi Hall and later to 2nd Respondent's headquarters. RW4 stated that she does not have authority to appoint assistant returning officers and denied appointing PW12 as such, the same is done by the 2nd Respondent through a process, not there and then. She denied ever receiving a call from the 1st Respondent instructing her to ensure that he wins. RW4 averred that counting is done in 177 polling stations, results stuck on the wall at the polling stations and are in public domain. It is practically impossible for her change the results.

8.25 RW4 explained that for Salima (b) 1, page 49 of the record of proceedings at the totaling center shows the total ballots cast as 494, while the GEN 20 form shows the total figure of 492. When a simple arithmetic exercise was done with RW4 in Court the total came to 494 as indicated on the record of proceedings. RW4 explained that 492 was erroneously arrived at by the presiding officer at the polling station when adding the totals, however, the computer system at the totaling center corrected the same.

8.26 RW4 told the Court that the correct total for Kizito East 1 was 370 as recorded at page 49 on the record of proceedings at the totaling center, the presiding officer erroneously indicated on the GEN 20 form at page 53 that the rejected ballots were 6 when they were actually 9. For Yotam Muleya (Villa Park 1) at page 47

the total ballots cast were 567 as recorded on the record of proceedings, the GEN 20 form shows 568 because the presiding officer miscalculated the totals.

8.27 RW4 averred that no GEN 20 forms were shredded and the results were maintained as they came from the polling stations because everything was done professionally. She stated that all stakeholders are present at the totaling center and cannot just sit while figures are being changed. Results are announced before they are entered in the system to enable stakeholders to object. RW4 averred that the computer system does not miscalculate figures, and no candidate's figures were tampered with.

8.28 In cross-examination by Learned Counsel for the Petitioner, RW4 maintained that appointment letters are given to all officials after the assessment by the 2nd Respondent. She admitted that the 2nd Respondent issues a list which is placed at civic center. She admitted that PW12 was a presiding officer at Matero community hall. She admitted that when the presiding officer concludes counting he or she takes the results to the totaling center where tallying is done.

8.29 RW4 admitted that at the polling station, the GEN 20 form is signed by stakeholders to affirm that they have witnessed the

process. Results are always pasted on the wall and everyone can see them. She denied that the GEN 20 form is the source document and averred that the record of proceedings is the source document and all stakeholders at the polling station are availed GEN 20 forms.

8.30 RW4 maintained that a GEN 20 form is a valid document despite not being witnessed by anyone. She admitted that if a stakeholder is not availed a GEN 20 form, they can complain and request for the same. She only received one complaint from Teddy Chingu to the effect that they were not given GEN 20 forms at Chunga West Polling Station and she asked him to collect the same from the totaling center. She admitted that the stamp is a security material and when a ballot is not stamped at the back, it becomes a rejected ballot paper. She admitted that the stamps were faint but replaced.

8.31 She admitted that it does not matter whether a GEN 20 form is signed, entries are made by the technical support officer who then issues a computer generated document. She admitted that the computer is operated by human beings and computes what is entered by the technical support officer.

8.32 RW4 admitted that the computer cannot detect transposition errors. She denied ever receiving general complaints that GEN 20 forms were not issued but pro PF members had the same.

The complaint was from the UPND chairperson stating that there were so many people at the 2nd Respondent's table who he identified as PF members, the other complaint was from the PF Mwembeshi Candidate who stated that the results he had had a difference of two with what was recorded. RW4 stated that in the event that a GEN 20 form is not availed, stakeholders can copy results from the wall and use the same for parallel voter tabulation.

8.33 RW4 stated that it is only at a polling station where a recount is done so if there is a dispute, results can be recounted before being placed on the wall. She denied receiving a complaint of transposition of results from any polling station. She maintained that if there were problems at the polling stations, the same should have been brought to her attention and she would have acted.

8.34 RW4 denied having any problems of results not tallying at the totaling center. She denied ever calling PW12 to return to the totaling center because there was a problem of results not tallying. She maintained that PW12 lied when he stated that she called him back to the totaling center. She denied knowledge that PW12 is good at mathematics and computer entries. She denied tampering with figures and being caught in the process. She denied shredding any results and issuing instructions to

generate new results at the totaling center. She denied receiving any phone call from the 1st Respondent or being instructed to make him win the elections

8.35 She denied any knowledge of PW12 meeting GBM and offered a bribe to ensure that the 1st Respondent wins the elections. She denied ever appointing PW12 as an assistant returning officer. She denied changing any figures or instructing PW12 to change results. She admitted that it is not possible for GEN 20 forms to have similar handwritings as they originate from different polling stations and if such was the case, her conclusion would be that someone was writing those GEN 20 forms but not at the polling stations. When referred to "TM1(3)(a) relating to Government a 5 polling station, she admitted that the said document and accompanying documents have similar handwritings because they originated from the same polling station.

8.36 RW4 maintained that there is no condition attached before the record of proceedings is availed to stakeholders. Whether they sign or not, they are entitled to receive the document. She stated that Chingu (PW10) was actually the first one to sign as he wanted to leave, no one forced him to sign. She denied ever being approached by the 1st Respondent or GBM with a bribe.

8.37 She stated that political party representatives and returning officers for 7 constituencies were present at Nakatindi Hall. She maintained that they were not tampering with figures but were sorting and repacking and she would be very comfortable if the Court ordered a recount. She denied being apprehended as she went freely and was told to use Petitioner's vehicle. RW4 stated that she is not aware of any docket that was opened or ongoing investigations.

8.38 RW4 admitted that Teddy Chingu (PW10) reported acts of violence twice and she advised him to report to conflicts management committee. She denied being PF as she is non-partisan. She admitted that party regalia is not allowed within 400 metres of a polling station. She received a complaint of violence from officer Walubita at George Central Primary and was informed that there was a fight that interrupted the queues and the 1st Respondent was stabbed. RW4 admitted that the computer cannot detect transposed results. She maintained that it was not possible to transpose results.

9.0 PETITIONER'S SUBMISSIONS

9.1 The Petitioner's Learned Advocates filed written submissions into Court on 11th November, 2021.

9.2 The Petitioner's Learned Advocates submitted that indeed the burden of proof in an election petition as in any civil matter rests on the Petitioner to establish his case on a fairly high degree of convincing clarity. Reference was made to the case of **Anderson Kambela Mazoka and Others v Levy Mwanawasa and Others**¹ where the Supreme Court held that:-

“As regards the burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.”

9.3 It was submitted that the Petitioner has established a reasonable standard of proof required as the evidence put forward by the Petitioner is truthful, meritorious and cogent. The said evidence satisfies the provisions of section 97 (2) (a) and (b) of the Electoral Process Act No. 35 of 2016.

9.4 The Petitioner's Learned Advocates submitted that the Petitioner raised a number of allegations against the 1st Respondent with respect to violence and bribery through the distribution of money and mealie meal. The evidence proffered by the Petitioner was not disproved by the 1st Respondent, and the said evidence shows that the electorate was influenced by the alleged acts of electoral misconduct.

9.5 The case of *Mubika Mubika v Poniso Njeulu*² was cited. In the said case, the Supreme Court held that:-

"The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a Constituency were, or might have been prevented from electing a candidate of their choice. It is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the Constituency..."

9.6 It was submitted that the 1st Respondent's intention was to offer gifts in form of mealie meal and money in order to induce voters to vote for him. The 1st Respondent also used massive violence and threatened voters in order to disadvantage the Petitioner. Further, as per the evidence of PW1, PW11 and PW12, the Respondents conspired to achieve a common illegal cause of changing figures, swapping figures and destroying documentation to the detriment of the Petitioner.

9.7 Learned Advocates for the Petitioner also submitted that the 1st Respondent used Boba TV, a facebook page created for his benefit to deliberately publish a false statement for the sole

purpose of misleading the voters. The said acts of electoral misconduct and illegal practices had a serious effect on the majority of the voters in Matero Constituency as they were widespread. The 1st Respondent was therefore invalidly and illegally elected.

10.0 1ST RESPONDENT'S SUBMISSIONS

10.1 The Learned Advocates for the 1st Respondent filled written submissions on 12th November, 2021.

10.2 In the said submissions, it was submitted that the grounds upon which the election of a candidate as Member of Parliament may be nullified by the Court are set out in section 97 (2) (a) (b) and (c) of the Electoral Process Act No. 35 of 2016. It was submitted that it is not sufficient for a Petitioner to prove only that a candidate has committed a corrupt or illegal practice or engaged in other misconduct in relation to the election, without proof that the misconduct, corrupt or illegal practice was widespread and prevented or may have prevented, the majority of voters in the Constituency from electing a candidate of their choice. Reference was made to the cases of *Jonathan Kapaipi v Newton Samakayi*³ and *Mubita Mwangala v Inonge Mutukwa Wina*⁴

10.3 Learned Advocates for the 1st Respondent also submitted that a candidate is only liable for corrupt or illegal acts or misconduct that he or she commits and those committed by his election/polling agents or those done with his knowledge,

approval or consent. The cases of *Nkandu Luo (Prof) and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General*⁵ as well as *Margaret Mwanakatwe v Charlotte Scott and the Attorney General*⁶ were cited.

10.4 It was submitted that in relation to section 97 (2) (b) of the Electoral Process Act No. 35 of 2016, where a party alleges non-conformity with the electoral law in an election petition, there must be proof not only that there was non-compliance with the law in the conduct of the election in issue, but also that such non-compliance did affect the election result. Reference was made to the case of *Sibongile Mwamba v Kelvin Sampa*⁷ where the Constitutional Court held that:-

“For the Court to nullify an election based on the fact that the election was not conducted substantially in conformity with the law, the non-compliance with the law should be such that it affected the outcome of the election.”

10.5 It was submitted that where there is an allegation of non-compliance with the law in the conduct of elections, the proper party to answer to the same is the Electoral Commission of Zambia (2nd Respondent), as individuals who were candidates in the concerned elections cannot answer for any alleged non-compliance with the electoral law.

10.6 Learned Advocates for the 1st Respondent submitted that the burden of proof is on the Petitioner to prove the allegations at a fairly high degree of convincing clarity and the case of **Brelsford James Gondwe v Catherine Namugala**⁸ was cited.

10.7 It was further submitted that section 99 of the Electoral Process Act No. 35 of 2016 sets out the jurisdiction of the Court by providing what claims can be made in an election petition namely; a declaration that the election was void, or a declaration that any candidate was duly elected. The Court cannot therefore entertain claims outside what is provided in the Act, and does not have jurisdiction to grant any such relief.

10.8 Learned Advocates for the 1st Respondent submitted that in relation to the allegations of undue influence, the Petitioner has not alluded the 1st Respondent or his election or polling agents to the alleged attack on one Steven Malali. Further in the medical report produced in relation to the same, it was stated that he was assaulted by known people, however, the said known people have not been mentioned in the petition. The inconsistency on the identity of the alleged attackers makes this allegation fall short of meeting the standard of proof.

10.9 It was submitted that PW10 mentioned one Lee Mukupa and Chileshe alias 'Cash Money'. This Court was invited to take judicial notice of the judgment of the Honourable **Local Government Elections Tribunal 2021/P/LGET/004** which is evidence that Lee Mukupa was a candidate himself in the subject elections. It was submitted that the notion that the said Mukupa was running the 1st Respondent's campaign is outrageous.

10.10 It was further submitted that there is no allegation that Lee Mukupa or Cash Money were ever the 1st Respondent's election/polling agents or that the alleged acts of violence were carried out by the 1st Respondent or his election/polling agents, or indeed with his knowledge or blessing

10.11 It was submitted that in relation to ownership of the Boba TV facebook page, the Petitioner at pages 1 and 2 of his bundle of documents only exhibited a purported newspaper print out as evidence. It was argued that it is trite law that a newspaper publication is inadmissible hearsay in the absence of the author or editor of the publication to testify to its authenticity and context. Further, a newspaper article must be produced in its original form, but the Petitioner only presented a headline without the full statement.

10.12 In relation to the allegations of bribery, it was submitted that there is no shred of evidence as not a single witness testified to having received mealie-meal or money.

10.13 It was also submitted that as regards the rally of 11th August, 2021, it would be unreasonable to assume that the Former Republican Head of State Dr. Edgar Lungu was acting on the instructions of the 1st Respondent. In relation to the incident at George Central Primary School on polling day, it was submitted that the Petitioner's witnesses were partisan and untruthful. Despite the 1st Respondent's attacks and injuries being in public domain, they simply denied ever having heard about the same.

10.14 In relation to the allegations of illegal practices relating to the polls, Learned Advocates for the 1st Respondent submitted that the testimony of RW4 clearly showed that the 2nd Respondent conducted itself substantially in conformity with the law. The testimony of PW12 was full of inconsistencies requiring corroboration, and his demeanour tainted his credibility

10.15 In conclusion, it was submitted that the historical voting pattern shows that Matero Constituency is a PF stronghold, and the majority of voters could not have been swayed

against voting for their preferred candidate who is the 1st Respondent.

11.0 2ND RESPONDENT'S SUBMISSIONS

11.1 The Learned Advocates for the 2nd Respondent filed written submissions on 12th November, 2012.

11.2 In the submissions, it was submitted that the allegation of UPND party agents not being availed GEN 20 forms, even if it were to be proved cannot amount to an electoral malpractice sufficient to nullify the results because as per Article 229 of the Constitution of Zambia, the 2nd Respondent is the only body mandated to conduct elections. Therefore, even in the absence of polling agents, election monitors or observers, the 2nd Respondent has power to conduct elections, announce results and declare the winner. This is confirmed by section 36 (2) of the Electoral Process Act No. 35 of 2016.

11.3 It was submitted that in relation to the allegations of vote counting not being transparent and vote tally figures being added to the 1st Respondent, PW12's evidence was that he was appointed as assistant returning officer by RW4 who instructed him to alter figures in favour of the 1st Respondent. RW4 on the other hand denied the same. Considering that there are conflicting statements, issues of credibility come into play.

11.4 Reference was made to the case of **Chizonde v The People**⁹ where it was held that:-

"(a) an adverse finding as to credit is a finding that the witness is not to be believed, such a finding is in turn one of the factors which will influence the Court in its decision as to which of two conflicting versions of an affair it will accept;

(b) it is not valid to hold a witness to be untruthful for no other reason than the existence of the very conflict which the Court is called upon to resolve; such an approach would be purposeless and circular;

(c) an adverse finding as to credit may be based for instance on discrepancies in the witnesses evidence or on a previous inconsistent statement or on proved bad character or an evasive demeanor and so on; and

(d) if a finding as to credit is based on demeanor, such finding cannot be supported in the absence of evidence on record."

11.5 This Court was invited to consider RW4's evidence more credible than that of PW12 as PW12 was evasive and argumentative. It was further submitted that there is no

evidence to support that presiding officers were issuing fake GEN 20 forms.

11.6 In conclusion, it was submitted that as per the guidance in the case of *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (supra)*, the Petitioner has failed to prove that the 2nd Respondent committed electoral malpractices and the same influenced the outcome of the elections.

12.0 EVALUATION OF EVIDENCE AND FINDINGS OF FACT

12.1 From the outset, I must state here that I will address each of the Petitioner's allegations seriatim. The burden of proof is on the Petitioner to prove his case against the Respondents to the required standard of a fairly high degree of convincing clarity. I am guided by the case of *Abuid Kawangu v Elijah Muchima*^{1°}, where the Constitutional Court held that:-

"The standard remains higher and distinct from that required in an ordinary civil matter but lower than the standard of beyond reasonable doubt required in criminal matters. As the Supreme Court opined in the case of *Lewanika and Others v Chiluba and Others* that parliamentary election petitions are required to be proved to a standard higher than on a mere balance of probabilities and issues raised to be established to a fairly high degree of convincing clarity."

12.2 I must also state here that this petition is anchored on section 97(2) of the Electoral Process Act No. 35 of 2016 which provides that:-

"97 (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."

13.0 UNDUE INFLUENCE

- (i) *The Petitioner alleged that there were attacks on the UPND offices, party members and some individuals. On 10th June, 2021 Steven Malali a member of the Petitioner's campaign team was assaulted by PF cadres from the 1st Respondent's campaign team. On 14th June, 2021 and 10th July, 2021 PF cadres led by Chileshe popularly known as Cash Money a*

member of the 1st Respondent's campaign team under the instructions of the 1st Respondent and Lee Mukupa attacked some individuals and UPND party members causing severe injuries whilst trying to burn the UPND constituency offices.

- (ii) *The Petitioner also alleged that on 12th June, 2021, his team members clad in UPND regalia were beaten and a man was hacked by PF cadres from the 1st Respondent's campaign team.*

13.1 The evidence on record as adduced by PW1 was that Cash Money led the 1st Respondent's security team, and on three occasions while in the company of Lee Mukupa the Councillor for Muchinga Ward 24, attempted to burn down the UPND offices. According to PW1 between 20th May 2021 and 14th June, 2021, there were several attempts to burn down the said office.

13.2 PW1 also testified that it was dangerous for anyone to be clad in UPND regalia and PF cadres armed with machetes, golf sticks and catapults would attack them. According to PW1, Cash Money hacked a lot of people including John Boma and someone nicknamed 'HH Aisha'. He referred to pictures at pages 30 and 31 and a video at page 58 of the Petitioner's bundle of documents. PW1 added that the 1st Respondent could not deny being affiliated to Cash Money as there was a picture of him with Cash Money at the said Cash Money's wedding at page 4 of the Petitioner's bundle of documents.

13.3 In cross-examination however, PW1 denied being present when Steven Malali was injured and admitted that he did not see PF cadres attack or hack the said person, neither did he see Cash Money or Lee Mukupa lead the said cadres. PW1 admitted that Lee Mukupa is the councilor for Muchinga Ward 24. PW1 admitted that he did not know the 1st Respondent's election agent and on the nomination document, only Mike Gura was listed as the 1st Respondent's election agent.

13.4 He denied having ever seen Cash Money obtain instructions from the 1st Respondent or his election agent. PW1 admitted that when a report relating to Steven Malali's incident was made, the 1st Respondent's name was not mentioned.

13.5 Still in cross-examination, PW1 denied that all UPND cadres were under his control. He stated that some cadres would engage in acts not sanctioned by the UPND.

13.6 PW10 testified that on 10th June, 2021 PF cadres led by Cash Money and Lee Mukupa under the instructions of the 1st Respondent launched an attack at the UPND office and UPND members including Steven Malali got injured. According to PW10, the assailant Cash Money was the 1st Respondent's agent and a member of his security team.

13.7 On 12th June, 2021, he was informed that there was a meeting at Lee Mukupa's house. After the said meeting, Lee Mukupa drove past the UPND office and stated that the said office was not wanted in Matero. The PF cadres attacked them, overpowered police officers and hacked a man on the head as per the video at page 58, and he reported the incident at Matero Police Station, as well as to the returning officer for Matero Constituency.

13.8 In cross-examination, PW10 admitted that he did not know the 1st Respondent's election agent, but one Mike Gura was listed as such on the nomination paper. He denied that Lee Mukupa and Cash Money were listed as agents. PW10 admitted that Lee Mukupa was campaigning as a candidate for the position of councilor. He stated that on 10th June, 2021, he heard the 1st Respondent giving instructions to Lee Mukupa at his house.

13.9 PW10 later contradicted himself and admitted that his testimony in chief was that the meeting at Lee Mukupa's house was on 12th June, 2021. PW10 denied attending the said meeting or having seen the 1st Respondent addressing the same, as he was only informed by a Mr. Sunday. PW10 denied ever being in the presence of the 1st Respondent and Lee Mukupa or having seen the 1st Respondent with Cash Money on 10th June, 2021. PW10 admitted that the picture of the 1st Respondent at the said Cash Money's wedding does not depict anyone in security attire

and he did not have any proof before Court that Cash Money was providing security to the 1st Respondent.

13.10PW10 also admitted that he did not hear what Lee Mukupa said when he drove past the UPND office but was just informed by the people manning the office. He admitted that he saw Cash Money lead the PF cadres but did not see the 1st Respondent. He admitted that in the video relating to the man who was allegedly hacked on the head, the said man was walking unaided, the video does not show who hacked him, and there is no medical report relating to that incident.

13.11PW10 also admitted that the man in the video was clad in UPND regalia despite him having testified that no one could put on UPND regalia. PW10 admitted that no one was arrested in relation to that incident and the attempted attack at the UPND office on 12th June, 2021 was prevented as cadres were chased away.

13.12PW8's testimony was that on 12th June, 2021, he led a team of police officers and was informed that Cash Money the PF youth chairman at Buseko Market and his colleagues had blocked the Commonwealth Road with burning tyres and stones. Lee Mukupa was seated in a PF branded motor vehicle. When the PF youths tried to attack the UPND campaign center, they were

repelled with the help of police officers from Lusaka division headquarters.

13.13 In his Answer, the 1st Respondent contended that he did not have any persons named as Chileshe alias 'Cash Money' or Lee Mukupa on his campaign team or registered as his election or polling agents.

(iii) *The Petitioner alleged that on 23rd June, 2021 Gilbert Chilembo a member of the Petitioner's campaign team was assaulted by PF cadres from the 1st Respondent's campaign team.*

13.14 In cross-examination, PW1 denied being present when Gilbert Chilembo was assaulted and did not know who assaulted him. PW10 also denied being in the company of Gilbert Chilembo on 23rd June, 2021 when he was assaulted.

(iv) *The Petitioner alleged that between April, 2021 and 12th August, 2021 a young disgruntled man from Buseko camp working under the instruction of Cash Money and in possession of very dangerous weapons was sent to the UPND constituency office to cause bodily harm to a named official. He was taken to the police station where he was detained, a docket was opened and he was supposed to appear in Court but the 1st Respondent negotiated for his release.*

13.15 PW1 testified that the said disgruntled man was carrying a small bag on his back. Upon suspicion of his movements in the UPND office premises, he was searched and found with a sharp machete, knife, scissors, belt and the 1st Respondent's flyers. When he was interrogated, he revealed that he and Cash Money were assigned to attack PW1. He was taken to Matero Police Station where he was charged and detained, but the 1st Respondent had him released. The case is ongoing in the Subordinate Court.

13.16 In cross-examination, PW1 admitted that the young man he was referring to is one Emmanuel Katiba who was charged with criminal trespass and being in possession of offensive weapons. He denied that Katiba was charged for threatening his life. PW1 admitted that a person charged with an offence can be released on police bond. He denied knowledge of whether the 1st Respondent signed as a surety on the said police bond.

13.17 PW1 then contradicted himself by stating that he was only informed that the 1st Respondent tried to bribe police officers to have Katiba released but the police officers declined the bribe. PW1 admitted that he never saw Katiba obtain

instructions from cash money. He admitted that Cash Money and the 1st Respondent are not jointly charged with Katiba.

13.18 PW4's testimony was that she resides opposite the UPND office and on 4th July, 2021, as she was leaving her yard, she witnessed Katiba being manhandled as he was in possession of a ZNS belt, knife, Zambia police coat, scissors, machete and PF flyers. Katiba confessed that he was from the 1st Respondent's camp and had been sent to harm the Petitioner. He was taken to Matero Police Station where a docket was opened and the matter is still active in the Subordinate Court.

13.19 In cross-examination, PW4 admitted that Katiba was not jointly charged with other persons. She denied being a UPND member. She admitted having spoken to the Petitioner before testifying but denied being coached. She denied that Katiba trespassed on her premises despite being the complainant in that case.

13.20 According to PW10, the incident relating to Katiba happened on 4th July, 2021 and the said Katiba was clad in a green track top. When apprehended, he revealed that he was from the 1st Respondent's camp at Buseko and was sent to harm someone.

13.21 In cross-examination, PW10 admitted that Patricia Mutwale took Katiba to the police station, however, she is not the

owner of the premises where Katiba trespassed as she resides next to the UPND office. He admitted that the said Patricia Mutwale (PW4) is named as the complainant in the criminal trespass and possession of offensive weapons charge, and not UPND. PW10 admitted that conspiracy to murder was not among the charges and neither Cash Money nor the 1st Respondent were jointly charged with Katiba.

13.22 PW10 denied that Katiba's bag contained a picture of the 1st Respondent, but only flyers. He maintained that it was not amateurish to send an assailant with one's identity document.

(v) *The Petitioner alleged that on 10th August, 2021 PF cadres under Cash Money's leadership damaged some motor vehicles including a Toyota Vitz registration number BAP 2140 belonging to Steven Chisanga.*

(vi) *The Petitioner also alleged that on 19th July, 2021 after a meeting with five councilors, a pirate vehicle hired by Humphrey Sindawa was destroyed by PF cadres by breaking the front screen, head lamps and removing the stereo.*

13.23 The evidence on record as adduced by PW1 is that he was informed that the UPND lima Ward Councillor Humphrey Sindawa just saw a group of PF cadres led by Cash Money at

choppies matero. The said cadres damaged a motor vehicle namely a Toyota Vitz and he referred to photos at pages 32 to 34 of the Petitioner's bundle of documents.

13.24 In cross-examination, PW1 admitted that he did not witness the attack on the vehicle that Sindawa and other councilors were supposed to use. He also denied knowledge of whether any of those councilors failed to vote.

13.25 PW10 testified that on 19th July, 2021 there was another attack at the UPND office and a motor vehicle hired by the UPND councillor was damaged by Cash Money and his team.

13.26 In cross-examination, PW10 admitted that he was with Sindawa on 19th July, 2021. PW10 contradicted himself when he admitted that he did not see who damaged the vehicle, neither did he see Cash Money or the 1st Respondent.

(vii) *The Petitioner alleged that on 10th August, 2021, according to the programme drawn by the police, UPND was going to be in Mwembeshi Ward for door to door campaigns. During the said campaigns, PF cadres from the 1st Respondent's team accosted the Petitioner and his team and burnt beyond recognition property namely a Nissan Hard Body registration number BAC 172 belonging to Edwin Kafula, one of the UPND aspiring councilors.*

13.27 The evidence of PW1 was that despite the campaign timetable that was made to avoid clashes, on 10th August, 2021 while carrying out door to door campaigns, they were attacked by PF cadres led by Cash Money. A Nissan Hard Body belonging to Edwin Kafula was burnt and he referred to the video at page 60 of the Petitioner's bundle of documents.

13.28 In cross-examination, PW1 admitted that he had a fruitful door to door campaign in Mwembeshi Ward and denied sustaining any injuries. PW1 admitted that during door to door campaigns his team wore UPND regalia. He denied ever meeting the 1st Respondent or his election agent during the said door to door campaigns. PW1 admitted that in the video he referred to, there was no one clad in PF regalia and one could not tell the make of the car that was burning, or who torched it.

13.29 According to PW10, on 10th August, 2021 while in Mwembeshi Ward they were attacked with stones by PF cadres and Edwin Kafula's vehicle was burnt.

13.30 In cross-examination however, PW10 denied being with the Petitioner in Mwembeshi Ward on 10th August, 2021. He admitted that he was not present when Kafula's vehicle was torched and did not see who torched it. He denied having any

knowledge of anyone who has been arrested for arson or malicious damage to property relating to that incident.

13.31 In his Answer, the 1st Respondent stated that he complied with the police programme and he and his official campaign team were not in Mwembeshi Ward on the day in question.

13.32 In considering the allegations of undue influence it is imperative to note here that section 83 of the Electoral Process Act No. 35 of 2016 provides that:-

“83. (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

(b) inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means, or pretended supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person.”

13.33 According to the Petitioner, the 1st Respondent engaged in undue influence in the form of violence which resulted in UPND members and other individuals sustaining injuries.

The said violence also caused damage to property including motor vehicles.

13.34 Relating to the incidents of 10th June, 2021 and 12th June, 2021, according to PW1 and PW10 the PF cadres who launched the said attacks were led by one 'Cash Money' under the instructions of the 1st Respondent and Lee Mukupa. The said Cash Money was allegedly in charge of the 1st Respondent's security team.

13.35 In cross-examination, PW1 admitted that he did not witness the attack related to Steven Malali or Gilbert Chilemba, neither did he see Cash Money or Lee Mukupa. When queried on whether he knew the 1st Respondent's election agent, PW1 stated that he did not know the named Mike Gura and he never saw Cash Money obtaining instructions from the 1st Respondent or his election agent. What is more interesting is that PW1 admitted that not all the UPND cadres were under his control and some would engage in activities not sanctioned by UPND.

13.36 PW10 on the other hand when taken to task in cross-examination stated that he heard the 1st Respondent issuing instructions to Mukupa at the said Mukupa's house on 10th June, 2021, he later contradicted himself by stating that the meeting at Mukupa's house was on 12th June, 2021

and he only heard that the 1st Respondent addressed the same from a Mr. Sunday, as he did not attend the meeting. PW10 also denied ever being in the presence of Mukupa and the 1st Respondent.

13.37 PW8's evidence to the effect that the attempted attack by PF cadres led by Cash Money on 12th June, 2021 was prevented and the cadres turned away was in sharp contrast to PW1 and PW10's evidence that a person nicknamed 'HH Aisha' was hacked in the head by PF cadres. PW10 admitted in cross-examination that no arrests were made relating to that incident and the PF cadres were chased away.

13.38 As alluded to herein above, one Chileshe alias Cash Money and Lee Mukupa were severally mentioned in the Petitioner's evidence, as persons who were behind a spate of violent attacks on the Petitioner's campaign team members, their property and that of UPND.

13.39 The Petitioner vide his Learned Counsel submitted that as regards the allegations of violence at the instance of the 1st Respondent, the evidence proffered by the Petitioner was not disapproved by the 1st Respondent and that the electorate was influenced by the alleged acts of electoral

misconduct. The Petitioner placed his reliance on the case of **Mubika Mubika v Ponso Njeulu (supra)**.

13.40 The 1st Respondent on the other hand submitted through his Learned Counsel that in respect to the allegation of undue influence, the Petitioner did not allude to the 1st Respondent or his election or polling agents to the alleged attack on one Steven Malali. Further that in the Medical report of the said Malali, it is stated that he was assaulted by unknown people, however, the said known people have not been mentioned in the petition. The 1st Respondent also argued that there are inconsistencies in the identity of the alleged attackers thereby making the allegation fall short of meeting the standard of proof.

13.41 The crux of the matter as it relates to undue influence, otherwise the allegations of violence at the instance of the 1st Respondent is whether there is cogent evidence that the 1st Respondent directly or through his election and polling agents or with his consent, committed electoral malpractices or misconduct complained of by the Petitioner.

13.42 I must state here that in the video at page 58 of the Petitioner's bundle of documents showing the said '*HH Aisha*', there are no persons who would be identified as PF

cadres whatsoever and the said person is walking freely in his UPND regalia with what appears to be blood oozing from his head, covered with a headsock. PW10 in relation to the same admitted that no medical report was produced. This Court therefore finds it very difficult to believe that the said man was hacked on 12th June, 2021 when the attempted attack at the UPND constituency office was actually prevented and was unsuccessful, further the there is no cogent evidence that those who hacked HH Aisha were PF cadres.

13.43 Turning to the incidents resulting in damage of motor vehicles, the allegations are that the same were spearheaded by one Cash Money.

13.44 The Petition in paragraph 6(2) states that a motor vehicle namely a Toyota Vitz registration number BAP 2140 was one of motor vehicles damaged by PF cadres on 10th August, 2021. However, the evidence on record as adduced by PW1 and PW10 affiliates the said motor vehicle to the alleged attack on UPND Lima Ward aspiring councilor one Humphrey Sindawa near choppies in Matero Constituency on 19th July, 2021. This Court is therefore at a loss to understand whether the said Toyota Vitz was damaged on 19th July, 2021 or 10th August, 2021.

13.45 That notwithstanding, PW10 despite stating that he was with Sindawa when the incident happened, in cross-examination, he denied having seen Cash Money or anyone who damaged the said vehicle and this flies in the teeth of the Petitioner's allegation that the vehicle was damaged by PF cadres led by Cash Money. Further, PW1 denied knowledge whether as a result of that incident, any of the councilors were prevented from voting.

13.46 It was also alleged that one Edwin Kafula's motor vehicle a Nissan Hard Body registration number BAC 172 was torched by PF cadres in Mwembeshi Ward. I have viewed the video at page 60 and the same only depicts a vehicle burning in what appears to be a drainage, as rightly admitted by both PW1 and PW10 in cross-examination, one cannot tell the make of the vehicle or who actually torched it. PW10 admitted that the said Kafula was a UPND aspiring candidate in Muchinga Ward 24 who lost the elections, petitioned in the Local Government Elections Tribunal, and lost the petition. This particular piece of evidence puts this Court on alert, as the Lee Mukupa mentioned in connection with one Cash Money was also aspiring for the same position under the PF ticket.

13.47 PW10 also admitted that on the said date, he had a fruitful door to door campaign in Mwembeshi Ward. Despite it

being not in dispute that the campaigns in Lusaka between PF and UPND were marred with violence, what this Court finds odd is that in this day and era of advanced technology, none of the pictorial or video evidence produced by the Petitioner captures the alleged attacks by PF cadres but only shows end results of the said attacks.

13.48 The name Cash Money has severally been mentioned in the Petitioner's evidence and the question that begs an answer is why was the said Cash Money not reported to the police and arrested if indeed he hacked anyone or damaged motor vehicles. Clearly something is not adding up in the Petitioner's evidence.

13.49 Both PW1 and PW10 in an attempt to affiliate the said Chileshe alias 'Cash Money' to the 1st Respondent stated that he was a member of the 1st Respondent's security team. PW10 admitted that apart from the photo at Cash Money's wedding, he did not have any proof that Cash Money was providing security to the 1st Respondent. I have had the occasion to look at the said picture at page 4 of the Petitioner's bundle of documents and must state that the same does not in any way depict the said Cash Money providing any security to the 1st Respondent. Cash Money as a bride groom and the 1st Respondent stood side by side

both in formal attire and there is no suggestion of any security services.

13.50 In relation to Lee Mukupa, both PW1 and PW10 admitted that he was aspiring for the position of councilor in Muchinga Ward 24 under the PF ticket. They also admitted that the 1st Respondent registered only one election agent as listed on the nomination paper at page 1 and the same is Mike Gura. PW1 and PW10 admitted that neither Cash Money nor Lee Mukupa are listed as election agents.

13.51 Further in relation to the young man by the name of Emmanuel Katiba, PW1 and PW10 tried to link him to the 1st Respondent by stating that he was carrying the 1st Respondent's flyers in his bag and allegedly confessed that he was from the 1st Respondent's camp at Buseko and together with Cash Money had been assigned to harm the Petitioner.

13.52 There are many inconsistencies in the testimonies of PW1, PW4 and PW10 in relation to Katiba's incident. In the petition, it was alleged that the said person was released from police cells by the 1st Respondent. However, despite PW1 and PW10 stating that Katiba was released from custody, PW1 contradicted himself by stating that he was informed that the 1st Respondent tried to bribe police

officers to have him released but the officers declined. PW1 and PW10 admitted that Katiba is facing prosecution for the charges of criminal trespass and being in possession of offensive weapons. PW4 confirmed that the case was still active in the Subordinate Court.

13.53 The evidence on record is that PW4 is named as the Complainant in that case, despite the allegation that Katiba trespassed on the premises of UPND and not that of PW4. What is surprising to this Court is how PW4 found herself as the Complainant despite denying that she is not a UPND member. Further that despite alleging that Katiba was sent by Cash Money and the 1st Respondent, PW1, PW4 and PW10 all admitted that neither Cash Money nor the 1st Respondent are jointly charged with Katiba.

13.54 I hasten to agree with the submissions of Learned Counsel for the 1st Respondent firstly that Lee Mukupa being a candidate for Local government elections, the notion that he was running the 1st Respondent's campaign is outrageous. The proper position is that Lee Mukupa was campaigning for himself.

13.55 Secondly, there is no evidence whatsoever to connect Lee Mukupa and Chileshe alias Cash Money to the 1st

Respondent as his appointed election and or polling agents.

13.56 I am guided by the case of *Nkandu Luo(Prof) and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General* (supra) where the Constitutional Court held that:-

“In order for a Petitioner to successfully have an election annulled pursuant section 97(2) (a) there is a threshold to surmount. The first requirement is for the Petitioner to prove to the satisfaction of the Court that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent.

In addition to proving the electoral malpractice or misconduct alleged, the Petitioner has the further task of adducing cogent evidence that the electoral malpractice was so widespread that it swayed or may have swayed the

majority of the electorate from electing the candidate of their choice.”

13.57 I am fortified by the case of *Chrispin Siingwa v Stanley Kakubo*¹¹ where it was held that:-

“Regulation 55 (1) of the Electoral Process (General) Regulations is succinct and is in line with the definition of an election agent in section 2 of the Electoral Process Act. This is that an election agent is one who is specifically appointed and named as such in the candidate’s nomination paper. The fact that the Legislature was specific on the definition of election agent was meant to avoid endless permutations of who an agent is in particular circumstances.”

13.58 The import of the aforecited precedents is that not every member of a political party is a candidate’s appointed agent, and only the misconduct of the candidate or his appointed agents, or misconduct that is done with the consent and approval of the candidate or his appointed agent, which is so widespread and prevented the majority of voters from electing their candidate of choice can lead to nullification of an election.

13.59 Section 2 of the Electoral Process Act No. 35 of 2016 provides that:-

“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,

“polling agent” means an agent appointed by a candidate in respect of a polling station.”

13.60 In casu, it is the considered position of this Court that the Petitioner has failed to prove any link of the 1st Respondent to Cash Money, Lee Mukupa, Emmanuel Katiba and alleged PF cadres who engaged in acts of violence. None of the named persons were the appointed agents of the 1st Respondent as provided under section 2 of the Electoral Process Act No. 35 of 2016. The alleged acts of the said named persons cannot therefore be said to have been done with the knowledge, consent and approval of the 1st Respondent or his appointed election agent.

13.61 Further, there is no evidence to show that the said acts of violence were widespread and prevented the majority of voters in Matero Constituency from electing their candidate of choice.

13.62 I therefore find and hold that the Petitioner has failed to prove his allegations of undue influence. The said allegations therefore fail.

14.0 PUBLICATION OF FALSE STATEMENT

The Petitioner alleged that on or about 12th or 13th July, 2021, there was a statement published on Boba TV, a facebook page owned by the 1st Respondent that incorrectly informed the public that the Petitioner had withdrawn as a parliamentary candidate for Matero Constituency and endorsed the 1st Respondent. This had significant effects on the elections as it was viewed by over a million viewers.

14.1 I have had the occasion to read the said post which is at page 14 of the Petitioner's bundle of documents and couched as follows:-

"Boba TV

22 mins

UPND Matero Constituency candidate MP Tom Michello has allegedly withdrawn and endorsed PF candidate Miles Sampa who is a clear favourite of the community.

Details later."

14.2 The said post was commented on by Tom Michelo Matero Upnd as follows:-

"What a joke!! Please desist from such propaganda I'm still in the race. You can do better than this."

14.3 The evidence on record as adduced by PW1 is that he was in South Africa when the post was made on Boba TV and it had a negative impact on him. According to PW1, the facebook page Boba TV is owned by the 1st Respondent as he had on 8th July, 2021 issued a statement as per pages 1 and 2 of the Petitioner's bundle of documents that all his media interactions will be disseminated through his personal chanel styled Boba TV.

14.4 In cross-examination, PW1 admitted having rebutted the allegation that he had withdrawn from the race within 22 minutes of the said post and that anyone who read the post would have to verify the same, because the information was not confirmed. He also admitted that the post was written in second person and may not have been personally written by the 1st Respondent.

14.5 PW7 also admitted in cross-examination that he responded to the post after being instructed by PW10 within 15 minutes, and the word 'allegedly' in the post meant that the information in the post was not a fact. He stated that he did not form the impression that the Petitioner was not a man of integrity as he did not believe the post.

14.6 PW7 admitted that the 1st Respondent may have engaged someone to post on his behalf and did not personally post, in the same manner he had created a facebook account for the Petitioner and had his log in credentials, He also admitted that anyone can create a Boba TV facebook page and post anything without the permission of the official owner of Boba TV. PW7 admitted that after the post, the Petitioner continued campaigning and any rational person following media events knew that he was still in the race on 12th August, 2021. He denied having knowledge of any person who did not vote because of the said post.

14.7 According to PW10, the post on Boba TV had a negative impact on the Petitioner. In cross-examination PW10 stated that the word 'allegedly' connotes an assumption and cannot be taken as a fact, hence he viewed the post as cheap propaganda. He admitted that the person responsible for the Petitioner's social media accounts was PW7 who refuted the allegation within 15 minutes of the post.

14.8 In his Answer, the 1st Respondent stated that he did not own Boba TV and did not publish or cause to publish the alleged content, and has no control over what is published on the page.

14.9 RW1 testified that Boba TV is a public page that can be followed by anyone, consequently there is a disclaimer to the effect that

the views and opinions expressed on the page are those of the original authors and do not reflect the official views of the administrator or Miles Sampa in any capacity. He stated that he could not tell who made the post on Boba TV.

14.10 In cross-examination, RW1 admitted that page 14 of the Petitioner's bundle of documents does not show the administrators or who created the Boba TV facebook account, and does not show how many people viewed the post. He admitted that the post went viral and Miles Sampa is mentioned in the disclaimer because he is affiliated to Boba TV.

14.11 RW3 on the other hand testified that he and his colleague one Nando Sibitwane own the facebook page Boba TV and sought permission to use the name 'Boba' meaning home, which was the 1st Respondent's initiative and was being used by him. According to RW3, not acting under instructions from anyone, he personally posted the post as it was a trending story he obtained from some whatsapp groups. However, after reading the comment by Tom Michelo Matero UPND, he quickly deleted the post as the comment confirmed that the information in the post was false.

14.12 In cross-examination however, RW3 admitted that there was no proof before Court that he is the proprietor of Boba TV. He admitted that it is in the public domain that the

name Boba TV belongs to the 1st Respondent. He also admitted that the post went viral and no apology was rendered. RW3 however denied that the same was damaging to the Petitioner as he refuted the information in the post.

14.13 I am alive to the provisions of section 84(1) of the Electoral Process Act No. 35 of 2016 which are that:-

“84. (1) A person shall not, before or during an election, publish a false statement of the illness, death or withdrawal from election of a candidate at that election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not believing it to be true.”

14.14 Further, regulation 15(1) (c) of the Code of Conduct of the Electoral Process Act No. 35 of 2016 provides that:-

“15. (1) A person shall not (c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election”

14.15 I am guided by the case of **Sunday Chitungu v Rodgers Mwewa and The Attorney General**¹² where the Constitutional Court held that:-

"Under the Electoral Process Act, an allegation of misconduct is proved only where it is shown that it was done by the candidate or their election or polling agent or by someone else but with the candidate or their agent's knowledge and consent or approval. To warrant nullification, the Court must also find that by virtue of the illegal act, the majority were prevented or were likely to have been prevented from electing a candidate of their choice."

14.16 I am also guided by the case of **Chrispin Siingwa v Stanley Kakubo (supra)** where the Constitutional Court held that:-

"The threshold in section 97(2)(a) of the Electoral Process Act must be satisfied on the basis of credible and cogent evidence. This entails that the Petitioner must prove at a fairly high degree of convincing clarity, all the allegations and that the majority of the voters were influenced in their choice of preferred candidate."

14.17 The import of the aforecited precedents is that in order to nullify an election under section 97 (2) (a), the Petitioner must adduce credible and cogent evidence.

14.18 The Petitioner alleged that Boba TV was owned by the 1st Respondent because he issued a statement that his media coverage was to be issued through the said Boba TV. The Petitioner relied on the article at pages 1 and 2 of the index to the Petitioner's Bundle of Documents. The said article reads in part:-

..... Lusaka Mayor Miles Sampa has issued a media black-out announcing he will not give any interviews because it was meaningless to do so when media houses do not publish them and those that do allegedly manipulate his messages.

Sampa has delegated all media interviews for the Lusaka City Council to his deputy Christopher Shakafuswa, the Town Clerk and spokesperson George Shichimba. He says all his media interactions will be disseminated through his personal channel he has styled Boba TV....

8th July, 2020.

14.19 The 1st Respondent did not only deny issuing the article complained of by the Petitioner, but also that he did not own Boba TV and to that effect he called RW3. The evidence adduced by RW3 is that he and his friend one Nando Sibitwane are the Proprietors of Boba TV and only requested for permission to use the name "Boba" from the 1st Respondent who initiated the same.

14.20 Learned Counsel for the Petitioner submitted that the 1st Respondent used Boba TV, a facebook page created for his benefit to deliberately publish a false statement for the sole purpose of misleading the voters. The said acts of electoral misconduct and illegal practices had a serious effect on the majority of the voters in Matero Constituency as they were widespread.

14.21 The 1st Respondent's submissions on this aspect is that it is trite law that a Newspaper publication is inadmissible hearsay in the absence of the author or editor of the publication to testify to its authenticity and context. Further a Newspaper article must be produced in its original form, but the Petitioner only presented a headline without a full statement.

14.22 I have seriously applied my mind to the argument as to who is the owner or proprietor of Boba TV. Clearly from the article at pages 1 and 2 of the Petitioner's Bundle of Documents, Boba TV was an initiative of the 1st Respondent, when he was a Mayor of the city of Lusaka in 2020. However, there is evidence of RW3 to the effect that he and his friend Nando Sibitwane are the media bloggers of Boba TV. RW3 also acknowledged that he posted the article in issue as the same was a trending media item. RW3 was not broken in cross-examination. He remained solid and took full responsibility of the said post.

14.23 It may be concluded that the mention of the 1st Respondent's name in the disclaimer of Boba TV facebook page implies that the 1st Respondent is in one way or the other affiliated with the said page. Nonetheless, RW3 testified that a disclaimer was placed against the 1st Respondent as it was in public domain that he was the initiator of the name Boba TV, which now belonged to RW3 and Nando Sebitwane.

14.24 With the coming on scene of RW3 that he is the owner of the Facebook page Boba TV, and that he is the person who posted the article complained of by the Petitioner, I have not found any cogent evidence to prove that Boba TV is owned by the 1st Respondent.

14.25 In the most recent persuasive Australian case of *Fairfax Media Publications Pty Ltd & Others v Dylan Voller*^{1 3} where it was held that:-

Each appellant, by the creation of a public facebook page and the posting of content on that page, facilitated, encouraged and thereby assisted the publication of comments from third-party facebook users. The

appellants therefore publishers of the third-party comments and were liable.

14.26

Equally, in the case of *Austin C. Liato v Sitwala Sitwala*¹⁴ the Constitutional Court held that:-

We have examined the record of appeal and considered the submissions of Learned Counsel for the parties on this ground. We note as the judge correctly observed that although the appellant alleged that the Respondent repeatedly published that he was a ritualist who buried money at the graveyard and that money intended for development projects would be used on rituals and would be buried at the grave yard if the electorate voted for him as Member of Parliament for the Constituency, the appellant did not call any independent witness to testify to hear the Respondent's statement to that effect.

In the circumstances, we cannot fault the trial judge when she held that the appellant did not prove his allegation that the Respondent published defamatory statements about him. We further agree with the trial judge that there is no evidence that there was widespread publication

of the false statement to the extent where the majority of the voters in the Constituency were or may have been influenced against voting for him.

14.27 The case of Austin C. Liato, underscores the principle that even in allegations of publishing false statements against a candidate in an election, there is need for the Petitioner not only to prove the falsity of the publication but most importantly, the wide distribution and dissemination of the false statement, and the extent of its effect on the electorate. That requires the calling of witnesses to speak to the effect. The said witnesses should be eligible voters with voter's cards in the Constituency in issue.

14.28 The import of the above persuasive case is that if it was established and proved that the 1st Respondent was the owner of Boba TV face book page, it would not matter who posted the article complained of by the Petitioner, he may be liable, however, RW3 did not only claim to be the owner of the Boba TV facebook page, but also that he posted the article in issue.

14.29 The question that follows therefore is, whether the post made on Boba TV alleging that the Petitioner had withdrawn from the Matero parliamentary race was made

by the 1st Respondent or with the knowledge and consent or approval of the 1st Respondent or his appointed agent, and whether the said post may have prevented the majority of voters from electing their preferred candidate.

14.30 Both PW1 and PW7 admitted in cross-examination that the post was written in the second person and may not have been directly posted by the 1st Respondent. RW3 confirmed that he made the post as it was a trending story he obtained from some whatsapp groups, and he was not under the instruction of the 1st Respondent.

14.31 I must state here that the said RW3(Chaze Mwale) is not listed as the 1st Respondent's election agent on the 1st Respondent's nomination paper at page 1 of the 1st Respondent's bundle of documents. The Petitioner has not brought forth any evidence to show that the post was made with the knowledge and consent or approval of the 1st Respondent or his appointed election agent.

14.32 It is incumbent upon the Petitioner to prove with cogent evidence that as a result of the post, the majority of the voters were prevented from electing their candidate of choice. However, the Petitioner did not call not even one witness who may have been influenced by the post and prevented from electing their preferred candidate or

demonstrate the negative impact suffered as a result of the post. The Petitioner's own witnesses PW7 and PW10 admitted in cross-examination that the word 'allegedly' that was used in the post meant that the information was not a fact. PW7 went further to state that he did not believe the post and did not form the opinion that the Petitioner was not a man of integrity.

14.32 PW7 also admitted that he did not know anyone who did not vote because of that post, and that any rational person was fully aware at the time of the elections, that the Petitioner was still an aspiring parliamentary candidate and he refuted the allegation that the Petitioner had withdrawn within 15 minutes of the post.

14.33 It is the considered position of this Court that despite the said Boba TV facebook having a very large following, and the post having gone viral there is no tangible evidence to prove that the post was made by the 1st Respondent or with the knowledge and consent or approval of the 1st Respondent or his appointed agent, and that by virtue of the said post, the majority of voters in Matero Constituency were prevented from electing their preferred candidate.

14.34 I therefore find and hold that the Petitioner has not proved to the requisite standard the allegation of publication of a false statement against the 1st Respondent. The said allegation therefore fails.

15.0 BRIBERY

15.1 The Petitioner made a number of allegations of bribery against the 1st Respondent and I shall deal with the same collectively. Nonetheless, the said allegations are as follows.

- (i) *That on 1st July, 2021, a viral video footage captured the 1st Respondent campaigning and distributing campaign materials to entice the electorate to vote for him.*
- (ii) *That the 1st Respondent by himself, servants, agents and other persons distributed campaign materials and 10kg bags of mealie meal, within Matero Constituency, that were labelled with the 1st Respondent's name in a bid to solicit votes on 11th August, 2021.*
- (iii) *That throughout the election period, the 1st Respondent and members of his campaign team handed people money for the purposes of enticing the electorates, and*
- (iv) *That Ms. Edith Nawakwi affiliated with the PF being part of the 1st Respondent's campaign team, corruptly sneaked in quiet a large number of bags of mealie meal at the UCZ Matero Congregation Centre to give to would be voters in order to entice the electorates to vote for the 1st Respondent.*

15.3 In reference to the video footage which is said to have gone viral, the same is at page 61 (video No. 4) in the Petitioner's Bundle of Document, PW1 testified that the 1st Respondent was distributing campaign materials in Desai Compound, Kapwepwe Ward 29 of Matero Constituency. Further, in respect to the allegation of distribution of mealie meal in Matero Constituency in order to solicit for votes, PW1 averred that the 1st Respondent was distributing bags of mealie meal branded '*ECL 2021 powered by Miles Sampa*'. PW1 relied on pictures at pages 39 to 41 of the Petitioner's Bundle of Documents.

15.4 PW1 also testified in connection to the allegation of dishing out money by the 1st Respondent and his campaign team to would be voters for the purposes of enticing the electorates. According to PW1, one person called Cash Money was known to dish out money to prospective voters throughout the campaign period. PW1 testified that even the 1st Respondent distributed money as was the trend during the campaign period, in homes and night clubs where he played music as '*DJ Alola*'.

15.5 In cross-examination, PW1 denied having seen the 1st Respondent or his election agent one Mike Gura distributing mealie meal to individuals. He admitted that UPND provided food to its foot soldiers during campaigns. PW1 also admitted that the label on the mealie meal in pictures at pages 39 to 41 was soliciting for votes for Dr. Edgar Lungu. It was also

admitted that there was no one receiving mealie meal in the said pictures. PW1 acknowledged that he also distributed campaign materials to his supporters in like manner the 1st Respondent distributed, as depicted in video 4. He maintained, that the video was taken on 1st July, 2020 despite the same not appearing on the video.

15.6 Further, in cross-examination, PW1 denied ever witnessing the 1st Respondent or his election agent distributing money to prospective voters.

15.7 PW2 was Elias Siwale, he testified that as a member of the 1st Respondent's campaign team, between 11th May, 2021 and 11th August, 2021 they distributed branded T-shirts, chitenge materials and mealie meal branded "*ECL 2021 powered by Miles Sampa*". He averred that the distribution of campaign materials was across all the five wards of Matero Constituency.

15.8 In cross-examination, PW2 admitted that in the pictures produced before Court there was nothing showing some activity of distribution. He admitted having participated in door to door campaigns and that food was being provided to the campaign team.

15.9 PW3 (Steven Musonda) testified that as a member of the 1st Respondent's campaign team, he ensured that materials like PF

branded T-shirts, caps, chitenge material and mealie meal were available. He told the Court that each participant who was taught on how to vote and who to vote for, was given a bag of mealie meal branded "*ECL 2021 powered by Miles Sampa*".

15.10 In cross-examination, PW3 admitted to have posted information on his facebook page expressing his despise against PF. He admitted that he despised some of the PF members and their decisions, he was a disgruntled member of PF. PW3 further admitted that he was initially happy that the 1st Respondent was adopted as Parliamentary candidate, but that he later regretted the decision. He admitted that he was not happy that the 1st Respondent won the election and it would please him if he lost the seat.

15.11 The Petitioner did not lead any evidence whatsoever to prove the allegation that Ms. Edith Nawakwi was part of the 1st Respondent's campaign team and corruptly sneaked in large number of bags of mealie meal at the UCZ Matero Congregation Center to give to would be voters in order to entice them to vote for the 1st Respondent. That notwithstanding in cross examination, PW1 denied ever seeing the 1st Respondent with Ms. Edith Nawakwi during the campaign period.

15.12 I must state here that regulation 1(1) of the Code of Conduct of 2016 provides that:-

1. (1) A person has, subject to paragraph (2), the right to (d) distribute election literature and campaign materials”

15.13 Further, section 2 of the Electoral Process Act No.35 of 2016 defines campaign materials as follows:-

“campaign material” means party or candidate manifestos, advertisements, billboards, posters, t-shirts, cloth or other material depicting colours regarding symbols, and other designs of a party or pictural images of a candidate.

15.14 I have had the occasion to view the video at page 61 of the Petitioner's bundle of documents, and in the said video, the 1st Respondent is single handedly distributing PF branded chitenge materials to some individuals. The Petitioner's contention as it appears to this Court is that the same was during the campaign ban, however, there is no evidence whatsoever to show that the said video was taken during the campaign ban.

15.15 I opine that a candidate has the right as per regulation 1(1) (d) of the code of conduct to distribute election literature and campaign materials which includes party branded

chitenge material, and there was nothing wrong with the 1st Respondent distributing PF branded chitenge materials.

15.15 This leads me to the issue of distribution of mealie meal. The mealie meal in issue as per the pictures at pages 39 to 41 of the Petitioner's bundle of documents is labelled "*ECL 2021 powered by Miles Sampa*". However, PW1 admitted that he never saw the 1st Respondent or his agent distributing mealie-meal.

15.16 PW2 and PW3 alleged that they distributed mealie-meal under the instructions of the 1st Respondent but admitted that there was no proof before Court in terms of pictures showing any distribution of mealie meal. The said mealie meal is only laden in a motor vehicle with no one in the pictures receiving the same. Further, PW2 and PW3 are not listed anywhere as the 1st Respondent's appointed election agent.

15.17 The evidence of PW3 who admitted that he is a disgruntled member of the PF and wants the 1st Respondent to lose his seat is highly questionable and goes to his credibility.

15.18 In relation to the issue of Edith Nawakwi, PW1 admitted that he never saw her with the 1st Respondent. The said Edith Nawakwi is not the 1st Respondent's election agent

and the allegations against her cannot in any way be linked to the 1st Respondent.

15.19 It is the considered position of this Court that the alleged acts of distribution of mealie meal cannot therefore be said to have been done by the 1st Respondent or with the knowledge and consent of the 1st Respondent or his agent, or that the same prevented the majority of voters in Matero Constituency from electing their preferred candidate. It is also crucial that the Petitioner did not call any evidence to demonstrate, or show the number of eligible voters who may have been induced to vote, or refrain from voting on the basis of the alleged bribery.

15.20 Turning to the distribution of money, Section 81 of the Electoral Process Act No. 35 of 2016 provides that:-

“81. (1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly
(a) give, lend, procure, offer, promise or agree to give, lend, procure or offer, any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as aforesaid on account

of such voter having voted or refrained from voting at any election.

15.21 I am also persuaded by the Ugandan case of Col Rtd Dr. Kizza Besigye v Museveni Yoweri Kaguta and Electoral Commission¹⁵ where the Supreme Court of Uganda held that:-

“The offence of Electoral bribery is not committed unless the gift, money or other consideration is given to or received by a person who is proved to be a registered voter”.

15.22 The import of the aforcited case is that in order for giving out of money or a gift to amount to bribery, the said gift or money must be given to a registered voter, to induce him or her to vote for a particular candidate, or prevent a prospective voter from voting for a candidate of their own choice.

15.23 In casu, in relation to the allegation of distribution of money, the Petitioner did not call even one witness to prove that they received money and were induced to vote for the 1st Respondent or to refrain from voting altogether. Cash Money according to the Petitioner was known for

giving out cash, however, the said Cash Money was not the 1st Respondent's appointed agent. It cannot therefore be said that the alleged acts of distribution of money were done by the 1st Respondent or with the knowledge and consent or approval of the 1st Respondent or his appointed election or polling agent.

- 15.24 I therefore find and hold that the Petitioner has not proved to a high degree of convincing clarity his allegations of bribery against the 1st Respondent. The said allegations have therefore failed.

16.0 OTHER MISCONDUCT AND ILLEGAL PRACTICES

- (i) *The Petitioner alleged that the 1st Respondent negligently disregarded the campaign ban imposed by the 2nd Respondent on 15th June, 2021 and continued campaigning, this had an impact on the election results.*

16.1 According to PW1, he reported the issue of the 1st Respondent campaigning during the ban to the returning officer for Matero Constituency. He referred to a video 2 at page 59 of the Petitioner's bundle of documents and stated that the 1st Respondent was distributing campaign materials in Muchinga Ward 28 on 15th July, 2021. He also referred to video 4 at page 61.

16.2 In cross-examination however with reference to video 4, PW1 admitted that there was no proof that the same was taken during the ban. With reference to video 2, he admitted that the date in the said video is 15th July, but no year is shown, and the video also shows 13th 2021 without a month, making it difficult to tell the exact date. PW1 admitted that he did not have any evidence to show that the 1st Respondent was campaigning during the ban. PW1 denied having proof of when the ban was lifted.

16.3 PW2 testified that under the instructions of the 1st Respondent, they continued distributing mealie meal in all the wards of Matero constituency during the ban and distributed about 3000 bags.

16.4 PW2 admitted in cross-examination that the pictures before Court do not show any distribution of mealie meal.

16.5 According to PW10, during the ban, PF continued campaigning and holding meetings with large numbers of people. The 1st Respondent was distributing mealie meal, chitenge materials and money. PF campaigned in all the wards and the Petitioner was deprived of the opportunity to meet the electorate. He reported the said issue to the returning officer who advised him to report to the conflict management committee.

16.6 In cross-examination, PW10 admitted that UPND challenged the ban, however the same was not in writing and the challenge was not in Court. He denied having any videos of the 1st Respondent distributing mealie meal or money.

16.7 It is not in dispute that the 2nd Respondent imposed a campaign ban in Lusaka between PF and UPND on account of violence and failure to adhere to covid 19 regulations on 15th June, 2021 as per the document at pages 5 to 10 of the Petitioner's bundle of documents.

16.8 The evidence adduced by the Petitioner, however does not show with any clarity that the 1st Respondent continued to campaign during the ban. PW1 referred to a video at page 61 and alleged that the same was captured on 1st July, 2021 when the 1st Respondent was campaigning in Kapwepwe ward. I must state here that the said video does not show any date whatsoever.

16.9 The other video referred to at page 59 shows a date of 15th July without a year and another date of 13th 2021 without a particular month. Clearly this Court cannot speculate what date the said video was captured and in the absence of clarity, the Petitioner cannot expect this Court to believe that the same was during the campaign ban.

16.10 PW2 's evidence on the issue is found to be unreliable because no evidence was produced to show any distribution of mealie meal, and the number of eligible voters who received the said mealie meal, and were induced to vote for the 1st Respondent or made to refrain from voting for the Petitioner or any other candidate of their preference.

(ii) *The Petitioner alleged that he and the 1st Respondent agreed not to hold campaigns in the same ward and on the same days to avoid disputes. However, the 1st Respondent went against the said agreement drawn by the police, thus causing violence and intimidating the Petitioner's campaign team*

16.11 In cross-examination when PW1 was referred to video 1 in the 1st Respondent's bundle of documents he stated that the same was taken on 8th August, 2021 as he was walking back to the office after a door to door campaign. He admitted that people were clad in UPND regalia in the said video. He admitted that video 3 was taken in Kapwepwe ward and in video 4, he was addressing a crowd. PW1 admitted that the said videos do not depict any attacks by PF.

16.12 I must state that I have had the occasion to watch the said videos that PW1 was referred to in cross-examination and the same depict the Petitioner freely campaigning and addressing

people with his members clad in UPND regalia. None of the videos show any PF cadres disrupting campaigns or launching attacks on the Petitioner and his team.

16.13 It is the considered position of this Court that the Petitioner has not led any cogent evidence to prove the alleged acts of misconduct or show that the same were committed by the 1st Respondent or with the knowledge and consent or approval of the 1st Respondent or his appointed agent.

(iii) *The Petitioner alleged that on 11th August, 2021 another public rally addressed by former Republican President Mr. Edgar Chagwa Lungu and the 1st Respondent was held in Mwembeshi Ward in complete disregard of the 2nd Respondent's ban and directives. The 1st Respondent and his campaign team continued to campaign beyond the 18:00 hours deadline thereby unfairly gaining advantage to the detriment of the Petitioner.*

16.14 According to PW1, on the last day of campaigns, he was informed by PW10 that police officers had advised that their campaign programme in Mwembeshi Ward could not take off because Dr. Edgar Lungu would be in Matero. When the Former Republican President left, the 1st Respondent continued distributing bags of mealie meal and money after the close of campaigns.

16.15 In cross-examination however, he admitted that on 11th August, 2021, the campaign ban had been lifted.

16.16 PW10 testified that the cancelling of their campaign programme on 11th August, 2021 had a negative impact on the Petitioner. According to PW10 despite campaigns closing at 18:00 hours, he found PF branded vehicles playing campaign songs at a place called Pamakofi around 19:00 hours.

16.17 In cross-examination, he maintained that he saw PF branded motor vehicles around 19:00 hours but did not see the 1st Respondent.

(iv) *The Petitioner alleged that during the campaign period, UPND posters and flags in Matero Constituency were consistently removed by PF cadres who were part of the 1st Respondent's campaign team.*

16.18 PW8 averred that on several occasions while police officers were conducting surveillance between mid- night to 01:00 hours, the 1st Respondent's campaign team would pretend to be putting up posters when they were in fact removing the Petitioner's posters.

16.19 In cross-examination however, PW8 admitted that he did not know the 1st Respondent's election agent and did not see the 1st Respondent removing posters or instructing anyone to do the same. He admitted that as per the 2nd Respondent's guidelines, the owner of private property is not precluded from pulling down campaign posters, and he never received any complaints from private property owners that posters had been removed without their permission. PW8 denied knowledge that UPND posters are still hanging in Matero.

16.20 I am guided by the case of *Lewanika v Chiluba*¹⁶ where the Supreme Court stated that:-

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

16.21 I must state that despite the Petitioner alleging that the 1st Respondent disregarded the ban on 11th August, 2021, the said date was the last day of campaigns before elections, and the campaign ban had been lifted by the 2nd Respondent as confirmed by PW1 in cross-examination. The Former Republican President was at liberty to campaign on that day and his decision to visit Matero Constituency as well as the

decision by the police to cancel the Petitioner's campaign programme, cannot be blamed on the 1st Respondent and the police, as their priority was to provide security to the Head of State as he then was.

16.22 The Petitioner has not adduced any cogent evidence to show that the 1st Respondent campaigned beyond 18:00 hours on that day, PW10 only stated that he saw PF branded motor vehicles playing campaign music but did not see the 1st Respondent. There is no evidence to show that the said people allegedly playing loud campaign songs in PF branded vehicles are the appointed agents of the 1st Respondent or that the alleged acts were done with the knowledge and consent or approval of the 1st Respondent or his election agent.

16.23 There is also no evidence that the said campaigning beyond 18:00 was widespread and may have prevented the majority of voters from electing their preferred candidate, as PW1 only mentioned one place named Pamakofi without even stating the number of people who were at the said place.

16.24 Further in relation to the allegation of removal of posters, I am alive to the provisions of regulation 15(1) (g) of the Code of Conduct of 2016 which states that:-

"15. (1) A person shall not

(g) deface, remove or destroy any political campaign materials of any person or political party or publications of the Commission”

16.25 According to PW8, under police watch, PF cadres allegedly removed the Petitioner's posters. In cross-examination however, he denied seeing the 1st Respondent doing the same. Clearly the removal of posters is contrary to the electoral code of conduct, however, it is incumbent upon the Petitioner to prove that the same was done by the 1st Respondent or with the knowledge, consent and approval of the 1st Respondent or his appointed agent and that the illegal act prevented the majority of voters in Matero Constituency from electing their candidate of choice.

16.26 There is no evidence whatsoever that the said PF cadres were the 1st Respondent's agents or acting with his knowledge and approval. Further, no evidence has been led of the negative impact occasioned on the Petitioner by the said removal of posters or that the same was widespread.

(v) *The Petitioner alleged that on election day, the 1st Respondent and his campaign team stormed George Central Primary School Polling Station with intent to attack George Liswaniso who was exercising the right to vote. This instilled fear in would be voters who left the polling station without voting*

- 16.27 According to PW1, he was only informed about the incident at George Central Polling Station by PW5
- 16.28 In cross-examination, PW1 denied witnessing what transpired at George Central Primary School. He however admitted having heard that the 1st Respondent was stabbed.
- 16.29 PW5 narrated that he was stationed as a UPND monitor at George Central Primary School Polling Station on 12th August, 2021 which was filled to capacity due to a large turn-out of voters. Around 12:00 to 13:00 hours, Dr. Nevers Mumba visited the said polling station and parked his vehicle outside the gate.
- 16.30 PW5 testified that around 16:00 to 17:00 hours, the 1st Respondent arrived in his white Range Rover with a number of other vehicles accompanying him. The people in the said vehicles were chanting '*Alebwelelapo Miles Sampa*'. Despite being denied access into the premises, the said vehicles managed to enter the premises. The people who disembarked from the vehicles beat up people on the queues and the voters scampered. When Zambia Army personnel arrived, the 1st Respondent who was being held on both sides by two men jumped into a Toyota Corolla and left the premises.

- 16.31 In cross-examination PW5 admitted that despite being a monitor, he did not know the number of ballots cast at George Central Primary. He stated that the registered voters were over 18,000 and maintained that people turned out in large numbers and were not intimidated. He denied being attacked personally and denied knowledge that the 1st Respondent was stabbed at that polling station. PW5 admitted that he is a UPND member who is not happy that the Petitioner lost.
- 16.32 PW6 stated that the 1st Respondent entered George Central Primary Polling station with a mob of PF cadres who started beating up people. The said cadres attempted to attack one George Liswaniso but she helped him escape by jumping over the wall fence. She stated that the 1st Respondent spoke to a certain lady in a low tone and asked her to jump in his white vehicle, because people would kill her if she remained behind. The Respondent who was being held on both sides and asked to calm down left in another vehicle and left his vehicle behind. PW6 stated that all the people waiting to vote ran away and the 1st Respondent's motor vehicle was driven out by police officers
- 16.33 In cross-examination, PW6 denied having any political affiliations but admitted that she supports the Petitioner and was not happy that he lost. She admitted that she would be

happy if the 1st Respondent lost his seat. She denied being a UPND member but admitted that she knew Liswaniso as a UPND youth leader. PW5 denied knowledge that the 1st Respondent was stabbed in the back.

16.34 According to PW8, as deputy operations officer at Matero police station, he led a taskforce of police officers who were maintaining law and order on polling day. Around 14:00 hours, he received information that the 1st Respondent was heading to George Central Primary with a huge security detail. He and his team headed to the said polling station where the 1st Respondent's security team caused commotion when they tried to harass a UPND member George Liswaniso. Voting was suspended and people waiting to vote ran away.

16.35 In cross-examination, PW8 stated he did not know the number of people who ran away and did not vote, but they were over 40. He stated that he did not know that anyone got injured during the incident, he only learnt of the 1st Respondent's stabbing on facebook. He denied having seen any police paper work at his office relating to the incident and he had no knowledge of a police officer scheduled to appear as a witness in the assault case.

16.36 PW10 testified that he received a complaint from George Central Primary Polling Station that voting had been

disturbed by the 1st Respondent and PF cadres, and some voters had run away without voting.

16.37 RW2 stated that he was an elections monitor at George Central Primary Polling Station and when the 1st Respondent in the company of three people, police officers allowed him into the premises. One of the officers received a phone call and the 1st Respondent was advised to leave for his own safety. As he was about to leave UPND cadres started throwing stones at him. A tall man in a red-UPND t-shirt then produced an axe and hacked two people who were with the 1st Respondent. Thereafter he threw the axe on the 1st Respondent's back.

16.38 In cross-examination, RW2 denied being a PF cadre but admitted that he did not have proof to show that he was a monitor. He admitted that political party regalia is not allowed at polling stations. He admitted that the tall man in UPND regalia produced an axe from the inside pocket of his leather coat. PW2 admitted that he likes the 1st Respondent as a member of parliament but denied testifying because the 1st Respondent was his boss as Lusaka Mayor.

16.38 RW4 in cross-examination admitted that she received a report from one officer Walubita that the 1st Respondent had been stabbed at George Central Primary Polling Station.

16.39 It is imperative to state here that the evidence of PW5 who is a UPND member with his own interest to serve, and admitted that he is not happy that the Petitioner lost the elections must be treated with utmost caution. I am guided by the case of **Steven Masumba v Elliot Kamondo**¹⁷, where the Constitutional Court held that:-

"The evidence of partisan witnesses should be treated with caution and requires corroboration from an independent source to eliminate the danger of exaggeration and falsehood."

16.40 PW5's evidence is full of inconsistencies. Despite stating that the 1st Respondent was denied access into George Central Primary Polling Station, he admitted in cross-examination that he did not hear the conversation that the 1st Respondent had with the police officers at the gate. PW5 stated that the people that disembarked from the vehicles started beating up people on the queue and voters ran away. He however admitted in cross-examination that he could not see the 1st Respondent's motor vehicle when it was parked inside or when people disembarked because the gate was closed and he was at a shop 10 metres away from the gate. PW5 maintained that the voter turn-out was high and voters were not intimidated.

16.41 With all these inconsistencies, it is very difficult to believe the evidence of PW5 that PF members intimidated voters and beat them up. It is also difficult to believe that he was actually a monitor considering that he did not even know the number of votes cast, and the votes that the Petitioner got at the polling station where he was allegedly monitoring.

16.42 PW6's evidence is also highly questionable because despite testifying that PF members who were with the 1st Respondent wanted to attack a UPND member George Liswaniso and that the 1st Respondent told a certain lady to follow him for fear of her being killed, she admitted in cross-examination that she did not hear everything the 1st Respondent said to the said lady.

16.43 This puts the credibility of PW6's evidence in question. I am further guided by the case of *Mwiya Mutapwe v Dominic Shomeno*¹⁸, where the Constitutional Court held that:-

"The issue of credibility of a witness is broad and includes the demeanour and perception on truthfulness of the witness and consistency of one's testimony"

16.44 PW6 despite denying being a UPND member appeared to be closely linked to UPND member Liswaniso, to an extent that

she even facilitated his escape. PW6 also admitted in cross-examination that she supports the Petitioner and was not happy that he lost the elections. She went further to admit that she would be happy if the 1st Respondent lost the parliamentary seat. Clearly all these are signs of a witness politically inclined to UPND who was not being truthful when she stated that she did not know that the 1st Respondent was stabbed in the back despite stating in examination in chief that when he was leaving, the 1st Respondent was being aided on both sides.

16.45 PW8's evidence is even more interesting as he blatantly denied knowledge that the 1st Respondent was stabbed at George Central Polling Station despite him being the team leader of police officers manning the said polling station. His testimony was contrary to that of PW6 who testified that after the 1st Respondent left in another vehicle, his vehicle was actually driven out by police officers. PW8 also denied knowledge of any police officer who was a witness in the assault case relating to the 1st Respondent.

16.46 It is practically impossible for the Petitioner to expect this Court to believe that the officer in charge of operations at the polling station in issue only learnt of the stabbing of the 1st Respondent on facebook, when he was actually present at the said polling station. This Court wonders which police officers

then were instructed to drive the 1st Respondent's vehicle out of the premises, and who instructed them if not PW8. It is the considered view of this Court that PW8's evidence is unreliable and untruthful. PW5, PW6 and PW8 were all being economical with what exactly transpired at George Central Primary Polling Station.

16.47 RW2's evidence is also highly questionable, despite admitting in cross-examination that he is aware that political party regalia is not allowed at polling stations, he insisted that a tall man wearing a red UPND t-shirt produced an axe from the inside pocket of his leather coat and hacked two people who were with the 1st Respondent. Thereafter threw the axe on the 1st Respondent's back.

16.48 That notwithstanding, what is clear is that the 1st Respondent arising from the incident at George Central Primary Polling Station, sustained injuries as per the picture at page 3 of the 1st Respondent's bundle of documents. PW5 and PW6 confirmed that as the 1st Respondent was leaving George Central Primary School Polling Station, he was being aided to walk on both sides. It is therefore illogical to conclude that the 1st Respondent and his team were the perpetrators of an alleged attack on one George Liswaniso a UPND member, when there is no evidence that any UPND member sustained injuries.

16.49 Having considered the facts, evidence and authorities cited, I find and hold that the Petitioner has failed to prove to a high degree of convincing clarity that the 1st Respondent engaged in electoral misconduct and illegal practices. The said allegations therefore fail. Further, it cannot be said that people were prevented from voting at George Central Primary polling station as there is undisputed evidence on record that after the commotion calm restored and voting continued peacefully.

17.0 ILLEGAL PRACTICES RELATING TO POLLS

- (i) *The Petitioner alleged that the 1st Respondent committed electoral offences in the capture and entry of valid votes cast at the totaling center (matero boys hall). The Petitioner's party agents were consistently not availed GEN 20 forms, vote counting in most polling stations was not transparent as pro-PF polling staff added vote tally figures to the 1st Respondent's votes. Polling agents kept writing and filing in GEN 20 forms at the totaling center and that raised a lot of suspicion. Further, a GEN 20 form was produced by poll staff which did not have details of the polling station and was not signed by relevant signatories.*

17.1 I must state that all the aforementioned allegations relate to the conduct of elections and section 97(2) (b) of the Electoral Process Act No. 35 of 2016. The same provides that:-

“97 (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) 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.”

17.2 I am guided by the case of *Giles Chomba Yambayamba v Kapembwa Simbao and 2 Others*¹⁹ where the Constitutional Court held that:-

“It is unequivocal that section 97(2) (b) relates to non-compliance with the law in the 'conduct of elections'. It calls for annulment of elections in the event that there

has been non-compliance with the principles laid down in the Electoral Process Act in as far as the conduct of elections is concerned. The question then arises who has conduct of the elections? The answer in our view lies in Article 229 (2) (b) of the Constitution of Zambia. It reads:

'The Electoral Commission shall... (b) conduct elections and referenda...'

Thus the Constitution expressly gives the function to conduct elections to the Electoral Commission of Zambia. ECZ must fulfill its function by ensuring that the requirements of the Electoral Process Act are respected and observed in the electoral process. Section 97(2)(b) therefore concerns non-compliance to the provisions of the Act, by ECZ the body charged with the conduct of elections...and not the candidates to an election or their agents."

17.3 Further in the case of *Margaret Mwanakatwe v Charlotte Scott and the Attorney General* (supra), it was held that:-

"It is clear to us that section 97(2) (b) which is set out above relates to non-compliance with the provisions of the

Act in the conduct of the election in issue and that the non-compliance has affected the election result."

17.4 The import of the aforecited precedents is that as per section 97(2)(b) the non-compliance in the conduct of elections relates to the Electoral Commission of Zambia and the said non-compliance should affect the election results.

17.5 The petitioner alleged that the 1st Respondent, his servants, workers and agents breached the Electoral Process Act and committed electoral offences in the capture and entry of valid votes cast at the totaling center which affected the election outcome.

17.6 The Petitioner(PW1) when cross-examined by Learned Counsel for the 2nd Respondent admitted that the 2nd Respondent is the only public body in Zambia mandated to conduct elections.

17.7 This Court is at a loss to understand how the 1st Respondent who was an election candidate, or his agents were allegedly involved in the capture and entry of votes considering that they were not election officers employed by the 2nd Respondent, as defined under section 2 of the Electoral Process Act No.35 of 2016. It cannot be overemphasized as per plethora of authorities from the Constitutional Court that the conduct of elections is the preserve of the 2nd Respondent. I find this

particular allegation against the 1st Respondent to be legally misplaced.

17.8 Turning to the allegation of UPND polling agents not being availed GEN 20 forms, according to PW1, after voting closed it was discovered that some pro PF presiding officers refused to avail GEN 20 forms to UPND polling agents and that made it difficult for him to verify results.

17.9 In cross-examination by Learned Counsel for the 1st Respondent however, PW1 admitted that he had polling agents in all the 177 polling stations but did not know the number of agents who were not availed GEN 20 forms.

17.10 PW10 testified that he received a complaint that UPND polling agents had not been availed GEN 20 forms at Kizito East 2 polling station. When he visited the said polling station, he received information that the presiding officer had recorded thirty more votes in favour of the 1st Respondent. He approached the returning officer who was personally known to him, with his intervention, figures were corrected and he was given GEN 20 forms.

17.11 RW4 when cross-examined admitted that if a stakeholder is not availed a GEN 20 form, they can complain and request for the same. She denied receiving general

complaints that GEN 20 forms were not issued but pro PF members had the same. She stated that the only complaint she received in relation to the same was from PW10 who complained that they were not given GEN 20 forms at Chunga West Polling Station, and she requested him to collect the same from the totaling center. She also stated that in the event that a GEN 20 form is not issued, stakeholders can copy results from the wall and use the same for parallel voter tabulation.

17.12 I must state here that despite the allegation that UPND polling agents were denied access to GEN 20 forms, not even one affected polling agent was called by the Petitioner to speak to the same or demonstrate how the election results were affected by the alleged failure to be availed GEN 20 forms. PW1 only stated that because of not being availed GEN 20 forms, it was difficult for him to verify results. Further, the only incident according to PW10 was at Kizito East 2 Polling station and he was eventually availed the GEN 20 form at that polling station.

17.13 RW4 mentioned a report from PW10 relating to Chunga West Polling station, which was also resolved. It is the considered position of this Court that it is the duty of the Petitioner to place before this Court cogent evidence to prove his allegation and demonstrate how the election

results were affected by the said failure to access GEN 20 forms. There is no clear and cogent evidence before me that UPND polling agents were not availed GEN 20 forms and that the same affected the election results.

17.14 In relation to the allegations that vote counting was not transparent, vote tally figures were added to the 1st Respondent, polling agents suspiciously kept on filling in GEN 20 forms and a poll staff produced a GEN 20 form that was not signed and did not have details of the polling station, the evidence of PW1, PW10, PW11, PW12 and RW4 is of vital importance.

17.15 According to PW1, figures kept changing and were being altered at the totaling center and he referred to page 49 of the Petitioner's bundle of documents where the record of proceedings at the totaling center shows the total ballots cast at Kizito East 1 Polling Station as 370 with 9 rejected ballots. He also referred to page 53 where the GEN 20 relating to the said polling station shows 6 rejected ballots.

17.16 PW12 testified that he was instructed by RW4 to alter election results in favour of the 1st Respondent and he manipulated votes for 67 polling stations. He stated that for Kizito East 1, he added 3 rejected ballots to the initial 6 in order to make it 9 as per the record of proceedings.

The same 3 votes were added to the total of the 1st Respondent.

17.17 RW4 on the other hand explained that at Kizito East 1, the presiding officer at the polling station erroneously recorded 6 rejected ballots when they were actually 9. The error in addition was rectified at the totaling center as per the record of proceedings.

17.18 I have looked at the GEN 20 form at page 53 of the Petitioner's bundle of documents. The same has a total of 370 ballots which is the same total indicated at page 49 of the record of proceedings. Simple addition shows that when all the figures on the GEN 20 are added, the total is 367. This clearly confirms RW4's testimony that the presiding officer erroneously indicated 6 rejected ballots when they were in fact 9 as the presiding officer actually came to a total of 370.

17.19 I must state here that the demeanor of RW4 (Marglorious Shepe) was that of a witness who is composed, consistent and reliable and her evidence was not shaken in cross-examination. To the contrary, the credibility of PW12 (Phinnias Kazongo) as a witness is highly questionable for a number of reasons. I am guided by the case of **Mushemi v The People**²⁰ where it was held that:-

"The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The judgment of the trial court faced with such conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others."

17.20 In casu, it is illogical for anyone to expect this Court to believe PW12's evidence that the same 3 votes added to the rejected ballots was added to the 1st Respondent's votes. Going by PW12's evidence, the implication is that 6 votes in total were added. However as can clearly be seen on both the GEN 20 and record of proceedings, the total ballots cast remained constant at 370.

17.21 PW12 went on a rampage of how he was offered a bribe of K530,000 by(GBM) Geoffrey Bwalya Mwamba to fuse in ballot papers while people were voting, how a gun was pointed at him but he still declined to take the bribe or do as he was requested. He then went on to narrate how RW4 appointed him as assistant returning officer for the said purpose of altering vote tabulation and he altered figures in favour of the 1st Respondent at 67 out of 177 polling

stations in Matero Constituency under the instructions of RW4, who was allegedly instructed by the 1st Respondent.

17.22 In cross-examination however, PW12 admitted that RW4 (Marglorious Shepe) did not offer him any bribe, threaten him or put a gun to his head. He admitted that he did not report RW4 to the police for the alleged instructions she issued. PW12 also denied being offered a bribe by the 1st Respondent but stated that the 1st Respondent threatened him over the phone.

17.23 In cross-examination by Learned Counsel for the 2nd Respondent, PW12 admitted that he applied for the position of Presiding officer and was trained as such.

17.24 RW4 testified that she never appointed PW12 an assistant returning officer as the same is done by the 2nd Respondent through a process. She denied having spoken to the 1st Respondent or having been issued any instructions to alter elections results in his favour. RW4 denied issuing any instructions to PW12 to tamper with election results.

17.25 Surely, which threat carries more weight between a gun on one's head and a verbal threat over the phone. PW12 claimed to have rejected a huge bribe of K530,000.00 from GBM, which he has never earned in his life, and refused to

slot pre-marked ballots in the ballot boxes despite a gun being pointed at him. However, he allegedly still went ahead to alter election results of over 17,000 votes in favour of the 1st Respondent because he was instructed by RW4 without any threat or bribe whatsoever.

17.26 PW12 admitted in cross-examination that he altered the results at Villa Park 1 in favour of the 1st Respondent, but in the same breath contradicted himself by admitting that at the said polling station, the Petitioner who polled 281 votes got more votes than the 1st Respondent's 256.

17.27 PW12 claimed to have added two votes to the 1st Respondent's vote for Salima (b) 1 to make a total of 494 ballots cast as opposed to the 492 recorded on the GEN 20 at page 51 of the Petitioner's bundle of documents. A careful perusal of the said GEN 20 shows that when all the recorded figures are added up, the total is 494 and not the 492 recorded by the presiding officer. This confirms RW4's testimony that the presiding officer erroneously added the figures and the same was corrected by the computer system at the totaling center as per page 49 of the Petitioner's bundle of documents.

17.28 PW12 also testified that he swapped results for a number of polling stations including Matero (a) 2, Matero (b) 2,

Barlastone (a) 1 and Galco (b) 1. He stated that he generated new GEN 20 forms and shredded the original ones. In cross-examination, he admitted that with respect to each polling station, he was making changes on all forms namely announcement of results(GEN 20), ballot paper account form, statement of rejected ballots and record of proceedings at the count. He admitted that polling agents were present during the exercise. He admitted that the GEN 20 at page 51 relating to Salama (b) 1 was shredded but the same was before Court because only the original one was destroyed.

17.29 During cross-examination by Learned Counsel for the 1st Respondent, when an arithmetic exercise was undertaken, PW12 admitted that with reference to the polling stations he had mentioned in examination in chief the total votes he manipulated were 1233 which is just 5.6% of the 22,000 margin between the Petitioner and the 1st Respondent. He also admitted that his aspirations are to be appointed as returning officer in future, hence he wants to be in good books with the current regime.

17.30 Further when taken to task in cross-examination by Learned Counsel for the 2nd Respondent, PW12 admitted that the technical support staff are trained to enter results in the computer system and they are the only ones with

the password. He admitted that after results are entered by the technical support staff, the record of proceedings at the totaling center is printed out and availed to observers and party representatives.

17.31 RW4 testified that even as returning officer she did not know the password that is used by technical support staff. In cross-examination RW4 denied receiving any complaint of transposition of results relating to any polling station. She maintained that if there were any problems at the polling stations, the same would have been brought to her attention and she would have acted accordingly. RW2 admitted that the computer system cannot detect transposed figures.

17.32 What is surprising to this Court is that PW12 having admitted that it was possible to have copies of the shredded GEN 20 forms before Court because only the original was shredded, no GEN 20 however was produced to show the alleged correct results before the results were swapped. In the absence of the same, it is very difficult to believe the swapping. Further, PW12 having admitted that only the technical support staff have the password to the computer system that produces the computer generated record of proceedings at the totaling center, PW12 shot

himself in the foot by claiming that he made alterations to all the documents.

17.33 PW12 testified that some signatures on GEN 20 forms were forged at the totaling center and at Nakatindi Hall. PW11 testified that he was investigating a complaint of forgery and falsifying of documents lodged by the UPND candidates namely the Petitioner herein, Aaron Mulope of Mandevu Constituency and Portifer Tembo of Chawama Constituency with respect to GEN 20(a) and GEN 18 documents dated 12th August, 2021.

17.34 RW4 in cross-examination when referred to documents marked "TM1(3) a" relating to Government A-5, admitted that the handwritings on the documents appeared to be similar.

17.35 It is imperative to state here that the said "TM1(3) a" documents emanated from one polling station and it is only logical to conclude that they were filled in by one person. Further, not even one presiding officer apart from PW12 was called to prove that his/her handwriting or signature was forged. In addition, no polling agent was called to prove that his or her signature was forged despite not witnessing the signing of the GEN 20 forms

17.36 PW1 testified that RW4 had GEN 20 forms with the 2nd Respondent's seal, names of parliamentary candidates and result figures but without the name of the polling station or presiding officer. PW10 testified that as a monitor at the totaling center, he observed people moving around with GEN 20 forms and he brought the same to the attention of RW4.

17.37 In cross-examination, PW1 admitted that PW10 was his agent who signed on the record of proceedings at the totaling center. He however denied that the signature signified acceptance of results. PW10 stated that he was given a condition to sign the results before being availed a copy. In cross-examination by Learned Counsel for the 2nd Respondent, both PW1 and PW10 admitted that they did not report any of the allegations to the conflicts management committee. PW10 also admitted that he did not see anyone changing figures at the totaling center.

17.38 PW10 and PW12 testified that results for Mosen 7 polling station were lost and a certain gentleman at the totaling center offered to avail the returning officer a copy. PW12 also testified that on 26th August, 2021 at Nakatindi Hall, they were altering election results. In cross-examination by Learned Counsel for the 1st Respondent, PW10 stated that he did not agree with the results for Mosen 7 as they came

from an unknown source. He however admitted that even if the total ballots cast of 572 at Mosen 7 were added to the Petitioner's results, he would not have won the elections as there was a margin of about 22,000 votes between the Petitioner and the 1st Respondent.

17.39 RW4 averred that on 14th August, 2021 when PW1 entered the totaling center, he alleged that his votes had been stolen and she explained to him that it was impossible. He produced a GEN 20 which did not have delimitation information namely polling station, constituency, name of presiding officer and signature. It only had candidate's figures with interlineations. She explained to PW1 that the same could not have been written by a presiding officer. When she looked for her copy with the same figures, she observed that the same was neatly written and she showed it to PW10.

17.40 According to RW4, an individual she just knew as the UPND chairman raised a concern that there were too many people seated at the 2nd Respondent's table. He alleged that the same were PF cadres altering figures. However, she explained to him that they were presiding officers submitting results. She invited him to the table to observe what was happening.

- 17.41 RW4 stated that as the winner was about to be announced on 15th August, 2021, she discovered that they had not recorded presidential results for Mosen 7 and due to exhaustion, they could not locate the results. An election observer from Transparency International Zambia and another one from FODEP volunteered to avail their copies. A comparison was made and the results were the same. While she was in the process of receiving results from the presiding officer from the said polling station via whatsapp, her assistants managed to find their copy of results. Results were entered and the process was closed.
- 17.42 According to RW4, copies of record of proceedings at the totaling center were printed out and given to stakeholders who confirmed that there were no errors. The stakeholders signed on the same then she announced and declared the winner.
- 17.43 On 18th August, 2021, the process of verification of ballot paper account forms, reconciliation and packing commenced and the same was in the presence of stakeholders. All seven constituencies of Lusaka were part of the process. On 26th August, 2021 while she was in the cashier's office, Christine Siatalimi called her and asked her to rush to Nakatindi Hall. The Petitioner was screaming that results were being changed. Shortly, the media and

police officers arrived and PW1 suggested that they should be arrested.

17.43 In cross-examination, RW4 denied tampering with figures and being caught in the process. She maintained that political party representatives and returning officers for 7 constituencies were present at Nakatindi Hall during the sorting and packing exercise.

17.44 I must state here that I am alive to the provisions of section 71 and 72 of the Electoral Process Act No 35 of 2016 which deal with the announcement of provisional results at the polling station and declaration of results by the returning officer respectively. The same provide that:-

“ 71. (1) After announcing the result at a polling station, a presiding officer shall complete a form, as may be prescribed, reflecting—

- (a) the number of ballot papers supplied to the polling station;
- (b) the result at the polling station;
- (c) the number of rejected ballot papers;
- (d) the number of spoilt ballot papers; and
- (e) the number of unused ballot papers.

(2) When a presiding officer has complied with subsection (1), the presiding officer shall publicly announce the result of the count at the polling station to members of the public, the accredited observers, monitors, election and polling agents present at the polling station.(Underlined for emphasis only)

(3) When the presiding officer has complied with subsection (2), the presiding officer shall inform the returning officer of the result of that count at the polling station.

(4) When the presiding officer has complied with subsection

(3), the presiding officer shall—

(a) seal in separate ballot boxes each of the items mentioned in subsection (1) and the written record of any objections;

and

(b) deliver the form, completed in terms of subsection (1), and the sealed ballot boxes to the returning officer.”

“72. (1) Upon receipt of the items mentioned in section seventy one, a returning officer shall tally the results of

the votes received from the polling station in the constituency, district and ward and shall—

(b) declare the results for the National Assembly and Ward election.”

17.45 From the foregoing provisions of the law, it is very clear that the presiding officer at the polling station publicly announces the election results at the count to members of the public, accredited observers, monitors, election and polling agents present at the polling station. The purpose of the said announcement is to allow the stakeholders to make objections if any relating to inaccuracies in counting of votes.

17.46 PW1 admitted having deployed polling agents in all the 177 polling stations in Matero Constituency. For the Petitioner to now try to paint a picture before this Court that the requisite stage of announcing results at the polling station was skipped and the results were altered at the totaling center is neither here nor there. I have not seen any evidence before this Court that the results announced at the polling stations were objected to. This Court cannot be made to believe that the results at the totaling center were in a vacuum and the relevant stakeholders were hearing the said results for the first time, considering that results

emanate from the polling stations and are only transmitted to the totaling center for verification, tallying and declaration of the winners.

17.47 The issue of polling staff suspiciously filling in GEN 20 forms at the totaling center does not arise because at the time the results get to the totaling center, they are already in the public domain as announced by presiding officers. If there were any differences in results from what was announced at the polling stations and what was recorded at the totaling center, the same would have easily been spotted.

17.48 The results from the polling stations are transmitted to the totaling center on four different forms and it is far-fetched to expect this Court to believe that PW12 made changes to all four forms relating to 67 polling stations and shredded the documents with correct results, in the presence of relevant stakeholders.

17.49 Not only that, but also that the said GEN 20 form which did not have names of the polling station or presiding officer was not produced before Court. In the absence of such proof, it is difficult to ascertain whether the said document emanated from the 2nd Respondent or was just authored by any person out there.

17.48 Further, it is illogical to suggest that during the reconciliation and sorting out of election materials in readiness for transmission to the 2nd Respondent, the process of tampering with election results continued because at the said time, winners had already been declared and results were in the public domain. The assertion that PW10 signed the totaling certificate on condition that if he did not sign, he would not be availed a copy can also not hold, because as per Regulation 5(2) of the Electoral Code of Conduct of 2016, whether he signed or not, the same cannot invalidate the results.

17.50 The fact that there were a few instances of miscalculation of totals by presiding officers which were corrected at the totaling center as testified by RW4 cannot render the election void. Section 97(4) of the Electoral Process Act No. 35 of 2016 provides that:-

"97 (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."

- 17.51 I am persuaded by the Ghanaian case of *Nana Addo Dankwa Akufo Addo and Others v John Dramani Mahma and 2 Others*²¹ where the Supreme Court of Ghana stated that:-
"Elections ought not to be held void by reasons of transgressions of the law without any corrupt motive by the returning officer or his subordinate, and where the Court is satisfied that the election was, notwithstanding those transgressions, a real election and was conducted under the existing election law."
- 17.52 The Petitioner has not led any tangible evidence to prove that the electoral process was so flawed and was not conducted in conformity with the law or that the few mentioned instances of miscalculations by presiding officers affected the election results. There is also no evidence that the elections were not free and fair.
- 17.53 The Petitioner prayed for an order that ballot papers relating to Matero Constituency Parliamentary elections be scrutinized, verified and recounted.

17.54 In accordance with section 99 of the electoral process Act No. 35 of 2016, there are only two reliefs that may be sought in an election petition that is; a declaration that the election was void or a declaration that any candidate was duly elected.

17.55 This Court is of the considered view that the Petitioner's prayer for an order that ballot papers relating to Matero Constituency Parliamentary elections be scrutinized, verified and recounted is not supported by any law. Section 47 of the Electoral Process (general) Regulations, Statutory Instrument No. 63 of 2016, provides that:-

47. A candidate, an election agent or polling agent may, if present when the counting of the votes is completed, request the Presiding officer to have the votes re-counted, or the Presiding officer may, have the votes re-counted or again recounted, except that the Presiding officer may refuse the request if, in the opinion of the Presiding officer, it is unreasonable.

17.56 Further Section 76 of the Electoral Process Act No. 35 of 2016 provides that:-

The Commission may correct a mistake committed by an electoral officer in the tabulation of results within seven days after the declaration of the results.

17.57 The import of the above cited authorities is that an application for verification, scrutiny and recount of ballot papers cannot be entertained at this stage. I am guided by the case of **Christabel Ngimbu v Prisca Chisengo Kucheka & Electoral Commission of Zambia**²² where it was held that an order for a recount is interlocutory made only on the basis of cogent evidence justifying the making of such an order. The relief sought by the Petitioner cannot therefore be granted at this late hour.

17.58 The 1st Respondent Miles Sampa having been declared winner of the Matero Parliamentary seat with 55, 612 votes, leaving a huge margin of 22, 014 between him and his closest opponent the Petitioner herein, clearly shows that the people of Matero Constituency elected their candidate of choice freely as the results speak for themselves, considering that there was a large turn-out of voters

18.0 CONCLUSION

18.1 It is the considered position of this Court that the Petitioner herein has lamentably failed to prove to high degree of convincing clarity that the 1st Respondent committed the alleged acts of electoral misconduct and engaged in illegal practices. Further no credible and cogent agent was adduced to prove that the alleged acts of electoral misconduct or illegal practices were committed with the consent and knowledge or approval of the 1st Respondent or his appointed election/polling agents or that the alleged acts were widespread and may have prevented the majority of voters in Matero Constituency from electing their preferred candidate.

18.2 The Petitioner also failed to prove that the elections were not conducted in conformity with the law and that such non-compliance affected the election results. The threshold as required by Section 97(2) of the Electoral Process Act No. 35 of 2016 has clearly not been met to call for the annulment of the Matero Parliamentary elections.

18.3 I therefore find and hold that the 1st Respondent **Miles Sampa** was duly elected as Member of Parliament for **Matero Constituency** as the Petitioner has failed to prove his allegations to the required standard of proof.

The Petition is accordingly dismissed.

Each party shall bear their own costs.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 19TH DAY OF NOVEMBER, 2021.

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Hon. Justice D. Mulenga
HIGH COURT JUDGE