

**IN THE HIGHCOURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2021/HP/EP/0002

**IN THE MATTER OF: ARTICLES 47(2),51,54,68,72(2)C,73(1) OF THE
 CONSTITUTION OF THE REPUBLIC OF ZAMBIA**

AND

**IN THE MATTER OF SECTIONS 81,89,97(1), 98(C) 99,100(2)(a) OF THE
 ELECTORAL PROCESS ACT NO 35 OF 2016**

AND

IN THE MATTER OF: CODE OF CONDUCT RULES 12,15(a),(h),(k)

AND

**IN THE MATTER OF: MWENSE CONSTITUENCY ELECTIONS HELD IN
 ZAMBIA ON 12TH DAY OF AUGUST 2021**

BETWEEN

KAPUTU CHISAKULA

PETITIONER

AND

DAVID MABUMBA

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

For the Petitioner: Mr. C. Sokoni of ICN Legal Practitioners

*For the 1st Respondent: Mr. B.C Mutale & Mr. E.Banda both of Messrs BCM Legal
 Practitioners*

For the 2nd Respondent: Mr. A.M Musoka of Messrs Nhari Advocates

JUDGMENT

CASES REFERRED TO:

- 1. Winnie Babihunga v. Masiko Winnie Komuhamia and Others (HTC 00- CV -EP 004-2001)**
- 2. Ritcher v. Minister of Home Affairs & 2 Others CCT 09/09/2009 ZACC 3; 2009 (3) SA 615 (CC)**

3. **Rtd Col Dr Kizza Besigye v. Yoweri Kaguta Museveni & Electoral Commission Presidential Election Petition No.1 Of 2001**
4. **Morgan v. Simpson(1974) 3ALL ER 722**
5. **Col Dr Kizza Besigye v. Attorney General Constitutional Petition No. 13 of 2009**
6. **Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 Others, Election Petition No. 12 of 2013 EKLK,**
7. **In the Matter of the Gender Representation in the National Assembly and Senate Advisory Opinion No. 2 of 2012 EKLK**
8. **Charan Lal Sahu & Others v. Giani Zail Singh and Another; Nem Chandra Jain v. Giani Zail Singh, Charan Singh and Others v. Giani Zail Singh 1984 AIR 309; 1984 SCR (2) 6**
9. **Shiv Kirpal Sing v. Shri v. Giri (1971) SCR(2) 197**
10. **Chrispin Siingwa v. Stanely Kakubo 2016/HP/EP/0043**
11. **Austin Liato v. Sitwala Sitwala Selected Judgment No. 23 of 2018**
12. **Brelsford James Gondwe. Catherine Namugala SCZ Appeal No. 129 of 2012.**
13. **Mubika Mubika v. Poniso Njeulu SCZ Appeal No.114 of 2007**
14. **Jonathan Kapaipi v. Newton Samakayi CCZ Appeal No.13 of 2017**
15. **Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General selected judgment No. 51 of 2018.**
16. **Anderson Kambela Mazoka and Other v. Levy Patrick Mwanawasa and Others (2005) Z.R 138**
17. **Akashambatwa Mbikusita Lewanika and Others v. Fredrick Jacob Titus Chiluba (1998) Z.R 49**
18. **Constantine Lines v. Imperial Smelting Corporation (1942) AC 154**
19. **Simasiku Kalumiana v. Lungwangwa Geoffrey Lungwangwa and the Electoral Commission of Zambia 2006/HP/EP/007**
20. **Simasiku Namakando and Elieen Imbwae 2006/HP/002**

21. Christopher Kalenga v. Anne Munshya & 2 others (2011)/HP/EP
22. Mwiya Mutape v. Shomeno Domonic 2016/CC/A008
23. Abuid Kawangu v. Elijah Muchima 2016/CC/A039
24. Steven Masumba v. Elliot Kamondo SCZ selected judgment No. 53 of 2017
25. Richwell Siamunene v. Sialubulo Selected Judgment No. 58 of 28
26. Nabukeera Hussein Hanifa v. Kabule Ronald and Another (2011) UGCH
27. Zulu v. Kalima SCZ No. 2 of 2014
28. Sunday Chitungu Maluba v. Rodgers Mwewa and Another Appeal No 4 of 2017, 2016/CC/A040
29. Raila Odinga and five Others v. Independent Electoral and Boundaries Commission and three Others, Kenyan Election Petition No. 5 of 201
30. Poniso Njeulu v. Mubika Mubika Appeal No. 9 / 2017

STATUTES REFERRED TO:

- 1) The Constitution of Zambia Chapter 1, of The Laws of Zambia as Amended by Act No. 2 of 2016
- 2) The Electoral Process Act No. 35 of 2016

OTHER AUTHORITIES REFERRED TO:

- 1) Oxford advanced learners dictionary
- 2) Merian Webster law dictionary

1. The Petitioner Mr. Kaputu Chisakula, filed his Petition on 23rd August, 2021. He was a candidate in the Parliamentary Election for Mwense Constituency held on 12th August, 2021. The Petitioner is challenging the election of Mr. David Mabumba, herein referred to as the 1st Respondent, who also contested the Mwense Constituency seat under the Patriotic Front (PF) Party ticket and was declared

duly elected by the Electoral Commission of Zambia (ECZ) the 2nd Respondent in this matter.

2. He averred that the Returning Officer declared the 1st Respondent as duly elected with 15,131 votes whilst he got a total of 163 of the total votes cast. He added that the remaining votes were shared by the other four candidates; Mr. Mwelwa Charles an Independent candidate who polled 4,350 votes, Mr. Mwape Allan of the UPND who polled 2,509 votes while Mr. Chongo Danny H of the Democratic Party and Ms Nakamanga Maggie of the Socialist Party each received 206 and 62 votes respectively.
3. It was further averred that contrary to the declaration by the Returning Officer of the 1st Respondent as duly elected Member of Parliament for Mwense Constituency, the 1st Respondent was not validly elected for the following reasons:-
 - " a . Prior to the elections and during the Campaign period, the 1st Respondent did call the Petitioner using both normal voice call as well as Whatsapp for an unknown reason despite there not been any agreed and open channel of communication between the two parties.
 - b. Subsequent to the refusal by the Petitioner to speak to the 1st Respondent, there followed a series of intimidating and threatening activities and actions around and at the Petitioner's private residence and dwelling; that included uninvited visits by PF party cadres as well as motor-vehicles that would intentionally park at the Petitioner's private

residence and dwelling with some belting out PF-Party campaign songs.

- c. That there were massive acts of intimidation and provocations aimed and targeting the Petitioner by the 1st Respondent, such acts as purposefully and intentionally holding a 3-hour Road Show/Rally at the private residence and dwelling of the Petitioner whereas the Petitioner was relegated to remain hidden in doors as PF Party cadres and supporters surrounded his House and blocked in his Motor vehicle by parking other motor-vehicles around it.
- d. The 1st Respondent did in fact knowingly and intentionally commit an offence of trespass by entering private residence space and allowing his supporters to surround the Petitioner's house and occupy his veranda for a period of over three (03) hours to instill fear and ridicule the Petitioner in the eyes of all that witnessed the event unfold.
- e. Holding of a Road-show was both in breach of the 2nd Respondent's code of conduct and specially set Covid-19 guidelines as well as a clear demonstration by the 1st Respondent to the petitioner that he had the muscle to muzzle him and hinder him from campaigning freely.
- f. Prior to the elections, and during the restricted campaigns that were held under very strict Covid-19 Guidelines of scheduled campaigns according to a calendar that was drawn by the ECZ, the 1st Respondent did conduct a PF Party

supported Road show/rally on a day and in an area/ward not allocated to them.

- g. Prior to the elections, and during the campaign period, the petitioner was visited by unknown persons that purported to deliver messages in person whilst others sent messages via cellular telephone that messages were of a threatening nature aimed at instilling fear in the Petitioner to be able to freely participate in the said elections.
- h. Your Petitioner states that as a consequence of the aforementioned illegal practices committed by the said 1st Respondent and his agents, the Petitioner remained in fear for his life and that of his gents throughout the entire Campaign and election period thus rendering the elections not free and unfair.
- i. The Petitioner further asserts that the elections were held in an atmosphere which was not free and fair due to widespread malpractice and corrupt practices by the 1st Respondent; malpractice and corrupt practices that included handing out of cash as well as issuing threats to civil servants to the effect of dismissal should they not vote for the 1st Respondent.
- j. A preferred list of Personnel that was endorsed by the 1st Respondent was the basis of the selection of Presiding Officers. Assistant Presiding Officers and Polling Assistants that underwent training thus rendering the elections biased and with a predetermined outcome.

- k. The 2nd Respondent's Election officials that included Presiding Officers, Assistant presiding Officers, Polling Assistants routinely frustrated the works of the Petitioner's Election Agents as well as of the Petitioner himself by forbidding them to enter some Polling stations or demanding they leave the Polling stations.
- l. The 2nd Respondent's Election official, the Presiding officers specifically routinely voted for/on behalf of illiterate voters far more than their acceptable limits as evidenced by the Petitioner's Election agents.
- m. The Petitioner was almost attacked in the night by unknown people that followed him to a polling station he was at, to witness vote counting but was only rescued by another election candidate.
- n. The role of GEAR and GOZA remained unknown as they routinely and actively helped the 2nd Respondent's Election officials in rotationally assisting illiterate voters in casting their votes as was evidenced by the Petitioner's Polling agents and as was confided by one GOZA staff to the Petitioner.
- o. An unusual Election practice was witnessed whereas some of the 2nd Respondent's Election officials and Monitors/observers were reconciling and cross-checking the Voter Registers post-election time to ensure they both ticked off the same number and matched identified voters."

4. In his affidavit in support of the application, the Petitioner reiterated the initial contents of his Petition. He went on to elaborate on the details upon which his Petition is premised.
5. The Petitioner in his affidavit regarding the telephone call he had received on 22nd July 2021 on his number 0954905895 deposed that it was from the 1st Respondent's number 0974914282 which can be retrieved and verified by ZICTA and the telecommunications company Airtel marked **"CK1"(a) (b) (c)"** are the screen shorts he had captured of the whatsapp messages and calls. The Petitioner also exhibited the alleged intimidation that took place at his place of residence as video recording and still photographs. He also captured number plates of some motor vehicles as **"CK2", "CK3" and "CK4"** respectively.
6. He deposed that the intimidation and provocation by the PF cadres surrounding his house is depicted in the video recording exhibited as **"CK5" and "CK6"** herein. Concerning the 1st Respondent's trespass at the Petitioner's premises, the Petitioner produced the still pictures exhibited as **"CK7"**. The Final campaign timetable **"CK8"** was produced as evidence of the fact that the 1st Respondent was campaigning on a day not allocated to him. The Petitioner further attested to the messages of a threatening nature that he received which have been marked as exhibit **"CK9"**.
7. The Petitioner further deposed that the atmosphere was not free and fair due to widespread malpractices and corrupt practices which included handing out cash as well as threats to civil

servants. In support of this allegation the Petitioner exhibited **"CK10"**.

8. The Petitioner further presented the preferred list of electoral officials namely Presiding Officers, Assistant Presiding Officers and Polling Assistants in an excel document marked as exhibit **"CK11"(e) and (f)**. With reference to the assertion that the aforementioned election officials frustrated the work of the Petitioner and his agents by forbidding them from entering the polling station or demanding that they leave, the Petitioner exhibited **"CK12"** as a list of his registered agents.
9. He filed a further affidavit in support of the Petition dated 20th September 2021 deposing that he did call some of the names on the list of pre-selected ECZ polling officials to confirm the suspected election malpractice and exhibited a ZICTA report marked **"CK13"**. The Petitioner also produced the registration numbers of the motor vehicles which he alleged came to his residence collectively exhibited as **"CK14"**.
10. The Petitioner deposed that as a result of the aforementioned malpractices committed by the 1st Respondent and the unprofessional conduct of the 2nd Respondent's election officials, the Petitioner was disadvantaged as the playing field was not levelled. He further deposed that by reason of the aforesaid, the Petitioner was also disadvantaged because the electorate were unduly coerced thus robbing the Petitioner of his intended votes. The Petitioner added that the illegal practices, acts of intimidation and invasion of his privacy by the 1st Respondent gravely affected

his ability to campaign freely and caused him immeasurable suffering during the entire campaign and election period.

11. By reason of the foregoing, the Petitioner prayed for the following;

- "1. A declaration that the election of the 1st Respondent as a Member of Parliament for Mwense Constituency is NULL AND VOID AB INITIO.**
- 2. A declaration that the 1st Respondent's Election malpractices do invalidate the resultant election results and that the same ought to be nullified.**
- 3. A remedial declaration in reaction to the illegal practices, acts of intimidation and invasion of privacy by the 1st Respondent that affected the Petitioner's ability to Campaign freely and caused him immeasurable suffering during the entire campaign and Election period.**
- 4. Such other declaration and orders as this Honourable Court may deem fit.**
- 5. An order that costs occasioned by the Petitioner be borne by the Respondents".**

12. At trial, the Petitioner called seven witnesses in support of his case against the Respondents. PW1 was Mr. Christopher Phiri, a teacher who testified about what happened before the election. He deposed that five days before the voting day he was going to the market, when he reached at the District Education Boards (DEBS) office, Mr Moses Kasakula stopped him calling him by name. Mr. Kasakula told him that both himself and PW1 were shortlisted on the list of those that would be transferred and/or fired from Mwense District. PW1 asked him what he had done

and who would fire him. Mr. Kasakula revealed that he got the information from the 1st Respondent's brother in-law by the name of Mr. Kasuba who told him all this at a drinking place called Chief Chisunka's bar at the market. According to PW1 that mode of communication was intimidation because there was no way he could be limited to talking only to certain people. PW1 also told him that they should do what they wanted because he was not employed by the 1st Respondent or anyone else.

13. It was his further evidence that on another day, after interacting with Mr. Moses Kasakula, he went to a barbershop in the market where he met a young man who also threatened him. He was told that "we have heard you are 'de-campaigning' the Patriotic Front and specifically Honourable David Mabumba". The young man then told him that he had the 1st Respondent's number and threatened to call him, but when PW1 dared him to call, the young man said "Sir, I am just joking".
14. In cross examination by Mr. Banda, when asked if he felt intimidated during the election period, PW1 confirmed that he felt intimidated. When questioned if he was intimidated by the 1st Respondent he responded that he was not intimidated by the 1st Respondent or by the 1st Respondent's registered agents.
15. Cross examined further by Mr. Mutale, he conceded that he did not know the number of votes the 1st Respondent polled although he confirmed that the 1st Respondent was declared winner of the parliamentary election for Mwense Constituency.

In further cross examination he confirmed that he had not been transferred after the election. In response to how many were shortlisted he confirmed that he did not see the shortlist. PW1 maintained that the information he received was accurate because it came from someone living in the same house with the 1st Respondent. PW1 also reiterated that he was not intimidated personally by the 1st Respondent.

16. In re-examination PW1 confirmed that he had not been transferred since the election.
17. PW2 was Mr. Phiri Mclean William, a peasant farmer aged 45 years of Lwamfwe, in Chief Lukwesa's village in Mwense District who attested that he was an election agent for the Petitioner. His evidence was that in executing his role of mobilizing and trying to win members of the public, he came across someone who told him that he was wasting time campaigning for the Petitioner because the PF candidate had already won. Since, according to him, the statement kept on being repeated, he decided to find out the basis of these claims and did his own investigations. Consequently, he came across a document with names of Polling Agents, Polling Assistants as well as other polling staff.
18. He identified the document of interest shown to him which was in an excel document and tendered the said document as part of his evidence before Court as **"CK11(e)"** and **"CK11(f)"**.
19. PW2 testified that he found the document on a certain person's computer that he had already obtained through other sources. After confirming with a friend from ECZ that the selection

process for polling staff had not yet been done, PW2, wondered how the list came about since the selection had not yet been done by ECZ. PW2 was told it was possible that the 1st Respondent had interest in selection of Polling Officials. PW2 further spoke to some of the people on the list that he knew and he was informed that they had not yet been trained by ECZ. PW2 passed the information to the Petitioner for his action.

20. The witness added that he was personally threatened by the PF cadres who also were threatening civil servants with dismissal or transfer. He also testified about an incident that occurred at Sunshine Primary School, where the Petitioner had gone to donate a soccer ball. The head teacher of the school informed him that he was called to ask what the Petitioner was doing at the school. When asked where the instructions came from, he was told from people in high offices within Mwense.
21. PW2 further testified that he also saw a government vehicle, a Toyota Land Cruiser gray or green in colour belonging to either Survey or Forestry department that passed not far from where they were at the time.
22. PW2 also alluded to another incident, when the Petitioner was prevented by the Police from doing a road safety campaign within Mwense which has high number of accidents involving motorcycles in the district. He wondered why the 1st Respondent was allowed to move a fleet of motor vehicles from Mwense to Kawambwa but the Petitioner who only had one motor vehicle was not allowed a safety campaign. When this matter was

allegedly reported no action was taken. PW2 testified that they were treated as second class in everything they did.

23. In cross examination by Mr. Banda, PW2's response was that he got the document from someone and also from Felix's computer. When asked at what point he had the document, he could not recall the date but stated that it was weeks before the elections. He conceded that his document was not dated on both pages. He maintained that the document could not have been authored after election because he had it before the elections.
24. Regarding the incident that happened at Sunshine School, he clarified that on the particular day they were giving a ball, the Petitioner was not involved in electoral malpractice but was simply making a donation. He acknowledged that he had no evidence that the people who tried to interfere were instructed by the Police. PW2 also replied that he was not sure if the matter was reported to the Conflict Resolution Management Committee.
25. In further cross examination by Mr Mutale, PW2 confirmed that he did not have any qualifications as an investigator. He also confirmed that he did not report any malpractice to the Conflict Resolution Management Committee. PW2 conceded that he was not a civil servant. When questioned if PF recruit teachers, PW2 was unable to respond.
26. In terms of being denied permission by the Police to do a sensitization campaign to reduce motorcycle accidents, he attested that it was Commissioner Mwape who denied them permission and added that he did not know if she was a PF

supporter. He conceded that she was not the 1st Respondent's registered agent. PW2 further conceded that 1st Respondent was not a police officer and that he did not know the communication between the 1st Respondent and the Police.

27. PW2 confirmed that he was the Petitioner's registered agent but he did not have the documents with him. PW2 maintained that he did not go to an internet café and he was not sure if the 1st Respondent was the author of the document before Court. PW2 also conceded that the mandate to appoint polling officials was the preserve of ECZ.
28. In cross examination by Mr. Musoka, counsel for the 2nd Respondent, he confirmed that he knew Felix. He also confirmed that the spread sheet found on Felix's computer could be drafted by anyone with basic computer knowledge. He confirmed that there was no official mark indicating that the document came from ECZ. When questioned whether Felix worked for ECZ, he stated that he had done so in the past. The witness was then referred to exhibit **"CK11(e) and (f)"** He confirmed that it was found on Felix Chupa's computer and Felix's name was on the list.
29. In further cross examination by Mr. Musoka, PW2 acknowledged that Felix did not participate in any official role during the election, he however maintained that the list was not fake. PW2 also clarified that he has never worked for ECZ. PW2 agreed that he knew the procedure for appointing polling staff by ECZ because he was told by his friend who worked for ECZ. The

witness was referred to "**CK12**", a list of registered agents for the Petitioner and PW2 confirmed that his (PW2's) name was not on the list of registered agents for the Petitioner in this matter.

30. In re-examination by Mr. Sokoni he clarified that his role was to report any information, good or bad to the Petitioner who took up the matter from there. Regarding the alleged investigations he conducted he attested that it could be referred to as a search because when he found out information, he did some inquiries before approaching the people involved. He confirmed that he did not know the author of the document, **(CK11(e)(f))** in question. Concerning the mandate to appoint, he reiterated that he called his friend from ECZ to find out the procedure and then wondered how the document was authored before the official selection of polling officials had been done by ECZ. About the donation of a ball that the Petitioner made, he clarified that about five members of that team were their supporters who made a request to the Petitioner who responded to their request by donating a ball to their team.

31. PW3 was Mr. Kapya Moses, a 30 years old peasant farmer and fisherman of Kapala village in Chief Lukwesa. He deposed that he used to escort the Petitioner on his campaign trails. His evidence was that he was a registered agent for the Petitioner and on 12th August, 2021, the day of the elections, he started around 05 hours from Bundabunda, heading to the polling stations. When he reached the polling station at Tondo he was not allowed to

enter, instead Glory the head teacher, got his card and returned it to him asking him to come back after 14 hours.

32. He then proceeded to Kapala where he was allowed to enter the polling station and observe the voting process. Later he moved to Kasonge polling station and based on his observations he told the Petitioner that the voting process was not being done well. The polling agents of the 2nd Respondent were helping the illiterate beyond their limits when voting. He testified that he continued his visits to other polling stations and the next polling station he visited was Ponga where he was chased. He then went to Lwamfwe and later stopped at Mukumbo where he was allowed access. After he saw that time was running out, he decided to go to a polling station near his home. PW3 later called the Petitioner and told him what he had observed on election day.

33. In cross examination by Mr. Mutale, he confirmed that he was passing through the polling stations on the election day and in total he visited nine polling stations. He conceded that the 1st Respondent did not prevent him from entering the polling stations and that the people denying him access were the senior most persons at some polling stations. He further acknowledged that it was not the polling agents but a group called GOZA that were preventing him from observing the voting. PW3 also clarified that GOZA was a group of supporters for the 1st Respondent because he was aware that it was run by the 1st Respondent.

34. PW3 was then referred to Petitioner's exhibit "**CK12**", which is a list of names of polling agents for the Petitioner and in response he confirmed that his name was the second on the list. He added that the Petitioner only had 17 polling agents. He also alluded to the fact that he did not have a specific polling station. When questioned on whether the Petitioner's team was disorganized or not, PW3 hesitated to answer the question and simply stated that the Petitioner's agents were denied access to the polling stations.
35. In cross examination by Mr. Musoka, he reiterated his evidence concerning what he observed on election day. He also reiterated that where he found people voting on behalf of the illiterate was at Kasonge. He confirmed that he was aware that ECZ is mandated to help the aged, illiterate and the blind when voting but maintained that not all being assisted were aged or blind. PW3 added that he was not in a position to lodge any complaint it was the Petitioner who could complain. He also conceded that he did not object to what he saw at the polling station.
36. PW4 was Mr. Norman Simwala, aged 29 years of Helen Kaunda in Lusaka, a freelance electrical technician. He attested that he was the Petitioner's right-hand man and personal assistant. His further testimony was that as members of the Petitioner's team, what they noticed was that a neighbour, one George Bunda a teacher at Ponga Primary School, would receive gifts from the 1st Respondent and it appeared that the people who came to intimidate had to go through Mr. Bunda and later they

would come to sit on the verandah to intimidate the Petitioner's team on a number of occasions.

37. It was also his evidence that because he used to answer the Petitioner's phone, he received a call from the 1st Respondent. He testified that before this call the political environment was calm. After the call, a person by the name of Jackson Mwansa came with 4 people who sat on the verandah and refused to leave when asked to. He was told that they were going to vote for the 1st Respondent because he was the one looking after them. According to PW4 those people were there to assess the weakness of the Petitioner and his campaign team.
38. PW4 attested concerning the alleged roadshow conducted at the Petitioner's residence that the 1st Respondent's vehicle was parked outside and there were a lot of cars and people. The 1st Respondent's team came with comedians including Kasaka and surrounded the Petitioner's house. PW4 testified that the Petitioner asked him to go outside to safeguard the Petitioner's campaign vehicle. There was a huge crowd which included Mr. Ronald Chitotela. The PF official discouraged the crowd from voting for Independent Candidates because they borrowed money from the banks and if elected, they would spend 5 years paying back the money to the banks instead of serving the people.
39. He added that as a result of what happened, voters lost confidence in the Petitioner. He emphasised that the magnitude of the people present was a representation of the entire

community which changed the narrative of the Petitioner's campaign because when they were chanting their slogan "pakasote" they were booed by the people who had earlier loved them stating that they wanted a change. The roadshow humiliated the Petitioner and his campaign team. They lost supporters and their campaign team left them. He reiterated that the roadshow was a huge blow to the Petitioner's bid for Parliamentary seat for Mwense Constituency. PW4 also alleged that the day when the roadshow took place was not allocated to the 1st Respondent as there was a timetable from the 2nd Respondent on how campaigns were to be conducted. When the road show ended the 1st Respondent and a group of about 20 men in green work suits walked to his car. The 1st Respondent conducted the roadshow despite the ban by the 2nd Respondent.

40. As far as other irregularities are concerned, PW4 testified that there was a list of polling officials which was circulating before ECZ had officially appointed any election officials for Mwense Constituency. Another irregularity according to PW4 was that officials appointed by the 2nd Respondent repeatedly voted for voters on the polling day. PW4 stated that in addition he was given a hostile attitude by election officials. He gave an example of Musungampashi polling station where he was asked to leave the polling station.
41. In cross examination by Mr. Banda, who asked him the location of the said residence, he described a 3 roomed house with no security fence and confirmed that the house was close to the

road. He conceded that the 1st Respondent did not come to sit on their verandah. He reiterated that the roadshow was held by the 1st Respondent and they broke bottles of alcohol on the Petitioner's verandah which he considered to be violent. In terms of the number of votes it was his testimony that the Petitioner got 163 votes and the 1st Respondent got over 15 thousand votes.

42. In cross examination by Mr. Mutale, PW4 Responded that Mr. Ronald Chitotela stood as candidate in Pambashe and not Mwense Constituency, he added that Kasaka was not a candidate for Mwense Parliamentary election. He reiterated that the Petitioner campaigned in all 11 wards. He clarified that they had polling agents in most of the wards but it was unnecessary in some of them.
43. In cross examination by Mr. Musoka, he confirmed that he did not report any malpractice to ECZ. He conceded that ECZ cannot be faulted for the Petitioner's decision not to have polling agents in all wards. He also acknowledged that there was no limit to the help the 2nd Respondent could offer illiterate voters.
44. In re-examination he confirmed that Mr. Ronald Chitotela and Kasaka were not candidates for Mwense Constituency but maintained that they were campaigning for the 1st Respondent because they were mentioning his name in their statements.
45. PW5 was Mr Kaputo Derrick aged 38 years of Chief Lwino, a peasant farmer, his evidence was that he was security personnel for the Petitioner during campaigns. He testified that the people

who used to come to Petitioner's residence were sarcastic and used to drink beer. He added that amongst the people who used to go there were Mwansa Jackson and Bunda. He further testified that they received some other people from the 1st Respondent's group whom they told that the Petitioner's residence was not a place to hold a meeting which they ignored until there were a lot of people. There was no cross -examination or re-examination of this witness.

46. PW6 was Mr. Martin Lombe Mumba, a Manager at the Road Transport and Safety Agency (RTSA) aged 54 years who attested that he was before Court to confirm the registration details of some vehicles using the documents he presented before Court.
47. In cross examination by Mr Banda, PW6 was referred to **"CK14a"** and he confirmed that they were motor vehicles for RKC Tour and Guide Limited. He also clarified that the vehicle whose number plate appeared on the exhibit marked **"CK14b"** belonged to Aubrey Mwelwa, while the ones on exhibits **"CK14c"** and **"CK14d"** belonged to Teresa Mwelwa and Ephraim Mbewe respectively. **"CK14e"** belonged to one Mark Dennis. PW6 acknowledged that none of the documents exhibited before Court was for vehicles belonging to the 1st Respondent. In further cross examination by Mr. Musoka, PW6 confirmed that none of the documents alluded to were for a vehicle belonging to ECZ. There was no re-examination of this witness.
48. PW7 was Mr. Mulonga Mwewa, a Maintenance Specialist at

Zamtel aged 40 years, who testified that he was in Court to present the outgoing call log reports. The witness confirmed that it was a report as compiled by Zamtel.

49. In cross-examination by Mr. Mutale, PW7 conceded that he did not work for ZICTA and further that he had not produced documents from ZICTA. He also acknowledged that the documents were not showing the nature of the conversations.
50. He was then referred to entry numbers 156 to 161, his response was that he did not know who the conversations referred to. He also confirmed that he did not know the Petitioner's number by heart and that he did not have further evidence that the Petitioner and the 1st Respondent had a conversation.
51. In cross examination by Mr. Musoka, PW7 stated that he did not know if the calls were from ECZ. He reiterated that he was sure about the fact that those were the outgoing calls but he did not know the details of the said calls. His position was that Zamtel as a corporation was the custodian of the documents and he had just been sent to tender the documents. He confirmed that his role is to maintain mobile equipment for Zamtel and that he did not work in the records office for Zamtel.
52. In re-examination, by Mr. Sokoni, PW7 attested that he had nothing to do with the nature of the conversation, his role was just to check the number and where it was going to not what was discussed. He reiterated that he did not work for ZICTA but for Zamtel. He added that by law ZICTA as a governing body for companies providing Information Communication Technologies

(ICT's) can give instruction to any of the companies it governs such as Zamtel to provide information on the number from which calls originated and to whom the calls were going.

53. In further re-examination, PW7 clarified that the purpose of the call logs was to show the outgoing calls and not the content of the respective conversations. He also reiterated some of his testimony in cross examination.
54. PW8, the Petitioner in this case Mr. Chisakula Kaputu aged 50 years an Energy Consultant and Director for Sustainable Energy and Environment Limited testified that he was a candidate in the just ended Mwense Constituency Parliamentary Elections. He attested that as the Petitioner he was before Court to further elaborate on the grounds of his Petition and also give the Court an appreciation of the events and circumstances surrounding his campaign period leading to the election day, 12th August 2021. He added that he would also refer to information from his certificate of exhibits.
55. He testified that prior to receiving a call from the 1st Respondent, his campaign was unhindered and was able to campaign from Mwense to Kaombe freely.
56. He followed the guidelines and calendar as laid down by ECZ and on 22nd of July, 2021, his day allocated to campaign in Mwense ward, he put up an elaborate campaign. Later, they retired to his base in Luche ward in Lukwesa village where he was residing. As they were strategizing over the next move, according to him his assistant received a call from the 1st

Respondent who asked the assistant to hand the phone to the Petitioner. The Petitioner instructed his assistant to tell the 1st Respondent that he was busy and would return the call although he had no intention of doing so.

57. The following day, 23rd of July, a group of smartly dressed men visited the Petitioner probing him why he was standing as an independent candidate. He informed them that in his own small way he wanted to effect change by changing government and the associates of the Patriotic Front. Subsequently, he experienced what ranged, from intimidation, provocation and ridicule from various individuals.
58. He later came to identify two of the key persons as Mr. George Bunda his neighbour in Chief Lukwesa's village and a Mr. Jackson Mwansa. According to him the role of these two people was to spy on the Petitioner. He added that they would sit on his verandah and listen to the conversations inside and sometimes they would allow other people to sit on his verandah. The Petitioner tasked his security Derrick Kaputo and his assistant Norman Simwala, at the risk of being attacked, to evict people from their property but he never came out himself.
59. Later motor vehicles started coming to his house and he took it upon himself to record the vehicle registration numbers, which he would send by WhatsApp to his family in Lusaka in case something happened to him. He deposed that of particular note was vehicle registration No AAV8668 an Isuzu pickup red in colour.

60. He also testified that after some days there was an incident where PF cadres came to the property and insisted on mounting the PF flag on his property which he declined. He testified that after some hours the same Isuzu came and parked outside and started playing PF party songs. According to the Petitioner the same Isuzu came with a different registration number plate AAV 8686 which number plate the Petitioner checked and found that AAV 8686 did not exist in the system but AAV 8668 existed with various traffic offences. The Petitioner inquired and RTSA gave him some information about the vehicle.
61. The Petitioner added that he used a Sony handheld camcorder camera that he has owned for more than five years. According to him anyone in the room could operate the said camera with clear instruction. He took the video himself on the day in question while he hid behind the curtain and made an effort to zoom on the vehicle and the occupants. In terms of content, he narrated that the video shows some PF cadres dancing to party songs, some men standing along the said Isuzu holding the flags they had been refused to mount.
62. It was his further evidence that on 9th August, 2021, according to ECZ calendar he was not scheduled to campaign in Luche where he lives. The candidate whose day it was to campaign in that area was Mr. Charles Mwelwa. He was in the house around 14 hours when he noticed people coming towards his residence and his security went outside to ask the people who were gathering to leave. The Petitioner also testified that a number

of vehicles started to arrive at his place and he identified the vehicle of the 1st Respondent who stepped out of his vehicle, a Ford Ranger and started giving directions to the people around. The Petitioner asked Norman Simwala to guard his vehicle. By that time there were people even at the back of the house, he therefore asked his security man, Derrick Kaputo to keep guard outside whilst he locked himself inside the house leaving the security outside. He added that he took out his video camera to capture the moment as it unfolded and that is when he saw a big truck by the roadside and the 1st Respondent directing the driver of the truck to park in the Petitioner's yard. He later saw that the truck was a stage convertible truck and was converted into a stage, its registration number was BAR 4604. He had mixed emotions because he liked Kasaka as a comedian but he was also infuriated at the invasion of his privacy. This incident went on from about 15 to 18 hours. The Petitioner emphasised that he did not think that anything he did warranted that conduct from 1st Respondent and his supporters at his residence.

63. The Petitioner captured the event inside the house behind the curtain to ensure that no one noticed him. After they finished their show, the Petitioner saw the 1st Respondent who had parked in front of his house, go to his car accompanied by 10 cadres and left his premises. The Petitioner was then able to leave the house and was met by some local people who made fun

of him stating that he had been made wiser and had been defeated.

64. The Petitioner showed this Court a clip of a video concerning the event described above. The convertible truck with a sizable number of people were seen though it was not clear for one to identify anyone however some voices and noise were audibly clear and distinct such as the mention of the word Kasaka, breaking of a glass, name of Edgar Chagwa Lungu, Mabumba and voices of children, mostly loud music was heard. This Court saw images of a larger number of children than adults.
65. After the incident there were beer bottles on his verandah which his helper cleaned up. He further testified that the said road show was held on a day not allocated to the 1st Respondent and it was also not in line with the Covid-19 guidelines of the Technical Committee.
66. He testified further that on 18th July, 2021, one William Phiri his election agent sent a message with an attachment of a document for the Petitioner's attention. The said document had 60 names, the positions they would be placed in and the mobile numbers of the said people and was titled poll list which he discovered was created on 30th May, 2021. After going through the document, the Petitioner called randomly some of the numbers on the list on 30th of July 2021. He and his team called over 20 numbers on the list on the pretext that they intended to hire them as polling agents. The people declined on the grounds that they had

already been hired by ECZ. He added that the first person he called was John Chilabwe, then Beatrice Mulenga.

67. The Petitioner recruited 17 polling assistants. Ten of them had been issued computer generated cards while 7 had letters of appointment only. The ones issued with cards were designated as field agents to move around the constituency whilst the others had to be at a fixed polling station. The Petitioner decided to focus on Kapela ward with about 4,555 registered voters, followed by Luche ward with 4,200 registered voters, and lastly Kapanga with 1,868 registered voters, while Mwense had 2,044 registered voters and is the hub of civil servants and the literate.
68. The Petitioner further testified that he had agents move between Kaombe, Nkanga and Chiwasha. There was another agent that covered, Kapela, Luche and Pebekabesa. Yet another agent covered Mwense, Kasengu and Katiti the last one covered Kapamba which was away from the main road. The Petitioner placed the balance of polling assistants in stations that had more numbers, namely Luche, Kapela and Mwense wards. He testified that the purpose of these agents was to monitor what was going on at the polling stations on election day. The Petitioner was also moving between Mwense and Kaombe on election day. They begun working about 05 hours in the morning and ended at 23 hours.
69. The Petitioner further attested that he received calls from some

of his polling agents informing him that they had been denied entry into some of the polling stations. They were informed that they needed not only to have the letter of appointment but the card as well. The Petitioner called ECZ agent who issued the cards to inform him that his agents were being denied entry and he was told that they should have been allowed into the Polling stations. The Petitioner received a further report from another agent that in some polling stations he was refused entry even upon presenting his card. He added that for those who managed to enter polling stations witnessed that polling officials assisted voters beyond their limit of assistance.

70. Still regarding the events that occurred on election day, the Petitioner testified that he also went to Mwense Primary School where he was refused entry by a female police officer at that polling station though he had explained to her that as a candidate he was allowed to visit the polling station. He alluded to the fact that the report he got from his agents on the polling day demonstrated unfairness on the part of the officials at the polling stations.

71. In cross examination by Mr Mutale about whether he was a coward he replied that he was a circumstantial coward. The Petitioner conceded that he did not know who broke the bottles at his residence. He also confirmed that he did claim that there were malpractices and that he unofficially reported these incidents to ECZ.

72. In further cross examination he reiterated that the 1st

Respondent's agents trespassed on his property but he did not report the matter to the Police. He maintained that his Petition was not an afterthought that he never hid from anyone except on the roadshow day. He maintained that his being behind the curtain was to collect evidence.

73. As regards the number of votes that he got, PW8 confirmed that he polled 163 votes and that there were 60 polling stations. He acknowledged that even in his village he did not receive any votes. He also confirmed that he had not identified the 1st Respondent or any of his registered agents in the videos.
74. The Petitioner was then referred to **CK14(a) to (e)** he acknowledged that the motor vehicle registration certificates in question do not belong to the 1st Respondent. He also acknowledged that he was at the bottom as far as the results of the election were concerned. He confirmed that it was not the first time that the 1st Respondent stood as member of parliament for Mwense constituency but he disputed the assertion that he did not perform well because he was an alien to Mwense. He also disputed the assertion that he was staying in a grocery. He confirmed that his house was near shops but maintained that it was 20 meters from the road. He maintained that he had presented evidence which shows that he was indirectly intimidated by the 1st Respondent.
75. In further cross examination by Mr Banda, he reiterated that the 1st Respondent was campaigning in an area that was not allocated to him to campaign at that particular time. He

however conceded that the timetable for campaign **"CK8"** was not signed by ECZ although it had been approved.

76. When cross examined by Mr. Musoka, the Petitioner confirmed that none of the vehicle registration certificates presented under exhibits **"CK14(a)"** to **"CK14(e)"** belonged to ECZ. The Petitioner was then referred to **"CK11(e) and (f)"**, he acknowledged that the excel list can be made by anyone with basic computer knowledge. He also confirmed that he got the spread sheet from William Phiri but he did not know if he had ever worked for ECZ.
77. As it pertains to his campaigns, his response was that ECZ allowed him to campaign and that he campaigned smoothly until he received a call from the 1st Respondent. When questioned whether he had reported the alleged malpractices to ECZ, the Petitioner's response was that he reported unofficially by sending messages and WhatsApp messages but not officially.
78. The Petitioner reiterated that the wards with the highest votes were Kapela and Luche. He conceded that that he did not have agents in all the polling stations at the same time and ECZ could not be blamed for this. He also acknowledged that there was no limit to the help that the electoral agents could give illiterate aged and blind voters.
79. In re-examination the Petitioner clarified that he did not report the trespass at his premises to the police. He agreed that although the video he captured did not show the face of the

1st Respondent, he was mentioned in the audio recording. He maintained that he was fearful even on the day of elections.

80. The 1st Respondent filed their answer to the Petition on 6th September, 2021, admitting paragraphs 1 to 4 of the Petition. The 1st Respondent then denied paragraph 5 of the Petition. He contended that he was duly elected as Member of Parliament for Mwense Constituency. He averred that if there were any communications between the parties being complained of were for the sole purpose of discussing the optimization of the campaign timetable as directed and encouraged by the 2nd Respondent. The 1st Respondent further denied the allegations of intimidating and threatening activities and denied having engaged in any activities in contravention of the electoral rules.
81. The 1st Respondent denied ever having committed the offence of trespass by entering the Petitioner's private residence either by himself or his agents. He asserted that had the allegations been true, the Petitioner would have reported the matter to the Police or the Dispute Resolution Committee constituted by the 2nd Respondent since all aspiring candidates were made aware of the said ECZ rules.
82. The 1st Respondent disputed having held a road show at the Petitioner's private residence, he averred that all roadshows were carried out on public roads and not at the Petitioner's residence and asked that the Petitioner be put on strict proof thereof. The 1st Respondent further denied having held a road show that contravened the 2nd Respondent's as well as Covid-19 guidelines.

His position was that there was no roadshow or rally conducted by the 1st Respondent in an area/ward or on a day not allocated to him. He emphasized that he did not hinder the Petitioner from campaigning freely.

83. The 1st Respondent denied the assertion that the Parliamentary election for Mwense Constituency held on 12th August, 2021 were not free and fair. He averred that he and his agents were not involved in any illegal practices that endangered the Petitioner's life. The 1st Respondent also disputed allegation that he and his agents engaged in any widespread malpractice and corrupt activities such as handing out cash as well as issuing threats of dismissal to civil servants if they did not vote for him.
84. The 1st Respondent filed his affidavit in opposition to the affidavit verifying the election petition on 13th September, 2021 which he deposed to. He begun by admitting the contents of paragraphs 4,5 and 6 of the Affidavit in Support of the Petition. He then deposed that he was declared winner of the Mwense Constituency Parliamentary Election by the Returning officer Mr. Chanda James after polling 15,131 votes and exhibited a copy of the declaration of results marked "**DM1**" before Court.
85. The 1st Respondent disputed the assertion by the Petitioner that he was not validly elected and repeated his assertions in his answer to the Petition.
86. At trial the 1st Respondent (RW1) Mr. David Mabumba, aged 50 years testified that he participated in the elections as a candidate for the PF in Mwense Constituency Parliamentary

Elections. He attested that it was the third time he was contesting the election as a member of parliament in the same constituency. He first participated in the 2011 election which he won, his second being in 2016 which he also won, the third was the just ended 2021 election and he was declared as the winner on 13th August 2021.

87. He deposed that his campaigns according to the PF strategy were at different levels, at central committee level, provincial executive level, district executive level, constituency executive level and ward executive level. He further testified that at each ward the party deployed competent and experienced team of PF members headed by campaign co-ordinator in all the 11 wards.
88. He denied the allegation of threatening the Petitioner, according to him there was no point in time through telephone conversation or physical at which he intimidated or threatened the Petitioner.
89. Concerning the vehicles he used for campaigns, the 1st Respondent testified that the vehicles that were mentioned were not owned by him as a candidate for PF in Mwense Constituency. He further testified that the vehicles he used were a Ford Ranger, Nissan Elgrand and Toyota Land Cruiser Prado, whose registration certificates have been exhibited as **"DM2(1)"**, **"DM2(2)"** and **"DM2(3)"**. He stated that the first two vehicles were owned by him as the 1st Respondent, whilst the last one was owned by his brother-in-law Victor Kasuba.

90. The 1st Respondent denied having conducted a show at the Petitioner's residence but confirmed that he did a roadshow at a big trading area in Mwense stretching about 500 metres, along the tarred road. He further testified that on both sides of the road are shops, restaurants and bars. He contended that the alleged residence of the Petitioner was actually a shop along the said 500 metre stretch which also houses a market.
91. The 1st Respondent therefore denied having walked majestically towards the Petitioner's residence with bodyguards and neither did he nor any of his supporters ever sit on the verandah of the Petitioner. Concerning the video evidence, the 1st Respondent deposed that there was no image of him that appeared in the said video.
92. The 1st Respondent contended that the Petitioner in his allegations did not make mention of a particular area or ward where the 1st Respondent held his rally on a date not allocated to him. He also denied having abrogated the Covid-19 guidelines because his party the PF complied with all the Covid-19 guidelines as provided by ECZ.
93. The 1st Respondent denied issuing out a list of preferred polling officers before they underwent training by ECZ. His testimony was that he had never worked for the ECZ nor had a hand in choosing officers. The 1st Respondent also denied the assertion that GOZA belonged to him.
94. The 1st Respondent attested that Mwense had 60 polling stations

and 11 wards. That the total number of registered voters was 31,937, he polled 15,131 votes whilst the Petitioner received 163 votes.

95. In cross examination by Mr. Musoka, the 1st Respondent acknowledged that it was not their role to endorse electoral staff and that he did not worked for ECZ.
96. In cross-examination by Mr Sokoni, he confirmed that it was his third time to stand as member of parliament for Mwense Constituency. The 1st Respondent also confirmed that he was aware of the electoral rules and answered that **"DM4(a)"** was authored by the District Electoral office but he conceded that it did not show the author and was not signed by anyone. Similarly, exhibits **DM4 (b),(c)** and **(f)** were not signed and did not show the author. He denied having authored the said documents. He confirmed that he was the only person that stood as parliamentary candidate for Mwense Constituency for the Patriotic Front.
97. In further cross examination he denied the allegation that there was a campaign rally for PF held at someone's residence because the area in questioned was a trading centre, that included a market, bars and shops. He reiterated that the building where the video was taken from was not a residential building. He stated that honourable Chitotela was a central committee member of the PF. He denied the assertion that Hon. Chitotela campaigned with him in Mwense. When questioned regarding his communications with the Petitioner, he denied having

communicated with the Petitioner except in connection with the election campaign timetable.

98. RW2 was Mr. Mwenya Issac aged 65 years, a peasant farmer residing in Lukwesa, Mwense Constituency in Chief Lukwesa's area. His testimony was that he was the District Chairperson for the PF and was the councillor for Luche ward from 2011 to 2016.
99. He went on to attest that the plan of the PF was that they started with the commanding centre, where the mixed members of the party from the district constituency and those from the ward. With particular reference to Luche ward, there was a place where they would gather as leaders. The place is called Meleka on the way to Chief Lukwesa's palace a stretch of about 600 to 700 metres, straddled with shops and restaurants where the PF members have been gathering since 2011. This is the place where all the plans for the way forward for the PF were explained and that is where the leaders had gathered on that day in readiness to receive Mr Ronald Chitotela their leader.
100. He had received a call from Mr. Ronald Chitotela, that the members of the party should gather at that place as he passed by and this is what they did and Mr. Chitotela came and met with them. RW2 deposed that he had met the Petitioner before although he did not know him well.
101. RW2 denied that PF members gathered at the Petitioner's house. According to him they never went to any person's residence apart from their usual meeting place at Meleka. It was also his

evidence that the 1st Respondent's campaign was based on what he had done and what he wanted to do in future for the community. In addition, RW2 denied having intimidated the Petitioner in this matter.

102. In cross examination by Mr. Sokoni, he clarified that PF put one group in each ward. He stated that he was the chairman of the district, and conceded that he could not be present at all the meetings at the same time. His evidence was that he was present at the meeting because it was the place where he resides and sleeps at night. He also denied having attended a rally. There was no re-examination of this witness.
103. RW3 was Ms Kabanshi Harriet, a peasant farmer aged 45 years and a resident of Musangu in Chief Lubunda village, whose testimony was that she was the Constituency Chairlady and she was working from Luche ward for PF. She denied knowing the Petitioner in this matter. She further testified that the campaigns by the PF were door to door and that the 1st Respondents campaign message was to show the people what he had done for the people of Mwense Constituency.
104. She was referred to **CK1(a), CK 3(a)(b)(c) (d)** and **CK 7** which she confirmed were images. With particular reference to **CK7(c)** RW3 deposed that she did not know the place well. She described it according to what she saw as a place of business. There was no cross examination of this witness by the 2nd Respondent and by Counsel for the Petitioner.
105. The 2nd Respondent filed an Answer to the Petition on 13th

September, 2021 averring that it was the Constitutional Body established under Article 299 of the Constitution of Zambia mandated to conduct elections, referenda, voter registration and delimitation of electoral boundaries.

106. The 2nd Respondent then proceeded to confirm that on 12th August, 2021, it did conduct tripartite General Elections comprised of Presidential, Parliamentary and Local Government elections. The 2nd Respondent contended that according to the declaration of the Returning Officer of the election the 1st Respondent emerged victorious with 15,131 votes and was declared the duly elected Member of Parliament for Mwense Constituency. The Petitioner obtained 163 votes while the other four candidates shared the remaining votes cast.
107. The 2nd Respondent then addressed the contents of the Petitioner's Petition in paragraph 1 and paragraph 5(a) to 5(j) of the Petition which were considered to be within the Petitioner's peculiar knowledge. The 2nd Respondent admitted that the contents of paragraphs 2,3, and 4 of the Petition were true. The 2nd Respondent then proceed to deny the contents of paragraph 5(k) to 5(o) of the Petition and asked the Petitioner be put on strict proof thereof.
108. The 2nd Respondent further contended that it was mandated with the responsibility of employing Presiding Officers, Assistant Presiding Officers and Polling Assistants and in pursuance thereof, it independently employed the said officers in accordance with the law.

109. It was also the 2nd Respondent's contention that the Mwense Parliamentary elections were conducted in conformity with the Constitution and the Electoral Process Act together with the regulation passed thereunder. The 2nd Respondent asserted that the Petitioner was not entitled to any relief sought and prayed that the Petition be dismissed with costs.
110. In the affidavit verifying the Answer, the 2nd Respondent reiterated its position regarding the Petition outlined above. The 2nd Respondent then added that it acted properly, openly and publicly in the conduct vitiating incidents of the 1st and 2nd Respondents. It was also asserted that the contents of paragraphs 9 and 10 of the Affidavit in Support of the Election Petition were within the peculiar knowledge of the Petitioner.
111. In support of its case against the Petitioner, the 2nd Respondent called one witness, RW4, Ms. Betty Liswaniso. Her evidence was that she was the District Elections Officer for the 2021 August elections. She added that her duty was to manage the election process in Mwense District which had 60 polling stations.
112. She referred this Court to paragraph 3 of the Petition and confirmed that the same was a true reflection of the true results of the election for Mwense Constituency at parliamentary level.
113. RW4 disputed the allegation in paragraph 5(j) of the Petition that the 1st Respondent generated a list of polling staff because it was only her office that was mandated to appoint election polling staff. She further asserted that her office did not receive any complaints from the Petitioner regarding the elections.

114. She testified that contrary to the assertions of the Petitioner in Paragraph 5(l) of the Petition, the polling staff of ECZ has mandate to assist the illiterate, blind and any incapacitated voters and there was no limit to the assistance to be rendered.
115. Finally, she contended that to the best of her knowledge and capability, the Mwense Parliamentary elections were conducted in a free and fair manner. There was no cross examination of this witness.
116. In his final submission filed on 4th October, 2021, counsel for the Petitioner begun by reiterating the irregularities alluded to in the pleadings and further brought into his submissions what was not pleaded such as the inflating of the votes in favour of the 1st Respondent which in my view is sneaking in evidence at the bar. This should have been brought up earlier by way demanding a recount or verifying the votes cast before the declaration was made of the winner. He then submitted that the Petitioner's case was anchored on the grounds that the conduct of the 1st and 2nd Respondents violated the principles of a free and fair election as well as the electoral process set out in the Constitution, Electoral Laws and Regulations and that the Respondents committed errors in voting, counting and tabulation of results. It was further argued that the Respondents committed irregularities and improprieties that significantly affected the election results and generally they committed other contraventions and violations of the electoral process.
117. It is the Petitioner's contention that the citizenry's fundamental

political rights are encapsulated in the principles of free and fair elections and that the 2nd Respondent had an obligation to conduct the elections in a simple, accurate, verifiable, secure, accountable and transparent manner which they failed to do.

118. Regarding his case against the 2nd Respondent, the Petitioner contended that the 2nd Respondent like all other State Organs and Persons is bound by the principles of Constitutional Supremacy. It was therefore submitted that any acts that violate those principles of the Constitution shall be *ipso facto* invalid. Further that any election conducted contrary to those principles was a usurpation of the people's sovereignty which produce masquerades who do not represent the peoples' will and are not accountable to them.
119. It was further submitted for the Petitioner that the election was so badly conducted and marred with irregularities that it did not matter who won or was declared winner. This was owing to the fact that the irregularities committed significantly affected the results to the extent that the 2nd Respondent could not accurately and verifiably determine what results any of the candidates got.
120. It was contended that his agents were not allowed to enter the polling stations to monitor the voting and witness the announcement of the results. Consequently, the 2nd Respondent inflated votes cast in favour of the 1st Respondent making it impossible to determine whether the threshold for winning the elections under the Constitution was met. The Petitioner

referred this Court to the case of **Babihunga v. Masiko Winnie Komuhamia and Others**⁽¹⁾ to the effect that the quantitative test was most significant where numbers and figures are in question whereas the qualitative test was most suitable where the quality of the entire process is questioned and the Court has to determine whether or not the election was free and fair.

121. This Court was also referred to the South African case of **Ritcher v. Minister of Home affairs and two Others**⁽²⁾ to the effect that cases concerning the right to vote should be approached being mindful of the symbolic value of the right to vote as well as the deep democratic value that lies in a citizenry conscious of its civil responsibilities and willing to take trouble to exercise that right.
122. Reliance was further placed on the Ugandan case of **Rtd Col. Dr Kizza Besigye v. Yoweri Kaguta Museveni & Electoral Commission**⁽³⁾ which defined free and fair elections as inter alia where the process is free from intimidation, bribery, violence, coercion, and results are announced in good time.
123. The cases of **Morgan v. Simpson**⁽⁴⁾ and **Col Dr Kizza Besigye v. Attorney General**⁽⁵⁾ were relied on to support the argument that if the election was conducted so badly that it was not substantially in accordance with the law, the election is vitiated irrespective of whether the result was affected.
124. Based on the foregoing authorities, it was submitted that in the Mwense Parliamentary election, the 2nd Respondent became a law and an institution unto itself and so flagrantly flouted the

Constitution and the written election law on elections that in the end it completely subverted the will of the electorate. The Petitioner emphasised that the election was fundamentally flawed.

125. Counsel for the Petitioner then proceed to submit on the election as a process and in so doing relied on the Learned author and former Chief Justice of Ghana in the book 'International Standards in Electoral Disputes Resolution; Guidelines for understanding Adjudication and Resolving Disputes in Elections' and the cases of **Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 Others**⁽⁶⁾ which was cited with approval in the matter of the **Gender Representation in the National Assembly and Senate Advisory opinion**⁽⁷⁾ The gist of these authorities was aptly described by the Court in the Karanja case when the Court observed that:-

An election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral office, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results...The concept of free and fair election is expressed not only on the voting day but throughout the election process... any non compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament"

126. On the aspect of undue influence, counsel referred this Court to

Section 171(C) of the Indian Penal Code which defines undue influence. It was submitted that although the wording of the Indian Penal Code is materially different from section 83 of the Electoral Process Act, the meaning of the said provision was applicable in the Zambian context.

127. This Court's attention was also drawn to the consolidated Indian case of **Charan Lal Sahu and Others v. Giani Zail Singh and Another; Nem Chandra Jain v. Giani Zail Singh, Charan Singh and Others v. Giani Zail Singh**⁽⁸⁾. This was an authority to the effect that the test was whether there was interference or an attempted interference with the free exercise of any electoral right. In addition, the case also clearly defines the distinction between canvassing for votes and undue influence. Further reference was made to Section 83 of the Electoral Process Act which defines undue influence and Section 171A(b) of the Indian Penal Code which defined the electoral right of an elector which was compared with Article 45 of the Zambian Constitution which confers certain political rights on citizens without restriction including the right to vote.

128. Reliance was placed on the Indian case of **Shiv Kirpal Sing v. Shiri V.V. Giri**⁽⁹⁾ which stated that undue influence will be held to have been committed if the elector having made up his mind to cast a vote for a particular candidate does not do so because of the act of the offender and this can only be if he is under the threat or fear of some consequence. It was submitted that it was proved by the testimony of a teacher Mr. Christopher Phiri, that

the first Respondent threatened civil servants in Mwense with dismissal if they supported the Petitioner and this created an impression in the mind of voters that consequences would follow as a result of their exercise of their political choices.

129. It was therefore submitted that from the evidence on the record the illegalities and irregularities committed by the Respondents were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by the 2nd Respondent can in good conscience declare that they do not matter and that the will of the people was expressed nonetheless.
130. The submissions further drew this Court's attention to section 97(2) of the Electoral Process Act which gives this Court mandate to overturn a parliamentary election in appropriate circumstances. Finally, the Petitioner prayed that the results of the Mwense Parliamentary election should be overturned as he had proved that the election was not conducted in compliance with the principles laid down in the constitution and the applicable electoral law.
131. The gist of the Petitioner's pleadings was that the conduct of the Respondents violated the principles of a free and fair election as well as the electoral process set out in the constitution and the electoral laws in this jurisdiction thus impacting the integrity of the election to the extent that the 2nd Respondent could not accurately determine the result that any of the candidates got.
132. The 1st Respondent filed his final submissions on 12th October,

2021. His counsel begun by reiterating the claims upon which the Petitioner's application against him is premised. The 1st Respondent further relied on the evidence adduced during trial and his pleadings before Court.

133. Counsel agreed that the election of a Member of Parliament can be challenged based on the provisions of section 97(2) of the Electoral Process Act. It was therefore submitted that it was the duty of the Petitioner at the hearing of the Petition to show that the 1st Respondent himself and his election or polling agents with his consent or approval were directly involved in any corrupt, illegal or other malpractices as alleged in the Petition. It was argued that in this instance the Petitioner failed to prove this.
134. It was contended that the Petitioner failed to adduce any evidence showing or identifying the 1st Respondent's election agents but merely demonstrated to the Court that other persons who remained unknown, were involved in electoral malpractices.
135. The 1st Respondent then referred this Court to section 2 of the Electoral Process Act for a definition of election agent and polling agent and the case of **Chrispin Siingwa v. Stanely Kakubo**⁽¹⁰⁾ to the effect that an election agent must be specifically stated in the candidate's nomination papers.
136. The 1st Respondent emphasised that the burden of proof in election petitions lies on the Petitioner who must not only prove the allegations of corruption, illegal and other misconduct was committed by the 1st Respondent or his agents, but must do so

to a standard higher than that in other civil matters as held in the case of **Austin Liato v. Sitwala Sitwala**⁽¹¹⁾ and **Brelsford James Gondwe v. Catherine Namugala**⁽¹²⁾ namely to a fairly high degree of convincing clarity.

137. The 1st Respondent added that the Petitioner must then show that as a result of the alleged misconduct the majority of the voters were prevented from electing their preferred candidate as was held in the case of **Mubika Mubika v. Poniso Njeulu**⁽¹³⁾ which was also cited with approval in the case of **Jonathan Kapaipi v. Newton Samakayi**⁽¹⁴⁾.
138. It was further submitted that in addition to proving that the electoral malpractice or misconduct alleged, the Petitioner had the further task of adducing cogent evidence that the electoral malpractices or misconduct were so widespread that it swayed or may have swayed the majority of the electorate from electing a candidate of their choice in accordance with the case of **Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General**⁽¹⁵⁾.
139. It was also argued that the holding of the rally in breach of Covid-19 guidelines is alleged to have occurred in one area of ward where the Petitioner resides. This Court was asked to take judicial notice of the fact that Mwense Consituency is vast and has 11 wards with 60 polling stations. Therefore, even if this Court found that the alleged misconduct was proved by the Petitioner, it could not be said that the same was widespread in

the Constituency and as a result the majority of the voters were prevented from electing a candidate of their choice.

140. Counsel for the 1st Respondent concluded by submitting that the Petitioner had failed to prove his case to the required standard as set in the cases of **Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others**⁽¹⁶⁾ and **Akashambatwa Mbikusita Lewanika and Others v. Fredrick Titus Chiluba and Others**⁽¹⁷⁾ and as established by the governing electoral laws. He therefore prayed that the Petition and the allegations contained therein be dismissed and that the 1st Respondent be declared as the duly elected Member of Parliament for Mwense Constituency. He also prayed that the Petitioner be condemned in costs.
141. In its final submissions filed on the 7th October, 2021, the 2nd Respondent begun by reiterating the claims by the Petitioner against the 2nd Respondent.
142. The 2nd Respondent submitted that it was trite that the burden of proof is always on the person who alleges to prove that all the allegations are true. In so doing referred this Court to the learned author of Phipson on Evidence and the case of **Constantine Line v. Imperial Smelting Corporation**⁽¹⁸⁾ and **Akashambatwa Mbikusita Lewanika and four Others v. Fredrick Jacob Titus Chiluba**⁽¹⁷⁾ and the case of **Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others**⁽¹⁶⁾.

143. The 2nd Respondent submitted that the standard of proof in election petitions is higher than that in ordinary civil matters but not as high as criminal cases which require proof beyond reasonable doubt. In this regard reliance was placed on the latter two cases above to the effect that -:

“Parliamentary election petitions were required to be proved to a standard higher than on a mere balance of probability and therefore in this, where the petition had been brought under constitutional provisions and would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Furthermore, the issues raised were to be established to a fairly high degree of convincing clarity”.

144. This Court was referred to the cases of **Simasiku Kalumiana v. Lungwangwa Geoffrey Lungwangwa and the Electoral Commission of Zambia**⁽¹⁹⁾ and **Simasiku Namakando and Eileen Imbwae**⁽²⁰⁾ in which it was emphasized that witnesses in election Petitions were in different categories and that the Petitions, hinge on the credibility of the witnesses and it is imperative to put strict scrutiny on their credibility. The 2nd Respondent also relied on the case of **Christopher Kalenga v. Annie Munshya and two Others**⁽²¹⁾, which has been alluded to by this Court. The Court was therefore urged to cautiously and carefully evaluate all the evidence adduced by the Petitioner in view of the forgoing authorities.

145. On the allegation that a preferred list of personnel endorsed by the 1st Respondent was the basis of selecting Electoral

officers by the 2nd Respondent, it was submitted that PW2, PW4 and PW8 admitted that the said document can be doctored by anyone with little computer knowledge and that the said document was not on ECZ official or headed paper. Additionally, it was submitted that PW2 admitted that the person who teased him about PF winning and Felix Chupa were both his friends and that it was the Petitioner to make a report to ECZ or the Police. Furthermore, counsel argued that RW4, had testified that her office was the one in charge of appointing polling staff contrary to the allegations by the Petitioner and some of his witnesses.

146. This Court was then referred to Sections, 37, 39 and 41(1) which all provide for the appointment of Electoral and other polling staff. It was thus submitted that all polling staff were appointed by the 2nd Respondent in a transparent and fair manner through the office of the District Electoral Officer as testified by RW4 and in line with the above law. This Court was urged to dismiss the assertions by the Petitioner as they were speculative and not proved before Court.

147. The allegation that the 2nd Respondent Election officials specifically the Presiding Officers routinely voted for/on behalf of illiterate voters far more than the expected acceptable limits, it was submitted that PW3, PW4 and PW8 all accepted that the commission can help the illiterate, aged and the blind to vote and that there was no limit to the same. It was argued that the said witnesses admitted that they did

not know who the voters voted for and did not object to such voters casting their votes. It was further contended emphasising that PW3 admitted that he only visited 3 wards and 9 polling stations.

148. This Court was further referred to sections 64(1), 64(3) and at page 51 of the Elections Officers handbook. It was thus submitted that the Presiding Officers were in order and acting within the confines of the law when they assisted the blind, illiterate and the incapacitated to vote. It was also contended that the said allegation was an afterthought as none of the Petitioner's agents or the Petitioner himself objected to any of the voters casting their votes.
149. The argument that the Petitioner's agents were not allowed into some of the polling stations as alleged by PW3, it was pointed out that both PW3 and PW8 admitted that they did not report the refusal to grant them entry into the polling stations officially to the 2nd Respondent. This is despite the fact that section 64(3) of the Electoral Process Act provides for the same.
150. In concluding the submissions, Counsel for the 2nd Respondent drew this Court's attention to Section 97(4) of the Electoral Process Act. It was therefore submitted that the Mwense Constituency Elections results cannot be nullified by reason of any of the allegations levelled against the 2nd Respondent as the elections were conducted substantially in accordance with the Electoral Process Act and the

Constitution of Zambia. In addition, it was been submitted that the Petitioner has not proved to this Court that the acts or omissions of ECZ affected the said results and that the petitioner has not discharged the burden of proof that election petitions require. It was submitted thus that the Petition be dismissed for being devoid of merit with costs to the 2nd Respondent against the Petitioner.

151. This Petition is premised on Articles **47(2),51,54,68, 72(2)C** and **73(1)** of the Constitution of the Republic of Zambia, as well as sections **81,89,97(1),98(c),99, and 100(2)(a)** of the Electoral Process Act No 35 of 2016 as well as the code of conduct rules,12 and 15(a),(h) and(k)

Article 47(2) of the Constitution provides that:-

Elections to the National Assembly shall be conducted under a first-past-the post electoral system, and in accordance with Article 68

Article 51 stipulates that:-

Any person is eligible for election as an independent candidate for a National Assembly seat if the person-

- a) Is not a member of a political party for at least two months immediately before the date of the election; and**
- b) Meets the qualifications specified in Article 70 for election as Member of Parliament.**

Article 54 further provides-;

A candidate and a political party shall comply with prescribed electoral code of conduct.

Article 68 stipulates that-:

- 1. A Member of Parliament shall be elected in accordance with Article 47(2) and this Article**
- 2. The National Assembly shall consist of –**
 - a) One hundred and fifty-six member directly elected on the basis of a simple vote under the first-past the post system;.....**

Article 72(2) provides that -:

The office of Member of Parliament becomes vacant if the member-

(c) Acts contrary to a prescribed code of conduct;

Article 73(1) provides that:

A person may file an election petition with the High Court to challenge the election of a Member of Parliament.

152. The Petitioner also relied on the electoral Process Act whose relevant provisions can be summarized as follows. Section 81 which deals with bribery prohibits a person from doing any of the things defined under that section which are considered to be bribery by the Act. Section 89 of the said Act further defines other election offences. By virtue of section 97(1) of the Act, the election of Member of Parliament shall not be questioned except by an election Petition presented in accordance with the Act. Section 98 of the Act which the Petitioner also relied on further augments on persons that are allowed to present a Parliamentary election Petition before the High Court. Section 100(2)(a) also clarifies on the filing of an election petition which should be filed with the Registrar of the High Court. Finally,

Section 99 outlines the reliefs that may be claimed by a petitioner who has filed an election petition.

153. As a starting point, in an election petition just as in any civil matter the burden of proof is borne by the Petitioner to prove the assertion of electoral offences complained of. Consideration of jurisprudence in our jurisdiction has settled the standard of proof in election petitions as being higher than that required in ordinary civil matters. The evidence adduced in support of the allegation must prove the issue raised to a fairly high degree of convincing clarity.

154. In the case of **Mwiya Mutapwe v. Shomeno Dominic**⁽²²⁾ it was held that:-

The Petitioner in an election petition, just as in any civil matter bears the burden to prove the election offence complained of. However, the standard of proof in an election petition is higher than that required in an ordinary civil action. The evidence adduced in support of allegation made in an election petition must prove the issues raised to a fairly high degree of convincing clarity. (underlined for emphasis)

155. In the case of **Lewanika and Others v. Chiluba**⁽¹⁷⁾ the Supreme Court stated regarding the standard of proof that:

Parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probabilities....it follows also that the issues raised are required to be established to a fairly high degree of convincing clarity.

156. In another case of **Abuid Kawangu v. Elijah Muchima**⁽²³⁾ it was similarly held that:-

The appellant had to prove the allegation to a fairly high degree of convincing clarity. 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.

157. Having been so guided, I will now proceed considering the Petitioner's claims cognisant of the said standard. I have considered the pleadings filed by the parties before this Court, their submissions and the authorities cited therein.
158. At the outset, I should bring it to the attention of Counsel for the Petitioner that the required standard of proof in a criminal matter is totally different from that required in an electoral petition. Therefore section 171(C) of the Indian Penal Code would in my view require a higher standard of proof and should not be compared to section 83 of the Electoral Process Act whose standard of proof is lower. As such, a comparison of these two sections is inapplicable to this case.
159. From the above it can be deduced that the main question raised by the Petitioner's claims is whether or not the 1st Respondent was validly elected as Member of Parliament for Mwense Constituency and that his election should be nullified. The Petitioner belaboured to show that there was intimidation of voters, an invasion of his privacy and that there were malpractices by both the Respondents which hindered him to campaign freely. I will consider the claims by the Petitioner in turn. For the sake of convenience, I have chosen to begin by

dealing with the third claim of the Petitioner, and proceed to consider the second and first claim together as they are related.

Acts of Intimidation

160. The Petitioner seeks a declaration that acts of intimidation and invasion of privacy affected the Petitioner's ability to campaign freely. The evidence regarding alleged acts of intimidation was adduced by PW1, PW4, PW5 and the Petitioner himself. The Oxford Advanced Learners Dictionary defines 'To intimidate' as **"frighten or threaten somebody so that they will do what you want"**. It was alleged that a motor vehicle with the registration number AAV 8668 parked at PW8's residence and attempted to mount the PF flag there but PW8 stopped them and they drove away. In accordance with the definition of intimidation stated above, PW8 and his team were not frightened nor threatened as the team did not mount the flag but drove away. The other act of intimidation referred to was the threat that PW1 would be transferred or fired if the 1st Respondent won the election, PW1 however showed that he was not afraid of the said threats. He had not seen the said short list of those to be fired or transferred. He was also not threatened by the young man who alleged that he was campaigning against PF because he dared the young man to ring the 1st Respondent.
161. The evidence of PW4 and PW5 was that they were personally intimidated by the PF Cadres who frequently sat on the Petitioner's verandah refusing to leave and talked about how the

1st Respondent was looking after them. PW4's conclusion was that the PF cadres were just there to assess the weakness of the Petitioner and his campaign team. PW5 mentioned two names of the PF cadres as George Bunda and Jackson Mwansa. The said two were not identified as registered agents for the 1st Respondent and it was not proved that they had been sent by the 1st Respondent or that they were acting with the knowledge and consent or approval of either the 1st Respondent or his agents. There was no list of registered agents of the 1st Respondent produced in this case to clarify that George Bunda and Jackson Mwansa were agents for the 1st Respondent.

162. PW8 in his evidence in his evidence claimed that the intimidation by the 1st Respondent was indirectly done, however in this case indirect intimidation cannot constitute intimidation unless it can be proved that it was the 1st Respondent or his agents or others with his knowledge and consent or approval. He further claimed that he was still fearful on the election day but he was able to move freely from Mwense to Kaombe.

Invasion of Privacy

163. According to Merriam- Webster Law Dictionary, invasion of privacy is defined as;

“ the tort of unjustifiably intruding upon another's right to privacy by appropriating his or her name or likeness, by unreasonably interfering with his or her seclusion, publicizing information about his or her

private affairs that a reasonable person would find objectionable and in which there is no legitimate public interest, or by publicizing information that unreasonably places him or her in a false light”.

164. The evidence concerning invasion of privacy was given by PW4, PW5 and the Petitioner, (PW8), attesting that the 1st Respondent and his agents invaded the Petitioner's privacy by coming to his home and sitting on the verandah. The said invasion culminated in the 1st Respondent holding a roadshow at the Petitioner's private residence. The Petitioner added that he captured the whole incident by still pictures and recording which he exhibited as **“CK1”** to **“CK4”** the images captured by the Petitioner of the people and vehicles at his residence but had a roadshow. The 1st Respondent on the other hand vehemently denied ever having held a roadshow at the Petitioner's private residence. The exhibit **“CK7”** and **“CK7(c)”** tendered by the Petitioner, shows a number of people standing outside what appears to be a public area and some shops had names clearly posted on them.
165. This according to the definition above does not constitute invasion of privacy. This in my view is trespassing on somebody's private residence. This can either be a tort or a criminal offence. I will refer to the criminal trespass as defined in the Penal Code in particular section 306 of chapter 86 of the Laws of Zambia.

The Penal Code defines the offence as:-

Any person who-

- (a) unlawfully enters into or upon any property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property;
- (b) having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with intent to commit any offence;

is guilty of the misdemeanour termed "criminal trespass" and is liable to imprisonment for three months. If the property upon which the offence is committed is any building, tent or vessel used as a human dwelling or any building used as a place of worship or as a place for the custody of property, the offender is liable to imprisonment for one year.

I have cited the trespass as a crime to show that if the assertion by the Petitioner that the 1st Respondent invaded his privacy and intimidated him was to be proved, then there should have been a report from the Police. If the Police had taken no action, the Attorney General could have been sued or made a party to these proceedings.

166. On the alleged vehicles that surrounded the Petitioner's house, the Petitioner produced as exhibit "**CK4**" a list of registration numbers of vehicles which were at the Petitioner's residence. PW6 an officer from RTSA confirmed the owners of the said vehicles and the Petitioner conceded that none of them belonged to the 1st Respondent or his registered agents. The Petitioner and his agents did not report this alleged invasion of privacy to the police.

Hindrance to campaign

167. I will now consider whether the acts as alleged by the Petitioner hindered his ability to campaign freely, the evidence of PW1 shows that he neither saw the list nor confirmed the alleged person who was the source of the said information. Further he conceded that neither the 1st Respondent nor his agents approached him to coerce him to vote for the 1st Respondent. This piece of evidence was merely hearsay and to be discounted. PW1 did not hear from the alleged source himself and did not verify the information. Nevertheless, PW1 is still teaching in Mwense District at the time this matter was heard. In my view the alleged intimidation did not hinder PW1 to vote for his preferred candidate of his choice.
168. The evidence of PW2 shows that they were being hindered from campaigning freely even on a date when they just went to donate a ball at Sunshine Primary School. The headmaster at the school approached them to query what they were doing there after PW2 saw a GRZ vehicle pass by and according to PW2 those in the motor vehicle were spying on behalf of the 1st Respondent without clarifying whether the occupants of the GRZ vehicle were sent by the 1st Respondent. Having failed to prove any connections with the 1st Respondent, it cannot be said that the 1st Respondent had hindered them from donating the ball. Further, the headmaster was not called as a witness to clarify these issues.

169. Another complaint that came through the evidence PW2 was that the Police hindered them from carrying out a road safety campaign. If the Police were deemed to be biased towards one political party there was still recourse to table the complaint before Conflict Resolution Management Committee, this was not brought officially to ECZ nor was the Attorney General made a party to this Petition to answer to the said allegation.
170. PW4 alleged in his testimony that Mr. Bunda the neighbour to the Petitioner used to receive gifts from the 1st Respondent and that the people who used to intimidate the Petitioner's campaign team used to go through him. This testimony is not supported by the evidence on the record, neither did PW4 clarify what gifts Mr Bunda was receiving and who were receiving the gifts. There was also no independent evidence or witness to corroborate this testimony to show that Mr. Bunda and others were hindering the campaign of the Petitioner's team if their role was to merely sit on the Petitioner's verandah.
171. There is a claim that from the time the alleged roadshow was conducted at the alleged Petitioner's private residence, the Petitioner was humiliated and rendered incapable of campaigning freely. Further, that his voters from that time abandoned him. It is also noteworthy that the evidence exhibited by the Petitioner did not demonstrate to the Court which picture was depicting the outside of the alleged residence to clearly show that it is a private residential property and not a public place. **CK3(b)** depicts a man on the phone standing at a distance from

a building with a named shop in front of him so do other exhibits **CK3(a)(c)** and **CK3(d)** depict a man on phone near an incomplete building. In his affidavit in reply to the 1st Respondent's affidavit in opposition, the Petitioner did not adduce evidence proving that the place where the 1st Respondent had his roadshow was a private residence but simply averred that he did not recall his family private property being re-gazetted into a public road. This in and of itself does not prove that the pictures were taken from the Petitioners private residence. Nevertheless, assuming it was in fact at the Petitioner's residence the incident complained of occurred, it was on a specific day, in short was an isolated incident. The Petitioner and his agents did not report this incident to the Police or the Conflict Management Committee put in place to handle such matters which could, in my view, have established the conduct of people who invaded his privacy with the clarity as demanded by the law. There is no documentary evidence or otherwise connecting the 1st Respondent to criminal trespass. In other words, the Petitioner took a casual approach in handling this serious allegation.

172. The allegation that the 1st Respondent handed out cash is also not supported by evidence on record neither was it corroborated by any other independent evidence or witness.
173. There was no evidence adduced to demonstrate that a group called GOZA, belonged to the 1st Respondent neither was any member of that alleged group called as a witness for the

Petitioner to prove that they were working for the 1st Respondent. Furthermore, the Petitioner and his witness conceded that they were not personally intimidated by the 1st Respondent or his agents. Therefore the 1st Respondent had no role in hindering the Petitioners campaigns.

174. Finally, still on the issue of being hindered from campaigning, it was also brought to the attention of this Court by both parties that there was a campaign timetable drawn up by the 2nd Respondent. RW4's signature and her name is found on exhibit **"DM4(e)"** Going by the evidence on record, each political party was to campaign in a particular area on the days allocated to them. This entails that the Petitioner was allowed to campaign freely on the days allocated to him and any interference by the 1st Respondent as well as other candidates, the Petitioner was at liberty to report such incidents to the District Electoral Officer which the Petitioner confirmed he did not do. In view of the forgoing, I find the claim by the Petitioner that the 1st Respondent hindered his ability to campaign is not adequately supported by the evidence on the record and therefore I make no declaration to that affect.

Malpractices

175. In relation to the malpractices, the word malpractice is not specifically defined by the Act unless we can deem it to be the misconduct, illegal practice and corrupt practices. By his second claim, the Petitioner asked this Court to declare that the

Respondents Election malpractices invalidated the resultant election and the same ought to be nullified. Section 97(2) of the Electoral Process Act provides that:-

2) **The election of a candidate as 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 tribunal, as the case may be, that-**

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

i. by a candidate or;

ii. with the knowledge and consent or approval of a candidate or 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 the preferred.

176. Allegation of the malpractices by the 1st Respondent, which are alleged to have hindered the Petitioner from campaigning have already been alluded to. For avoidance of doubt, the Petitioner has not proved that the illegal practices or the misconduct were done by the 1st Respondent or with his knowledge and consent or approval, or done by any of his agents. The video recording "CK5" and "CK6" and the images "CK7" do not depict the 1st Respondent or his registered agents. The evidence by the Petitioner did not prove that the alleged invasion of privacy was done with the knowledge and consent or approval of the 1st Respondent. The Petitioner in cross examination by Mr. Mutale

despite this evidence, admitted that he did not make an official report of the malpractices to ECZ. Further that the Petitioner conceded that he did not report the trespass to his property to the Police. The record shows that the 1st Respondent exhibited **"DM3"** which are two distinct documents of reports one to the District Electoral Officer against the 1st Respondent and the other report by PF to the Police dated 9th September, 2021 against another contesting candidate. I have referred to these pieces of documents to show that other parties were reporting cases to the Police freely and/or to the Electoral officers freely, no cogent reasons have been given by the Petitioner for failing to report to any one of the bodies put in place by the State or ECZ.

177. In addition, the 1st Respondent did adduce evidence to the effect that the PF campaigns were organised at different level, namely central committee, provincial executive, district executive, constituency and wards levels. That being the case, Mr Chitotela could have come to motivate PF party members at a different level and not necessarily on behalf of the 1st Respondent but being in the constituency where the 1st Respondent was a candidate had to drum up support for the PF candidate. Further, the video is not clear and no image of the 1st Respondent was identified. More over the Petitioner has not adduced evidence to establish that Mr Chitotela's visit was organised and facilitated by the 1st Respondent.

178. The thrust of the Petitioner's case against the 2nd Respondent was that ECZ committed some malpractices and that the 2nd

Respondent did not conduct the elections in accordance with the Constitution and the Electoral Law in this jurisdiction. The Petitioner further contended that the Mwense Parliamentary Election was fundamentally flawed thus impacting on the integrity of the outcome of the said election.

179. Evidence of alleged malpractices was given by PW3, PW4 and the Petitioner himself. Firstly, it was alleged that the 2nd Respondent had a list of pre-selected polling staff which was compiled with the influence of the 1st Respondent. According to the Petitioner, it was the reason his polling agents were being chased or denied entry at some polling stations. Secondly, that the 2nd Respondent allowed the 1st Respondent to hold rallies without restraint in breach of Covid-19 regulations. Thirdly, that the 2nd Respondent chased the Petitioner's polling agents from some polling stations on the polling day.

180. Explaining further on the list of pre-selected poll staff exhibited before Court as "**CK11**" the Petitioner and his witness have not proved that it was authored by the 1st Respondent or by his registered agents with his knowledge and consent or approval. Although the Petitioner testified that he knew Mr Felix Chupa, he was not called as a witness before Court neither was his computer brought to show that it contained a list of pre-selected polling staff which included Felix Chupa's name and the Petitioner conceded that Felix Chupa did not get any role as polling official for ECZ. None of the people on the list was called as a witness before Court to testify whether or not they were

eventually trained by the 2nd Respondent or appointed as polling staff. Moreover, the author of the said list remains unknown I find it difficult to place reliance on **"CK11"**.

181. About the alleged abrogation of the Covid-19 regulations and the campaign timetable, it has not been proved that the 2nd Respondent was aware about the alleged rally or roadshow held by the 1st Respondent on a day not allocated to him to campaign. The Petitioner did not adduce evidence pertaining to dates and whether other rallies were conducted apart from the road show alleged to be at the Petitioner's residence.

182. It was alleged that the Petitioner's polling agents were not allowed into some polling stations by the electoral staff of the 2nd Respondent. PW3 testified how he was denied entry at Tondo polling station as well as at Ponga and some other polling stations not specifically mentioned. PW4 also alluded to the fact that he was asked to leave Musungampashi polling station without giving him reasons. Nevertheless, the record clearly indicates that the Petitioner neglected/failed to report this irregularity. In addition, section 64(3) of the Electoral Process Act allows an election agent or voter to object to any conduct of an election officer or any other person present at a polling station. Despite this provision, none of the Petitioner's registered election agents lodged any formal complaint. The prudent thing in my view would have been for the Petitioner and his agents to lodge a formal complaint and if no action was taken, produce evidence before this Court of having made such a complaint.

There was no such report or evidence and as alluded to by this Court when addressing the claims against the 1st Respondent, there was nothing hindering the Petitioner and his election agents from following the grievance procedures prescribed by law so that the alleged malpractices could have been addressed there and then.

183. On the allegation of inflation of the votes that the 1st Respondent received, the Petitioner did not call any witness who was present during the counting of the votes. Such a witness could have attested to the number of votes that the 1st Respondent received before they were allegedly inflated by the 2nd Respondent to reflect what was announced as his total votes. This allegation in my view is just an afterthought as there were independent monitors positioned in polling stations.

184. In terms of breach of the Constitution and other Electoral laws, the record shows that the Petitioner did not specify which particular Articles of the Constitution the 2nd Respondent breached. Further review of the Constitutional provisions upon which this application is premised shows that the said provisions do not address the duties of the 2nd Respondent. The role of the 2nd Respondent is clearly articulated in Article 229 of the Constitution. By virtue of Article 229(2) these include inter alia; regulating the conduct of voters and candidates. The Petitioner in his pleadings did not aver that the 2nd Respondent breached this provision of the Constitution.

185. As far as the provisions of the Electoral Process Act are concerned, the Petitioner neglected to specify the sections relied on which the 2nd Respondent breached and in what way they were breached. In addition, PW3 claimed that not all who were being assisted by the polling official were illiterate or blind but did not call any witness to attest to the fact that they were neither illiterate, aged nor blind to require assistance from the polling officials of ECZ.
186. The Petitioner also cited the authorities to the effect that the electoral process is elaborate and begins with registration of voters until the final declaration of the winner. It was incumbent upon the Petitioner, as rightly pointed out in the **Kizza Besigye** cited by the Petitioner, having made reference to the entire electoral process to specify and prove which stage of this process was flawed with evidence to support the assertion. This would have assisted the Court make a determination of whether there was abrogation of the law at any particular stage of the election process. This has not been done in this case.
187. In this case in casu it is clear that the evidence was mainly based on partisan witnesses. The case of **Steven Masumba v. Elliot Kamondo**⁽²⁴⁾ held that:

The evidence of partisan witness should be treated with caution and requires corroboration from independent sources in order to eliminate the danger of exaggeration and false hood.

In the case of **Richwell Siamunene v. Sialubalo Gift**⁽²⁵⁾

It was held that it is incumbent on the Petitioner to place before the Court independent evidence to corroborate and strengthen the testimony of partisan witnesses. This is not only because of the reduced weight attached to their evidence but also because of the higher standard of prove required.

188. In another case of **Christopher Kalenga v. Anne Munshya and two Others**,⁽²¹⁾ wherein Kaoma, J as she was then cited the case of **Nabukeera Hussein Hanifa v. Kibule Ronald and Another**⁽²⁶⁾ approving the following quote-:

In an election petition just like in an election itself each party is set out to win. Therefore the Court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection. It would be difficult indeed for a court to believe that supporters of one candidate behave in a saintly manner, while those of the other candidate were all servants of the devil. In an election contest of this nature, witnesses most of them are motivated by the desire to score victory against their opponents will deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain."

189. On the basis of the foregoing authorities, it is apparent in this case that the Petitioner did not call non-partisan witnesses to augment his case against both Respondents concerning what transpired in the period prior to the election and on the election day itself. The only independent witnesses called by the Petitioner were PW6 and PW7. PW6 from RTSA whose testimony did not support the Petitioner's case because none of the vehicles whose documents were brought before Court belonged

to the 1st Respondent or his agents. PW7 from Zamtel also did not confirm the Petitioners evidence but simply tendered the call record. The Mobile numbers for the Petitioner and the 1st Respondent were not identified by PW7 for this Court to be satisfied that PW4 received a call from the 1st Respondent. PW4 did not attest to the fact that he was familiar with the voice of the 1st Respondent for him to tell the Petitioner that the call was from the 1st Respondent. This fact was also not corroborated by the Petitioner as he did not speak to the 1st Respondent himself to testify positively that it was the voice of the Respondent. It must be remembered that burden of proof rest upon the Petitioner to prove the allegations with the high degree of convincing clarity.

190. I find that no independent witness was called to confirm that the 2nd Respondent chased the Petitioner's agents at some of the polling stations. There was no non partisan witness to testify that the election process itself was flawed, even other candidates in the constituency could have been available to testify.

191. Turning to the first claim by the Petitioner, he is seeking a declaration that the election of the 1st Respondent as a Member of Parliament for Mwense Constituency was null and void ab initio. Section 99 of the Act Provides that:

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

(b) a declaration that any candidate was duly elected

192. Section 99 should not be considered in isolation to section 97(2)(a)(ii) already cited which stipulates that the election of a candidate shall not be questioned. I will only quote the last part of this section(ii) which states that:

"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 the preferred;"

Further, the case of **Steven Masumba v. Elliot Kamondo**⁽²⁴⁾ held that:

The requirement in the current law for nullifying an election of a member of parliament is that a petitioner must not only prove that the respondent had committed a corrupt or illegal act or other misconduct or that the illegal act or misconduct complained of was committed by the respondent election agent or polling agent or with the respondents knowledge, consent or approval, but that he/she must also prove that as a consequence of the corrupt or illegal act or misconduct committed, the majority of the voters in the constituency were or may have been prevented from electing a candidate whom they preferred.

193. In the case of **Zulu v Kalima**⁽²⁷⁾ which involved an appeal on a Parliamentary election petition, the Supreme Court confirmed that burden of proof is three-fold and the Petitioner must establish:-

- i. That corrupt practices or illegal practices were committed in connection with the election.
- ii. That the majority of the voters in a constituency were prevented from electing a candidate of their own choice

iii. It must be proved who committed that illegal act or corrupt practice

In the same case, the Supreme Court also stated regarding the act being widespread that :

“Therefore what was of import in the court below is whether the distribution of chitenge materials was done on such a large scale that the majority of voters in that Constituency were or may have been prevented from electing a candidate of their choice. This is a question of fact based on the evidence”.

194. Under the Electoral Process Act No. 35 of 2016 an allegation of misconduct is proved only where it is shown that it was done by the candidate or their election or polling agents or by someone else but with the candidate or their agent’s knowledge and consent or approval.

Further that under section 97(2) of the Electoral Process Act No. 35 of 2016, it must be found that by virtue of the alleged act, the majority were prevented or were likely to have been prevented from electing a candidate of their choice.

195. The Constitutional Court in the case of **Sunday Chitungu Maluba v. Rodgers Mwewa and Another**⁽²⁸⁾ at page J45-46 quoted WH Smith Concise Oxford Dictionary as to what is meant by “the majority”

“majority is said to be the greater number of a part. It is also pertinent to note that the word is used only with countable nouns. The numerical sense of “majority” has been further elaborated through the use of the term “widespread”..., widespread means widely distributed or disseminated.

196. Applying the above principle to this case, the Petitioner must prove that the malpractice and breaches by the Respondents were on such a large scale or so widespread that the voters in Mwense Constituency were or may have been prevented from electing a candidate of their choice. The question I ask myself in view of the forgoing authorities is whether the said acts complained of were widespread enough to influence the majority of voters of Mwense Constituency from voting for a candidate of their choice.
197. The evidence is clear that most of the acts of intimidation complained of occurred at the alleged Petitioner's residence in Luche ward and through cross examination by Mr. Mutale, the Petitioner confirmed that there were a total of 60 polling stations in Mwense Constituency. Given the testimony of the Petitioner, then this means that the actions of the 1st Respondent would have influenced the voters from the area where the Petitioner was coming from. The Petitioner confirmed further in cross examination, that even in his village he did not receive any votes. It cannot be said that the actions at the Petitioner's private residence influenced the voting public in all 11 wards and at the 60 polling stations.
198. In their testimony the Petitioner and his witnesses PW3 and PW4 mentioned about visiting only the following polling stations; Kaombe, Nkanga, Chiwasha, Kapela, Lute, Pebekabesa, Mwense, Kasengu, Katiti, Kapanga, Tondo, Bundabunda, Lwamfwe, Musungampashi, Mukombo and Kasonge as the stations which

they visited on the polling day, this evidence shows that the Petitioner and his agents visited less than a quarter of the polling stations. This leaves over 40 stations not accounted for. Having visited less than half of the 60 polling stations, the Petitioner in my view did not visit enough polling stations on polling day to establish that the election process itself was flawed to the extent that the 2nd Respondent could not determine the votes obtained by the different candidates.

199. Turning to the allegation that the 2nd Respondent's polling agents were assisting the illiterate voters far more than acceptable limits, the Petitioner has not proved that it was a widespread conduct of the 2nd Respondent. The Petitioner conceded that there were no limits as to the help to be rendered in accordance with the Electoral Process Act, and no voter was called to inform the Court that he/she did not vote because the 2nd Respondent's officers voted for him/her. Further the Petitioner agreed that he was not able to specify what action the 2nd Respondent's agent took that was contrary to the law.

200. In the case of **Raila Odinga and five Others v. Independent Electoral and Boundaries Commission and Three Others**⁽²⁹⁾ the Supreme Court of Kenya held that:-

A Petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the elections was so devoid of merit and so distorted as not to reflect the express of the people's electoral intent and that the evidence should disclose profound irregularities in the management of the election process even though this case has no

binding upon this court it is of persuasive nature and widely cited in our jurisdiction.

201. The alleged irregularities having not been proved, I am of the view that the 2nd Respondent carried out its duty as required of it. In Conclusion, I wish to state that the Petitioner lost the election by a margin of 14,968 votes. In the case of **Poniso Njeulu v. Mubika Mubika**⁽³⁰⁾ the Constitutional Court found that the appellant has not proved any of the grounds to a high degree of convincing clarity and dismissed the appeal. Similarly in this case, I find that the Petitioner's evidence in all grounds did not meet the applicable threshold that is, to a fairly high degree of convincing clarity, that as a result of illegal practices or other misconduct by the Respondents, the majority of voters in Mwense Constituency were prevented from voting for their preferred candidate to persuade this Court that the election of the 1st Respondent ought to be nullified. In short, this is not a proper case for this Court to declare, the election of the 1st Respondent as Member of Parliament for Mwense Constituency null and void. This Petition therefore fails and is dismissed. I accordingly declare that the 1st Respondent David Mabumba is the duly elected Parliamentary candidate for Mwense Constituency as the same did not contravene Section 97 of the Electoral Process Act. The case being an election petition, it is a constitutional matter that involves public interests, I therefore order that each party bears their own costs except for the one

202.

referred herein when the Petitioner and his counsel failed to attend court on 22nd September 2021 without giving reasons. Leave to appeal to the Constitutional Court is granted.

Delivered this 19th Day of November, 2021 at Mansa.

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M.K Makubalo
HIGH COURT JUDGE

