

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



2021/HP/EP/0057

**IN THE MATTER OF: A PALIAMENTARY ELECTION PETITION FOR THE
KANYAMA CONSTITUENCY SITUATE IN THE
LUSAKA DISTRICT OF THE LUSAKA PROVINCE OF
THE REPUBLIC OF ZAMBIA HELD ON THURSDAY,
12TH AUGUST 2021**

AND

**IN THE MATTER OF: SECTIONS 83, 97,98 AND 99 OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016**

AND

**IN THE MATTER OF: THE ELECTORAL COMMISSION OF ZAMBIA ACT
NO. 25 OF 2016**

BETWEEN:

ELIZABETH PHIRI

PETITIONER

AND

**MONTY CHINKULI
ELECTORAL COMMISSION OF ZAMBIA**

**1ST RESPONDENT
2ND RESPONDENT**

Before the Honourable Mr. Justine C. Chanda in Open Court on the 26th
November 2021

For the Petitioner: Mr. N. Yalenga, Messrs Nganga Yalenga &
Associates

For the 1st Respondent: Mr. G. Phiri with Ms M. Phiri both of Messrs
PNP Advocates

For the 2nd Respondent: Mr. F. Sichalwe, Messrs Nkusuwila Nachalwe &
Advocates

J U D G M E N T

Cases referred to:

1. *Lewanika v Chiluba* (1988) ZR 79
2. *Breslsfor James Gondwe v Catherine Namugala Appeal No. 175 of 2021*
3. *Giles Chomba Yamba Yamba v Kapembwa Simbao & Others selected Judgment No. 6 of 2018*
4. *Nkandu Luo v Doreen Sefuke Mwamba selected Judgment No. 51 of 2018*
5. *Chrispin Siingwa v Seanley Kakubo Appeal No. 7 of 2017*
6. *Mabenga v Sikota Wina* (2003) ZR 110
7. *Saul Zulu v Victoria Kalima S.C.Z Judgment No. 2 of 2014*
8. *Khalid Mohammed v The Attorney General* (1982) ZR 49
9. *Wilson Masauso Zu;u v Avondale Housing Project Limited* (1982) 172
10. *Abuid Kawanku v Elijah Muchima Appeal No. 8 of 2017*
11. *Nkandu Luo & Ecz v Doreen Sefuke Mwamba selected Judgment No. 51 of 2018*
12. *Jonathan Kapaipi v Newton Samakayi – Appeal No. 13 of 2017*
13. *Sunday Chitungu Muluba v Rodgers Mwewa & The Attorney General*
14. *Austin Liato v Sitwala Sitwala selected Judgment No. 23 of 2018*
15. *Muhali George Imbuwa v Enock Kaywala Mundia selected Judgment No. 25 of 2018 (CC)*
16. *Mbololwa Subulwa v Kaliye Mandandi selected Judgment No. 25 of 2018*
17. *Mazoka v Mwanawasa* (1005) ZR 138
18. *Barclays Bank (Z) Plc v Frank Mutambo Appeal No. 8 of 2019*
19. *Dean Masule v Romeo Kang'ombe 2019/CC/A002*

Legislation referred to:

1. *The Electoral Process Act No. 35 of 2016*
 2. *The Constitution of Zambia Chapter 1 of the Laws of Zambia*
 3. *The Constitution (Amendment) Act No. 2 of 2016*
1. **ELIZABETH PHIRI**, the Petitioner herein, has presented this petition against **MONTY CHINKULI** and the **ELECTORAL COMMISSION OF ZAMBIA** as the First and Second Respondents respectively in terms of the relevant provisions of the Electoral Process Act, No. 35 of 2016 as set out in the title above seeking to nullify the election of the 1st Respondent as Members of Parliament for Kanyama Constituency. The said election was sought to be nullified on the allegation that the said election was not free and fair but was conducted in an environment characterized by intimidation, undue influence and violence to the detriment of the Petitioner.

2. The petition shows that the Petitioner was a Parliamentary candidate for Kanyama Constituency in the just ended Presidential and General elections held on the 12th August 2021 on the Patriotic Front (PF) ticket. The other candidates were **MONTY CHINKULI** (1st Respondent) of United Party for National Development (UPND), **PETER MUBANGA** of The People's Alliance for Change (PAC), **JIMMY SIMOONGA** of Socialist Party (SP), **MONDE SISHEKANU** of Democratic Party (DP), **LASTON SHONGA** (UNIP) and **MUNASIMENDA KANYAMA** an Independent Candidate. Following the said elections, the Returning Officer declared the 1st Respondent as the duly elected Member of Parliament for Kanyama Constituency. The Petitioner, however, contends that the 1st Respondent was not validly elected on allegations of that made the election not being free and fair.
3. The following were the detailed allegations made against the 1st Respondent.
 - 4.1. *In John Laing and Chibolya compounds, the UPND had set up camp and were terrorizing and beating persons clad in PF regalia.*
 - 4.2. *In Chibolya compound in Harry Mwanga Nkumbula Ward, the Police recovered offensive weapons from a UPND cadre alias "CONCRETE" which had been used in the beating and terrorizing of people in the constituency.*
 - 4.3. *In Chibolya compound, as soon as the Petitioner's vehicle was sighted, suspected UPND cadres would pelt it with stones and hound her and her campaign team out of the compound thereby denying her the opportunity to campaign.*
 - 4.4. *At all polling stations, mobs of the UPND supporters were heard threatening persons in the queues waiting to vote that they would beat any identified Patriotic Front supporter.*

- 4.5. *At all polling stations, hordes of UPND supporters surrounded the polling station and many were hanging from windows flashing their party symbols (thereby denying the voter the privacy to secretly cast their vote) and chanting party songs in full view of the Police and the Electoral Commission of Zambia (ECZ).*
- 4.6. *Sometime around 4th August 2021, in Kanyama ward 13, a group of UPND supporters attacked the PF camp in a vicious attack that left two PF members namely Danny Chingangu and Enock Mwale dead. The property of the PF was also damaged and the attack left the members of the community and would be voters traumatized and many feared to go and vote on the 12th August 2021.*
- 4.7. *During the attack that left two PF members dead, Enock Mwale was stabbed at the PF campsite in Kanyama Ward. A report was made to the Police.*
- 4.8. *In Linda compound, UPND attacked PF foot soldiers that were conducting door to door campaign in Munkolo Ward 15. One of the campaign members namely Rapheal Mambwe suffered grievous bodily harm.*
- 4.9. *On 30th July 2021, a member of the PF called Geoffrey Chitoti was beaten upon being identified as a PF member in Makeni Villa and both his hands and one (1) leg were broken. The matter was reported to the Police.*
- 4.10. *The degree of violence perpetrated by the UPND was severe that on 2nd August 2021, the 2nd Respondent saw it fit to once again ban the UPND from conducting campaigns in Kanyama.*
- 4.11. *On the polling day at Twashuka polling station, one Yalenga Juba the Campaign Manager for the Petitioner was accosted and robbed of phones, car keys, National Registration card*

and his motor vehicle registration number ADC 6255 was extensively damaged when the crowd tried to overturn it. A report was made to the Police. This event greatly traumatized the PF supporters many of whom left in fear of suffering the same fate.

4.12. On the polling day at Bayuni School in Munkolo ward 15, the PF polling agent by the name of Peter Sinonge was badly beaten by the UPND cadres within the precincts of the polling station in full view of the police and other voters and was only released when he was beaten to a bloody pulp. Voters in the queue were warned and intimidated that they would suffer similar fates if they were identified as voting for the PF.

4.13. Throughout the constituency, homes of the known PF supporters and sympathizers were attacked and broken down. The house of Mr Enock Mwale, Mr Mawili Daka PF ward Chairperson for Kanyama and Mr Brighton Bilumba candidate for the councilor in Kanyama ward were all destroyed by the suspected UPND cadres causing fear and consternation among the PF supporters many of whom left the constituency in fear for their lives.

4. On the basis of the above allegations, the Petitioner sought the following reliefs:

5.1. A declaration that the election was null and void ab initio;

5.2. costs of and incidental to this Petition-

5.3. such declaration and Order as this Honorable Court may deem fit.

5. In his Answer supported by an affidavit verifying facts, the 1st Respondent confirmed having been such candidate together with others

and that he emerged victorious after polling 57,452 votes whilst the Petitioner polled 38,564 votes. The 1st Respondent however denied the allegations of his party's leadership having issued any call on its membership to protect their votes and not to leave the polling stations and of mounting road blocks. He further denied all the allegations of violence, intimidation and assertions that as a result of violence the majority of the voters were prevented from voting for a candidate of their choice. He averred that if the same were committed it was without his knowledge, approval or consent or that of his election agents. He stated that in fact it is the United Party for National Development (UPND) that suffered confusion at the hands of the Patriotic Front (PF) and atrocities at the hands of the Police.

6. The 2nd Respondent in its answer and affidavit verifying facts deposed to by one **KRYTICIOUS PATRICK NSHINDANO** the Chief Electoral Officer denied all the allegations and put the Petitioner to strict proof thereof. It was averred that during the course of the election period, it never received any alarming notices regarding malpractice and it executed its mandate professionally and diligently, thus the said elections were validly held in accordance with the provisions of the law.
7. At trial the Petitioner testified in her own right and called eight (8) other witnesses. PW1 was the Petitioner herself who stated that she was a 61 years old business lady and a resident of Plot 18997, Off Parliament Lane, Lusaka. PW1 confirmed that she was a Petitioner in respect of Kanyama Constituency and also confirmed the results of the election and that the 2nd Respondent had declared the 1st Respondent as the winner. She stated that the 2nd Respondent on 12th May 2012, allowed parties to start their campaigns, and she immediately put foot soldiers in place and established 54 campaign centres having one major centre with 53 satellite centres. That the purpose of the centres was to ensure the foot

soldiers had a place to go back to, for meals and do postmortem of the campaigns.

8. Her testimony was that the leadership of the United Party for National Development Party (UPND) had issued instructions to its membership that they had to strictly guard the votes to an extent that even when they voted they should not leave the polling stations and possibly escort the results to the totaling centre. Following those instructions, on the voting day, the UPND were really vigilant and strict with any vehicle heading to the polling station. During that time the UPND openly chanted their slogans and intimidated people going to vote.
9. PW1 then testified that at Twashuka, the motor vehicle for Mr. Juba Yalenga, her Deputy Campaign Manager was searched and almost overturned and he lost his National Registration Card, voters card and keys and the said motor vehicle was also damaged. She complained that these happenings were in all the polling stations during voting day. She recounted that violence in Kanyama was rampant and the police received a number of reports of injuries and deaths of two (2) of their members. She stated that the violence in Kanyama intensified to an extent that the PF lost two of its members and the 2nd Respondent had to suspend the UPND campaigns in Kanyama because of the violence. That the police recovered dangerous weapons from **CONCRETE** a UPND cadre who was in remand.
10. That these experiences instilled fear in the would be voters and others voted under stress and people who came with the view of voting for PF ended up voting for UPND. PW1 lamented that considering all the happenings in Kanyama she expected the 2nd Respondent to cancel the Kanyama Parliamentary election because it was marred with violence and the deaths of the two PF members was in public domain which

violent acts she stated continued during and after the election, and a number of people had lost properties, freedom and some were forced to leave Kanyama. It was her further testimony that the UPND was suspended from campaigns twice, the first suspension covered both the PF and UPND which was later lifted. The second suspension came after the death of the two PF members which arose from the UPND attack on the PF camp. The said suspension of the UPND campaigns in Kanyama Constituency was published in print media, social media as well as television. I was referred to the 2nd Respondent's Media Release dated 2nd August, 2021 on the said suspension appearing at page 28 of her Bundle of Documents. The Petitioner repeated that she thought the second suspension would coincide with the cancellation of the elections for Kanyama Constituency.

11. In testifying on happenings in John Laing and Chibolya, the Petitioner explained that the UPND had set camp in John Laing compound where they were intimidating the PF supporters during campaigns and on the actual day of the elections. She testified that when she had sent her officials to buy charcoal, her vehicle was stoned and an axe was thrown at the back of the vehicle, the stones and the axe went through the rear window, thank God there were minor injuries and the persons who were in the vehicle rushed to the police and reported the matter. The axe and stones were recovered and kept as exhibits. Her testimony on happenings in Kanyama ward 13 was that her supporters were beaten and taken to the hospital and most have not yet recovered and the death of two who died happened in Kanyama Constituency at one of her campaign centres.
12. The Petitioner also recounted on the violence that occurred in Linda Mukolo ward 15 to the effect that according to the report she received, her foot soldiers went into campaign and met their UPND colleagues,

they greeted and passed. The road the PF used was a crescent as such they met their colleagues again on the same road and that was when the UPND regrouped and beat up the PF supporters. On events in Makeni villa, she explained that that according to the report that was received, one of her supporters was badly beaten, however, she only came in contact with the him when she was considering how to best render assist and support.

13. On happenings at Twashuka polling station, the Petitioner explained that she was only informed by **MR YALENGA** her Campaign Manager that they had been harassed and attacked and also that the incident had been reported the Police station. She explained that on the polling day she got a report from Bayuni School that one of her supporters was beaten by the UPND and was only left when he was bleeding heavily, which incident was reported to the police and received medical attention at Kanyama Hospital. The Petitioner further testified that she was informed that at the time of His Excellency President Hakainde Hichilema's road show in Kanyama, the PF's ward office and the Los Angels PF command centre were destroyed by the UPND.
14. The Petitioner referred me to page 1 of her supplementary bundle of documents a photo of the destruction of her Motor vehicle a Pajero which was branded in the PF campaign colour and portraits of herself and Dr. Edgar Chagwa Lungu showing a broken rear window of the said motor vehicle. She stated that the car was axed but she never saw the 1st Respondent commit these violent acts and cause death. Nevertheless, she was of the view that every UPND supporter was an agent of the President, Member of Parliament, Mayor and councilor responding to the instructions from the UPND, and the 1st Respondent was on the UPND ticket. Further she went on to state that it was in public domain that the President His Excellency Hakainde Hichilema had given instructions to

every UPND supporters to be an agent and guard the elections and protect the vote.

15. In concluding her testimony, the Petitioner expressed that these violent acts intimidated people not to vote and others changed their minds and voted otherwise. She went on to lament that as a country that upholds democracy, these elections could not be said to have been free and fair, especially, that the UPND were suspended twice. She further expressed a desire to set a precedent and uproot the spirit of violence so that the people know that where there is violence they will not benefit from it. She further testified that there are six (6) wards in the constituency and violence was happening in almost all the wards. And that intimidation and violence would not bring about a democratically elected government and as such the 2nd Respondent ought not to have deemed these elections as being free and fair because of the violence.
16. In cross examination by Mr. Phiri, the Petitioner confirmed that UPND won elections in all the wards and no councilor contested the seats and also that the difference was about 18,888 votes between her and the 1st Respondent. She conceded to the fact that the instruction to guard the election and being vigilant were not illegal and also that prior to the Polling day the Zambia Army and Zambia Police were deployed on the streets of Lusaka to enforce law and order. PW1 further conceded that the Police were in Kanyama on the day of the election. She also conceded not having any Police Report to support her allegation of road blocks in Kanyama. After being referred to Zambia Police Report dated 12th August, 2021 on the things that were lost on page 30 of her bundle of documents, she confirmed that the only item that was lost was the National Registration Card. The Petitioner became evasive when it was put to her that the Media Release by the 2nd Respondent did not say that UPND was suspended because of violence. However, she confirmed that

the said media release did not name any individual but just the party. It was also her testimony that the PF did not have any membership cards, however, it had a system of identifying its members.

17. The Petitioner also confirmed that the first suspension of the 15th July, 2021 was for both PF and UPND as a result of violence. Nonetheless, she would not confirm whether or not the PF was involved in the said violence because she was not present. When the Petitioner was asked if she was there when the people were being intimidated to vote otherwise, her response was that she was not there and could not produce names of the said people, as she voted in the mid-morning at Twashuka in Kanyama ward after which she went back to her place within Kayama ward. On the dangerous weapons that were recovered by the Police and a person called **CONCRETE**, the Petitioner explained that she did not know the actual names of the said **CONCRETE**, whom she was not sure whether or not was in prison. After being tasked by counsel, she could not present any proof that the said **CONCRETE** was a UPND member. On the incidences of John Laing it was established that there was no Police Report and also that she did not know the persons who had attacked her motor vehicle because she was not in the vehicle at the time of the attack and that no police report had been presented before court regarding the attack.
18. On incidences of Kanyama ward 13 she said that a number of medical reports had been produced on the said incidents. It was established that the medical report on page 26 of her bundle was for a Road Traffic Accident and throughout her testimony there was no mention of an RTA and also that the medical report on page 27 of her bundle was not signed by any medical doctor. She explained that Road Traffic Accident was for one **ADAM PHIRI** however the said report had no narration of any sort. On the report that she received from Bayuni school concerning an attack

on one of her monitors, she stated the said monitor was not named because she was not present when he was attacked and there was no police report regarding the same before court. It was further, established that there was no police report regarding the damage occasioned to the PF centres when President Hakainde Hichilema had a road show.

19. She then testified that the blame for all these incidents should be on the UPND and that the 1st Respondent was connected to the said incidents but she would not know if the UPND had agents. When referred to the Candidate Detail Declaration Form on page 12 of the 1st Respondent's Bundle of Documents, PW1 admitted that **JUSTINE KABWE** was the official agent and conceded that she did not produce the proclamation of President Hakainde Hichilema urging all UPND supporters to protect the vote and be vigilant. The Petitioner was referred to the Record of Proceedings at the Totaling of votes – National Assembly on pages 1 to 10 of the Respondent's Bundle of Documents and confirmed that there were 201 polling stations in Kanyama and that she only won in 33 of the said polling stations although she insisted her desire to nullify the elections.
20. In her further cross examination by Mr. Sichalwe, the Petitioner testified that she was aware of a procedure of reporting malpractice and the powers of the 2nd Respondent in dealing with reports of malpractice. She was referred to a Media Release on the suspension of the UPND by the 2nd Respondent on page 28, in line with the said media release the Petitioner stated that she was happy with the said decision of the 2nd Respondent. She testified that she was happy to proceed with the elections after the first suspension, however, after the second suspension she expected the cancelation of the election. And also that she is not before court merely because she lost the election. Subsequently, it was established that the 2nd Respondent's second suspension was never appealed against and that she was not sure if her campaign manager

had made the report to 2nd Respondent. She confirmed being aware of the 2nd Respondent's duties and confirmed that the decision as to whom the voters would vote for, was outside the scope of those duties. Finally PW1 expressed ignorance of the fact that the absence of the PF agent's signatures on the Gen20 did not affect the validity of the election results.

21. In re-examination the Petitioner stated that an agent was one that was specified on page 12 of the 1st Respondent's Bundle of Document. She also confirmed that the Candidate Details Form (Part B) on pages 13 and 14 of the 1st Respondent's Bundle of Document contain names of persons with a duty to support the agents. She explained that the army presence during election was necessitated by violence. I was referred to a Zambia Police Report showing that one **YALENGA JUBA** of Garden Park lost an NRC on page 30 of her bundle and as such he could not vote without an NRC. She testified that the Medical Report on pages 26 of her bundle was produced for a person whom was run over by a vehicle and that the report had the requisite police stamps and signatures. She further testified that the said **CONCRETE** was always in the UPND party regalia and cheering at campaigns, she went further to state the **JUSTINE KABWE** was not the only person who was campaigning for the 1st Respondent.
22. **PW2** was **GEOFFREY CHITOTI** aged 27 years old an unemployed youth of unknown House number in Kanyama. His testimony was that he was campaigning for the PF Parliamentary candidate in Kanyama Constituency and his role was putting up campaign posters. He stated that on the 31st July, 2021 whilst he was putting up campaign posters for the PF in Kanyama but without knowledge, they were surrounded by the UPND cadres wearing their party regalia labeled 'Bally'. That these were familiar faces he used to see in the compound who then started stoning him and his colleagues forcing his colleagues to disperse. He

remained behind and they started beating him up using planks and stones, he fell unconscious. When he woke up he found himself in University Teaching Hospital with bandages on his back, hand and head as had sustained internal injuries on his back. He was in the hospital for three (3) days and after being discharged he went home. He reported the incident to Buma Branch where he was working and never reported anywhere else because he did not know where else to report the matter. He stated that he did not know the whereabouts of the attackers and was not certain whether or not the police were looking for them. He then narrated that when he was beaten and taken to the hospital by an ambulance, he was issued with a medical report appearing on page 27 of the Petitioner's Bundle of Document which was issued at Kanyama Police. And finally that as a result of the incident he did not cast his vote.

23. In cross examination by Mr. Phiri, PW2 stated that he was no longer using crutches but insisted that he knew that the people who assaulted him were UPND. He confirmed that he was stoned and beaten on the 31st July, 2021 and fell unconscious, only to wake up in the hospital. That his younger sister and brother were the ones who picked him up and took him on the wheelbarrow to the police to get a medical report form and then to Kanyama clinic and finally to the University Teaching Hospital. He testified that he regained his consciousness at UTH around 03:00 hours and confirmed that the medical report was issued on the 31st July 2021. He was referred to a Medical Report at page 27 of the Petitioner's Bundle of Document and argued that the said report was stamped on the 30th July, 2021. That although there was something wrong with the date, the injuries he sustained were correct.
24. In further cross examination, PW2 was referred to the Medical Report on page 27 of the Petitioner's Bundle of Document which was showing injuries he sustained and explained that the incident was reported to the

police by the person who picked him up and admitted that the said medical report was silent on his broken hands. He said the plasters were put on him the other week. He confirmed that the people who beat him up wore red regalia, some wore labelled caps and shirts. He also stated that he was a registered voter though he could not vote as a result of the foregoing incident. However, he conceded that he never brought proof of registration. Finally PW2 stated that he gave the report to the Petitioner and insisted he was working for the PF and not the Petitioner and he was actually paid by the chairperson of the PF.

25. In his further cross examination by Mr. Sichalwe, PW2 conceded that he never reported his attack to 2nd Respondent.
26. In reexamination, PW2 explained that his name was written in the report and the details in the Medical Report were recorded by the Police Officer, and denied the plaster of paris were put on him on the 20th September 2021 in readiness for court.
27. **ENOCK MWALE** a 40 years old Businessman of House No. E426 of Wusakile Township, Kitwe was **PW3**. His testimony was that he traveled from Kitwe to Lusaka to be part of the PF campaign team for Kanyama Constituency. He used to deliver T-Shirts, Chitenge materials and stickers to different wards within Kanyama. He explained that soon after the campaigns started the PF and the UPND were suspended. But after the suspension on 30th July, 2021, whilst eating with his colleagues in Kanyama, they saw the UPND people surround them. They started kicking pots, forcing them to run away, as they were running away he felt like a stone had hit him in the back and two of his colleagues fell down and he ran a further 200 metres. And asked one of his friends to check what had happened to his back, and discovered that he had been stabbed with a knife his intestines were outside.

28. He was taken to the hospital and the wound was stitched but he did not recognize any of his assailants. Two of his colleagues remained on the ground and were hit and stabbed with a knife and eventually died. He said he did not know their names but they were commonly known as **SHIPUNDU** and **KABOMBA**. That the attackers were wearing berets and shirts written "*Bally*" and were shouting "*Zambia Forward*". PW3 reported the matter to the Police and was issued with a Medical Report of which he took the original to the police and kept the photocopy in the house which was stolen together with household goods when his house was broken into by the UPND youths. PW3 produced a photograph showing wounds on page 18 of the Petitioners Bundle of Documents and he explained that he took the photo on the day of the stabbing. He testified that after learning that his house had been broken into and the people wanted to kill him he moved back to Kitwe. Finally that he had registered and voted in Kanyama Constituency but after the killings in Kanyama, people were afraid and his wife and in laws left Kanyama and they did not vote.
29. In cross examination by Mr. Phiri, PW3 confirmed that both the PF and the UPND were suspended for violence. PW3 failed to explain why the photo he produced is dated 29th July when he was stabbed on the 30th July, 2021 on page 18 of the Petitioner's Bundle of Document. He also admitted that it was difficult to tell who the person in the picture was because there was no facial impression. He explained that he was stabbed whilst running along Mutanda Bantu Road and stopped after 200 metres from the PF camp and asked his friend to take the said picture. In the case of the two (2) people who died, PW3 admitted that he did not see the stabbing and the incident was reported to the police not by him. He confirmed that his house in Garden Park was broken into and the medical reports were lost on the 14th August 2021 and the incident was reported to the police by a **BASHI JAMES** as he was not

around having had left for Kitwe on 12th August, 2021 and that he never mentioned any attacker in his evidence.

30. In his further cross examination by Mr. Sichalwe, when asked if a formal complaint on the stabbing and breaking in were brought to the attention of the 2nd Respondent, PW3 stated that these incidences were reported by the party but would have to find out from the secretariat if there was a report given.
31. In re-examination, PW3 the witness testified that he had another photo showing his wounds with a clear facial impression which was taken by his friend when he had stopped running.
32. **BRIAN CHISANGA** a 41 years old Aluminum Fitter of house number 49/63 John Laing, was **PW4**. His stated that both him and the Petitioner were members of the PF of which the Petitioner was the Parliamentary candidate for the Kanyama Constituency on the PF ticket while he was a foot soldier. As foot soldier his role in the campaigns included the distribution of campaign materials and collection of data on the PF membership in the constituency. He narrated that he was a foot soldier for 89 days up until the eve of the elections and was deployed in Harry Mwanga Nkhumbula and Kanyama wards. That he had been a resident of Kanyama for a number of years and had also worked in Kanyama Constituency as a foot soldier before in 2016 elections. In the 2016 he had worked well with the UPND supporters then because they came from the same church with most of them, the Seventh Day Adventist. However, in the last elections he saw a lot of people who were not from Kanyama among them he knew **CONCRETE** commonly known as the Commander, who was the leader of the UPND youths in Kanyama, but did not know his real names.

33. PW4 then narrated on the violence that occurred in Kayama on the the 30th July, 2021, after finishing with his duties in Kanyama ward and returned to the centre for lunch. He stated that whilst sitting with his colleagues waiting for lunch, he was shocked by the rain of stones and a group of UPND people carrying with them different weapons, who surrounded them and this sent the people at the camp to scamper into different directions. He managed to run away up to his home in John Laing and upon reaching home he received a call that two of his PF colleagues had been killed. Later in the evening he received a message that **CONCRETE** had been arrested in Matero in connection with the said attacks. According to the post which was circulating in the media, at the time of his arrest **CONCRETE** was putting on a Zambia National Services uniform with a portrait of President Hakainde Hichilema and besides him was a machete, axe and other implements. He testified that all these happenings left him intimidated and scared, forcing him to relocate and abandon his engagement as a foot soldier and he did not know where his family was, but he said he continued to campaign using social media as a foot soldier.
34. PW4 referred to a photo dated 29th July, 2021 and identified the body of **DANNY** one of the deceased being taken to the mortuary on page 19 of the Petitioner's Bundle of Document and to another photo of the said deceased showing his injuries on page 20 of the Petitioner's Bundle of Document. On page 21 he identified a photo showing the burial procession of the deceased persons and to a photo showing the weapons which were allegedly found in possession of **CONCRETE** at the time of his arrest. He explained that after the violence and death of the two people, the PF members were scared and intimidated to go and vote, however, those who had courage to vote found the UPND team who did not move from the polling station and remained standing by the windows intimidating PF supporters. He went further to state that after the

elections the people said they did not vote. He explained that one of the other things that intimidated the people was that when his Excellency Hikainde Hichilema had a road show on Los Angeles road the PF branch office was damaged and also in Chibolya the UPND had damaged the PF office which increased fear in the people.

35. In cross examination by Mr. Phiri, PW4 confirmed that 104,242 votes were cast in Kanyama Parliamentary elections which was the highest in the country. However, he stated that the registered number was higher than those who voted, and the reason was because the people were afraid, but could not remember the precise number of those who never voted as he only met the said people on the road. He indicated that he did not learn of these thing whilst in hiding and that he was in hiding from 30th July, 2021 till the date of election but he was no longer in hiding after elections. Then he stated that at the time of hiding he was using social media that was how he knew of the intimidation and fears of the people. He also testified that his family was squatting with his in laws.
36. PW4 stated further that **CONCRETE** was called commander however the he had never been a member of the UPND thus would not know the position **CONCRETE** held in that party but he always wore the UPND regalia although he could not produce any document or photo because his phone got burnt. He confirmed that he never saw **CONCRETE** kill anyone but witnessed him beat up women as he was the ring leader. On which version was correct considering in one breath he narrated he was running for his life and in another he was watching **CONCRETE** whip women, PW4 said he only started running after the violence got tense. That although these events happened on the 30th July, 2021 the photos produced were dated 29th July, 2021 but he did not know how the document was prepared.

37. PW4 then confirmed that UPND was banned on the 2nd of August 2021 and the PF continued with their campaigns unhindered, although he continued campaigning on social media platforms such as WhatsApp and Facebook. He conceded not bringing any proof to support his testimony regarding the destroyed PF offices on Los Angels Road and Chibolya and also that he was only informed of these events. Although he confirmed that the UPND supporters never left the polling station, PW4 however, expressed ignorance as to whether a voter was precluded from witnessing the counting of votes. Finally, PW4 denied producing any photo or picture of the said **CONCRETE**, however, stated that there was something on the social media.
38. In re-examination, PW4 explained that the UPND cadres remained at the polling station from the time of voting up to the counting of votes.
39. **EVERISTO BWALYA** a 35-year-old businessman of House No. 5/38 John Laing Kanyama testified as **PW5**. He stated that the campaigns leading up to the Kanyama Parliamentary elections were not free and fair and that his role in the said campaigns was to drive a PF branded motor vehicle and also putting up campaign stickers for the PF candidates in the elections being the Presidential candidate Dr. Edgar Chagwa Lungu, the Petitioner who was candidate for Kanyama Parliamentary Constituency and the mayoral candidate.
40. PW5 then testified that on the election day he went to vote, he woke up at around 04: 00 hours, had his NRC, driving licence, wallet and a K150. When he arrived at Harry Mwanga Nkumbula Polling station he found about thirty (30) people in front of him in the queue. He was number thirtyone (31) and a group of people came who and asked him who were behind him and he answered that there was no one. They told him that he was not supposed to be on the queue and was searched and they got

his wallet but they continued harassing and in fear he ran home and never went back to vote. He explained that he did not know the people who harassed him but were chanting '*forward*' slogans for the UPND. He stated that he never went to the police because he was scared at the time there was a lot of violence in Kanyama. He further explained that before he ran away from the polling station, there were people on the windows who were harassing people and chanting '*forward*' and asking people who were coming out of the polling station whom they had voted for and those who said they voted for the PF were beaten.

41. In cross examination by Mr. Phiri, PW5 admitted that he had not brought any evidence to support his assertion that he was attacked and items were taken away from him and also that he never brought proof that he was a registered voter. PW5 also admitted that he had not named any individual who harassed him and confirmed that he never reported to any of the police officers at the polling station, what had happened to him. PW5 testified further that he never named any person who was beaten or harassed on that day. He admitted that a vote was secret and one would not know whom the other had voted for and also that he never heard anyone disclose that they had voted for the PF or any other party for them to be beaten. He further stated that his harassers were chanting '*forward*' and to him everyone who chanted '*forward*' was UPND and that after being harassed he ran away as such he did not know whether the voting continued.
42. In cross examination by Mr. Salubeni, PW5 admitted knowing the roles of the 2nd Respondent which included issuing of voters cards and guiding parties during election campaign period. He confirmed that the elections were conducted in line with the stated rules. He also confirmed that the 2nd Respondent had allowed them to campaign peacefully but at some point they were stopped and they were not the only party that was

stopped. He also stated that after being harassed and his NRC taken away from him by the suspected UPND cadres, he never reported the matter to the 2nd Respondent. He then admitted that the information in his testimony was never brought to the attention of the 2nd Respondent because he was not aware that he ought to have reported and also that he would not know whether the 2nd Respondent conducted the election in accordance with its constitutional mandate.

43. In re-examination, he testified that the parties which were stopped from campaigning were PF and UPND. He went on to state that after being harassed he ran away and only stopped at a distance with hope of getting his items back, that was when he witnesses people coming from voting being asked whom they voted for by the UPND cadres who were in the windows, and if they said PF they were harassed and beaten.
44. **PW6** was **VENUS CHITOTI** a 20-year-old, Part-Time Teacher of house No 49/89 Kanyama. Her testimony was that on 30th of July, 2021 around 15:30 hours as she was resting at home, she was informed that her brother (PW2) had been brutally beaten by the UPND cadres. She immediately rushed to Mbasela within Kanyama and found her brother unconsciously laying on the ground with deep cuts on the head and there were a lot of people watching who told her that he had been beaten by the UPND cadres. Thereafter, she rushed to get a wheelbarrow and took him to Kanyama Police where she reported the matter. Later he was taken to Kanyama Level one Hospital, where they cleaned his wounds and from there she left and her father is the one who remained at the hospital. At around 21:00 hours the father called her and told her that PW2 had been referred to the University Teaching Hospital where he was put in the Intensive Care Unit. On the 31st of July 2021 they operated on his arms and legs and put bandages and he was also put on wood sticks to support his legs. On the 3rd of August 2021, he was discharged

and given the 6th of August 2021 as the date for review and on the 16th August 2021 he was put Plaster of Paris (POP) on his arms and legs. She further testified that PW2 was a Patriotic front youth who was still recovering.

45. In cross examination by Mr. Phiri, PW6 stated that PW2's testimony that he sustained injuries on the 30th July 2021 may have been because he was unconscious following the attack on him. She conceded to the fact that she did not mention names of the people who informed her about PW2's injuries and the party they belonged to. She agreed that the most logical thing to do was to rush the injured person to the clinic and not police. PW6 recalled that when the people who were helping her carry PW2 got tired, she went to get wheelbarrow and took him to the police. She confirmed that the Plaster of Paris were put on PW2 on the 16th August, 2021 and that PW2 had no position in the PF but was a cadre in the employment of the PF. However, she did not know who employed him but all she knew was that he used to get some money.
46. In her further cross examination, PW6 stated that she was the one who reported the incident to the police and after being referred to a medical report on page 27 of the Petitioners Bundle of Documents, PW6 stated that she could not give the Police Officer the names of the attackers because she never saw them and also that she was not aware of any injuries to PW2's hands. She denied telling the police that PW2 had a painful right leg but confirmed that her statement was reduced into a report. PW6 further confirmed that PW2 was in the Plasters of Paris because of the injuries of the 30th of July 2021 and his hands were broken, however she conceded that there was no proof as to when the Plasters of Paris was put on him.

47. In her further cross examination by Mr. Sichalwe, PW6 admitted that she never reported what had happened to PW2 to the 2nd Respondent. PW6 was not re-examined.
48. **PW7** was **MIRRIAN LUMAI**, aged 41 years old, unemployed of old Kanyama unknown house number within Lusaka. She testified on what happened to (PW2) her son. She narrated that on 30th July 2021 she took PW2 to Kanyama clinic and was referred to the University Teaching Hospital at around 21:30 hours they reached the University Teaching Hospital was put in ICU. The following morning, after paying K520.00 PW2 was taken to the theater but they were advised that the Plasters of Paris could not be put on him because his legs and hands were still swollen. That was how he was put on wooden sticks for support and a bandage was put on him. That he regained consciousness around 14:00 hours and he was discharged on the 3rd of August, 2021 and the 6th August, 2021 was given as a date for review. On the said 6th of August 2021 PW2 was examined and X -ray was done on him. On the 16th August 2021 he was taken for a second review and the Plaster of Paris were put on him, on the 10th September 2021 he was taken for a subsequent review and they were given 29th September 2021 as a new date for review. She stated that PW2 was staying with her and he was still ill.
49. She further narrated that PW2 was a PF supporter and on the fateful day, had gone for a meeting and putting the campaign stickers. While at home one **ABBY** told her that PW2 had been beaten by a group of people wearing UPND regalia. She testified that the Plasters of Paris could not be put on PW2 immediately upon reaching the hospital because of the swelling of the legs and hands, thus, was only put on 16th August, 2021. It was her position that she did not see the person who beat up PW2 but

was only informed by the people who were present and ABBY that he was beaten by the UPND cadres.

50. In Cross examination by Mr. Phiri, PW7 stated that the statement to the police was made by PW6. She testified that PW2 was taken from the Police to the hospital by herself, PW6 and her other son Alex. She went on to state that PW2 was beaten by UPND people because they were wearing UPND regalia though no membership card was ever produced by the said informants.
51. **GREGORY KABWE KASANDA**, a 39 years old Businessman of House No. 66 John Laig Compound, Lusaka came in as **PW8**. He stated that he was a foot soldier doing door to door campaigns in Kanyama Constituency. That on the 30th July 2021, him and his colleagues were in the field distributing campaign materials in Kanyama ward ten (10) in Kanyama Constituency, and were clad in Patriotic Front regalia. In the course of the said exercise they decided to rest at the Patriotic Front ward branch, while waiting for the food and then they saw UPND youths in the company of **CONCRETE** the youth commander who was chanting forward, and charged in their direction, PW8 did not realize that this UPND group was large and before realizing **CONCRETE** and his group started kicking the food and beating the women who were cooking.
52. PW8 testified that the UPND youths were armed and the whole PF camp dispersed in different directions and that was how he ran behind the ward into the road and followed it to its end. He was then followed and they caught up with him and hacked him with a panga on the head. He was also hit with an iron bar on the forehead and other person one had a sharp instrument who wanted to stab him in the heart but managed to block it by using his left hand and in the process his finger was injured,

thereafter he fell to the ground, them thinking he was dead and that was how they left him.

53. He further narrated that after the situation calmed a bit and there was silence, he crawled and hid himself and later moved and got the motor vehicle and went to the hospital where he was attended to and his wounds sutured after which he went home. The following morning, he woke up very swollen that he could not go to the Police and in the evening at around 18:00 hours he went back to the hospital where he was admitted for 2 days. His stitches were removed and they cleaned the wounds.
54. PW8 went to state that he only managed to go to the police on the 5th August, 2021 when he could see. At the Police he gave his statement and explained that from the attackers he only knew **JOHN BANDA** commonly known as **CONCRETE** who was the UPND youth Commander. He stated that before he reported the matter the two of the persons he was with in the ordeal namely Danny and Davy died in the said violent attack. I was referred to the photos showing the said deceased person on pages 19 to 21 of the Petitioners Bundle of Documents. I was subsequently referred to his Medical Report dated 5th August 2021 on page 6 of the Petitioner's Supplementary Bundle and a photo of his swollen face and cuts on the head on page 8 of the said Bundle. He continued to testify that during the campaign period there was violence in Kanyama Constituency from the time the 2nd Respondent declared the campaigns especially when the PF and UPND met. Later, the 2nd Respondent banned the campaigns in Lusaka Province for PF and UPND but shortly the said ban was lifted and both parties were allowed to hold their campaigns and roadshows but the violence continued. Before long, the UPND was banned because of the violence and the President even deployed the Zambia Army to maintain order and peace. He ended by stating that him and his PF colleagues

were always scared and feared meeting the UPND and were always careful in their movements.

55. In Cross examination by Mr. Phiri, PW8 stated that **CONCRETE**'s real name was John Banda and the gentleman was well known on the streets, and the reason the Petitioner did not name him by his real name in the Petition maybe because she may not have known him. He stated that he was attacked between 14 hours and 16 :00 hours by six people who were clad in the UPND regalia though he named only one of those. He further stated that though he did not see their membership card, he knew that they were UPND because of the regalia. He conceded to that he was not familiar with UPND constitution in that he would not know whether there was a position of Youth commander in the UPND constitution.
56. He was referred to a medical report on page 6 of the Supplementary Bundle where he confirmed getting the said report after six days of the alleged injury and that according to the report there were only two injuries occasioned to him. He further confirmed that there was nowhere in the report or in any document before court showing that he was swollen or naming the person who attacked him. He was referred to his photo on page 7 of the Supplementary Bundle where he confirmed that the photo was not dated and the sister who took it was not named. He was referred to photos of the two deceased persons on pages 19 and 20 of the Petitioners Bundle, where he stated that pages 20 and 19 are photos of Danny, after which it was put to him by Counsel that the caption on page 19 was GIFT, which he also confirmed. He insisted to have known the two deceased persons very well.
57. PW8 stated that he had been friends with the two deceased persons even before the campaign started and that they were just youths in the PF

without any positions and that two were killed on the day of the attack. He confirmed that he never reported any incident of violence to the police. He confirmed that after the UPND were banned the PF continued with their campaigns which included road shows. He testified that the reason behind the first ban was violence however he stated that UPND was not banned because of violence. He confirmed that the UPND went to the PF branch where they were resting and waiting for food and also that after he ran away, he was followed by his assailants, of whom he only recognized **CONCRETE** of his attackers.

58. In his further cross examination by Mr. Salubeni, PW8 confirmed having good interaction with the 2nd Respondent however, he stated that he could still have brought them to court if they did not do things in a free and fair manner. It was established that a request for cancellation of election was the job of the candidates and that there was no proof of any correspondence to the 2nd Respondent on the alleged violence. He also stated that had the Petitioner won, he would not have sued the 2nd Respondent however, he denied coming to court because the Petitioner had lost the elections. He further confirmed that after the UPND was banned from campaigning in Kanyama the PF continued with its campaigns. It was his testimony that the 2nd Respondent conducted the elections in Kanyama Constituency in accordance with the law and that he had no problems in getting his voters card.
59. In re-examination, PW8 explained that the election were not free and fair because they were characterized by violence.
60. **EMMANUEL MWANZA** a 27 years old, a general worker in the Industrial area and resident of house number 14/25 Chibolya was **PW9**. He testified that there was violence in Linda, Minkolo ward and also that he was a foot soldier for one and half month for the PF. He stated that in

July 2021 him and his colleagues were sticking posters and distributing campaign material for the PF. On their way to Linda they met UPND members who were sticking their party posters, at that junction. PW9 and his colleagues were in a Toyota Land Cruiser and they requested that they needed peace and they were allowed to pass but it did not occur to them that the road they were on was a crescent. They proceeded to their Centre and collected regalia, then started distributing in Mukolo ward in groups of four. As they started going to Barclay, they did not know that the same UPND were in front of them and others were behind, at that point they were surrounded and they asked for peace and perceptively, they were granted passage but as they started moving one of the person on the Motor Vehicle was pulled and they started beating him with golf sticks and planks. Upon seeing this they did not stop, as they had no protection. When they reached their centre they called and informed their leader, the Campaign Manager a **MR BANDA** on what had happened after which they were advised to leave the place. They went back using another route to pick the ones who had been left behind again they found the UPND cadres in front of them who started stoning them and since the cruiser was quite loaded, people started falling off the motor vehicle and in the process a window was broken. Luckily, they managed to escape, after a short period the police officers came, however, he could not know any of the person who attacked them but all he said was that they wearing UPND regalia and were sticking UPND posters while chanting UPND slogans "*we need change!*" "*Bally will fix*". He said that all UPND members were candidates' agents.

61. He continued that they waited for the Police to come and that was when they left, and that people were beaten and hurt. I was referred to a photo showing a person with a bruise on the elbow on page 12 of the Petitioner's Supplementary Bundle and stated he continued that some of the people who were hurt include **EVERISTO** on the right and **ANDREW**

KANYANGA in the green Zambian Jersey, on the said photo. He said that as a result of violence in Kanyama between political parties' people were never free in the community. He also stated that he was a registered voter and that he cast his vote from Amadea Polling station in Kanyama ward. He narrated that when he went to vote, he failed to vote nicely because there were a lot of UPND members at the Polling Station chanting their party slogans and known PF supporters like himself were chased from the queue.

62. It was his further testimony that **JOHN BANDA** alias **JOHN CONCRETE** and himself came from the same compound, he stated that the said **JOHN** used to make people chant "*forward*" whenever he found them and whosoever refused was beaten. That **JOHN CONCRETE** was involved in the death of the two Patriotic Front foot soldiers namely, **DAVY** and **DANNY** and the Police picked up the dead bodies and proceeded to apprehended **CONCRETE** in Chibolya compound where he was found with dangerous weapons such as bayonet, Panga, Knives and also a telephone. I was referred a photo showing the said weapons and the military uniform he was wearing at the time of his arrest, PW9 said that those were the weapons JOHN would use when he wanted to attack someone. He ended his testimony to the effect that **CONCRETE** was in Chimbokaila Prison.

63. In Cross examination by Mr. Phiri, PW9 confirmed that there was violence in July though he could not remember the dates and that he only identified the attackers through the regalia they wore, though, he could not take a shot of the said UPND cadres in their regalia. He also confirmed only producing one photo of one injured person, the same being on page 12 of the Petitioner's Bundle of Documents which he stated was taken when they went back to centre. He went on to state that the photo for the broken driver's window was lost. On proof for his

statement *'that everyone in UPND was the agent of the candidates'* he stated that he did not bring any proof as he relied on President Hakainde Hichilema's social media statement.

64. PW9 denied breaking into the UPND Mundachi camp and knowing where it was but subsequently, testified that Mundachi camp was in Harry Mwanga ward but later expressed ignorance as to the location of Mundachi camp. He confirmed having challenges voting at Amadea due to the UPND cadres and having brought it to the attention of the Polling officer as well as the Police who was managing the queue. Accordingly, to him the Army and Police were only deployed after the violence persisted and that there was violence on the election day and the cadres were harassing voters, because they were chanting UPND slogan *'Bally will fix it!'* and *'forward'* and to him anyone who was chanting these slogan was UPND. He also confirmed that the person in the photo on page 20 of the Petitioner's Supplementary Bundle was **JOHN CONCRETE** arrested in line with violence in Chibolya. When it was put to him that the person he referred to as **CONCRETE** was arrested five (5) days to elections in Matero on charges not connected to the deaths of the **DAVY** and **DANNY**, he expressed ignorance.
65. PW9 further testified that he was present at the time of the attacks and the matter was reported to the Police. He explained that he was not present when **DAVY** and **DANNY** were killed on the 30th of July 2021. He was referred to page 22 of the Petitioner's Supplementary Bundle and tasked to show the court the writings *"HH do or die"* on the panga, which he could not and said that his friend had a clearer photo where the words were visible. He stated that the PF cadres were peaceful and merely victims of the UPND. He then admitted that he never told the Court that he was doing door to door campaign.

66. In re-examination PW9 stated that the photo on page 20 of the Petitioner's Supplementary Bundle was showing a person wearing UPND regalia. He explained that foot soldiering is a door to door campaign, he went further to state that he did not take UPND photos because they were many while PW9 and his colleagues were only thirteen (13). That marked the close of the Petitioner's case.
65. The 1st Respondent testified as RW1 who was a 57 years old Member of Parliament for Kanyama Constituency. His testimony was that the call on the people to be vigilant was meant for them to protect their votes and not engage in any violent acts. RW1's testimony was that during the campaign period leading up to the 12th August, 2021 him, his agent and 15 supporters who accompanied him on the nomination day did not engage in acts of violence or intimidation against the PF or members of the public. He stated that his agent was **JUSTINE KABWE** as per Electoral Commission of Zambia Information Declaration Form showing the candidates and their agents on page 12 of his Bundle of Documents. RW1 went on to state that the fifteen (15) supporters were indicated in the Candidate Confirmation Form and the Particulars of the fifteen (15) supporters on page 13 of his Bundle of Documents.
66. RW1 denied allegations of mounting illegal road blocks at polling stations to search all vehicles heading to polling stations for pre marked ballot papers. He went on to state that Kanyama Constituency was heavily guarded by the Police and Soldiers and the road blocks were under their control.
67. RW1 stated that him and his agent never took part in any of the incidents of violence that were specifically pleaded by the Petitioner. He explained that rather it was the PF who were attacking the UPND. He

further, stated that if indeed any of the incidents alleged took place he was not aware and sympathized with the Petitioner.

68. On allegations of UPND supporters chanting their party slogans on windows, threatening and intimidating electorates at polling stations on the Poll Day, RW1 firstly, stated that he was not aware of these incidents. Secondly, that electorates would be alone in the booth while voting and a vote was a secret as such he did not see how one could be intimidated and threatened by people outside the booth to change their decision. Lastly, he stated that Polling Stations were heavily guarded by the police and it was not possible for such to happen.
69. On offensive weapons that were allegedly recovered on a suspected UPND cadre named **JOHN CONCRETE** in Harry Mwanga Nkumbula ward. He explained that him and his agents were not aware of this incident and the said **JOHN CONCRETE** was not his agent and was not even in his campaign team. He stated that he had never met the said CONCRETE only learnt of him in the course of this matter.
70. He refuted all allegations of violence on the Poll Day and testified that he voted from Twashuka at about 11:00 hours and that it was calm with no sign of violence, that was how he went back home believing all was well.
71. RW1 also testified that campaigning in Kanyama was a nightmare, all his posters and banners were pulled down by known PF cadres. If the UPND were found sticking posters were beaten and went on to explain that these matters were reported to the Police but they were never pursued. His further testimony was that in fact he never campaigned in Kayama because after the campaign period was opened in June, the following day the 2nd Respondent banned roadshows in Lusaka. After removing that ban, it issued another ban on UPND not to campaign in Kanyama.

72. In cross examination by Mr Yalenga, RW1 stated that the persons who were sticking posters for him were not his agents or the fifteen (15) supporters but the other UPND people. He confirmed that these people are the ones who were subjected to violence at the hand of the PF. He confirmed that a **CHIKOTI** was injured by an alleged UPND cadre and that Kanyama a hot bed of violence. He also confirmed that the violence was between the UPND and the PF. He further confirmed that the manner in which the election campaign was conducted was a nightmare. He testified that as a result of the violence between the PF and UPND the 2nd Respondent, firstly, banned roadshows, then banned the UPND from campaigning in Kanyama for loss of life of two alleged PF supporters.
73. RW1 stated that some people who were campaigning for him were never appointed by him, but the party. He further testified that he was aware of the attacks on the UPND by the PF and that the same were reported to the police, but stated that he was not aware that the UPND were retaliating as they had instructions not to retaliate.
74. In re-examination, RW1 explained that Kanyama was a hot bed of violence because the UPND were butchered and victimized by the PF. That marked the close of the 1st Respondent's case.
75. **DANNY MULANGA CHIBIMBA** a 41 years old of House No. 182/52 Makeni, Lusaka and a Director of Social Services for Lusaka City Council was RW2. He stated that in April 2021 he was the returning officer for Kanyama Constituency for the 12th August, 2021 and his roles included , facilitating for nominations, training poll stuff, drawing up the campaign time tables with the political parties and managing the election. That he was appointed Returning Officer in April 2021 before the dissolution of Parliament and was still in that capacity as they were still unresolved issues.

76. On the suspension of political parties in Kanyama constituency. He started by explaining that during the campaign period, there were committees such as Conflict Management Committees which were set up to resolve conflicts. When committees were unable to resolve the matter, the cases were referred to the 2nd Respondent. RW2 testified that he was asked by the District Electoral Office (DEO) to go into the constituency to inquire from the residents whether they had experienced any violence. The findings were that there had been a confrontation which led to the loss of lives. He relayed the information to the District Electoral Officer which was in turn relayed to the 2nd Respondent, which proceeded to suspend the UPND from campaigning in Kanyama as per media statement on page 28 of the Petitioner's bundle.
77. On happenings on the Poll Day, he testified that on the 11th of August, 2021, he deployed staff to conduct elections which included the Presiding Officers, Polling Assistants, ushers and uniform staff. On 12th August, 2021 Polling Stations were open at 06:00 hours. That they were a number of complaints, most of which were operational challenges, such as, inadequate space to accommodate electorates at Hill View Polling station. However, there were no reports of political malpractice, the only complaint he received was from the UPND that the poll staff had opened the boxes where the ballot papers were without the presence of others, every ballot box was then verified and the issue was resolved.
78. He explained the process after the poll, that the presiding officers managing the stations would make an announcement that the polls have closed. Thereafter they would start counting the votes cast in presence of the stakeholders, after which the results were announced publicly. The results would be entered in the Election Announcement Form, then they were taken to the Totalling Centre where they would be received by the Returning Officer. Then the Presiding Officer would announce by going

polling station to polling station. Thereafter they would be entered in the totaling sheet which would be put on the Projector that everyone in the Totalling Centre could follow. During the process they would share provisional results was printed and signed page 1 of the Petitioner's Bundle of Documents.

79. Finally, RW2 testified was that the PF had one of their members present, a **MR. JUBAH** an election agent for the Petitioner who was sharing a table with a UPND agent, who witnessed all the proceedings. However, he did not know why **MR. JUBAH** did not sign the declaration of results, but according to law that could not invalidate the results if the same was signed by Returning Officer.
80. In cross examination by Ms. Phiri, RW2 confirmed not bringing any document to show the investigation he conducted. He also confirmed that from 2nd August, 2021 the UPND were not allowed to campaign until the election. He testified that on the Poll Day every polling had at least two police officer. RW2's position was that during campaigns he only received one complaint of violence which was from the UPND. However, on the Poll Day there were no complaints of violence.
81. In his further cross examination by Mr. Yalenga, on the allegations of violence in Kanyama Constituency, RW2 confirmed collecting information from the residents and relaying it to the D.E.O on the confrontation at the PF camp in Mutandabantu Mukwa area between the UPND and the PF, in which two allegedly PF members died.
82. On suspensions of political parties, RW2 stated that it was the Dispute Resolution Committee that reported the violent incidents to the 2nd Respondent, following which PF and UPND were banned so as to create a peaceful environment for others. On the second ban, he confirmed that

the two PF members were killed under gruesome circumstances and information was relayed to the 2nd Respondent who took action by instituting investigations and suspending the culprits. He testified that even after suspending the UPND violence continued in Kanyama Constituency. He confirmed that the violence in Kanyama was too much that police could not have managed that they called the army. He further confirmed that according to the 2nd Respondent's answer in paragraph (i), it never received any report of violence. He stated that he had been an election official in the years 2006, 2008, 2011, 2021 and that he had never experienced such an environment. He stated that the duty to ensure a free and fair environment was on all stakeholders but more on the 2nd Respondent.

83. In re-examination, PW2 testified that after the suspension of the PF and the UPND there was a reduction in the levels of violence. On the allegation that the PF was attacked by the UPND at their camp in Mtandabantu, he explained that it was a confrontations and not an attack per se which appeared to have started from some other place and just moved to Mutandabantu area with the people involved, as such was the case with the confrontations between PF and the UPND.
84. At the close of the hearing, all the parties expressed their desire to file written submissions which they did. I now proceed to summarize their arguments and submissions.
85. It was submitted on behalf of the Petitioner that the election of the 1st Respondent fell to be nullified as the conduct of elections in Kanyama Constituency fell short of the constitutional requirement of a free and fair election and was an affront to the tenets of democracy. Such a submission was premised on the alleged failure of the 2nd Respondent to conclude its investigations prior to the elections which would have

informed it that the violence in Kanyama was not conducive for the holding of elections.

86. The Petitioner's main contention was that the elections sought to be nullified were marred in violence including murder. I was therefore urged to determine whether the numerous acts of violence were sufficient to warrant the nullification of the Kanyama Parliamentary election. Even then, the Petitioner and her legal team were cognizant of the standard of proof required and referred to the case of **LEWANIKA V CHILUBA**⁽¹⁾ where the Supreme Court held as follows:

“as part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability.”

87. I was also referred to the provisions of Section 97(2)(a) & (b) and (4) of the Electoral Process Act No. 35 of 2016 in so far as it provides the grounds upon which an election petition may be nullified. It was, therefore, submitted that the violence in Kanyama constituted a valid ground upon which the said elections could be nullified.
88. The Petitioner then focused on the evidence of RW2 to the effect that the ECZ followed a scale of the levels of violence which informs the remedial measures to be taken. In this case it was pointed out firstly that due to the violence in Kanyama, both the Patriotic Front (PF) and the United Party for National Development (UPND) were suspended. Despite the initial suspension of both parties, violence in Kanyama did not abate and culminated in the killing of two (2) PF cadres at a PF camp. In this regard, the communiqué issued by ECZ was referred to which found that UPND had perpetuated the violence and was subsequently suspended.

Finally, I was also urged to take into account the fact as testified by RW2 that violence did not end but was more or less present right up to election day.

89. To reinforce her submission, I was referred to the provisions of Section 55 of the Electoral Process Act which enacts as follows:

“A general election shall be held in accordance with the constitution, this Act and as may be prescribed.”

90. I was then referred to Article 45(2) of the Constitution of Zambia in which it provides as follows:

“(2) The electoral process and system of administering elections shall ensure-

(a) that elections are free and fair;

(b) that elections are free from violence, intimidation and corruption.”

91. It was therefore contended that the evidence of violence and intimidation was not contradicted and that the presence of the army to maintain law and order was not in accord with the tenets of holding free and fair elections. It was then argued that the second suspension of the UPND following the murder of the two (2) PF cadres did not result into the cessation of violence. As such it was submitted that the murder of supporters was a greater intimidatory conduct of an opposing political party.

92. Although it was acknowledged that the 1st Respondent may not have caused the violence, it was nonetheless submitted that the provisions of Section 97(2)(b) were applicable irrespective of whether the 1st Respondent knew or consented to it. It was thus submitted that the

election fell to be nullified because the ECZ failed to invoke the provisions of Section 56 of the Act to postpone the election on account of the violence which made it impossible to conduct a free and fair election. This was so on the basis that Section 97(4) of the Act empowers the Court to nullify an election where the act complained of was the failure by an election official in breach of their official duty.

93. To augment their submission, it was pointed out that in the 1st Respondent's testimony, he had described the degree of violence in Kanyama as being a nightmare. That UPND were victims of the violence by PF was dismissed as no evidence was led to that effect but rather that both parties were equally involved in the violence.
94. While the imposition of a ban on UPND was recognized, it was however submitted that such ban fell short of an ideal democratic election that ensured a free and fair election devoid of violence and intimidation. It was pointed out that the Chief Electoral Officer was a custodian of the conduct of elections in Zambia who had undertaken investigations following the murder of the PF cadres. It was, however, lamented that the findings or conclusion of the said investigations was awaited up to date hence the prayer to nullify the election of the 1st Respondent.
95. In the case of the 1st Respondent, it was submitted that the Petitioner had failed to prove that the alleged illegal acts were committed by the 1st Respondent or his election agent and I was urged to dismiss the petition with costs for want of any merit. Emphasis was placed on the burden and standard of proof required as laid down in the cases of **LEWANIKA V CHILUBA⁽¹⁾** and that of **BRELSFORD JAMES GONDWE V CATHERINE NAMUGALA⁽²⁾** wherein the Supreme Court held as follows:

“The burden of establishing any one of the grounds lies on the person making the allegation and in election petitions, it is the Petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions namely a fairly high degree of convincing clarity.”

96. It was pointed out at the outset that the Petitioner grounded her case on allegations that the alleged violence was committed by “suspected” UPND members or supporters or by “unknown persons” and as such the Petitioner failed to prove to the requisite standard that the alleged violence was linked to the 1st Respondent or his officially appointed agents. On that score I was urged not to annul the elections as prayed on the authority of **GILES CHOMBA YAMBA YAMBA V KAPEMBWA SIMBAO & OTHERS**⁽³⁾ where the Constitutional Court held as follows:

“We have already stated above that an election can be annulled on the strength of one incident of corrupt or illegal practice or misconduct provided that, under Section 97(2)(a), such is attributable to the candidate or his duly appointed agent with their knowledge and consent or approval and the majority of the electorates were or may have been prevented from electing a candidate they preferred; or if it is an allegation pursuant to Section 97(2)(b) on non-compliance, cogent evidence must be proffered to show that the results were affected. That is the new threshold.”

97. The thrust of the 1st Respondent’s submission is that the Petitioner’s grievances is against acts or omissions committed by “suspected” UPND members or supporter or by “unknown persons” which falls far short of the applicable standard of proof required in election petitions of proof to a fairly high degree of convincing clarity on the basis of the decisions in

the **LEWANIKA V CHILUBA⁽¹⁾** and that of **BRELSFORD JAMES GONDWE V CATHERINE NAMUGALA⁽²⁾**. On that score it was submitted that the election of the 1st Respondent could not be annulled based on allegations against unknown persons who in any event are not in any way connected to the 1st Respondent or his officially appointed agents.

98. I was further referred to the cases of **GILES CHOMBA YAMBA V KAPEMBWA SIMBAO & OTHERS⁽³⁾** and that of **NKANDU LUO V DOREEN SEFUKE MWAMBA⁽⁴⁾** which cases underscores the need to prove the misconduct or malpractice committed either by the candidate or their appointed election or polling agents or for acts committed by other people with their knowledge, consent or approval. The above cases also underscore the fact that not everyone in one's political party is one's election agent as election agents have to be specifically appointed.
99. It was thus stressed on the authority of **CHRISPIN SIINGWA V STANLEY KAKUBO⁽⁵⁾** that none of the Petitioner's witnesses named the 1st Respondent or his election agent Justine Kabwe as perpetrators of any of the allegations contained in the petition. Similarly, it was submitted that there was no evidence showing that the 1st Respondent or his election agent were aware of the attacks complained of as required by the provisions of Sections 83 and 97(2) of the Electoral Process Act.
100. And finally, my attention was drawn to the learned authors of Halsbury's Laws of England, 5th Edition volume 38A where they opine at paragraph 667 as follows:

"No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate election rules if it appears to the tribunal having

cognizance of the question that the election was so conducted substantially in accordance with the law as to elections, and that the act or omission did not affect its results. The function of the Court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the result was affected."

101. And in the case of the 2nd Respondent, it was submitted that the elections were conducted in accordance with the provisions of the law and therefore the declaration of the 1st Respondent as being duly elected was valid. On that score I was urged to dismiss the petition with costs as the Petitioner lamentably failed to discharge her burden to prove her allegations to a fairly high degree of convincing clarity. Reliance was then placed on the cases of **LEWANIKA V CHILUBA⁽¹⁾**, **MABENGA V SIKOTA WINA⁽⁶⁾** and that of **SAUL ZULU V VICTORIA KALIMA⁽⁷⁾** which cases affirm both the burden and stand of proof required in election petitions.

102. After setting out the provisions of Section 97 of the Electoral Process Act as is relevant to factors that are to be proved before an election can be annulled, I was quickly reminded of the role of the 2nd Respondent as established under Article 229 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 as follows:

"(1) There is established the Electoral Commission of Zambia which shall have offices in provinces and progressively in districts.

(2) The Electoral Commission shall:-

- a) implement the electoral process;*
- b) conduct elections and referenda;*
- c) register voters;*

- d) settle minor electoral disputes as prescribed*
- e) regulate the conduct of voters and candidates;*
- f) Accredited observers and election agents as Prescribed;*
- g) delimit electoral boundaries; and*
- h) perform such other functions as prescribed..."*

103 From the above provisions of the Constitution, it was pointed out that in the performance of its functions, the 2nd Respondent was wholly guided by the Electoral Process Act including its schedule thereto the Electoral (Code of Conduct) Regulations of 2016. It was then pointed out that the Petitioner never filed any complaint or report to the 2nd Respondent in terms of the provisions of Regulation 12 of the Electoral (Code of Conduct) Regulations 2016 which provides the procedure where misconduct or malpractice has been noticed as follows:

- "1. The following persons may lodge a complaint to the Commission in relation to an election:*
 - a) a voter or candidate in a constituency where a breach of this code has been committed or*
 - b) from a political party participating in an election*
- 2. Complaints arising during election campaigns and elections may be made to an election officer or to a conflict management committee at the place where the conduct complained against occurred.*
- 3. The Commission may refer and report any violation of the Code to the Zambia Police Service, Anti-Corruption Commission or any other appropriate law enforcement agency for investigation and prosecution where appropriate."*

104. Given the failure by the Petitioner or any of her witnesses to report or make a formal complaint to the 2nd Respondent, it was submitted on that failure that it was unreasonable to assert that the perceived inaction on the part of the 2nd Respondent rendered the election *null and void obinitio*. It was, nonetheless, the position of the 2nd Respondent that it acted at all times in accordance with the regulations and as such it was submitted that there was no basis let alone the authority on which the 2nd Respondent would have cancelled the elections as contended by the Petitioner in view of the provisions of Regulation 11 of the Electoral (Code of Conduct) Regulations 2016 which provides *inter alia* as follows:

"1. The Commission may:-

- a) reprimand a political party, candidate or stakeholder for any conduct in violating this code;**
- b) report a breach of this Code to the Zambia Police Service, Anti-Corruption Commission and Drug Enforcement Commission or any other relevant law enforcement agency;**
- c) revoke the accreditation of election agents, polling agents, monitors, observers or the media where it is necessary in the interest of public safety and security to do so; and**
- d) impose any administrative measures on any person, candidate or political party for persistent breach of this code."**

105. In relation to the testimony of RW2, it was submitted that where reports were received the 2nd Respondent conducted investigations and metted out administrative sanctions as was the case with the suspension of UPND from conducting all manner of political campaigns on 2nd August

2021. It was pointed out that the Petitioner in her cross examination even expressed her happiness with the decision the 2nd Respondent took.

106. Strangely, however, it was contended that the Petitioner now u-turned on the decision she was happy with and wanted the election cancelled and yet she did not appeal the 2nd Respondent's decision in terms of Section 111 of the Electoral Process Act. On that basis, it was submitted on behalf of the 2nd Respondent that this petition was an afterthought as the Petitioner never engaged the 2nd Respondent prior to the election concerning the alleged electoral misconduct and malpractice.

107. Finally, I was referred to the provisions of Section 36(2) of the Electoral Process Act which enacts as follows:

“The absence of an election or polling agent from a gazetted or prescribed place where an electoral proceeding is being conducted shall not invalidate those proceedings.”

108. It was, therefore, submitted that the absence of the name and signature of the PF polling agent on the declaration of results form was inconsequential and neither was it pleaded or evidence led showing that the announcement or declaration of the results was irregular in any way. Thus, it was submitted that there was no proof of any impropriety or incompetence on the part of the 2nd Respondent regarding its conduct during the course of the polling day which as testified by RW2 was generally ordinary.

109. I have carefully considered the Amended Petition, the Answers, the Replies to the Answers, the evidence before me and the arguments and submissions of Counsel. It is always a convenient starting point to remind oneself the sacred principle on which civil law is founded which

is that whoever asserts facts which constitute the cause of action bears the burden to prove those issues.

110. This principle is well established and the debate was settled by the Supreme Court in 1982 firstly in the case of **KHALID MOHAMED V THE ATTORNEY GENERAL**⁽⁸⁾ when Ngulube DCJ, as his Lordship then was, opined at page 51 as follows:

"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanity or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly, a defendant in such circumstances would not even need a defence."

111. And in the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED**⁽⁹⁾, Ngulube DCJ, again observed and reiterated at page 175 thereof as follows:

"There is one observation I wish to make before leaving this subject. Mr. Phiri's general approach has been to allege that the respondent had not adduced evidence in support of the allegations in the dismissal letter. I have found that the respondent did in fact adduce such evidence. In the process, however, I have also pointed out the deficiencies in the appellant's own evidence. It appears that the appellant is of the view that the burden of proof lay upon the respondent and it is on this that I would like to say a word. I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove

those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case. As we said in Khalid Mohamed v The Attorney General, quite clearly a defendant in such circumstances would not even need a defence."

112. It follows, therefore, that the Petitioner and not the Respondents, or any one of them, bears the burden to prove her allegations contained in her petition. Although election petitions are civil matters, the yardstick required in proving the same is much higher than the mere balance of probabilities. Here again, I draw from the wisdom of Ngulube CJ, as he then was, when he held on behalf of the full bench of the Supreme Court in the case of **LEWANIKA & OTHERS V CHIBUBA**⁽¹⁾ at page 169 as follows:

"As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore, that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of Constitutional power and authority, no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."

113. Since then, the Supreme Court remained steadfast and consistently asserted both the burden of proof and the standard of proof at every opportunity it had. For example in the case of **MICHAEL MABENGA V SIKOTA WINA & OTHERS**⁽⁶⁾ the Supreme Court observed as follows:

“An election petition is like any other civil claim that depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a mere balance of probability. Issues raised are required to be established to a fairly high degree of convincing clarity.”

114. From the evidence, I find as a fact and there is no dispute that the Petitioner and the 1st Respondent together with five (5) others were aspiring candidates for the Kanyama Constituency Parliamentary elections slated for the 12th August 2021 which elections were conducted and managed by the 2nd Respondent. I also find as a fact that after the said elections, the 2nd Respondent declared the 1st Respondent as the duly elected Member of Parliament having polled **57,452** votes while the Petitioner polled 38,564 votes and came out second.
115. I also find as a fact that both the PF and UPND had initially been banned by the 2nd Respondent from campaigning in Lusaka which ban was subsequently uplifted. I further find as a fact that lives of two (2) people were lost and other people were injured during an alleged clash between the PF and UPND. As a result of the death of the said two (2) people UPND was again banned by the 2nd Respondent from conducting election campaigns of whatever nature. I equally find that the Zambia Police together with the Army and the Zambia National Service were deployed in all the constituencies in Lusaka in a bid to maintain law and order.
116. The issue that falls for determination, however, is whether or not the Petitioner has proved to the requisite standard that the alleged violence or intimidation was perpetuated by the 1st Respondent or by his registered agents or with his consent for his election to be annulled.

117. The legal regime that informs the Court regarding the determination of election petitions in Zambia, has been elaborately provided for under Part IX of the Electoral Process Act of which Section 97 thereof enacts as follows:

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

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

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

(i) by a candidate; or

(ii) with the knowledge and consent or approval of that candidate or of that candidate's election agent or polling agent, and the majority of voters in a Constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been noncompliance with the Provisions of this Act relating to the conduct of elections and it appears to the High Court or tribunal that the election was not conducted in accordance with

the principles laid down in such provision and that such non-compliance affected the result of the election, or

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

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

- (a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent or with knowledge and consent or approval of such candidate or that candidate's election agent;*
- (b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and*
- (c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent; the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.*

(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's

official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.”

118. Since 2016, the jurisprudence around Section 97 of the Electoral Process Act has been firmly developed and established by the Constitutional Court whereby applicable principles of law settled in earlier cases I referred to above were adopted and Section 97 has now been put in its proper context. I wish to observe that the 2021 elections were not the first elections to be held under the new Electoral Process Act and so are the petitions which are not the first.
119. It is, therefore, reasonably expected that after five (5) years of the enactment of the Electoral Process Act, the values and ideals of our electoral process contained therein would have been infused into the very fabric of our societal DNA and be part of all facets of our Zambian life with regard to both the conduct of elections as well as the requirements on how and when to petition election processes. I have no doubt in my mind as is evident from the arguments and submissions of all the parties, that indeed our societal DNA has fully embraced and is cognizant of the plain and natural provisions of the Electoral Process Act.
120. All the parties are agreed that the new jurisprudence around Section 97 of the Act is that a parliamentary election shall not be annulled unless it has been proved to a high degree of convincing clarity that a candidate or with his/her knowledge and consent or approval or by his/her registered election or polling agents has committed a corrupt practice, illegal practice or other misconduct in connection with an election and that the majority of voters in a constituency were or may have been prevented

from electing the candidate in that constituency whom they preferred. This accords with the decision of the Constitutional Court in the case of **ABUID KAWANGU V ELIJAH MUCHIMA**⁽⁹⁾ when it held as follows:

*“The standard remains higher and distinct from that required in an ordinary civil matter but lower than the standard of beyond reasonable doubt required in criminal matters. As the Supreme Court opined in the case of **LEWANIKA & OTHERS V CHILUBA**⁽¹⁹⁾ parliamentary election petitions are required to be proved to a standard higher than a mere balance of probabilities and issues raised are to be established to a fairly high degree of convincing clarity.*

121. And in the case of **NKANDU LUO & ANOTHER V DOREEN SEFUKE MWAMBA**⁽¹⁰⁾, the Constitutional Court put the provisions of Section 97(2)(a) in its proper perspective when it held as follows:

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

122. The Constitutional Court held further that:

“in addition to proving the electoral malpractice or misconduct alleged, the Petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so

widespread that it swayed or may have swayed the majority of the electorates from electing the candidate of their choice.”

123. Seeing that an election can only be annulled where it has been proved that a misconduct or malpractice has been committed by the candidate or his or her election or polling agents, who then is an election or polling agents envisaged by the law? The answer lies in Section 2 of the Electoral Process Act which define the two agents as follows:

“Election agent” means a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate’s nomination paper.

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

124. It is, therefore, important to prove that the alleged agents of the 1st Respondent were indeed his appointed agents and not just any person. With regard to the question of who an election agent is, the Constitutional Court held in the case of **CHRISPIN SIINGWA V STANELY KAKUBO**⁽⁵⁾ as follows:

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

125. Again in the case of **JONATHAN KAPAIPi V NEWTON SAMAKAYI**⁽¹¹⁾ the Constitutional Court held as follows:

“Not everyone in a candidate’s political party is his or her election agent in terms of the law, an election agent has to be specifically appointed.”

126. In **PONISO NYEULU V MUBIKA MUBIKA**⁽¹²⁾, the Constitutional Court reiterated as follows:

“For a person to be a candidate’s election agent, he or she must be specifically named in the candidate’s nomination papers...A candidate is only answerable for those things which he has done or which are done by his election agent or with his consent and that not everyone in one’s political party is one’s election agent.”

127. It follows, therefore, that in order for the Petitioner to succeed in her petition, she has to prove with cogent evidence to a high degree of convincing clarity that the alleged misconduct or malpractice was committed by the 1st Respondent or by his registered election or polling agents or with their consent or knowledge.

128. It stands to reason, therefore, that in terms of the provisions of the Electoral Process Act an allegation of misconduct or malpractice or illegality is proved only where it is shown that it was done by the candidate or their election or polling agent or by someone else but with the candidate or their agent’s knowledge and consent or approval. And to warrant the nullification of the election, the Court must also find that by virtue of the illegal act, the majority of the voters were prevented or were likely to have been prevented from electing a candidate of their choice. See the case of **SUNDAY CHITUNGU MALUBA V RODGERS MWEWA & THE ATTORNEY GENERAL**⁽¹³⁾ .

129. It is, however, imperative to prove with cogent evidence that the electoral malpractice or misconduct alleged was so widespread that it swayed or

may have swayed the majority of the electorates from electing the candidate of their choice. In the case of **AUSTIN LIATO V SITWALA SITWALA**⁽¹⁵⁾, the Constitution Court emphasized as follows:

“It is not sufficient for a Petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice.”

130. The Constitutional Court had earlier guided as to what constitutes or how to determine the “majority” when it held in the case of **MUHALI GEORGE IMBUWA V ENOK KAYWALA MUNDIA**⁽¹⁵⁾ as follows:

“That the “Majority” is the greater number of a part. The word is used only with countable nouns. That the numerical sense of “Majority” has been further elaborated through the use of the term “Widespread” which means widely distributed or disseminated.....In the instant case, there was no evidence to show whether “Many” comprised or could have comprised a significant part of the population of the constituency especially the electorates. More so when the Appellant, in the same manner as the Respondent, only got a minority of votes with about two thirds of the voters not voting for him.”

131. And in terms of assessing the credibility of witnesses, I bear in my mental faculties the wise Counsel of the Constitutional Court to deal with partisan witnesses cautiously. In the case of **MBOLOLWA SUBULWA V KALIYE MANDANDI**⁽¹⁶⁾ the Constitutional Court cautioned as follows:

“In terms of the requirement for corroborating evidence in election petitions, witnesses who belong to a candidate’s own political party or who are members of the candidate’s campaign team must be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood by such witnesses in an effort to tilt the balance of proof in favour of the candidate that they support. Corroborating evidence is independent evidence that strengthens or confirms other evidence.”

132. I will, therefore, first determine whether the Petitioner proved any wrong doing on the part of the 1st Respondent. Only then will I proceed to determine the impact of such wrong doing on the elections in the constituency.
133. I note, however, that the Petitioner in her written submission has completely recast her case and has argued a case different from the one she presented in her petition. The Petitioner has now anchored her petition on the alleged 2nd Respondent’s failure to conclude its investigations into the violence that was experienced in Kanyama. In this regard it was submitted that the conduct of elections in Kanyama did not comply with the constitutional requirements for the holding of a free and fair elections.
134. Specifically it was submitted on behalf of the Petitioner at page 5 thereof as follows:

“It is the Petitioner’s submission therefore that the elections in Kanyama were held in a manner that did not comply with the provisions of the Act relating to the holding of elections as envisaged in Section 55 of the Act. The constitution expressly proscribed violence, intimidation and other electoral offences. We are alive to the 1st Respondent’s defence that the violence was not

with his consent or knowledge. This may indeed be true. However, the provisions of Section 97(2)(b) apply irrespective of what the 1st Respondent knew or consented to.

135. It was thus contended on the same page as follows:

“The failure by the ECZ to invoke the provisions of Section 56 of the Act to postpone the election on account of the violence which made it impossible to conduct free and fair elections was in our view a failure which entitled this Court to nullify the election.”

136. It was finally submitted at page 7 thereof as follows:

“My Lord, the testimony from the 1st Respondent speaks to the submission of the Petitioner that the 2nd Respondent failed to comply with the requirements of the Constitution and the Act in so far as conduct of free and fair elections was concerned as it failed to conclude its investigations prior to the conclusion of the election which would have no doubt informed it that Kanyama was a hotbed of violence and thus not conducive for the holding of elections.”

137. Clearly, from these excerpts of the submissions of the Petitioner, the challenge now shifts solely to the conduct of elections by the 2nd Respondent allegedly by not postponing the elections. A casual glance at the title of the petition as set out above, shows that the Petitioner did not rely on Sections 55 and 56 of the Electoral Process Act. Rather the petition is anchored on Sections 83, 97, 98 and 99 of the Electoral Process Act. Similarly, the said petition is not anchored on the provisions of Article 45(2) of the Constitution which the Petitioner now wishes to rely on.

138. This is not the way cases are presented in the High Court. Ours is an open and transparent justice which requires prior full and frank disclosure of the issues and reliefs sought in the pleadings. This is the purpose that pleadings serve as was reiterated by the Supreme Court in the case of **MAZOKA V MWANAWASA**⁽¹⁶⁾ when it held as follows:

“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the Court has to take them as such.”

139. Similarly, in the case of **MICHAEL MABENGA**⁽⁶⁾ cited above confirmed that an election petition was like a civil claim that depends of the pleadings. I am mindful that our Constitution is sacrosanct in its prohibition of violence and intimidation in our electoral system and process. But that is where the Electoral Process Act comes in. It prohibits undue influence and violence in Section 83(1) which has already been relied upon by the Petitioner.

140. The Petitioner cannot hope to change her cause of action in her written submission. Fairly recently, the Court of Appeal disapproved of such practice in the case of **BARCLAYS BANK (Z) PLC V FRANK MUTAMBO**⁽¹⁸⁾ when it held as follows:

“We, therefore, wish to make it absolutely clear that submissions are not an avenue for raising issues not pleaded but only serve to outline the evidence that a litigant believes the Court should consider for the ends of justice to be met.”

141. As a matter of interest, I find that the Petitioner attempts to use the Constitutional provisions to override the provisions of the Electoral

Process Act in the manner suggested is not tenable. The same constitution does not countenance discrimination. If indeed the Petitioner is in good faith aggrieved about the levels of violence experienced in Kanyama Constituency and contends as she has done in her submissions that the elections ought to have been postponed as a result, one then wonders why she has petitioned only the election of the 1st Respondent leaving out the presidential, mayoral and local government elections which were all held under the same prevailing circumstances. This is more so that there is no single averment in her petition challenging the conduct of the elections by the 2nd Respondent. The need to postpone the elections in Kanyama was not one of the grievances raised by the Petitioner in her petition and as rightly submitted by the 2nd Respondent, this was just an afterthought.

142. Whilst I am not bound to take into account the new issues raised in the Petitioner's submission regarding the failure to postpone the election, I regard such a move or issue to be the worst form of discrimination against the 1st Respondent while the election of other candidates in the same constituencies remain intact. I also take into account the Petitioner's response in her cross examination by Counsel for the 2nd Respondent that she was in fact happy with the 2nd Respondent's decision to ban UPND after the death of the two (2) people. It is even doubtful if at all, the Petitioner won the elections she would have petitioned her own election on account of the failure by the 2nd Respondent to postpone the elections.
143. Other than that, the evidence before me was that PF also actively participated in the violence that was in Kanyama even after UPND were banned. That being the case, the Petitioner who is a PF member cannot rush to Court to seek to annul an election on account that Kanyama was a hotbed of violence which her party may have perpetrated and or

participated in. It is trite law that no one should be allowed to benefit from his wrongdoing. Anyone who approaches the throne of equity must do so with clean hands. As much as I sympathize with the Petitioner having been disadvantaged by her party, I abstain from rendering sympathetic judgments. My judgment ought to be based on sound legal principles of law.

144. Since the issue of postponing the elections was not the pleaded ground in the 13 allegations on which this petition is anchored, I now proceed to determine the petition on the issues raised therein because it is trite that a Court cannot grant relief which has not been pleaded.
145. The thrust of the petition is that the elections in Kanyama Constituency were not free and fair as they were characterized by undue influence, threats of and actual violence, loss of life and damage to property and as a result the majority of the electorates were denied the chance to elect a candidate of their own choice as they were intimidated into voting for the 1st Respondent. The Petitioner cited thirteen allegations which are already set out above and is not necessary for me to repeat them.
146. Given the settled jurisprudence regarding the law on annulment of elections as set out above, has the Petitioner, proved to a fairly high degree of convincing clarity that the violence and deaths that occurred in Kanyama were perpetuated by the 1st Respondent or by his registered election or polling agents or with their consent, knowledge and approval by other people? In addition, has the Petitioner proved that as a result of such violence the majority of the voters in Kanyama Constituency were or may have been prevented from voting for a candidate of their choice?
147. There is no single averment in the petition alleging that the said violence complained of was caused by the 1st Respondent or his agents. Even in

the testimonies of the Petitioner herself and her witnesses, none of them ever alleged that the 1st Respondent whose election is sought to be nullified, nor his agents ever engaged himself in any acts of violence. The contention, however, is that since the leadership of UPND had issued a clarion call to its membership to campaign for its candidates and to protect the vote, then all UPND cadres or supporters were agents of the 1st Respondent.

148. That argument or position is not tenable in view of our law with regard to annulment of elections. In fact the Constitutional Court had an occasion to pronounce itself on the need for election agents to be specifically appointed in the case of **CHRISPIN SIINGWA**⁽⁵⁾ on appeal coincidentally mounted by the Counsel for the Petitioner herein when it observed at page J53 as follows:

“Learned Counsel Mr. Yalenga pressed the argument that the fact that the UPND policy was for all members and party officials to campaign for UPND candidates made the Lundales agents of the Respondent. That those who followed the party directive and campaigned on behalf of the Respondent were agents by implication though a strict interpretation of the law excluded them as they were not listed on the nomination papers.....We find the Appellant’s position on this point odd and it is simply not tenable. We do not agree as the law is very clear...we agree with the Respondent that the Appellant has shown no basis upon which the term election agent requires clarification. We also agree with Mr. Chungu that not only is it untenable for us to stretch the meaning of agent beyond what the law clearly provides, but for us to do so would also entail ascribing fault to candidates for electoral malpractices committed by persons who are not appointed by the candidate as election agents. The fact that the legislature was specific in the definition of election agent was meant in our