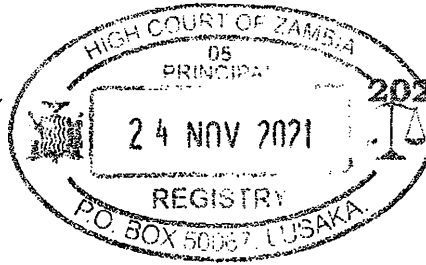


IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)



2021/HP/EP/032

IN THE MATTER OF: ARTICLE 54 AND 73 (1) OF THE CONSTITUTION OF  
ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE  
LAWS OF ZAMBIA.

IN THE MATTER OF: SECTIONS 82, 83, 96, 97, 98, 99 AND 100 (1) (a) OF  
THE ELECTORAL PROCESS ACT NO. 35 OF 2016  
OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: THE SCHEDULE TO THE ELECTORAL PROCESS  
ACT NO. 35 OF 2016 (THE CODE OF CONDUCT)  
SECTION 107 REGULATION 15 (1) (C).

AND

IN THE MATTER OF: AN ELECTION PETITION RELATING TO NALOLO  
CONSTITUENCY PARLIAMENTARY ELECTIONS  
HELD ON TUESDAY, 12<sup>TH</sup> AUGUST, 2021.

BETWEEN

ENOCK KAYWALA MUNDIA (MALE)

PETITIONER

AND

WAMUNYIMA IMANGA (MALE)

1<sup>ST</sup> RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2<sup>ND</sup> RESPONDENT

Before the Hon. Madam Justice C.B. Maka-Phiri

For the Petitioner : Mr. B. Phiri of Messrs. Linus E. Eyaa &  
Partners

For the 1<sup>st</sup> Respondent: Mr. W. Simutenda of Mesdames TMB  
Advocates

For the 2<sup>nd</sup> Respondent: Mr. R. Mukuka of Messrs. Rodrick and  
Associates

---

## J U D G M E N T

---

Legislation referred to;

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

Cases referred to;

1. David Zulu vs. The People (1977) Z.R. 151
2. Saidi Banda vs. The People S.C.Z Appeal No. 144 of 2015
3. Vincent Mucheleta vs. The People Appeal No. 124 of 2015
4. Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mung'omba, Sebastian Saizi Zulu, Jennifer Bwalya vs. Frederick J Jacob Titus Chiluba S.C.Z Judgment No. 14 of 1998
5. Michael Mabenga vs. Sikota Wina and Others S.C.Z. Judgment No. 15 of 2003
6. Anderson Kambela Mazoka vs. Levy Patrick Mwanawasa and Others Z.R. 138 (S.C)
7. Austin Liato vs. Sitwala, Selected Judgment No. 23 of 2018.
8. Breilsford James Gondwe vs. Catherine Namugala, SCZ Appeal No. 129 of 2012
9. Abuid Kawangu vs. Elijah Muchima Appeal No. 8 of 2017
10. Mubika Mubika vs. Poniso Njeulu, SCZ Appeal No. 114 of 2007
11. Jonathan Kapaipi vs. Newton Samakayi, CCZ Appeal No. 13/2017
12. Mubita Mwangala vs. Inonge Mutukwa Wina SCZ Appeal No. 80 of 2007.
13. Josephat Mlewa vs. Eric Wightman (1995/1997) Z.R. 106
14. Nkandu Luo and the Electoral Commission of Zambia vs. Doreen Sefuke Mwamba and The Attorney-General
15. Margaret Mwanakatwe vs. Charlotte Scott, Selected Judgment No. 50 of 2018
16. Mwiya Mutapwe vs. Shomeno Dominic Appeal No. 19/2017
17. Chrispin Siingwa vs. Stanely Kakubo Appeal No. 196/2015

18. Imbuwa vs. Enock Kaywala Mundia Selected Judgment No. 12 of 2018

19. Richard Sikwibele Mwapela vs. Miyuyu Chinga 2016/CC/AO37

20. Muvuma Situna Kambanja vs. The People (1982) Z.R. 115 (S.C)

Other Works referred to;

1. Phipson on Evidence 17<sup>th</sup> Edition (Thomson Reuters Legal Limited 2010).

2. Black's Law Dictionary, 10<sup>th</sup> Edition

Introduction

This was a Petition by Enock Kaywala Mundia who was the Patriotic Front (PF) candidate in the Parliamentary elections for Nalolo Constituency held on the 12<sup>th</sup> August, 2021. The petition was against Wamunyima Imanga and the Electoral Commission of Zambia as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively.

The petition was made pursuant to sections 82, 83, 96, 97, 98, 99 and 100 (1) (a) of the Electoral Process Act No. 35 of 2016 and Article 54 and 73 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 of the Laws of Zambia.

The Petition

The Petition was accompanied by an affidavit verifying facts in the petition, deposed to by the Petitioner.

The Petitioner stated that in the Elections that was held on the 12<sup>th</sup> August, 2021, the 1<sup>st</sup> Respondent Wamunyima Imanga was declared as being duly elected after polling 8,666 votes against the Petitioner who polled 5,484 votes.

In seeking to challenge the election of the 1<sup>st</sup> Respondent, the petitioner alleged that: -

1. The election for Nalolo Constituency was characterized by impersonation throughout the Constituency by the 1<sup>st</sup> Respondent in clear contravention of section 82(1) (e) (i) of the Electoral Process Act.
2. The 1<sup>st</sup> Respondent throughout the campaign and in all the 12 wards went round claiming that since the candidate for the United Party for National Development (UPND) had been disqualified, he was the one that was standing in for the said party which was a clear misinformation as he was relying on the popularity of the expelled candidate and his party.
3. The said election was characterized by undue influence and character assassination throughout the entire constituency in clear violation of section 83 (1) (b) of the Electoral Process Act Number 35 of 2016 and Regulation 15 (1) (c) of the Schedule to the Electoral Process Act. (Code of Conduct).
4. The 1<sup>st</sup> Respondent and his agents during the campaign trail and on the actual voting day were spreading false allegations that, regardless of the candidate of their choice, the votes would go to the Petitioner and the President of the Patriotic Front (PF) insinuating the Petitioner had some sort of dark supernatural powers.

5. Most of the people in the constituency do in fact believe in superstitions, and as such, the falsehoods perpetuated by the 1<sup>st</sup> Respondent and his campaign team throughout the constituency was believed leading to the voters shunning the Petitioner.
6. The 1<sup>st</sup> Respondent and his campaign team throughout the campaign period and in all the 12 wards went round deceiving the electorates by stating that if they voted for the Petitioner, they would automatically be voting for President Lungu who, according to the 1<sup>st</sup> Respondent and his team, had destroyed the country and hated the people of Western Province.
7. That due to the falsehoods against the Petitioner perpetrated by the 1<sup>st</sup> Respondent and his campaign team throughout the constituency, the same diminished the perception the voters had of the Petitioner. That after the votes were cast, the results for the Nalolo Parliamentary constituency were as follows: -
 

i.	Wamunyima Imanga (PNUP)	-	8,666
ii.	Mundia Enock K (PF)	-	5,484
iii.	Kwibisa Lubinda (DP)	-	1,646
iv.	Chinyama (SP)	-	857
8. The Returning Officer Inambao Mukela declared the 1<sup>st</sup> Respondent as a duly elected Member of Parliament for Nalolo Constituency.

9. The difference between the Petitioner and the 1<sup>st</sup> Respondent was a narrow 3,182 votes of which the Petitioner firmly believes that if it wasn't for the widespread falsehoods perpetrated by the 1<sup>st</sup> Respondent against the Petitioner in the entire Constituency which influenced a great number of registered voters, the Petitioner would have won the election.

The Petitioner's prayer was for: -

- a. A declaration that the election of the Respondent as a Member of the National Assembly for Nalolo Parliamentary Constituency was null and void ab initio.
- b. An Order that the declaration of the Respondent as winner and elected Member of the National Assembly for Nalolo Parliamentary Constituency was null and void and must be set aside.
- c. A declaration that the election is invalid by reason of non-compliance with the Constitution and the procedure for the conduct of elections as prescribed by the Electoral Process Act.
- d. An order that the Respondent be disqualified from being a candidate in the Bye-Election for not complying with the provisions of the Constitution and the code of conduct as prescribed by the Electoral process Act.
- e. Costs of and incidental to this Petition.
- f. And any such declaration and Orders as this Honorable Court may deem fit.

I note that though there are two respondents to this petition, the Petitioner's claims as outlined in the prayer above does not specify the Respondent to whom the claims are directed to. It can however be discerned based on the averments as contained in the Petition that were it is referenced Respondent, it is supposed to be the 1<sup>st</sup> Respondent.

#### **The 1<sup>st</sup> Respondent's Answer to the Petition**

The 1<sup>st</sup> Respondent's Answer was filed into court on the 8<sup>th</sup> September, 2021 wherein the 1<sup>st</sup> Respondent stated that the petitioner's assertions are wholly false, misleading, delusional and unsubstantiated. The 1<sup>st</sup> Respondent averred that he stood on the ticket of his own party, the Party for National Unity and Progress (PNUP) which has its own unique party constitution, party manifesto, colors and symbol and is manifestly distinct in the overall nature from the UPND.

The 1<sup>st</sup> Respondent denied practicing any form of undue influence and character assassination of the petitioner. He stated that he conducted his entire campaign with maximum decorum, respect, diligence, etiquette and strict adherence to the applicable laws relating to the electoral process and with conduct befitting a Parliamentary candidate.

#### **The 2<sup>nd</sup> Respondent Answer to the Petition**

The 2<sup>nd</sup> Respondent's answer to the petition was filed on the 14<sup>th</sup> September, 2021. The 2<sup>nd</sup> Respondent admitted that the petitioner

was a candidate in the Parliamentary Election for the Nalolo Constituency which has 12 wards. It further admitted that the Petitioner contested the elections under the PF and that the 1<sup>st</sup> Respondent contested under the PNUP.

The 2<sup>nd</sup> Respondent denied that the election for Nalolo Constituency was characterized by impersonation throughout the Constituency perpetrated by the 1<sup>st</sup> Respondent in contravention of the law. It stressed that the 2<sup>nd</sup> Respondent conducted the said elections in accordance with the law.

The 2<sup>nd</sup> Respondent admitted that it announced the official and verified results and declared the 1<sup>st</sup> Respondent as a duly elected member of Parliament for Nalolo.

Based on the foregoing, the 2<sup>nd</sup> Respondent denied that the Petitioner is entitled to any of the reliefs and remedies prayed for in the Petition. The 2<sup>nd</sup> Respondent further denied each and every allegation of fact as though the same set out and traversed seriatim.

#### **The Petitioner's case**

At the hearing of the matter, the Petitioner testified in his own right as PW1 and called eleven (11) witnesses.

PW1 testified that he contested the Nalolo Parliamentary Elections on the 12<sup>th</sup> August, 2021 in which the 1<sup>st</sup> Respondent was declared a winner on the 15<sup>th</sup> August, 2021. The Petitioner testified further that during the campaign period, the 1<sup>st</sup> Respondent went to all the



twelve wards of Nalolo Constituency and informed the electorates that since UPND had failed to field a candidate, the UPND leader Mr. Hakainde Hichilema had indorsed him to stand on behalf of the UPND. That the 1<sup>st</sup> Respondent further informed the electorates that if they vote for the petitioner, they would be voting for Edgar Lungu, a Presidential Candidate they despised. That in addition, the 1<sup>st</sup> Respondent informed the electorates that the Petitioner practices black magic and therefore, on the polling day, the electorates should not wear under pants because if they did, regardless of their preferred candidate, their votes would go to the Petitioner. The Petitioner complained that as a result of the foregoing, the electorates were not free to vote for their preferred candidate.

The Petitioner identified and explained all the documents in the Petitioner's bundle of documents. He explained that he lost at all the seven polling stations of Lyamakumba ward to the 1<sup>st</sup> Respondent. In Makoka ward, he lost at four polling stations out of the five to the 1<sup>st</sup> Respondent. In Kambai ward, he lost at all the five polling stations to the 1<sup>st</sup> Respondent. In Bukolo ward, he lost at all the five polling stations to the 1<sup>st</sup> Respondent and in Shekela ward, he lost at all the eight polling stations.

PW1 added that in Likule ward, he lost at all the five polling stations to the 1<sup>st</sup> Respondent and the same was the case with Silowana, Muoyo, Nanjucha and Ntukutu where he managed to win two out of five, two out of eight, two out of five and one out of three

polling stations respectively. He explained that in Kataba Ward, he lost at all the three polling stations while at Lobosi ward, he won at all the three wards.

Under cross-examination by Counsel for the 1<sup>st</sup> Respondent, PW1 explained that the 1<sup>st</sup> Respondent won the elections because he rode on the UPND after he claimed that he had been indorsed by the UPND. PW1 however conceded that he never witnessed the 1<sup>st</sup> Respondent say that he was indorsed by UPND and solely relied on his witnesses to prove his assertion. He conceded that he did not have the actual figures of the electorates who voted for the 1<sup>st</sup> Respondent on the basis of being a UPND aligned candidate, or on the basis of what the 1<sup>st</sup> Respondent told the electorates.

When referred to the Certificate of adoption on page 1 of the 1<sup>st</sup> Respondent's bundle of documents, the Petitioner conceded that the same was issued by the Party for National Unity and Progress. He further conceded that all the 1<sup>st</sup> Respondent's campaign materials had his party symbol and not that of the UPND.

There was no cross-examination from Counsel for the 2<sup>nd</sup> Respondent.

PW2, Namaya Pumulo was the campaign Manager for the Petitioner during the campaign period preceding the 12<sup>th</sup> August, 2021 elections. He testified that as campaign Manager for PW1, he was responsible for selling PW1 to the electorates. He testified that during the campaigns for the 12<sup>th</sup> August, 2021 elections he heard

from people that the 1<sup>st</sup> Respondent was telling the electorates that he was sent by the UPND President Mr. Hakainde Hichilema and hence, he should be voted for by the UPND sympathizers because the UPND was not fielding a Parliamentary candidate.

Later, on a date he did not state, PW2 met the 1<sup>st</sup> Respondent holding a meeting in Ilutondo village. It was at this meeting that PW2 personally heard the 1<sup>st</sup> Respondent saying that he had been sent by the UPND President Mr. Hakainde Hichilema and that all UPND supporters in Nalolo Constituency should vote for him. That he further heard the 1<sup>st</sup> Respondent state that if the electorates vote for the Petitioner, all their votes will automatically go in favor of Edgar Lungu, the Presidential Candidate whom most electorates despised.

PW2 testified further that Nalolo Constituency is a UPND stronghold and as such, the electorates were happy when they heard that the 1<sup>st</sup> Respondent was their UPND candidate. He stated that the 1<sup>st</sup> Respondent was not duly elected but won by cheating the electorates. He concluded by stating that he supported the petitioner because the 1<sup>st</sup> Respondent was not duly elected as Member of Parliament for Nalolo Constituency.

Under cross-examination, PW2 explained that he initially heard that the 1<sup>st</sup> Respondent was sent by the UPND President from the people of Nalolo Constituency and later on, he personally heard the 1<sup>st</sup> Respondent addressing a meeting to that effect. He conceded

that the materials he was using to campaign for the petitioner were branded with the Party symbol, Party President and the Petitioner. He further conceded that the electorates did not want any association with the PF Presidential candidate. He, however, stated that the campaign T-shirts for the petitioner had a portrait of the PF Presidential Candidate.

He conceded further that even if Nalolo Constituency is a stronghold for the UPND, the UPND last won elections in Nalolo in 2001. He explained that even if the Parliamentary Candidates never used to win, the UPND Presidential Candidate used to win.

There was no cross-examination from Counsel for the 2<sup>nd</sup> Respondent.

PW3, Lubinda Kwibisa was a Parliamentary Candidate for Nalolo Constituency in the August, 2021 elections under the Democratic Party. He testified that during his campaign trail, he used to send Senior Party officials namely, Mr. Likongo Kambututu, the District Chairman for the Democratic Party, Mr. Kamona Mwanamwalye, the Constituency Chairman and Mr. Mumbi Chibuye, the District Youth Chairman for the Democratic Party as an advance Party. That the role of the advance party was to assess the conduciveness of the environment for him to go out and campaign.

Under cross-examination by the Learned Counsel for the 1<sup>st</sup> Respondent, PW3 explained that he came in as a witness for the purposes of identifying his Party members.

PW4, Likonge Kambututu was the District Chairman for the Democratic Party. He informed the court that he was the campaign Manager for PW3 during the August, 2021 election period. He testified that during the campaign trail, he encountered challenges which included instances where the 1<sup>st</sup> Respondent was using the UPND for his campaign. That the 1<sup>st</sup> Respondent was telling the UPND supporters that they should vote for him because he was sent by the UPND Presidential candidate, Mr. Hakainde Hichilema. He explained that this worked to the advantage of the 1<sup>st</sup> Respondent because most of the people in Western Province are UPND supporters.

PW4 alleged that, by using the UPND, the 1<sup>st</sup> Respondent won the polls by cheating. He thus supported the petitioner on that basis.

When cross-examined by the Learned Counsel for the 1<sup>st</sup> Respondent, PW4 reiterated that he heard the 1<sup>st</sup> Respondent in all the 12 wards of Nalolo Constituency telling the electorates that he was sent by the UPND and its Presidential Candidate. He conceded that he did not write to the Electoral Commission of Zambia to complain about the 1<sup>st</sup> Respondent's conduct.

There was no cross-examination from Counsel for the 2<sup>nd</sup> Respondent.

PW5 was Mwanamwalye Kamona, the Constituency Chairman for the Democratic Party for Nalolo District. He told the Court that as Constituency Chairman, he was responsible for selling his

candidates. This was done by telling the people the names of the candidates and the name of the Party.

PW5 testified that during the campaign trail leading up to the 12<sup>th</sup> August, 2021 elections, he worked in Kataba Ward, Mafucha Ward and Matongo village. On a date he could not state, he attended a meeting in Kataba Ward that was held by the 1<sup>st</sup> Respondent. According to PW5, the 1<sup>st</sup> Respondent was telling the people that he had been sent by Mr. Hakainde Hichilema and they should vote for him. Further that he was the one who had been sent to stand for UPND in Nalolo. PW5 testified that the 1<sup>st</sup> Respondent went on to tell the people that his Presidential Candidate was not standing this year but will stand in 2026. He thus reiterated that he had been appointed to stand in the gap of UPND and as such the people should vote for him. PW5 concluded by stating that the petitioner's complaint is valid as the 1<sup>st</sup> Respondent used the UPND to win the election.

When cross-examined, PW5 conceded that he had no any other evidence other than what he had testified before Court. He further confirmed that he only attended one meeting at which he found the 1<sup>st</sup> Respondent addressing the people. He also confirmed that he did not complain to ECZ concerning the allegations that he raised before Court.

PW6 was Mubiana Munyinda the District Vice Chairperson of Politics for UPND. He explained his role to the Court which was to

campaign for the Presidential Candidate, Council Chairman and all the Councilors in the 11 wards. He testified that the UPND Parliamentary candidate failed to file nominations because he did not meet the qualifications set by ECZ.

PW6 testified that during the campaign period, he left to attend a funeral and when he returned, he was informed that the 1<sup>st</sup> Respondent who belonged to a party which had a symbol of a tyre was claiming to have been sent by the President Mr. Hakainde Hichilema.

Upon receipt of this information, PW6 phoned all the ward Chairmen in the wards and they all confirmed that the 1<sup>st</sup> Respondent had been going round claiming that he had been sent by the UPND President Mr. Hakainde Hichilema.

PW6 further phoned the Provincial Office and the UPND Secretary who told him that they never sent anyone.

When cross-examined, PW6 stated that he only heard of what his party officials told him. He however did not have proof that he had phoned his ward Chairman.

PW7 was Vincent Wachaita, the UPND information and Publicity Secretary for Nalolo District. He told the court that his role during the period preceding the August, 2021 elections was to collect information from the branches to the Constituencies at the UPND Secretariat in Lusaka.

He testified that on one particular day, he went to Ndandanda village to collect planks. Whilst there, his friend informed him that there was supposed to be a meeting. After a while, he went to where people had gathered and found a man who introduced himself as Imanga Wamunyima, of PNUP. The man went on to state that he had been sent by Mr. Hakainde Hichilema to stand on UPND because they did not have a candidate and as such they should all vote for him. The said man went on to state that if the people vote for the petitioner all their votes would go to Edgar Chagwa Lungu.

When PW7 heard this, he never said anything. He thus supports the Petitioner's complaint because the 1<sup>st</sup> Respondent won the election using the UPND and he cheated the people.

When cross examined, PW7 told the court that he had no other evidence concerning the meeting apart from his oral testimony. Further that the meeting he referred to was the only meeting he attended. He further testified that he had told the District Chairman about what he heard at the meeting, who told him that there was nothing like what the 1<sup>st</sup> Respondent was claiming.

When referred to page 2 of the 1<sup>st</sup> Respondent's bundle of documents, PW7 confirmed that it was a campaign poster for the 1<sup>st</sup> Respondent. He further confirmed that the poster had no UPND written on it.

PW7 also clarified that the 1<sup>st</sup> Respondent did not state that he was a candidate for the UPND as he was simply asking for votes.



When further referred to page 4 of the 1<sup>st</sup> Respondent's bundle of documents, PW7 confirmed that it was the mock ballot paper and the 1<sup>st</sup> Respondent was not saying that he was standing on the UPND ticket.

PW8, was Alex Litutu, the UPND Ward Chairman for Kambayi Ward. He explained that his role in the campaign period preceding the 12<sup>th</sup> August, 2021 election was to sell the Presidential Candidate, the Council Chairperson and Councilors.

He explained that as ward Chairperson, he used to go round in his ward campaigning. That it was during the campaign trail that he found the 1<sup>st</sup> Respondent holding a meeting. It was at that meeting where PW8 heard the 1<sup>st</sup> Respondent saying that because they had no MP in Nalolo, the UPND President Mr. Hakainde Hichilema, had authorized him to stand in Nalolo. Further that his President Mr. Hamududu would not stand this year. The 1<sup>st</sup> Respondent went on to ask the people to vote for Mr. Hakainde Hichilema and for him, being a candidate standing for PNUP. He testified that the 1<sup>st</sup> Respondent emphasized that the people should not make a mistake of voting for the petitioner as doing so would mean all votes would go to Mr. Edgar Lungu.

PW8 concluded by stating that he supported the petitioner because the 1<sup>st</sup> Respondent did not win the elections on his ticket as he used another Party's ticket.

When cross-examined, PW8 confirmed that there were 12 wards in Nalolo Constituency. He clarified that the meeting he referred to was in a polling station within Kambayi Ward.

He further told the court that the proceedings of the meeting were recorded though he had no video recordings.

When referred to page 2 of the 1<sup>st</sup> Respondent's bundle of documents, PW8 confirmed that it was a poster for the 1<sup>st</sup> Respondent. He further confirmed that the poster had no symbol for UPND.

When further referred to page 3, of the 1<sup>st</sup> Respondent's bundle of documents, PW8 confirmed that the mock ballot paper had no symbol for UPND on it. PW8 further confirmed that the last MP for UPND was in 2001.

He also testified that when he heard the 1<sup>st</sup> Respondent claiming that he was indorsed by UPND, he reported him to the District Chairman. PW8 could not complain to ECZ but only to his superiors which he did. He insisted that he saw what transpired and that is why he was a witness in this court. Lastly, that he did not have evidence of the UPND's oral objection to ECZ concerning the 1<sup>st</sup> Respondent's claims during the campaign period.

PW9 was Kamwi Nambole, the Youth Chairperson for UPND in Ukulo Ward in Nalolo. He testified that he was responsible for stopping the Youths from bringing confusion during the campaign

trail. To that effect, PW9 used to go to meetings which were being held by different parties to ensure that the Youths were not causing confusion.

He testified that on a day whose date he could not recall, a candidate who was standing on the PNUP ticket went to Ndeke village situated in Ukolo ward of Nalolo District. This PNUP candidate, who is the 1<sup>st</sup> Respondent in this case, was telling the people who had gathered that he had been sent by Mr. Hakainde Hichilema who had indorsed him to stand on UPND.

This was because the people of Nalolo had no MP and asked the people to vote for him. The 1<sup>st</sup> Respondent went on to guide the people that for the Presidential Candidate, they should vote for the UPND President Hakainde Hichilema, on the symbol of the hand but for the MP, they should vote for him on the symbol of the wheel. The people who were addresssed bclieved the 1<sup>st</sup> Respondent and started playing UPND songs, showing the symbol of the hand and saying that Hakainde has won.

PW8 concluded by stating that he supported the petitioner because the 1<sup>st</sup> Respondent won the election by cheating, as he put himself in another Party's shoes.

When cross-examined, PW9 stated that there were a lot of people who attended the meeting which he attended. He confirmed that it was the only meeting he attended though the 1<sup>st</sup> Respondent held

countless meetings during the campaign period. PW9 was not aware that the 1<sup>st</sup> Respondent was sponsored by PNUP.

When referred to page 1 of the 1<sup>st</sup> Respondents bundle of documents, the Certificate of adoption, PW8 confirmed that the 1<sup>st</sup> Respondent was adopted to stand by PNUP. When referred to page 2 of the 1<sup>st</sup> Respondent's bundle of documents, the campaign poster for the 1<sup>st</sup> Respondent, PW9 confirmed that it had no symbol for UPND on it.

PW9 was aware that there were 16 Presidential candidates and that the 1<sup>st</sup> Respondent had his own Presidential Candidate by the name of Mr. Highvie Hamududu.

PW10 was Harrington Mutambwa Simbula, a Youth Chairman for the UPND and a member of the Constituency Campaign Team. He explained that his duty during the August, 2021, election campaign period was to organize Youths and to stop them from causing confusion. He narrated that as UPND, they were campaigning for the President, Council Chairman and Councilors as they had no MP candidate.

PW10 explained that because the Constituency is big, they started their campaigns across the Zambezi river where seven wards are situated. They accordingly held meetings and explained to the people that they should vote for Mr. Hakainde Hichilema, on a symbol of a hand. The people were informed to skip the MP part as

the party did not have an MP and then vote for Council Chairman and Councilors.

The people however responded that there was an MP who had just told them to vote for Mr. Hakainde Hichilema for President and for MP to vote for Imanga Wamunyima. That the said Parliamentary Candidate had told the people that he had been sent by the President Mr. Hakainde Hichilema because Nalolo did not have an MP and that his President Mr. Hamududu would not stand in the election.

PW10 went to the remaining wards across the Zambezi River and they were told the same story by the people of what Mr. Imanga Wamunyima had stated.

When they crossed back, they held meetings in the remaining five wards and the same message from the people came through. When PW10's team went to Munyo ward, being the last ward of the five, they found Mr. Imanga Wamunyima holding a meeting at Sianga, Liyondo and Ilutondo Polling Stations. PW10 heard the said Imanga Wamunyima telling the people to vote for Mr. Hakainde Hichilema on the Presidential candidate and MP to vote for him because his President was not standing this year and he will stand in 2026. Mr. Imanga Wamunyima went on to tell the people to vote for the Council Chairman and Councilors on the symbol of the hand.

It was based on the foregoing that PW10 supported the complaint of the petitioner.

When cross examined, PW10 insisted that whilst his team was across the Zambezi river, people told them that there was a man who had been sent to stand on UPND. PW10 confirmed that he did not personally hear Mr. Imanga Wamunyima tell the people across the Zambezi that he had been sent to stand on UPND. PW10 had no any other evidence other than his word of mouth concerning what the people across the Zambezi river told his campaign team. He however reiterated that when they came to the last ward, they found Mr. Imanga and heard him saying he had been sent as a candidate for UPND.

PW11 was Mumbi Chibuye, the Youth Chairman for the DP. His duties included monitoring and organizing the youths so that elections could go well. He testified that on 12<sup>th</sup> August, 2021, he was assigned to monitor elections by his party. When the polling stations opened in Kataba, he saw some ladies gathered in the toilet. He suspected that someone had taken ballot papers there and as such he decided to go there. Before he could reach, he was stopped by some old ladies and told that he cannot go inside because some ladies who were in the toilet were taking off underwear. PW11 approached the people who came out of the toilet and they confirmed that they were taking of underwear. When he asked them why they had done that, they told him that Mr. Enock Mundia and his President Edgar Lungu will do black magic and if they vote with underwear regardless of who they wanted to vote for, their votes will go to them.

PW11 stated that he thereafter went to Moyo and Nanjuchu wards and found the same thing was happening. PW11 supported the petition on that basis.

When cross-examined, PW11 told the Court that he believed in witchcraft. PW11 confirmed that he never heard Mr. Imanga Wamunyima telling the people that if they vote with underwear, their votes will go to the petitioner. PW11 conceded that he did not know the percentage of women who voted in the last elections and he did not equally know the number of women who voted without underwear. He equally could not tell the number of women who voted for the 1<sup>st</sup> Respondent without underwear. PW11 believed that a vote cast for a particular candidate could be changed through witchcraft.

PW12 was Kaiko Muhalakwe, a farmer of Nalolo. This witness was subpoenaed by the Petitioner to produce a video recording that he had made of the campaign meeting of Mr. Imanga Wamunyima which was held on 19<sup>th</sup> July, 2021. He explained that the video was taken at Silai Village where he lived and he used his Itel 32 Smart phone to capture the video. PW12 identified the Itel S32 Smart phone and it was produced in evidence as exhibit P1. The video that PW12 recorded was thereafter played in Court.

When cross examined, PW12 confirmed that he was the one who was making running commentaries in the video. He clarified that he was not a member of PNUP, nor was he a politician. PW12

confirmed that the 1<sup>st</sup> Respondent did not say anything in the video but he was the one who had organized the meeting. PW12 explained that different political parties went to his village to sell their manifestos and that as a citizen he was free to attend those meetings.

PW12 was not aware that UPND had held a meeting in his village prior to the meeting where he shot the video. He emphasized that he had no personal interest in taking the video but just took it as he was happy with how the people were dancing.

PW12 further told the court that he was not aware that the colours for PNUP were orange but conceded that the 1<sup>st</sup> Respondent was wearing his personal orange t-shirt. He denied assertions that the 1<sup>st</sup> Respondent was gesturing the beating of drums but that he was flushing the symbol of the hand. He conceded that the 1<sup>st</sup> Respondent had no control over what people wore and that people were in any case free to wear the clothes that they liked. He however said that the people in the video were dominantly the UPND Members and very few were in their personal clothes.

This marked the close of the Petitioner's case.

#### **The 1<sup>st</sup> Respondent's Case.**

The 1<sup>st</sup> Respondent gave evidence in his own right and called one witness.



The 1<sup>st</sup> Respondent is hereinafter referred to as RW1. He began by stating that he was a Parliamentary Candidate in the just ended 12<sup>th</sup> August, 2021 election sponsored by the Party for National Unity and Progress, PNUP. The Petitioner was equally a Parliamentary Candidate and participated in the 12<sup>th</sup> August, 2021 election, sponsored by the Patriotic Front. RW1 explained that he was successfully adopted and given a Certificate of adoption shown on page 1 of the 1<sup>st</sup> Respondent 's bundle of documents. The Certificate of adoption is dated the 11<sup>th</sup> May, 2021 and has the official party stamp.

RW1 explained further that after he was adopted, he successfully filed his nomination on 17<sup>th</sup> May, 2021. He thereafter attended a stakeholder's meeting that was called by the 2<sup>nd</sup> Respondent for all the candidates. The meeting agreed on a campaign time table which was subsequently submitted to the Nalolo District Police Command. Following the approval of the campaign time table, RW1 constituted a campaign team comprising of Mr. Charles Mulonde Malimba as Campaign Manager, Mr. Lubasi Nawa, Campaign Executive Secretary, Mrs. Patricia Akabondo, Campaign Chairlady, Mr. Finos Ngenda, Campaign Coordinator and lastly, Mr. Jacob Nawa, the Personal Assistant.

The constituted campaign team campaigned based on the party manifesto, and party Constitution. RW1 explained that the campaigns were in consonance with the guidelines given by the 2<sup>nd</sup>

Respondent for door to door campaigns and or village to village campaigns for the rural constituency.

RW1 added that he was using his official mock ballot and party regalia during the campaigns. He referred the Court to pages 2 of his bundle of documents, being his official campaign poster. He explained that the campaign poster clearly showed that he was being sponsored by the PNUP. Further that on the poster were two pictures, a bigger picture was for him, and the smaller picture was for his party President Mr. Hamududu who was the Presidential Candidate. He further explained that at the bottom of the poster was the word "Mwa Liwili", which means wheel, and was the official symbol. RW1 further referred the Court to page 3 of his bundle of documents being the mock ballot, on which his image, name and party acronym, party symbols and how the Electorate should vote for a candidate of their choice were categorically shown.

He added that the mock ballot paper was significant for voter education and specifically how the electorate was to vote. He further added that voter education by candidates was standard requirements of all participating candidates to reduce voter apathy. RW1 also referred to the t-shirt, in the party official colours as one of the campaign materials that were used during his campaign. He denied allegations that he was using the UPND but that as he has demonstrated through his evidence, he was adopted by PNUP and his campaigns were conducted under the sponsorship of the PNUP.

RW1 found the bizarre allegation bordering on witchcraft to be unfounded. He emphasized that his engagement with the people was based on his party manifesto and was conducted with the requisite decorum of a candidate who was keen to win the elections. He lamented that the witchcraft allegations fronted by the petitioner were clearly unsubstantiated and premised on speculation. RW1 attributed the allegation to the fact that the petitioner was aware that his sponsors were unpopular.

RW1 testified further that the actual results of the election that each candidate polled had no direct relationship with the petitioner's allegation. That the petitioner did not show how many people of those that voted for RW1, voted based on his allegation. Further that the documents at pages 6 to 10 of the Petitioner's bundle of documents did not show how many of the electorates were male and female.

He added that the allegations by the Petitioner were first heard of for the first time in court as they were not brought to the attention of the 2<sup>nd</sup> Respondent during the campaign period. He narrated that all the candidates were given copies of the electoral code of conduct and were at liberty to seek recourse with the 2<sup>nd</sup> Respondent in case of breach by a candidate. That the absence of any complaint to the 2<sup>nd</sup> Respondent is an indication that the elections were conducted in a free and fair manner. Further that even when the returning officer declared him winner, the petitioner never raised any issue.

RW1 found the petitioner's allegations to be baseless, and untrue and solely anchored on the petitioner's failure to accept the results.

When referred to the video, P1, RW1 confirmed that the meeting was held in that village but it was shortly after the UPND had a meeting in the same village. He confirmed that he was welcomed in the village and proceeded to have the meeting but that he had no control of who chose to attend his meetings. He emphasized that as a candidate, he was in the village to deliver his campaign message to the people and he unreservedly addressed whoever came to attend that meeting.

He reiterated that he did not know who was in charge of dressing the people who attended his meeting but that the same gathering of people was earlier addressed by the UPND campaign team. He lamented that any other candidate from another political party would have addressed the same audience.

He denied gesturing a UPND symbol at the meeting but that since the crowd was performing various traditional dances, his gesture as seen in the video was a way of beating drums. He confirmed that it was not unusual that the crowd at the meeting was mixed as they had just come from a political rally by another party.

He categorically labeled untrue the assertions that he had told the people in seven wards that he was a UPND candidate. That he clearly premised his campaign on selling himself as an aspiring

candidate on the PNUP ticket. To that effect, he had unique campaign materials which the people found easy to associate with.

RW1 urged the Court to dismiss the petition with costs because all the allegations leveled against him are unfounded and based on frivolous grounds.

When cross-examined by the 2<sup>nd</sup> Respondent, RW1 informed the court that the difference between his votes and that of the petitioner was over three thousand. He further confirmed that all candidates were advised that issues that bordered on electoral malpractice were to be reported to the 2<sup>nd</sup> Respondent in writing. RW1 had no concerns with the manner that the 2<sup>nd</sup> Respondent conducted the elections in Nalolo constituency.

When cross examined by the Petitioner, RW1 confirmed that he was aware of the UPND symbol but insisted that his hand gesture in the video was a way of showing appreciation by beating drums and it was not similar to the UPND symbol. He also confirmed that the t-shirt he was wearing on the material day when the video was recorded was not the official campaign t-shirt.

RW1 explained that he was not present at the UPND meeting that was held prior to his. Further that according to the campaign time table, it was allowable that the four political parties could be in the same area at different time frames.

RW2 was Charles Mulonda Malimba, the 1<sup>st</sup> Respondent's campaign manager in the last election. He explained that his duty was to mobilize the people, show the people the symbol of their party PNUP which was the wheel and also teaching the people who they were supposed to vote.

RW2 stated that they had mock ballot papers, which they were using to show the people how they were supposed to vote. That he also had campaign posters which had portraits of the candidate as well as for the Presidential Candidate Mr. Hamududu. RW2 disputed assertions that the 1<sup>st</sup> Respondent was telling people that he was standing on the UPND ticket. When referred to paragraphs 6, 7 and 8 of the Petition, RW2 retorted that the issue of women not wearing under wear when going to vote was an insult and is not there in Nalolo.

RW2 emphasized that all that his campaign team did was to campaign for its candidate and ask for votes. He as such dispelled the claims that the 1<sup>st</sup> Respondent was telling the people that if they vote for the petitioner, they would be voting for Edgar Chagwa Lungu.

RW2 lamented that the issue of saying that they were campaigning using the UPND was not new as the petitioner had raised it even to the person who won the elections in 2016.

When cross-examined, RW2 insisted that the petitioner raised the same allegation that the candidate was using UPND in 2016. RW2

further told the court that as campaign manager, it was within his domain to advise the candidate if he was doing something wrong. He explained that his team conducted door to door campaigns and were passing through all the villages. He confirmed that they had a meeting at Silai village and he did not observe anything wrong during the meeting.

This marked the close of the 1<sup>st</sup> Respondent's case.

#### **The 2<sup>nd</sup> Respondent's case.**

The 2<sup>nd</sup> Respondent did not call any witnesses.

I received written submissions from all the parties. The following is the summary of their submissions.

#### **The Petitioner's Submissions**

The Petitioner's final submissions are dated the 4<sup>th</sup> October, 2021. The Petitioner gave a detailed background of this matter relating to the documents filed by the Petitioner. He further gave a summary and analyzed the evidence adduced in support of the allegations upon which the Petition is premised.

In relation to the allegation of impersonation, the Petitioner submitted that there was overwhelming evidence that establish that the 1<sup>st</sup> Respondent used the name of the UPND in his campaigns.

It was submitted that the evidence of PW12 who produced the video footage he recorded of the 1<sup>st</sup> Respondent campaigning should be

accepted because PW12 is not politically aligned to any party although he has had his preferred party.

The Petitioner added that PW12's version supported by the video footage, 'P1' should be given credence considering that the 1<sup>st</sup> Respondent agreed to knowing what the UPND symbol looked like and demonstrated it in Court.

It was submitted further that the 1<sup>st</sup> Respondent in the video footage 'P1' shows that he was flashing the UPND symbol and this is clear evidence of the 1<sup>st</sup> Respondent being dishonest.

In line with the foregoing, the Petitioner submitted that the following facts have been established: -

- i. The 1<sup>st</sup> Respondent used the name and/or symbol of UPND in Silai Village.
- ii. The 1<sup>st</sup> Respondent was dishonest about having used the name and/or symbol of UPND at Silai Village.
- iii. The 1<sup>st</sup> Respondent used the name and/or symbol of UPND throughout his campaigns.
- iv. The 1<sup>st</sup> Respondent used the name and/or symbol of UPND in different locations.
- v. The effect of the 1<sup>st</sup> Respondent's actions gave him an unfair advantage over his opponents in the election.

The case of David Zulu vs. The People<sup>(1)</sup> and Saidi Banda vs. The People<sup>(2)</sup> were referred to for the proposition that where the



available evidence establishes certain basic facts, which basic facts prove further facts, the only conclusion that can be made is that the case has been proved.

Relying on the case of Vincent Mucheleta vs. The People<sup>(3)</sup>, it was submitted that the petitioner has established basic facts which prove further facts with the effect of implicating the 1<sup>st</sup> Respondent to the satisfactory degree that he used the UPND in his campaigns.

The Petitioner contended that the 1<sup>st</sup> Respondent's conduct was a clear violation of Article 54 of the Constitution of Zambia which provides that:-

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

In addition to that, it was contended that the 1<sup>st</sup> Respondent violated Regulation 15 (1) (c) of the Electoral Process Act No. 35 of 2016 which provides that:-

**"A person shall not make false, defamatory or inflammatory allegation concerning any person or political party in connection with an election".**

It was the Petitioner's submission that a candidate in an Election Petition is only answerable for those things which he has done or which are done by his election agent or with his consent and that in one's political party, everyone is one's election agent.

The case of Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mung'omba, Sebastian Saizi

Zulu, Jennifer Bwalya vs. Frederick Jacob Titus Chiluba<sup>(4)</sup> was cited as authority for that proposition.

Reliance was further sought from the case of Michael Mabenga vs. Sikota Wina, Mafo Wallace Mafiyo and George Samulela<sup>(5)</sup> for the Proposition that:-

“Proof of an election petition, although a civil matter is higher than balance of probability, but less than beyond all reasonable doubt”.

The case of Anderson Kambela Mazoka vs. Levy Patrick Mwanawasa and Others<sup>(6)</sup> was also relied on to posit that:-

“...For the petitioner to succeed.....he must adduce evidence establishing the issues raised to a convincing degree of clarity in that proven defects and flaws were such that the majority of voters were prevented from electing the candidate who they preferred or that the election was so flawed that the defects seriously affected the results which can no longer be said to represent the true and free choice of the majority of voters”

The Petitioner contended that the 1<sup>st</sup> Respondent used the UPND to campaign and that he used it to a large enough portion of the electorate after which he had an unfair advantage that saw him win the elections by over 3,000 votes. It was further contended that the 1<sup>st</sup> Respondent took advantage of the fact that there was no Parliamentary Candidate for the UPND for Nalolo Constituency.

It was alleged that the 1<sup>st</sup> Respondent's statements during the campaign trail were false and defamatory.

In relation to the allegation that votes for the petitioner were automatically going to Edgar Chagwa Lungu, the Petitioner submitted that through the evidence of PW1, PW2, PW7 and PW8, it has been established that the 1<sup>st</sup> Respondent used UPND to campaign. The Petitioner submitted further that it has been established that the 1<sup>st</sup> Respondent stated that voting for the Petitioner would result in the votes being counted in favor of Edgar Chagwa Lungu.

It was submitted that by that evidence; the proven basic facts are that:-

- i. The 1<sup>st</sup> Respondent indeed stated that if the electorate voted for the Petitioner those votes would go to count for Mr. Lungu who was a Presidential Candidate for the PF, and
- ii. This statement was made to a large enough portion of the electorate that the 1<sup>st</sup> Respondent obtained an unfair advantage over his counter-parts.

That the said basic facts tend to prove that the 1<sup>st</sup> Respondent spread false-hoods about the Petitioner to the electorate which conduct is prohibited by the Electoral Code of Conduct.

Referring to the evidence of PW11, it was contended that the phenomenon of women going to remove their under wear at the Polling Stations on the poll day in all the 12 wards shows that the effect of the 1<sup>st</sup> Respondent's words was wide spread and worked to the disadvantage of the Petitioner.

It was submitted that PW11 testified that the people of Nalolo believe in the potency of super natural powers and as such are likely to attach negative emotions to a person whom they perceive to be the wielder of super natural powers.

It was the Petitioner's submission that the effect of the 1<sup>st</sup> Respondent's conduct was that he gained an unfair advantage because of his chosen campaign strategy which consisted of telling the electorates false-hoods.

In conclusion, the Petitioner submitted that this is a fit case for the court to grant the reliefs sought. The Petitioner prayed that the election for the Parliamentary seat for Nalolo Constituency held on the 12<sup>th</sup> August, 2021 should be nullified.

#### **The 1<sup>st</sup> Respondent's submissions**

The 1<sup>st</sup> Respondent's submissions are dated the 11<sup>th</sup> day of October, 2021. The 1<sup>st</sup> Respondent gave the background of the matter as well as the evidence from the respective witnesses that was adduced at the hearing of the matter.

The 1<sup>st</sup> Respondent submitted that the Petitioner has failed to prove his case on the balance of probabilities.

**Phipson on Evidence 17<sup>th</sup> Edition paragraph 6-06** was relied on to assert that 'he who alleges' and in this case, the Petitioner 'must prove all the allegations'.

Relying on the case of Austin Liato vs. Sitwala Sitwala<sup>(7)</sup> which cited the case of Lewanika and Others vs. Chiluba<sup>(4)</sup> with approval, it was submitted that in an election petition the standard required to be established is a fairly high degree of convincing clarity.

The case of Brelsford James Gondwe vs. Catherine Namugala<sup>(8)</sup> and Abuid Kawangu vs. Elijah Machima<sup>(9)</sup> were also relied on to buttress the proposition that the petitioner tendered unreliable, unsubstantiated and speculative evidence which fell short of the required standard of proof in election petitions.

Following from the foregoing, the 1<sup>st</sup> Respondent submitted that the petitioner failed to prove the allegations warranting nullification of his election as member of Parliament for Nalolo Constituency. That this is so because an election of a member of Parliament may only be nullified on the grounds set out in section 97(2) paragraphs (a), (b) and (c) of the Electoral Process Act No. 35 of 2016 which are restricted to corrupt practice, illegal practice or other misconduct in relation to the election.

It was contended that the petitioner's evidence is manifestly short of proving any plausible wrong doing on the part of the 1<sup>st</sup> Respondent to warrant the nullification of the Nalolo Parliamentary election.

It was contended further that the petitioner failed to prove an additional requirement that the corrupt practice or illegal practice or other misconduct was committed by the 1<sup>st</sup> Respondent or by his agents with his knowledge and consent or approval.

It was the 1<sup>st</sup> Respondent's further contention that there was no evidence that the alleged corrupt or illegal practice or misconduct prevented the majority of the voters in the constituency to vote for their preferred candidate.

In relation to the allegation that the 1<sup>st</sup> Respondent contravened section 82 (1) (e) (i) of the Electoral Process which prohibits impersonation of a registered political party, it was submitted that the Petitioner did not prove that the majority of the voters in Nalolo Constituency were prevented from electing their preferred candidate as a result of the said unsubstantiated allegation.

The 1<sup>st</sup> Respondent denied the allegation that, he used the UPND Party, that he told the electorates that voting for the petitioner would entail voting for Edgar Chagwa Lungu and that the 1<sup>st</sup> Respondent was using witchcraft.

The case of Mubika vs. Poniso Njeulu<sup>(10)</sup> which cited the case of Jonathan Kapaipi vs. Newton Samakayi<sup>(11)</sup> with aplomb was referred to posit that:-

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

to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate.”

To fortify this position, the cases of Mubita Mwangala vs. Inonge Mutukwa Wina<sup>(12)</sup>, Josephat Mlewa vs. Eric Wightman<sup>(13)</sup> and Nkandu Luo and the Electoral Commission of Zambia vs. Doreen Sefuke Mwamba and The Attorney-General<sup>(14)</sup> and Abuid Kawangu vs. Elijah Muchima<sup>(9)</sup> as well as Margaret Mwanakatwe vs. Charlotte Scott<sup>(15)</sup> were referred to.

Regarding the video footage, P1, the 1<sup>st</sup> Respondent submitted that it did not show that he was performing any corrupt practice or illegal practice or other forms of misconduct. It was contended that the movements of the 1<sup>st</sup> Respondent's hands was a symbol of acknowledging the people of Nalolo by way of beating drums.

In addition, it was submitted that the 1<sup>st</sup> Respondent had no control of the audience he addressed and all the more so, what they chose to wear on the day he addressed them.

Relying on the case of Nkandu Luo and the Electoral Commission of Zambia vs. Doreen Sefuke Mwamba and The Attorney General<sup>(14)</sup>, it was submitted that the 1<sup>st</sup> Respondent cannot be held liable for the acts of other persons who are not his election or polling agents. The 1<sup>st</sup> Respondent added that even more, there was no credible evidence before court relating to the 1<sup>st</sup> Respondent perpetrating any malpractice.

The 1<sup>st</sup> Respondent further submitted that the petitioner's witnesses were partisan witnesses with an interest to serve other than helping the Court render Justice. In this regard, the Court was urged to treat the petitioner's witnesses with caution and that in any case, their testimonies required corroboration in order to eliminate the danger of exaggeration and falsehood.

In conclusion, the 1<sup>st</sup> Respondent submitted that the petitioner has failed to prove his case and beseeched the Court to dismiss the petition.

#### The 2<sup>nd</sup> Respondent's Submissions

The 2<sup>nd</sup> Respondent's final submissions are dated the 7<sup>th</sup> day of October, 2021. The gist of the 2<sup>nd</sup> Respondent's submissions is that the Petitioner did not allege any wrong doing against the 2<sup>nd</sup> Respondent. Consequently, and hence no liability arises against the 2<sup>nd</sup> Respondent on the allegations leveled against the 1<sup>st</sup> Respondent.

The case of Michael Mabenga vs. Sikota Wina, Mafo Wallace Mafiyo and George Samulela<sup>(5)</sup>, and Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Hambaila, Dean Namulya Mung'omba, Sebastian Zulu, Jennifer Mwaba vs. Frederick Jacob Titus Chiluba<sup>(4)</sup> were relied on to posit that:-

"Parliamentary election petitions were required to be proved to a standard higher than on a mere balance of probability and therefore, where the petition has been brought under constitutional provisions and would



impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Further, the issues raised are required to be established to a fairly high degree of convincing clarity”

The case of Anderson Kambela Mazoka vs. Levy Patrick Mwanawasa and Others<sup>(6)</sup> was also relied on where the above position of the law was restated and applied with aplomb.

In line with this, it was submitted that the Petitioner’s evidence did not attain the level of legal cogency to compel this Court to sanction the 2<sup>nd</sup> Respondent who were only responsible for conducting elections in the country.

It was submitted further that on the Petitioner’s evidence, it cannot be seen what wrong the 2<sup>nd</sup> Respondent committed in the Nalolo Constituency Election.

The 2<sup>nd</sup> Respondent submitted further that it conducted the Nalolo Constituency election in substantial conformity with the law as provided for in the Electoral Process Act No. 35 of 2016.

Relying on section 97(4) of the Electoral Process Act aforesaid, the 2<sup>nd</sup> Respondent submitted that Parliamentary Elections cannot 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 Court that the election was so conducted as to be substantially compliant in accordance with the provisions of the

Electoral Process Act, and that such act or omission did not affect the result of that election.

In conclusion, the 2<sup>nd</sup> Respondent submitted that there is no evidence adduced by the Petitioner alleging any wrong doing on the part of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent beseeched the Court to find that the Nalolo Parliamentary Election held on the 12<sup>th</sup> August, 2021 was done in substantial conformity with the law.

I have considered the evidence adduced in this Petition as well as the Parties' final written submissions. I now consider the applicable law, make findings of facts, apply the law thereto and determine the matter.

#### **The Applicable law**

The governing provision of the law when an election of a Member of Parliament may be nullified is section 97(2) of the Electoral Process Act No. 35 of 2016. The section enacts as follows:-

97. (2).” The election of a candidate as Member of Parliament...shall be void if, on the trial on an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case maybe, that:

- (a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-
  - (i) by a candidate; or
  - (ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent, and the majority of voters in a constituency...were or may have been prevented from

electing the candidate in that constituency...whom they Preferred;

- (b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the results of the election; or
- (c) the candidate was at the time of the election a person not qualified or a person disqualified for election.

The above provision has been given rendition in a plethora of cases and posits a two pronged approach. The Petitioner must firstly prove that the Respondent had committed a corrupt or illegal practice or other misconduct and secondly that as a consequence thereof the majority of the voters in the constituency were or may have been prevented from electing a candidate of their choice.

In the case of Mwiya Mutapwe vs. Shomeno Dominic<sup>16</sup>, the Constitutional Court held as follows:

“The grounds on which an election can be nullified are set out in section 97(2) (a) of the Electoral Process Act No. 35 of 2016. A candidate will only be nullified if the petitioner proves to the satisfaction of the High Court or a tribunal, as the case may be, that the candidate committed a corrupt or illegal practice or other misconduct in relation to the election or that the corrupt or illegal practice or misconduct was committed by the candidate’s election or polling agent or by another person with the candidate’s knowledge, consent or approval or that of the candidate’s election or polling agent.

In addition to this, the Petitioner must further prove that as a result of the corrupt or illegal practice or misconduct complained of, the majority of the voters in the constituency, district or ward were or may have been prevented from electing their preferred candidate”.

The import of section 97 of the Electoral Process Act was further restated in the case of Chrispin Siingwa vs. Stanely Kakubo<sup>(17)</sup> as follows:

“A Petitioner must prove the following elements prescribed under section 97(2) in order to successfully have an election of a Member of Parliament nullified: -

- i) That the candidate whose election is being challenged personally committed a corrupt practice or illegal practice or other misconduct in connection with the election or that such corrupt or illegal practice or misconduct was committed with the knowledge, consent or approval of that candidate or his or her election or polling agent and
- ii) That as a result of the election malpractice or misconduct, the majority of the voters in the constituency district or ward were or may have prevented from electing their preferred candidate.

Further in the case of Imbuwa vs. Enock Kaywala Mundia<sup>(18)</sup>, the Constitutional Court stated as follows:

“The position of the law is that the proscribed act has to be proved before a Court can proceed to adjudicate on whether the majority of voters may or were prevented from electing their preferred candidate in any given election”.

In casu, the Petitioner is seeking to void the election based on the provisions of sections 82, 83 and regulation 15(1) which proscribes impersonation, undue influence and making false, defamatory or inflammatory allegations concerning any person or political party in connection with an election respectively. These sections must be read together with section 97(2) of the Electoral Process Act for purposes of voiding an election.

It is trite that the burden of proof in this election petition is on the Petitioner and the standard of proof is to a standard higher than on the mere balance of probability. The evidence must show a fairly high degree of convincing clarity. All the parties have ably submitted on the standard of proof in an election petition in line with a plethora of cases as cited by the parties.

The case of Lewanika and Others vs. Chiluba<sup>(4)</sup> is one such case where the Supreme Court held that Parliamentary election petitions are required to be proved to a standard higher than a mere balance of probability and that the Petitioner must prove his case to a convincing degree of clarity.

I am also aware of a catena of recent cases in which the standard of proof in election Petition was restated by the Court. The cases of Richard Sikwibele Mwapela vs. Miyuyu Chinga<sup>(19)</sup>, Chrispin Siingwa vs. Stanely Kakubo<sup>(17)</sup>, and Brelsford James Gondwe vs. Catherine Namungala<sup>(8)</sup> all restate that the evidence establishing the alleged proscribed act in an election Petition must reach a fairly

high degree of convincing clarity. This is so because election petitions are exceptionally important as they are a civilized way of participation of the citizens in the governance of the country.

Therefore, courts should not take a liberal view of the evidence adduced by the parties but the evidence should be treated with the highest degree of caution as it involves the rights of the public.

### **Finding of Facts**

It is undeniable that both the Petitioner and the 1<sup>st</sup> Respondent were candidates in the Parliamentary election for the Nalolo Constituency which has 12 wards. The Petitioner contested under the PF while the 1<sup>st</sup> Respondent was under the PNUP in the elections that were held on the 12<sup>th</sup> August, 2021.

The other candidates were Kwibisa Lubinda for DP and Chinyama for SP. The UPND did not field any parliamentary candidate as its candidate failed to successfully file in his nomination. It is undeniable that the people of Nalolo Constituency did not like the PF on whose ticket the Petitioner contested the elections.

It is further not in dispute that the 1<sup>st</sup> Respondent as a candidate for PNUP had his own official campaign posters shown in the 1<sup>st</sup> Respondent's bundle of documents. The poster had two pictures on it; the bigger picture for the 1<sup>st</sup> Respondent and the smaller picture for his Presidential candidate Mr. Hamududu. I take judicial notice that during the campaign period, campaign posters of participating

candidates are stuck in all possible places within the respective constituencies and are thus visible to the electorates.

The symbol for the PNUP as shown on the campaign poster and the mock ballot both shown in the 1<sup>st</sup> Respondent's bundle of documents was a wheel and is not in contention. The symbol for the UPND was a hand.

It is common knowledge that the 1<sup>st</sup> Respondent emerged the winner in the said elections after polling 8,666 votes. The Petitioner polled 5,484 votes whilst the other two candidates for DP and SP polled 1,646 and 857 votes respectively. The difference in votes between the Petitioner and the 1<sup>st</sup> Respondent was therefore 3,182 votes whilst the total number of votes against the 1<sup>st</sup> respondent was 7,987 votes. The total number of rejected ballots was 499.

I am further satisfied that the 1<sup>st</sup> Respondent was declared duly elected as member of Parliament for Nalolo Constituency by the Returning Officer Inambao Mukela on 15<sup>th</sup> August 2021 which election aggrieved the Petitioner.

The Petitioner has alleged that the 1<sup>st</sup> Respondent was engaged in character assassination, used undue influence and was impersonating a representative of the UPND during the campaign trail preceding the said elections and thusly seeks to have the election nullified. The 1<sup>st</sup> Respondent has denied any wrong doing in his campaign trail and as such the said assertions are in dispute.

The first consideration in resolving the disputed factual issues is whether or not the proscribed acts alleged by the Petitioner have been proved and fall into the category of the proscribed conduct provided for in the Electoral Process Act. Secondly, whether or not the prohibited acts allegedly committed by the 1<sup>st</sup> Respondent were wide spread and prevented or may have prevented the majority of voters in Nalolo Constituency from electing a candidate of their choice or whom they preferred.

The Petitioner's allegations in this cause are threefold, namely:-

- i. That Nalolo Constituency election was characterized by impersonation in that the 1<sup>st</sup> Respondent claimed that he was standing in for the UPND candidate who had been disqualified.
- ii. That the Nalolo Constituency election was characterized by undue influence and character assassination particularly targeting women to the effect that if they voted whilst wearing under wear, then their votes would go to the Petitioner and the PF President regardless of their choice, and;
- iii. That the 1<sup>st</sup> Respondent deceived the electorate by stating that if they voted for the Petitioner, they would be voting for Edgar Lungu, a PF Presidential Candidate who they perceived to have had destroyed the country and hated the people of Western Province.

It is convenient to address the allegations singly and sequentially.

### **The Allegation of impersonation**



The first ground relied on by the Petitioner is impersonation pursuant to section 82(1)(e)(i) of the Electoral Process Act which enacts as follows:

**'82. (1). A person shall not-**

**(a) ...**

**(b) .....**

**(c) .....**

**(d) .....**

**(e) impersonate-**

**(i) a representative of a registered political party;**

**(ii) ...."**

Impersonation is an election offence under the Electoral Process Act and as such any person who impersonates a representative of a political party commits an offence. The word impersonation has not been defined in the Electoral Process Act. I have thus looked at the general definition of personation as enacted in the penal code as follows:

**"378(1) Any person who with intent to defraud any person, falsely represents himself to be some other person..... is guilty of a misdemeanor".**

The Black's Law dictionary on the other hand defines impersonation as the act of impersonating or imitating someone.

To impersonate a representative of a political party under section 82 of the Electoral Process Act would be committed when a person

falsely represents himself as a representative of a political party or pretends to be a representative of a political party when in fact not.

Therefore when impersonation under section 82(1) (e) (i) is proved, an election of a member of parliament can be nullified under section 97(2) of the Electoral Process Act as the act of impersonation is in my view a proscribed misconduct. Suffice to note that such misconduct or electoral crime diminishes free and fair elections which are a coverture of every democratic state.

The outcry by the Petitioner was that the 1<sup>st</sup> Respondent was riding on the UPND, a popular party for campaign purposes when he belonged to another party and as such impersonating a political representative. Put differently, the Petitioner complained that the 1<sup>st</sup> Respondent was using the name of the UPND during his campaigns. If the Petitioner's allegation is proved, then the impact of the misconduct on the electorate would be considered to determine whether the 1<sup>st</sup> Respondent's election as a Member of Parliament can be nullified.

The Petitioner's (PW1) evidence was that the 1<sup>st</sup> Respondent went round all the 12 wards of Nalolo Constituency informing the people that since the UPND had failed to field a Parliamentary Candidate in Nalolo Constituency, the UPND leader Mr. Hakainde Hichilema had indorsed him to be the one standing as the UPND candidate. That the people of Nalolo did not therefore vote for a candidate of their choice.

The Petitioner did not hear the 1<sup>st</sup> Respondent utter that he was indorsed by UPND nor did he encounter him during the campaign trail. The Petitioner's evidence is thus by and large hearsay evidence and inadmissible in evidence. His evidence does not therefore prove the assertion of impersonation.

The Petitioner thus solely relied on his witnesses to prove his assertion. PW2, was the campaign manager for the Petitioner and as such a PF member. In terms of categorization, PW2 is a partisan witness as he belongs to the Petitioner's political party. PW2's evidence must thus be treated with utmost caution and circumspection as there is tendency by such witnesses to exaggerate in their testimonies. PW2's evidence should thusly be corroborated by an independent source in order to eliminate the danger of exaggeration or falsehood.

PW3, PW4, PW5 and PW11 are witnesses from the DP whilst PW6, PW7, PW8, PW9 and PW10 are UPND officials. PW12 is a farmer from Nalolo constituency. These ten witnesses do not belong to the Petitioner's political party and as such are not partisan witnesses. The 1<sup>st</sup> Respondent's submission that all the witnesses called by the Petitioner are partisan witnesses with their own interest to serve is not correct and cannot be sustained. The alluded to ten witnesses would be categorized as independent witnesses as they have no interest of their own to serve in the matter. The evidence of these ten witnesses could therefore corroborate the evidence of PW2 if at

all such a need arises. As for PW1, there is nothing to corroborate as his evidence is inadmissible hearsay evidence.

The evidence of PW2 was that he initially heard from people during the campaign trail that the 1<sup>st</sup> respondent who was standing on the PNUP ticket was going round telling the people that he was sent by Mr. Hakainde Hichilema and all UPND voters should vote for him. PW2 later attended a meeting at ilutondo village and personally heard the 1<sup>st</sup> Respondent telling the electorates that he was sent by the UPND President Mr. Hakainde Hichilema and that all the UPND supporters in Nalolo Constituency should vote for him.

I have considered the evidence of PW2 with regard to what he heard. This evidence was not disputed and as such I accept it as factual. I note however that what PW2 heard the 1<sup>st</sup> Respondent say at the meeting in my view falls short of impersonation in the strict sense. I say so because the 1<sup>st</sup> Respondent did not say he was a UPND candidate nor did he claim to be a representative of the UPND for his statements to amount to impersonation. I therefore find that based on the evidence of PW2, impersonation has not been proved. Suffice to note that PW2 did not state the estimated population of the people that attended the meeting at ilutondo village that the 1<sup>st</sup> Respondent addressed in his hearing. The size of the meeting cannot therefore be ascertained.

PW4, a campaign manager for the DP parliamentary candidate lamented that he personally faced challenges during the campaign

period because the 1<sup>st</sup> Respondent was using the UPND for his campaign. That he was telling the UPND supporters that they should vote for him because he was sent by Mr. Hakainde Hichilema. PW4 did not specify the places where he heard the 1<sup>st</sup> respondent campaigning using UPND. He did state however in cross examination that he heard this in all the 12 wards of Nalolo Constituency. It is clear to me that PW4 just heard from the electorates what he told the court and never personally encountered the 1<sup>st</sup> Respondent. There is no evidence of him attending a meeting called by the 1<sup>st</sup> Respondent and personally hearing for himself what he claimed he heard in all the 12 wards. PW4's evidence was therefore largely hearsay evidence which I cannot rely upon to make findings of fact and or conclusions as it is inadmissible.

PW4 in addition conceded that, even if he faced challenges during the campaign trail due to the 1<sup>st</sup> Respondent's conduct, he did not lodge any complaint with the Electoral Commission of Zambia. The total effect of this failure is that the credibility of PW4 as a witness is brought into question. As a party official and campaign manager, it does not make sense that PW4 decided to simply fold his hands amidst the challenge that he claimed to have faced. I find that PW4's credibility is below grandeur and renders his testimony not worthy of belief. I thus reject PW4's testimony in so far as it endeavors to establish that the 1<sup>st</sup> Respondent was using UPND during the campaigns.

PW5, Mwanamwalye Kamona, the DP Constituency Chairman for Nalolo District testified that he personally heard the 1<sup>st</sup> Respondent at a meeting in Kataba ward tell the people that he had been sent by Mr. Hakainde Hichilema and the people of Nalolo should vote for him being the one appointed to stand on the UPND ticket. PW5's evidence that he heard the 1<sup>st</sup> Respondent telling the people at Kataba ward that he had been sent by Mr. Hakainde Hichilema to stand on UPND ticket was not challenged. I thus accept the evidence as being factual and find as a fact that the 1<sup>st</sup> respondent addressed a meeting at Kataba ward at which he told the people that he had been sent by Mr. Hakainde Hichilema and people should vote for him as he was standing on the UPND ticket. These utterances amounted to impersonation as the 1<sup>st</sup> Respondent was by implication stating that he was a UPND candidate for him to stand on UPND ticket when he was a candidate for PNUP. PW5 did not however state how big the meeting was and as such the population in attendance remains unknown. He equally did not report the 1<sup>st</sup> Respondent's conduct to the Electoral Commission of Zambia.

PW6, a UPND official, testified that he only heard that the 1<sup>st</sup> Respondent was using the UPND in his campaigns. Clearly PW6's testimony is hearsay evidence and does not fall within the ambit of admissible evidence for the purposes of proving the existence or non-existence of a fact. In the case of Muyuma Situna Kambanja vs. The People<sup>(20)</sup>, the Court held that:-

"Hearsay evidence which does not fall within the exceptions of the rule and which does not come within section 4 of the Evidence Act is inadmissible of the truth of what is alleged".

In the premises of this case, I am satisfied that the import of PW6's evidence was to establish the truth of its contents. I thus find it inadmissible and reject it in so far as it endeavors to establish that the 1<sup>st</sup> Respondent actually used the UPND in his campaigns.

PW7, was the UPND Information and Publicity Secretary for Nalolo District. His evidence was that he was at Ndandanda village when he personally heard the 1<sup>st</sup> Respondent who introduced himself as coming from PNUP telling the people who had gathered that he had been sent by Mr. Hakainde Hichilema to stand on UPND ticket because they did not have a candidate. He further called on all the people of Nalolo to vote for him. In cross examination, PW7 stated that he reported what he had heard at Ndandanda village to the District Chairman who assured him that the claims by the 1<sup>st</sup> Respondent were not true. He further stated that the 1<sup>st</sup> Respondent did not state that he was a UPND candidate and he was just requesting for votes at the said meeting.

The evidence of PW7 as regards what he heard at Ndandanda village was not challenged. The major issue was whether that was the only meeting where he had heard the 1<sup>st</sup> Respondent make the claims of being sent by Mr. Hakainde Hichilema and he agreed. I note however that PW7's evidence was contradictory and as such not credible. Firstly, he told the Court that the 1<sup>st</sup> Respondent

introduced himself as a PNUP candidate; secondly that he was sent by Mr. Hakainde Hichilema to stand on UPND ticket. When cross examined, he stated that the 1<sup>st</sup> Respondent did not state that he was a UPND candidate but he was just requesting for votes. It is clear that PW7 was not sure of what he heard, and considering that the 1<sup>st</sup> Respondent began the meeting by introducing himself as PNUP candidate, it defies logic that he would at the same meeting claim to be standing on the UPND ticket. I therefore find it difficult to make sense of PW7's evidence in so far as he states that the 1<sup>st</sup> Respondent had told the people that he was standing on the UPND ticket. I however accept as a fact that the 1<sup>st</sup> Respondent did address a campaign meeting at Ndandanda village, whose main agenda was to ask the people who had attended the meeting vote for him as UPND had no candidate.

PW7 did not, however, testify as to the estimated number of people that had attended this meeting at the aforementioned village, leaving it to speculation as to whether the meeting was attended by a lot of people or it was just a few villagers who had attended the meeting.

PW8, PW9 and PW10 are all UPND party officials. PW8 testified that as he was going around campaigning for his party UPND in Kambayi ward, he found the 1<sup>st</sup> Respondent holding a meeting. He then heard the 1<sup>st</sup> Respondent tell the people that because you do not have an MP in Nalolo, the President of UPND, Mr. Hakainde Hichilema had authorized him to stand in Nalolo.



PW9's evidence was that he encountered the 1<sup>st</sup> Respondent at Nalele village in Ukolo ward at a meeting. The 1<sup>st</sup> Respondent was telling the people that he had been indorsed by Mr. Hakainde Hichilema to stand on UPND because the people of Nalolo did not have an MP. The 1<sup>st</sup> Respondent urged the people to vote for him on the symbol of a wheel and the Presidential vote to be for UPND President Hakainde Hichilema on the symbol of the hand. PW10 encountered the 1<sup>st</sup> Respondent at Ndeke Village in Ukolo ward where he was telling the people that he had been sent by Mr. Hakainde Hichilema who indorsed him to stand on UPND.

The evidence of these three witnesses as regards the specific places where they personally heard the 1<sup>st</sup> Respondent campaign that he had been sent by the UPND President to stand as MP is essentially not in dispute. The only issue that was raised by the 1<sup>st</sup> Respondent was whether the witnesses had any other evidence other than their oral testimonies. In view therefore, I accept the evidence of PW8, PW9 PW10 that they heard the 1<sup>st</sup> Respondent telling the electorate that he had been sent by Mr. Hakainde Hichilema. The 1<sup>st</sup> Respondent however introduced himself as a PNUP candidate and at no time did he claim to be a UPND official or party representative. These three witnesses who are UPND officials actually dispelled the 1<sup>st</sup> Respondent's claims that he had been sent by the UPND President because they in any case knew that UPND did not field any parliamentary candidate. The utterances by the 1<sup>st</sup> Respondent had no influence on these three witnesses whilst the

size of the general populace that attended the respective singular meetings was not stated.

Suffice to note that PW10's evidence as regards what he heard when he went across the Zambezi river and campaigned in 7 wards to the effect that the 1<sup>st</sup> Respondent was saying that he had the blessings of the UPND President Hakainde Hichilema to stand on the UPND ticket was hearsay evidence in so far as the evidence seeks to establish the truth of the matter. The same applies to what he heard when he crossed back and heard the same rumors in 4 wards before he finally met the 1<sup>st</sup> Respondent at Ndeke village.

The last witness on assertions of impersonation is PW12, a non-partisan witness. The video that he recorded is what the Petitioner claims depicts the 1<sup>st</sup> Respondent flashing the UPND symbol at a meeting that was held at his village on 19<sup>th</sup> July 2021. I have viewed the video and take the view that the 1<sup>st</sup> Respondent was gesturing a UPND symbol as seen in the video. I do not agree with the 1<sup>st</sup> Respondent that he was gesturing the beatings of drums as he claims. This is because it is clear from the songs and narration that accompanied the gesturing that it was referencing UPND. I therefore find as a fact that the 1<sup>st</sup> Respondent was gesturing a UPND symbol at the said meeting. The gesturing of the UPND symbol on its own without any utterances cannot amount to impersonation of a political representative.

### Allegations of undue influence, character assassination and falsehoods

The second allegation raised by the Petitioner was that the 1<sup>st</sup> Respondent's campaign was characterized by undue influence, character assassination and falsehoods.

The first particular being aspersions cast on the Petitioner that he uses black magic and women were urged to go to vote without wearing underwear as a way to circumvent the black magic.

PW1 had testified that the 1<sup>st</sup> Respondent was telling the electorates that the Petitioner practices black magic and that on the polling day they should not wear underwear because if they did, the votes would go to the Petitioner regardless. PW1 never heard the 1<sup>st</sup> Respondent make such utterances just like the first allegation. His evidence on this issue is again inadmissible hearsay evidence.

The only other witness who testified on the issue of women not wearing underwear on voting day was PW11, the DP youth chairman.

His evidence was that on 12<sup>th</sup> August 2021, he was assigned to monitor elections and went to Kataba polling stations. He then saw women gathered in a toilet and he decided to go there and check what was happening. He could not however be allowed to proceed because the said women were taking off their underwear.

PW11 did not actually see any of those alleged women taking off the pants. Though he claims to have met some of the women who actually confirmed that they had taken off their pants, none of those women were called as witnesses to confirm the assertion. Suffice to note that PW11 did not state the number of women who had allegedly gathered in the toilet and who he encountered to confirm what was happening in the toilet.

It is also strange that PW11 who was an election monitor and presumably informed on his role did not bring to the attention of the Police officer who were at the polling station of what he claims was happening in the toilet at Kataba polling station and the subsequent polling stations that he claimed to have visited. The evidence of PW11 is not cogent in the absence of evidence from any such woman who was at the said polling station and engaged in the acts of taking off underwear. It is also strange that going by PW11's evidence, the alleged practice of black magic of taking of underwear was only put into effect by women.

The view I take is that PW11's evidence is not credible and I cannot really on it to draw any conclusions in the absence of corroborative evidence. The Petitioner's allegation that the 1<sup>st</sup> Respondent and his agents were spreading falsehoods insinuating that the Petitioner had dark supernatural powers cannot be sustained on the evidence before court and it is hereby dismissed.

**Allegation that should the electorates vote for the Petitioner, the votes would automatically go to Edgar Chagwa Lungu.**

The third and last grievance by the Petitioner was that the 1<sup>st</sup> Respondent deceived the electorate by stating that if they voted for the Petitioner, they would be voting for Edgar Lungu, a PF Presidential candidate who was not liked by the people of western province. PW1 testified in usual style of just laying the foundation as he himself never witnessed the 1<sup>st</sup> Respondent making any such utterances. He relied on PW2, PW7 and PW8 who testified that whilst attending meetings at Ilutondo village, Ndandanda village and at a polling station within Kambayi ward respectively, they heard the 1<sup>st</sup> Respondent state that the people should not make a mistake of voting for the Petitioner as all such votes would go to Mr. Edgar Lungu. The evidence of the three witnesses was not substantially challenged and as such I accept the evidence as being factual of what had transpired.

The Petitioner's allegation that the 1<sup>st</sup> Respondent did tell the electorate that their votes will automatically be converted in favor of the Petitioner is sustained to the extent alluded to above. The three witnesses did not however testify as to the population that attended the respective meetings at which such utterances were made.

The said utterances by the 1<sup>st</sup> Respondent which subtly impugned practice of black magic by the Petitioner amounted to undue influence and character assassination which is prohibited under section 83 (1) of the Electoral Process Act, 2016. The act is further

proscribed under regulation 15(1) of the Code of Conduct as follows:

A person shall not-

- c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election.

The net effect of the foregoing is that the Petitioner has proved with convincing clarity that the 1<sup>st</sup> Respondent did tell the people who had attended his meetings at the three named villages/ward that he was sent by the UPND President Mr. Hakainde Hichilema to stand in Nalolo since UPND had no candidate and that voting for the Petitioner will translate in voting for Mr. Edgar Chagwa Lungu. The 1<sup>st</sup> Respondent further gestured the UPND symbol at Silai village.

Were the majority of the voters in Nalolo Constituency prevented from electing their preferred candidate.

Having established the foregoing, I now consider whether as a result of the aforestated misconduct, the majority of the voters in the constituency were or may have been prevented from electing their preferred candidate.

It is trite that the estimated number of the people who attended the meetings was not stated. The witnesses simply stated that they attended the meetings without an indication of whether or not the crowds were big or small or whether or not there were many people.

It was important for the witnesses to give an estimation of the people and all population who gathered to attend the meetings because the campaigns were held during the Covid 19 period when large gatherings were regulated and proscribed by the Ministry of Health. This I take judicial notice of.

Further if what was seen in the video, P1, could be taken as an example, the crowd included a number of children who are not electorates. It was thusly possible that the candidate could have been talking to ten people for instance and in which case such utterances will have no significance on the majority of the voters.

In the case of Imbuwa vs. Enock Kaywala Mundia<sup>(19)</sup>, the Constitutional Court noted the need for evidence to show whether many comprised of or could have comprised a significant part of the population of the Constituency.

Nonetheless, the fact that the meetings were held at two villages and one ward, it can be deduced that only a fraction of the people/electorates of Nalolo constituency attended these meetings. Suffice to note that the 1<sup>st</sup> Respondent's gesturing of the UPND symbol had no significant impact on the majority of the voters. The misconduct was not widespread as only three locations were in issue.

Therefore in the absence of the estimated population that attended the meetings, it would be difficult to conclude that the majority of voters were prevented from choosing a candidate of their choice.

Conversely, I am of the firm view that the Petitioner has not established that the three isolated incidents affected the majority of the electorates in Nalolo Constituency from voting for their preferred candidate.

The second issue to note is that the total votes against the 1<sup>st</sup> Respondent was 7,987 which translates into 46% of the votes cast. The total votes for the 1<sup>st</sup> Respondent was 8,666 which translates into 50.5% of the votes cast. The number of people who voted against the 1<sup>st</sup> Respondent though not the majority was significant and an indication that the people were free to choose a candidate of their choice. The Petitioner's argument that in view of the lean difference in the votes of 3,182, the Petitioner would have won had it not been for the utterances by the 1<sup>st</sup> Respondent is not supported by evidence and as such speculative. The argument cannot thus be sustained as my view remains that the malpractice did not substantially affect the result of the Nalolo constituency election.

The voting pattern from the record of proceedings at the totaling Centre shown in the Petitioner's bundle of documents reveal that the Petitioner got more votes than the 1<sup>st</sup> Respondent in certain polling stations. This to me is an indication that the majority of the people in Nalolo Constituency were not influenced by the 1<sup>st</sup> Respondent's misconduct in the three villages and were consequently not prevented from choosing a candidate of their choice.



The facts further reveal that the PF, the party on whose ticket the Petitioner stood was unpopular in Nalolo Constituency. There is no evidence to show that the Petitioner was a popular candidate. I would therefore agree with the 1<sup>st</sup> Respondent that the Petitioner lost the elections because he stood on an unpopular party and was poised to loose. The 1<sup>st</sup> Respondent's victory cannot be attributed to the allegation of impersonation because as alluded to above, all his campaign material had PNUP labels. All the witnesses who testified were fully aware that the 1<sup>st</sup> Respondent was standing on the PNUP ticket and not on the UPND ticket.

None of the witnesses testified that they voted for the 1<sup>st</sup> Respondent because they believed that he had been sent by UPND President Mr. Hakainde Hichilema to stand on the UPND Ticket. Further no witness testified that they voted for the 1<sup>st</sup> Respondent because they feared that if they voted for the Petitioner, the votes would go to the PF Presidential candidate Mr. Edgar Chagwa Lungu. The Petitioner did not call any witnesses to show that after they heard the falsehood relating to votes automatically going to Mr. Edgar Chagwa Lungu, they changed their mind and voted for the 1<sup>st</sup> Respondent. There is thusly no evidence to prove that the witnesses who testified before court or the majority of the people in Nalolo Constituency were swayed from choosing a candidate of their choice after they heard what the 1<sup>st</sup> Respondent said at the three meetings.

It is thus my conclusion that that there is no convincing evidence from the Petitioner and his witnesses that any of the electorates

were compelled to vote for the 1<sup>st</sup> Respondent on the alleged grounds of the petition. My considered view based on the foregoing analysis is that the Petitioner has failed to prove with a fairly high degree of convincing clarity that the majority of the voters in Nalolo Constituency were prevented from voting for a candidate of their choice and as such the election cannot be voided.

#### Allegations against the 2<sup>nd</sup> Respondent

The Petitioner did not adduce any evidence whatsoever imputing wrong doing on the part of the 2<sup>nd</sup> Respondent in so far as the conduct of elections in Nalolo Constituency is concerned. I thus agree in toto with the 2<sup>nd</sup> Respondent's submission that there was no wrongdoing on its part in the conduct of elections in Nalolo Constituency. I am therefore satisfied that the 2<sup>nd</sup> Respondent's conduct of the elections in Nalolo Constituency was in substantial conformity with the Electoral Process Act for which I commend the electoral body.

#### Conclusion

Bearing in mind the standard of proof in election petitions which is higher than the balance of probability, I come to the conclusion that the majority of the electorates in Nalolo Constituency were not prevented from electing their preferred candidate. Consequently, I find that the Petitioner's allegation have not been proved to a fairly a high degree of convincing clarity and hence cannot stand for lack of substance.

In the premises, I find that the Petitioner has failed to prove his case to a standard higher than on a mere balance of probability. In view thereof, I hereby dismiss the Petition and declare that the 1<sup>st</sup> Respondent was duly elected as Member of Parliament for Nalolo Constituency in the general elections held on the 12<sup>th</sup> August, 2021.

On the issue of costs, I wish to note that although costs ordinarily follow the event, a plethora of cases show that in election Petitions, parties need not be hampered with issues of costs. A Petitioner should only be condemned in costs in a case where there was no legal or factual justification for the Petitioner to petition the election results.

I therefore order that each party in this election petition will bear their own costs.

Leave to appeal to the Constitutional Court is hereby granted.

Delivered at Lusaka this 24<sup>th</sup> day of November, 2021.



C.B. Maka-Phiri  
JUDGE