

**IN THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL 2021/F/LGET/14
HOLDEN AT SHIWANG'ANDU
AT THE SHIWANG'ANDU DISTRICT**

(Civil Jurisdiction)

**IN THE MATTER OF LOCAL GOVERNMENT ELECTION PETITION FOR
MUCHINGA WARD OF SHIWANG'ANDU DISTRICT OF MUCHINGA
PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THE 12TH DAY OF
AUGUST 2021**

AND

**IN THE MATTER OF ARTICLE 159 OF THE CONSTITUTION OF ZAMBIA AS
AMENDED BY THE COSTITUTION (AMENDMENT) ACT NO. 2 OF 2016**

AND

IN THE MATTER OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

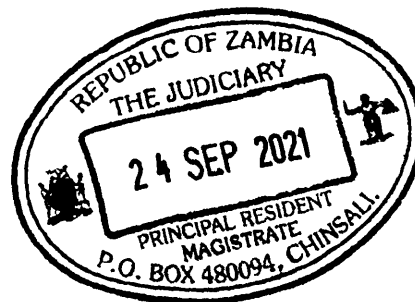
**IN THE MATTER OF THE LOCAL GOVERNMENT ELECTION TRIBUNAL
RULES S.I NO 60 OF 2016**

BETWEEN

KANGWA CLEVER

AND

MULENGA FRIDAH



PETITIONER

RESPONDENT

**BEFORE: C. CHILINGALA, G. CHIPULU AND M. MWENDA IN OPEN COURT
ON THIS 24TH DAY OF SEPTEMBER, 2021**

FOR THE PETITIONER: IN PERSON

FOR THE RESPONDENT: L.C LEMBE OF MULUNGUSHI CHAMBERS

J U D G M E N T

CHIPULU G delivered the Judgment of the Tribunal.

Legislation referred to:

1. The Constitution of Zambia as amended by the Constitution (Amendment) Act No. 2 of 2016
2. Electoral Process Act No. 35 of 2016
3. Local Government Electoral Petition Rules S.I 60 of 2016

Cases referred to:

1. Wilson Masauso Zulu vs. Avondale Housing Project (1982) Z.R 172 (SC)
2. Hanz Winfred Lorenz vs. Zambia Revenue Authority SCZ No. 192/2010
3. Austin Liato vs. Sitwala Sitwala Selected Judgment No. 23 of 2018
4. Lewanika and Others vs. Chiluba (1998) Z.R 48
5. Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General, Selected Judgment No. 51 of 2018
6. Margaret Mwanakatwe vs. Charlotte Scott Selected Judgment No. 50 of 2018
7. Mabenga vs. Wina and Others SCZ No. 15 of 2003
8. *Mazoka and Others vs Mwanawasa and Others (2005) Z.R 138*
9. Abuid Kawangu vs. Elijah Muchima CCZ No. 8 of 2017

This petition was filed on 27th August 2021 by Kangwa Clever (the Petitioner) who was a candidate for the United Party for National Development (UPND) in the Local Government Elections for Muchinga Ward of Shiwang'andu District. The Petitioner is challenging the election of Fridah Mulenga (the Respondent), his opponent who stood under the Patriotic Front (PF) in the said elections. The Respondent was declared as having been duly elected Councilor for Muchinga Ward on 14th August 2021 in the elections held on 12th August, 2021.

The petition is brought pursuant to Article 159 (3) of the Constitution of Zambia as amended by Act No. 2 of 2016 hereinafter referred to as "the

Constitution” and the Electoral Process Act No. 35 of 2016 of the Laws of Zambia hereinafter referred to as “the Act”.

The allegations made by the Petitioner are contained in paragraph 3 of the petition and are as follows:

- I. That the Respondent’s party namely the PF used the Social Cash Transfer (SCT) funds and the Farmer Input Support Programs (FISP) as campaign tools. Further, that the District Commissioner threatened voters with removal from the SCT program if they supported UPND and that, those who were going to vote for UPND risked having their houses demolished ;
- II. That PF through Mr. Stephen Kampyongo, Aaron Shinga and Ndanga went round polling stations giving out K20.00 notes. That among the beneficiaries were Alice Chanda and Benlock;
- III. That the Electoral Commission of Zambia (ECZ) allowed ineligible voters to vote at Chibesakunda and Matumbo; and
- IV. That the Respondent’s Party allowed an aspiring candidate namely, Stephen Kampyongo to commission the opening a mortuary at Matumbo Clinic on 6th August 2021.

To this effect, there is an Affidavit verifying the petition sworn by the Petitioner and the Petitioner accordingly prays that it be determined that the Respondent’s election be declared void.

The Respondent filed an answer on 2nd September 2021. The Respondent denied the contents of paragraph 3 (i) and (ii) of the petition and averred that he has no knowledge of his party using the SCT funds as a tool for canvassing votes or giving out K20.00 notes at polling stations.

Additionally the Respondents denied paragraph 3 (v) of the petition asserting that that at no time did her party or any of its members commission any project as alleged.

When the matter came up for hearing on 12th September 2021, the Tribunal made an observation that the Petitioner did not state the grounds upon which his petition was premised. Further the Tribunal guided the unrepresented Petitioner on the three grounds upon which an election petition could be premised to be as follows:

- I. a corrupt practice, illegal practice or other misconduct committed in connection with the election by a candidate or with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent;
- II. non-compliance with the provisions of the Electoral Process Act in relation to the conduct of elections; and
- III. that the candidate was at the time of the election a person not qualified or a person disqualified for election.

Following the aforesaid guidance the Tribunal asked the Petitioner to indicate which of the three grounds he was relying on. This was done in accordance with Rule 9 (3) which permits the Tribunal to order the parties to furnish such particulars which may be necessary to ensure a fair hearing of the matter.

The Petitioner stated that he was relying on all three grounds and the petition proceeded on the said premise.

At the hearing of the petition, the Petitioner testified and called two witnesses in support of his case.

The Petitioner was the first witness. He stated that he was a contender under the local government election seat for Councilor under Muchinga Ward and that he stood under the UPND ticket.

He stated that on a date he could not recall but in July 2021, he found the Respondent and the District Commissioner Ms. Eveline Kangwa addressing a rally at Bulaya and telling the attendees that they will cause those under the

UPND to be removed from the FISP and SCT programs. He further testified that at the time of paying out SCT funds, some beneficiaries were removed on account of being UPND. He further stated that the money was disbursed on 11th August 2021 by Mr. Mutale a teacher and pay point manager.

The Petitioner further stated that 12th August 2021, the Respondent and her people went to polling stations handing out K20. 00 notes, a practice he found to be irregular and illegal.

The Petitioner further testified that on 6th August 2021, the Respondent and her people commissioned the opening of a mortuary at Matumbo.

Under cross examination, the Petitioner stated that he was oriented on the procedures to follow once he observes an electoral malpractice. He further stated that he did not report the malpractices observed to the Electoral Commission of Zambia (ECZ) but to the police. He further stated that he did not understand how SCT and FISP programs are administered as he was not a beneficiary under these programs. He additionally, stated that he heard the Respondent instruct Mr. Mutale on how to disburse the SCT funds and that the instructions were given when the two were at the Respondents house whilst he, the Petitioner, was at the neighbour's place next door. He also stated that he personally observed the Respondent and her group disbursing K20.00 notes.

Under cross examination the Petitioner was asked whether Mutumbo is a government hospital and he confirmed it was, when asked whether the Respondent was a government employee he said she was not and did not understand the capacity under which she was part of the group commissioning the opening of the mortuary.

Loveness Matuto (PW2) testified that on 6th August 2021, the Respondent and Mr. Kanpyongo went to Kaluba Village to campaign. She stated that Mr. Kampyongo warned that all those who were not going to vote for him will not

get SCT funds. She also stated that the Respondent equally spoke at this rally telling people that that all those who belonged to UPND will not be getting money for the vulnerable. She further stated that in July, when the Community Welfare Assistant Committee (CWAC) officials went to disburse the SCT funds, she was paid without any problems but on 11th August when they returned to pay her name was omitted from the list.

Further, she stated that on 12th August 2021, when the Respondent went to ferry voters she was disbursing K20.00 notes and telling people to vote for her. She said she was equally offered a K20. 00 note by the Respondent but she refused to take it.

Bruce Sikapila (PW 3) testified that on 12th August 2021, as he was doing patrols as an election monitor for the UPND, he saw a Hino Truck which stopped at Kanakashi Polling Station. The Driver Mr. Kuka came out and gave the people behind the said truck money saying you must do as earlier instructed that is, *"voting suit"*.

PW 2 stated that later an Ipsum motor vehicle drove into the polling station and both the driver and passengers came out, the driver gave a K20, 00 note to one of the passengers reminding her not to forget.

Under cross examination, she said she did not report the said malpractice to ECZ officials but she reported to the Police.

This marked the close of the Petitioner's case. At the close of the petitioner's case and in exercise of our powers under Rule 20 (3) of the Local Government Elections Tribunal Rules, 2016 we ordered the Respondent and her witnesses to adduce evidence by Affidavit. The Affidavits were subsequently filed on 15th September 2021 and the same were read and translated to the Respondent before each witness was subjected to cross examination.

RW 1 was the Respondent. She deposed that she never attended a meeting with District Commissioner Evelyn Kangwa at Bulaya Village in July 2021 or indeed at any time during the campaigns for the 2021 general elections. She further deposed that she never gave money to any person in any Polling Station in Muchinga Ward for them to vote for her. That in fact she voted between 06:00 hours and 07:00 hours at Kanakashi Polling Station and thereafter, went home and never went back.

She further deposed that she does not have a neighbor by the name of Shi Bwalya and that she never instructed anyone to distribute SCT funds or distribute inputs under the FISP.

Under cross examination, the Respondent stated that she did not know if the Petitioner was present at the rally in Bulaya or not. When asked whether or not she saw the Petitioner as she was instructing Mr. Mutale on how to distribute the SCT funds, she responded that she did not. When asked whether or not she told Mr. Mutale to distribute the SCT as instructed, she denied instructing him to do so.

RW 2 was Eveline Kangwa, the District Commissioner for Shiwang'andu District. She deposed in her Affidavit that she never attended a meeting with the Respondent at Bulaya Village in July 2021 and that her responsibility as District Commissioner is to ensure that Government programs are implemented in accordance with government policy.

Under cross examination, she stated that she did not recall telling people at Chibesakunda Polling station that all supporters of UPND will be removed from the FISP program. She further stated that it was not lawful for a District Commissioner to threaten people on poll day as a District Commissioner was a government worker.

When an audio was played and she was asked to confirm who spoke the words (audio not clear) in the audio she stated that the one who recorded the same was better placed to say.

Another audio was played where people were being threatened with removal from SCT and FISP lists and RW 1 was asked why she was threatening people in that audio if she was a government worker she said she did not threaten anyone.

This marked the close of the Respondent's case and the close of the case. Learned Counsel for the Respondent filed written submissions whilst the Petitioner relied on the evidence on record.

In his submissions the Learned Counsel argued that other than the allegations of the Petitioner and his witnesses, no tangible evidence was adduced before the Tribunal to buttress the facts alleged.

Counsel further argued that the Respondent rebutted the allegations raised and called three witness to aid her case arguing that Respondent and her witness's testimony was not challenged.

Concerning the burden of proof, Counsel submitted that the same lies with the one who alleges and relied on the case of **Wilson Masauso Zulu vs. Avondale Housing Project** which was cited with approval by the Supreme Court in the Case of **Hanz Winfred Lorenz vs. Zambia Revenue Authority** where the Supreme Court held:

"Where a Plaintiff who alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove these allegations. A plaintiff who has failed to prove his case cannot be entitled to judgement, whatever may be said of his opponent's case."

Additionally Counsel argued that in election petitions, the standard of proof is higher than that required in ordinary civil matters and it is a condition precedent that before an election can be nullified, it must be shown that the evidence adduced in support of the allegations establishes the issues raised to a *fairly high degree of convincing clarity* and in this respect relied on the case of **Austin Liato vs. Sitwala Sitwala** in which the Constitutional Court cited with approval the sentiments of the Supreme Court in the case of **Lewanika and Others vs. Chiluba** wherein the Court stated that:

“it could not be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probabilities and that it followed that the issues raised were required to be established to a fairly high degree of convincing clarity.”

Counsel further submitted that the grounds upon which the election of a Councillor may be nullified by this Tribunal are provided for under Section 97 (2) of the Electoral Process Act and espoused in the case of **Nkandu Luo and the Electoral Commission of Zambia vs. Doreen Sefuke Mwamba and the Attorney General**.

Furthermore, Counsel argued that the evidence adduced by the Petitioner and his witnesses falls way too short of the threshold required to annul an election relying on the case of **Margaret Mwanakatwe vs. Charlotte Scott**, where the Constitutional Court stated:

“the 1st Respondent did not adduce any evidence to prove that the prohibited act was widespread and affected the result of the election by preventing the majority of the electorate from electing their preferred candidate and so rendered the election a nullity.”

In conclusion Learned Counsel argued that the evidential threshold to surmount in an election petition as espoused in a plethora of cases has not been met by the Petitioner.

We have considered the pleadings, the respective parties' evidence and the Submissions made herein.

By this petition, the Petitioner seeks to nullify the election of the Respondent as Councilor for Muchinga Ward. The grounds upon which the election of a candidate as a Mayor, Council Chairperson or Councilor may be declared void by a Tribunal are set out in Section 97 (2) of the Act.

Even though the Petitioner informed the Tribunal that the present petition is premised on all the three grounds stipulated in Section 97 (2) of the Act, we note that the evidence and in some cases, the pleadings adduced **squarely** falls under Section 97(2) (a), that is, the ground which alleges Illegal practice, corrupt practice and other misconduct.

In the case of ***Mabenga vs. Wina and Others*** the Supreme Court stated that an election petition is like any other civil claim that depends on the pleadings and the burden of proof is on the challenger. Since there is no evidence led in relation to the other two grounds we shall proceed on the basis that the petition is hinged only on Section 97 (2) (a) of the Act.

Section 97 (2) (a) of the Act on which the pleadings were grounded provides as follows:

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

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

- (i) *by a candidate; or*
- (ii) *with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and*

the majority of voters in a Constituency, District or Ward were or may have been prevented from electing the candidate in that Constituency, District or Ward whom they preferred

A scrutiny of the above Section reveals that the election of a candidate can only be nullified if:

1. the Petitioner proves to the satisfaction of the Tribunal that the candidate personally committed a corrupt or illegal practice or other misconduct in relation to the election; or
2. that the conduct complained of was committed with the candidate's knowledge and consent or approval or that of the candidate's election or polling agent;
3. In addition, the Petitioner must prove that, as a result of the misconduct, illegal or corrupt practice, the majority of the voters in the Constituency, District or Ward were or may have been prevented from electing their preferred candidate.

In the case of **Nkandu Luo** cited above, the Constitutional Court stated that:

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

malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent.” (emphasis ours)

The Court further stated that:

“in addition to proving the electoral malpractice or misconduct alleged, the Petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.”

In addition, it is trite law that, like in any other matter, the burden of proof in an election petition lies upon the Petitioner. The standard of proof required in an election petition however is higher than a mere balance of probabilities.

In the ***Mabenga*** case cited above, the Supreme Court held that:

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

Further in ***Mazoka and Others vs Mwanawasa and Others*** the Supreme Court stated:

“ for the Petitioner to succeed..., it is not enough to say that the Respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer

reasonably be said to represent the true free choice and free will of the majority of voters.”

As earlier stated, this petition is hinged on allegations of illegal practices, corrupt practices and other misconduct which the Respondent in his pleadings denies.

We shall now proceed to scrutinize the allegations in the order in which they were presented in the petition.

With regard to the allegation that the Respondent used the SCT funds and the FISP as tools to canvass for more votes, the Petitioner testified that on a date he could not recall but in July 2021, he found the Respondent and RW 2 in Bulaya Village of Muchinga Ward addressing a rally. He testified further that the two were telling the gathering that they will cause those supporting the UPND to be removed from the FISP and SCT Program. In addition he stated that at the time of paying, some beneficiaries were removed on account of being UPND and that the SCT funds were disbursed on 11th August 2021 by Mr. Mutale the pay point manager.

The Respondent denied the allegation stating that she never attended a meeting at Bulaya with the District Commissioner or at any other time during the campaigns for 2021 general elections. RW 2 equally disputed the assertion in her evidence. Despite an audio being played during cross examination of RW 2 to demonstrate the alleged threats, we hold the view that the allegation was not proved to the extent that as there is no evidence to demonstrate the scale to which the electorate were or may have been swayed not to vote for their preferred candidate.

Regarding the allegations of bribery involving the disbursement of K20.00 notes, we note from our perusal of the pleadings that allegation was made against Mr. Kampyongo and other specified individuals and not the Respondent. However we also note that the Respondent did not object to

evidence implicating her being led on the same. This Tribunal is not thus precluded from considering the same evidence. We are fortified in our view by the case of **Mazoka and Others** cited above where it was held that where a matter not pleaded is let in evidence and no objection is raised by the other side, the Court is not precluded from considering it. This Tribunal will thus consider the evidence led on this issue.

PW 2 testified that on 12th August 2021, when the Respondent went to ferry voters she was disbursing K20.00 notes and telling people to vote for her. The Petitioner also testified that he personally saw the Respondent disbursing K20.00 notes. The Respondent merely gave a bare denial of this issue whilst both the Petitioner and PW 2's evidence remained unshaken under cross examination.

This notwithstanding, we note there is no evidence on record to the effect the majority of the voters were or may have been swayed to vote in a particular way. We thus hold that this head has not been proved to requisite standard.

Furthermore it was PW 3's testimony that on 12th August 2021, as he was doing patrols as an election monitor for the UPND, he saw a Hino Truck parked at Kanakashi Polling Station and the Driver giving people on the truck money saying you must do as earlier instructed, that is to vote uniformly.

It was PW 3's further evidence that later that day an Ipsum motor vehicle drove into the polling station and both the driver and passengers came out, the driver gave a K20,00 note to one of the women saying do not forget.

The Respondent denied this allegation. However we note that both PW 3 was a partisan witness whose evidence required corroboration as per the guidance given by the Constitutional Court in the case **Abuid Kawangu vs. Elijah Muchima**.

While taking recognizance of the principle of law that there need not be a technical approach to corroboration and that “something more,” which though not constituting corroboration as a matter of strict law does suffice, we have combed the record for any such corroboration or “something more” and we find none. We thus find that this allegation has not been proved to the requisite standard. In any case, an election can only be nullified under Section 97 (2) (a) of the Act where cogent evidence is provided to show that a candidate or the candidate’s election or polling agent committed an electoral offence or that the offence was committed with his knowledge and consent or approval or that of his polling or election agent.

In **Lewanika and Others vs Chiluba** cited above, the Supreme Court observed thus:

“We are mindful of the provisions of the Electoral Act that a candidate is only answerable to those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one’s political party is one’s political agent since under regulation 67, an election agent has to be specifically so appointed.”

A scrutiny PW 3’s evidence on the alleged acts of bribery does not allege the same were personally committed by the Respondent or with the knowledge and consent of the Respondent or the Respondents duly appointed polling or election agent. In light of the foregoing reasons, this allegation fails.

Concerning the allegation that the ECZ allowed ineligible voters to vote at Chibesakunda and Matumbo, an objection was raised when the Respondent started leading evidence on this head. The objection was premised on the basis that ECZ is the only competent party to answer this allegation as the allegation was made against its servants/agents. We sustained the objection and further guided the unrepresented Petitioner that he had two options open to him, to apply to join ECZ to the action or dispense with the pleading under this head.

The Petitioner opted to dispense with this head and evidence relating to the same.

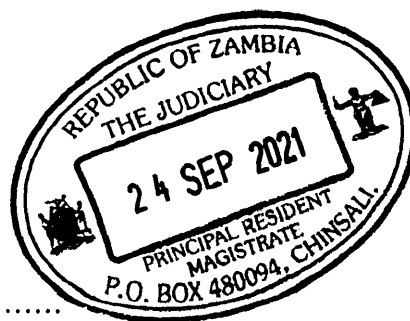
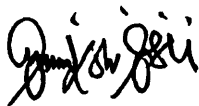
Concerning the allegation relating to the commissioning of the opening the mortuary at Matumbo Clinic on 6th August 2021, the Petitioner stated in his testimony that the Respondent and other PF officials commissioned the opening of a mortuary at Matumbo ward. We note that under cross examination, the Respondent testimony remained unshaken and that the Respondent did not rebut the same in his evidence. We thus find that the act complained of was proved and that contrary to paragraph 15 (i) of the Code of Conduct, the Respondent abused his privilege as an aspiring candidate for the then ruling party for political purposes. However, we again note that no evidence was adduced to prove that the majority of voters were swayed to vote in a particular way as a result of that act.

The upshot of our decision therefore that the Petitioner has failed to prove his petition to the requisite standard. Consequently, we find no ground on which to declare the election of the Respondent as Councilor for Machinga Ward void. In effect, we dismiss the petition and declare that the Respondent was duly elected as Councilor for Muchinga Ward.

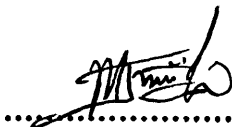
Each party to bear own costs.

Parties informed of right of appeal within 14 days of the Decision.

Dated this 24th day of September 2021.



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C. CHILINGALA
CHAIRPERSON



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M. MWIBA
MEMBER



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G. CHIPULU
MEMBER