

**THE LOCAL GOVERNMENT ELECTION TRIBUNAL 2021/SEO/LGET/013
FOR THE MUCHINGA PROVINCE**

HOLDEN AT ISOKA

(Civil Jurisdiction)

IN THE MATTER OF: ARTICLE 159(3) OF THE CONSTITUTION CAP 1 OF
THE LAWS OF ZAMBIA

IN THE MATTER OF: THE ELECTORAL PROCESS ACT No. 35 OF 2016

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS TRIBUNALS
RULES STATUTORY INSTRUMENT No. 60 OF 2016

IN THE MATTER OF: COUNCILOR ELECTION PETITION FOR VUMBO
WARD HELD ON 12TH AUGUST, 2021

BETWEEN:

LUHANGA WINGSTON

PETITIONER

AND

LUHANGA MISHECK

RESPONDENT

Coram: Honorable O.Z. Katyamba (Chairperson), Ms. G. Nyalugwe (Member)
Ms. C. Soko (Member)

Appearances: Mr. I. Simbeye, Muyatwa Legal Practitioners, for the Petitioner

Mr. E. Siatwaambo, Mulungushi Chambers, for the Respondent

JUDGMENT

C. Soko, Member, delivered the Judgment of the Tribunal.

Statutes referred to:

The Electoral Process Act No. 35 of 2016

The Local Government Elections Tribunals Rules, 2016

Cases referred to:

Abiud Kawangu *vs* Elijah Muchima, Appeal No. 8 of 2017

Brelsford James Gondwe *vs* Catherine Namugala SCZ Appeal No. 129 of 2012

Jonathan Kapaipi *vs* Newton Samakayi CCZ Appeal No. 13 of 2017

Mubika Mubika *vs* Poniso Njeulu SCZ Appeal No 144 of 2007

Mutambo and Five Others *vs* The People (1965) ZR 15 (CA)

Nkandu Luo and the Electoral Commission of Zambia *vs* Doreen Sefuke Mwamba and the Attorney General, Selected Judgment No. 51 of 2018

This Election Petition is a petition in which Luhanga Wingston, the Petitioner, has challenged the election of Luhanga Misheck, the Respondent, as Ward Councilor for Vumbo Ward which is situate in the Mafinga District of the Muchinga Province of the Republic of Zambia.

The Petitioner contends in his Petition filed on the 25th of August 2021 that the elections were not free and fair. He alleges that the ballot boxes and other electoral materials were delivered without his Knowledge thereby precluding him and/or his agents from witnessing the unpacking and handling of the said boxes. He also avers in his Petition that the Patriotic Front (PF), the party which sponsored the Respondent, was distributing money, mealie meal, and buckets of cooking oil to voters from the 11th-12th of August 2021.

That on the 12th of August 2021, the PF prepared food for the voters and persuaded them to vote for their candidates including the Respondent. On the same date, they also organized vehicles to ferry voters from various pick up points or their homes to the polling stations and back with a view of influencing them to vote for PF candidates.

The Petitioner also alleged that his agents were denied access to the Polling stations and thus could not effectively monitor the voting and counting process. In addition, the said agents were either denied access to GEN 20 or asked to sign a blank one. Therefore, the agents could not witness the manner in which the electoral officers were filling in the forms with results.

It is further alleged that the PF threatened to remove people from the Social Cash Transfer list of beneficiaries and the Farmer Input Support Program (FISIP) if they did not vote for the PF candidates including the Respondent. The Petitioner, in his Petition, asserts that the PF formed a special organization called Good Governance Zambia (GGOZA) to coordinate its illegal activities.

The Petitioner therefore prays that:

- (1) It be determined and declared that the declaration of the Respondent as winner of the Councilor seat for Vumbo ward is null and void;
- (2) That there be an order of injunction to restrain the Respondent from registering and being sworn in or taking up the position as Councilor for Vumbo Ward until after the determination of this matter;
- (3) That there be an order of injunction to restrain the Respondent from receiving any benefit either in form of emoluments or allowances or whatever otherwise meant for the Councilor for Vumbo Ward until after the final determination of this matter;
- (4) That the Petitioner may have such further or other reliefs the Tribunal shall deem fit; and
- (5) That the Respondent may be ordered to pay costs of and incidental to this petition.

The Respondent filed his Answer on the 6th of September, 2021. The crux of the Respondents Answer is that he denied all the allegations leveled against him by the Petitioner and put the Petitioner to strict proof of the said allegations.

In support of his Petition, the Petitioner gave evidence on oath and called 2 witnesses.

PW1, the Petitioner, told the Tribunal that on the 10th of August 2021, he saw Kumbukani Luhanga and Ziza Nyirongo, amongst other cyclists, carrying mealie meal on their bicycles. Upon inquiry, the said cyclists informed him that they had gotten the mealie meal from the PF Camp at Mr. Tembani's home for distribution to all villages that were near polling stations. They further informed him that they were working on the instructions of Duncan Kaonga and the Respondent. The cyclists also informed the Petitioner that the mealie meal was to be used in the preparation of nshima for voters on the 12th of August 2021 so that they could vote for the PF and the Respondent. It was also the Petitioner's evidence that the Cyclists told him that the relish would be delivered by the Respondent the following day, 12th August, 2021.

The Petitioner stated that on the 12th of August, 2021, he voted and subsequently decided to monitor what was happening in other polling stations. He told the Tribunal that the Ward had 7 Polling Stations, namely: Tembani, Mung'anga, Musanta, Bulawula, Vilulu, Namaluza, and Vumbo. He stated that he indeed confirmed that cooking for voters with a view of soliciting their vote was being done at villages approximately 300m from the polling stations. He specifically mentioned that the cooking for Tembani and Musanta Polling Stations was being done from the homes of Frank Mwandila and Duncan Mukandawire, respectively.

In addition to the foregoing, the Petitioner told the Tribunal that the PF had organized transport to ferry voters to and from the polling stations. The Petitioner further alleged that the Respondent gave money to people in order to influence them to vote for him. He also stated that the Respondent recruited and strategically placed people on the roads leading to the polling stations so that they could solicit voters to vote for the Respondent.

The Petitioner prayed that, in consideration of the above, this Tribunal nullifies the election of the Respondent as Ward Councilor for the Vumbo Ward of the Mafinga District.

In Cross-examination, the Petitioner, acknowledged that other than his witnesses, he had no physical evidence that directly linked the Respondent to his allegations. In response to most of the questions put to him, the Petitioner confirmed that he was informed of the Respondent's misconduct by third parties. The Petitioner also agreed that he had 535 votes whilst the Respondent scooped 1198 votes in all the polling stations.

PW2, Pegson Kanyika, told the Tribunal that on the 11th of August, 2021, the Respondent approached him at his residence and requested him to solicit for votes in his favor and that of the other PF candidates at Mung'anga Polling Station. Thereafter, the Respondent told him to go and vote early in the morning and handed him a K20 for food. PW2 stated that on the 12th of August, 2021, he indeed solicited for votes on behalf of the Respondent and the other PF candidates 100m from Munganga Polling Station. Thereafter, he obliged the Respondents invitation to go and eat nshima at the home of Davy Mwandila.

In Cross-examination, PW2 insisted that the Respondent had approached him at his residence and that he came alone despite not having any physical evidence to prove this allegation.

PW3, Owen Nyirongo, stated that on the 11th of August, 2021, he was recruited by the Respondent for purposes of soliciting votes for him along the road leading to Temwani Polling Station. The witness further states that he recruited Moses Kanyika and Zikwenda Kanyika to assist him because there were three roads leading to the said Polling Station with the full knowledge and consent of the Respondent.

The Witness alleges that on the 12th of August, 2021, he, in company of his wife and mother, were picked from home and ferried to Temwani Polling Station in a Toyota Noah by N'gona. He claims that he was the first to vote at 06:30 hours and thereafter he rushed to perform his role as agreed with the Respondent. He also informed the Tribunal that he was the first to eat at Frank Mwandila's home, the place where the PF had made their kitchen.

At the end of polling day, the witness alleges that he was given a 25kg bag of mealie meal as a token of appreciation for his hard work. He also felt it was necessary for the Tribunal to take note that there were 360 registered voters at Temwani Polling Station.

In Cross-examination, PW3, insisted that the Respondent recruited him from his home to campaign for him on the 12th of August, 2021. He however stated that he had no physical evidence to back up this allegation because there was no third party present. He also accepted, albeit in protest, that he had no direct physical evidence linking the Respondent to the cooking, distribution of mealie meal, and ferrying of voters.

The witness insisted that the 360 voters spoken to voted for the Respondent and his proof was the victory of the Respondent. He also shockingly disclosed that he did not vote in secret because he had elicited the assistance of the Presiding Officer. Therefore he was not able to discern whether or not his vote had been made public.

This marked the close of the Petitioners case.

The Respondent gave his evidence on oath and opted to rely exclusively on his filed statement save for a minor amendment to the second line in para 8 in order for it to read that "*...then these acts were done without any knowledge, consent and approval and they were done independently from my campaigns.*"

Without recourse to regurgitating the Respondent's statement, the crux of his evidence is that he denied the allegations leveled against him and insisted that his campaigns were done in accordance with the law and were free of any corrupt practices, illegal practices, or indeed misconduct on his part or that of his agents. He extended his denial by clarifying that the acts of the PF Party agents were done without his acquiescence or approval thereby making them independent of his campaigns.

The Respondent stated that Social Cash Transfer and Farmers Input Support Program were government initiatives over which he had no personal control. It therefore goes without saying that the Respondent denied leveraging his position by threatening voters with revocation of their benefits under these programs if they did not vote for him and the PF. The Respondent claimed that he had not known of GGOZA until the Tribunal proceedings began.

The Respondent prayed that the Tribunal dismiss the Petition and declare that he had legitimately won the just ended election for Councilor of Vumbo Ward.

In Cross-examination, the Respondent insisted that he had conducted door-door campaigns despite not having physical evidence to prove it. He also accepted visiting other polling stations and meeting people there. He however did not have evidence documenting the said meetings. The Respondent also admitted that he had no physical evidence to show that there was a Conflict Management Committee.

The Respondent's Advocate, Mr. E Siatwaambo, filed in written submissions in support of the Respondent's case on the 18th of September, 2021. In his submissions, he drew the attention of the Tribunal to Section 97(2) of the Electoral Process Act which provides for the grounds upon which an election of a candidate as Member of Parliament, Mayor, Council Chairperson or Councilor may be nullified. He interpreted the provision to mean that any such election may only be nullified where there is proof of corrupt practices, illegal practices, or misconduct by a candidate or his agents with such candidate's knowledge and consent or approval.

The Learned Advocate also defined an agent as is prescribed in Section 2 of the Electoral Process Act. It was his contention that it is thus not enough to show that the Respondent's agents were engaged in the prohibited acts; there was also need to show that they did so with his knowledge and consent or approval. It was also Counsels submission that according to **Nkandu Luo and the Electoral Commission of Zambia vs Doreen Sefuke Mwamba and the Attorney General**

a candidate cannot be held liable for acts of members of the candidate's political party or any persons other than his election or polling agent.

Counsel further argued that even in cases where such prohibited acts were proven there is a legal requirement to meet the threshold set in Section 97 (2)(a)(ii) of the Electoral Process Act. In support of his averment Counsel cited a number of cases including that of **Mubika Mubika vs Poniso Njeulu** which the Constitutional Court cited with approval in the case of Jonathan **Kapaipi vs Newton Samakayi**. It was therefore Counsel's submission that the Petitioner was not only saddled with the burden of proving corrupt practices, illegal practices, or misconduct on the part of the Respondent or his agents he also had to do so in conformity with the requisite threshold prescribed by the law and interpreted in the precedents cited.

It was Counsels submission that the Petitioners evidence was largely based on mere allegations and hearsay without any corroborating evidence. Counsel therefore submitted that the said evidence did not meet the stipulated standard of proof and as such did not provide the tribunal with the wherewithal to nullify the election of the Respondent.

In consideration of the Petition, Answer, and the evidence adduced, it is the Tribunals finding that the following facts are not in dispute:

- (a) That the Petitioner and Respondent contested for the position of Ward Councilor for the Vumbo Ward of the Mafinga District on the 12th of August 2021;
- (b) That the Petitioner contested the said seat on the United Party for National Development (UPND) ticket whilst the Respondent did so on the Patriotic Front (PF) ticket;
- (c) That the two candidates were engaged in campaigns prior to the 12th of August, 2021.

- (d) That on the 14th of August, 2021, the Respondent was declared winner of the said elections which results are being contested by the Petitioner herein.

The Tribunal has taken note that the Petitioner led no evidence at the hearing to prove that the Ballot Boxes and other electoral materials were delivered without his knowledge thereby precluding him and/or his agents from witnessing the unpacking and handling of the same; or that the polling agents of the Petitioner were denied access to the polling stations, or GEN 20A forms, or requested to sign on a blank one. It is also quite apparent from the evidence that the Petitioner did not endeavor to provide this tribunal with proof that the Respondent coerced or intimidated voters by threatening to withdraw their benefits under FISIP or Social cash transfer if they did not vote for him. Additionally, the Petitioner neglected to provide proof that the Respondent leveraged his vote through GGOZA.

The above said circumstances preclude this Tribunal from belaboring the said issues.

The Tribunal has also given much thought to the Petitioner's allegations that the Respondent was distributing money, mealie meal, and relish to voters. It has also addressed its mind to the Petitioner's averment that the Respondent organized vehicles to ferry voters to and from the polling stations. Based on the evidence adduced in support of these allegations and the Petitioner's own responses in Cross-examination, this Tribunal hastens to agree with the submissions of the Respondent's Counsel that it is indeed inadmissible hearsay. The Tribunal's decision is fortified by the case of **Mutambo and Five Others vs The People**.

In view of the foregoing, it is incumbent on the Tribunal to resolve the following:

- (i) Did the Respondent, his election or polling agent, or any other person with their knowledge and consent or approval perpetrate any corrupt

practices, illegal practices, or misconduct during the election in question? And

- (ii) If so were the prohibited activities so widespread to the level that they swayed or may have swayed the majority of the electorate from electing a candidate of their choice?

In so doing, the Tribunal wishes to remind itself of the burden and standard of proof in cases such as this. It is guided by the case of **Brelsford James Gondwe vs Catherine Namugala** in which the Supreme Court stated that:

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

We are further guided by the Constitutional Court in the case of **Abiud Kawangu vs Elijah Muchima** where it stated that:

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

Having warned ourselves of the standard and burden of proof placed on the Petitioner, the Tribunal wishes to state that it draws its power to nullify election results with regards the office of Councilor, amongst other local government officials, from Section 97(2) of the Electoral Process Act. The said section provides as follows:

“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 the voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been none compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the 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 determination of this Petition will however be in accordance with the allegations of the Petitioner and the evidence adduced which are akin to Section 97(2)(a). In order for this Tribunal to adjudge in favor of the Petitioner, the Petitioner is legally obliged to prove to a fairly high degree of convincing clarity that the Respondent by himself, his election or polling agent, or any other person by their knowledge and consent or approval did in connection with the election commit a corrupt practice, illegal practice, or other misconduct.

The issues that remain for the determination of this Tribunal are: firstly, the Petitioner's allegation that cooking was being done for voters in villages approximately 300m away from the polling stations whilst soliciting for their vote and with a view of influencing voters to vote for the PF and the Respondent. Secondly, that the Respondent had strategically placed people along the roads that led to the polling stations in order for them to solicit for votes in his favor and that of his PF counterparts. This part of the Petitioner's evidence was corroborated by PW2 and PW3 only in so far as it relates to Mung'anga and Temwani Polling Stations. Quite notably PW2 informed the Tribunal that he was told by the Respondent to go and eat at the home of Davy Mwandila after he had completed the task assigned to him.

This shows that the Respondent knew and consented to the acts of Davy Mwandila. It is also quite plain that the acts of the said Davy Mwandila were a mere extension of what he himself had set out to accomplish on polling day. PW3 in his evidence emphatically stated that his acts were motivated by his desire to see to it that the Respondent carries the day and not the Petitioner.

The Respondent neither impugned this part of the evidence in Cross-examination nor offered an alternative to the obvious conclusion of it.

If legally contextualized, this evidence alleges that the Respondent was canvassing or soliciting for votes within 400m of the polling station on polling day or offering food as an inducement, reward, or bribe in consideration of the people voting for him and other PF candidates contrary to Section 89(1)(e) of the Electoral Process Act and Regulation 15(h)(iii) of the said Act, Respectively.

In view of the above, it is the finding of the Tribunal that the Respondent did by his personal knowledge and consent or approval procure the commission of an illegal practice and misconduct in contravention of the above said section and regulation of the Electoral Process Act. However, the Tribunal is bereft of the cart blanche to nullify the Petition just yet. What needs to be done now is guided

by the case of **Mubika Mubika vs Poniso Njeulu**, as earlier cited by Counsel for the Respondent, in which the Constitutional Court reiterated with approval 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."

The Petitioner has indeed proven to a fairly high degree of convincing clarity that the Respondent did engage in electoral malpractice at Mung'anga and Temwani Polling Stations. However, this is a poultry 2 out of 7 constituencies and the Tribunal has nothing much to ride on in terms of determining whether or not the proven acts could have swayed or were likely to sway the majority of the voters in Vumbo Ward from voting for a candidate of their choice. It would have been more helpful if the Petitioner provided witnesses to the said malpractices from all polling stations in Vumbo Ward and the Electoral Commission of Zambia so as to provide the Tribunal some perspective and ammunition to decide in his favor.

The Tribunal accordingly finds that the Petitioner has failed to prove beyond a balance of probabilities that the election of the Respondent was unfair so as to equip this Tribunal with the requisite authority to nullify the said election. It is therefore, the finding of this Tribunal that the Respondent was legally elected as Councilor for the Vumbo Ward, situate in the Mafinga District of the Muchinga Province.

It is trite law that in the interest of upholding the Constitution and in cases not marred by frivolity, litigants should not be inhibited by unwarranted costs. It is therefore ordered by this Tribunal that each party bears its own costs.

The Tribunal further wishes to direct the parties' attention to Rule 24 of the Tribunal Rules, allowing an appeal to the Constitution Court within 14 days of this Judgement. The parties are accordingly informed of their right of appeal.

Dated at Thendele this 21st day of September, 2021.

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OBRIEN ZILINDI KATYAMBA
CHAIRPERSON

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GINA NYALUGWE
MEMBER

.....
CASSANDRA SOKO
MEMBER

