

**THE LOCAL GOVERNMENT ELECTION TRIBUNAL 2021/SEO/LGET/011
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 THENDELE
WARD HELD ON 12TH AUGUST, 2021

BETWEEN:

LOMBANI SINGOGO

PETITIONER

AND

DAVY MUFUNE

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

Simasiku Namakando and Eileen Imbwae, 2006/HP/EP/002

This election Petition is a Petition filed on the 25th of August, 2021, in which Lombani Singogo, the Petitioner, has challenged the election of Davy Mufune, the Respondent, as Ward Councilor for Thendele Ward which is situate in the Mafinga District of the Muchinga Province of the Republic of Zambia.

The Petitioner contends that the election was scooped by the Respondent because of the unfair practices that the Respondent engaged in during the campaign period and polling day.

He contends 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. 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, he averred that his 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.

The Petitioner alleges that the Patriotic Front (PF) 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 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.

It is also the Petitioner's claim that the PF threatened to withdraw the benefits of beneficiaries of Social Cash Transfer and the Farmer Input Support Program (FISIP) if they did not vote for the PF candidates including the Respondent. It is further alleged 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 Thendele 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 Thendele 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 Thendele 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's Answer was filed on the 6th of September, 2021. It would suffice to state that he made a bare denial of all the allegations leveled against him by the Petitioner and put the Petitioner to strict proof thereof.

In support of his case, the Petitioner adduced evidence on oath and called 3 witnesses.

PW1, the Petitioner, informed the Tribunal that he had contested for the position of Councilor for Thendele Ward on the 12th of August 2021 on the United Party for National Development (UPND) ticket and lost to the Respondent Davy Mufune of the Patriotic Front (PF). He stated that on the 11th of August 2021, he met Davy Chilonga who was on an ox-driven cart containing mealie meal, cooking oil, meat, kapenta, and soya pieces. The said Davy Chilonga informed the Petitioner that the food items would be cooked for voters the very night and early the next morning. This would be done at a home near the polling station where people would be told to vote for Davy Mufune. He further informed the Petitioner that he was doing this so that the Respondent's campaign would go well as part of an organization called Good Governance Zambia (GGOZA), an organization created some time back. He stated that the said organization worked with Davy Mufune and the PF.

The Petitioner further informed the Tribunal that on the 12th of August 2021, his agents on the ground informed him that the Respondent was giving money to voters. In addition to this, the Petitioner stated that he personally saw people cooking at Nanyiza's home which was a few meters from Mutindya Polling Station. When he inquired as to what was going on, he was informed that the Respondent had instructed that the food be cooked for people who were going to vote so that they would vote for him.

The Petitioner believed that the above stated incidents are what led to him losing the elections and so he submitted that the Tribunal nullifies the said elections because they were in this case unfair.

In cross examination, through an array of questions, the Petitioner was essentially asked if he could directly link the Respondent to the allegations he had made and his response was that he had no evidence to do so save for the witnesses he had brought. Additionally, the Petitioner accepted that the Respondent had lost at Mutindya.

PW2, Davy Chilongo, told the Tribunal that he was indeed a member of GGOZA which had started its operations sometime back. He stated that the GGOZA appointees were required to register 50 people each. Wesly Chilambo, a senior member of GGOZA, had informed them that GGOZA was created for the purpose of assisting voters so that they would vote for the PF government from the position of Member of Parliament (MP) to that of Councilor. Subsequently GGOZA brought items to be distributed namely: mealie meal and relish. He further stated that the Respondent gave him 16 25kg bags of mealie meal on the 11th of August 2021. Thereafter, they organized a place to cook from the very night and the morning of the 12th of August 2021 so that people would eat before going to vote. PW2 also stated that Wesly Chilongo informed them that they would send a motor vehicle to ferry voter to the polling stations. In this regard PW2 saw Tobias Kafunda ferry people to the polling station using motor vehicle registration No. BAG 6644.

In cross examination PW2 showed the Respondent's Advocate and the Tribunal his GGOZA ID which indicated that he was a Local Monitor. He told the Tribunal that he had no evidence to show that the items he was distributing came from the Respondent personally. He however, equally denied having received the items from GGOZA. He reiterated that the person driving the vehicle ferrying voters was Tobias Kafunda.

PW3, was Ben Ngambi. This witness informed the Tribunal that he was an Election Monitor for the UPND. He stated that on the 12th of August 2021 he voted early and on his way from the Polling Station he met Alex Simukoko. Alex Simukoko was distributing masks and telling voters to vote for the PF. The witness reprimanded the said Alex Simukoko and informed him that people from Ministry of Health had already distributed masks. Thereafter, he remembered seeing a motor vehicle driven by Mr. Mulenga ferrying people. On inquiry, Mr. Mulenga informed him that he had been booked to ferry people to and from Thendele Polling Station. Mr. Mulenga did not disclose his employer but instead directed PW3 to the District Commissioner, Godwin Singogo, for further queries.

Mr. Singogo acknowledged that he had money sent to his account for this purpose and that he had given it to Mr. Mulenga to pay the transporters. PW3 further stated that the people who were working as transporters at Thendele on the 12th of August 2021 were Delux Singogo, the Respondent, and Stanly Chilongo. Whilst the Respondent was dropping people at Thendele School he dropped a chitenge material which PW3 picked. PW3 also got a T-Shirt from his vehicle. Thereafter PW3 was reported to the police and subsequently apprehended.

PW3 stated that he was in custody for close to an hour after which he was released with the assistance of the UPND aspiring Member of Parliament, John Sichinga. After his release, PW3 stated that he went to Nzima Polling Station where he found the vehicle of Bobby Kafunda ferrying people to and from the said Polling Station. He further stated that he got a booklet from Bobby's vehicle which was labeled GGOZA, had pictures of the then President, and other writings. The booklet was admitted and produced into evidence as P1. The witness concluded by stating that he thereafter bought food and delivered it to the UPND agents at all the Polling Stations.

In cross-examination PW3 stated that there was a presence of UPND agents in all the polling stations and that contrary to paragraph 3(6) of the Petitioners Petition, no agent was denied access and the opportunity to effectively monitor the voting or counting process. The witness acknowledged that the incidents he had cited were electoral malpractices which he did not report to the Police and that he was the one arrested and not the person distributing masks or the ones ferrying voters. He also stated that he had no physical evidence to show the ferrying of voters or distribution of masks. PW3 further acknowledged that he did not have evidence to show that the Respondent was the author or distributor of P1. In re-examination, PW3 stated that he did not know that electoral malpractice is an offence.

PW4, Mable Sinyinza, told the Tribunal that on 11th August 2021 she was called by the Respondent at 14:00 hours. He sent word that she should go and collect mealie meal. She started off from Mutindya village at 16:00 hours. The Respondent gave her 3 bags of mealie meal, beef, tomato, cooking oil, onion, 1 gallon of fish (usipa), soya pieces, and 1 packet of salt. The Respondent told her to cook the food for voters so that after they eat they would vote for the Former President Edgar Chagwa Lungu, Chabinga Mutambo, Duncan Kaonga, and himself. PW4 stated that she indeed cooked on the 12th of August 2021 at around 06:00 hours for people who were voting from Mutindya Polling Station and thereafter went to vote. She further stated that she had cooked for a lot of people. The witness also told the Tribunal that she had some left over mealie meal and a packet of Soya pieces that had remained from the said cooking. The two items were produced and admitted into evidence marked P2 and P3, respectively.

In cross examination, PW4 stated that she supported the Respondent and did not know that he had lost in Mutindya. The witness admitted P2 and P3 were common items that could be bought from a shop and she had no physical evidence to show the Tribunal that she had gotten these items from the Respondent. PW4 also stated that she did not know the Respondent's number because he had sent word for her through a third party. In re-examination, the witness reiterated that she had received word from the Respondent through her friend. This marked the close of the Petitioners case.

The Respondent gave evidence on oath and called no witness. His testimony was that he contested the just ended election for Councilor of Thendele on the PF ticket. That due to the Covid 19 pandemic, the contestants were permitted to only campaign door to door. He stated that he did his campaigns with Friday Kaonga and Danny Ngambi till the 11th of August 2021 and that neither of them did so in possession of any money, chitenge materials, or party materials whatsoever.

The Respondent told the Tribunal that on the 12th of August 2021 he cast his vote at Thendele polling Station at around 07:00 hours. Thereafter, he hired Bernard Silwmba's Motor Bike and proceeded to check on how voting was progressing in other polling stations. As he proceeded to Kachindu Polling Station, Arron Ngambi, who was equally riding a bike blocked him from the front and reprimanded him for campaigning because the campaign period was over. The Respondent stated that he obliged the reprimand and started heading home. He further stated that Arron Ngambi kept tailing him up to the point where he decided to go back to Thendele Polling Station. On his way there he was bypassed by Ben Ngambi who was riding a motor bike. Subsequently the Police called the Respondent to enquire where he was after which Aaron Ngambi was apprehended by the Police. The Respondent spent the rest of the day at his home.

The Respondent denied knowing PW4. He also denied distributing money or giving any instructions to cook for voters. He further denied knowledge of GGOZA and insisted that the Farmer Input Support Program (FISP) is a government initiative. He then stated that he had 1555 whilst the Petitioner had 865 votes in eight polling stations. He also highlighted that he had lost in Mutindya, the same area where it is alleged he had been cooking for voters. The Respondent attributed his popularity to the fact that he hailed from Thendele whilst the Petitioner was from Tonga.

In cross examination the Respondent denied that he had met Danny Ngambi who advised him to stop campaigning because campaign period was over. He stated that he was with Aaron Ngambi at the point that he was called by the Police but had no physical evidence to prove this. He equally denied that Arron Ngambi was apprehended by the Police but acknowledged having met Ben Ngambi. This marked the Close of the Respondent's case.

The Respondents 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.

Upon consideration of the Petition, Answer, and the evidence placed on record by the Petitioner and Respondent, it is not in contention that the parties contested for the seat of Councilor for the Thendele ward in the just ended 12th August 2021 elections. The Tribunal thus finds it to be a fact that the Petitioner contested for the said seat on the UPND ticket whilst the Respondent did so on the PF ticket. The Tribunal finds it to be factual that the Respondent lost in Mutindya.

It is also not in dispute that the election results announced on the 14th of August 2021 declared the Respondent as Councilor for the Thendele Ward and as such he was sworn in and is the incumbent office bearer.

On perusal of the witness testimony and examination of P1, this Tribunal equally finds that it is a fact that there was in existence an organization called GGOZA. This organization, according to P1 appeared to be promoting good electoral practices whilst also broadcasting a depiction of a pre-marked ballot paper carrying only the picture of the former incumbent President Mr. Edgar Chagwa Lungu.

At this juncture, the Tribunal wishes to highlight 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 obvious from the evidence that the Petitioner provide this tribunal with no proof whatsoever 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.

Armed with the prescription under Rule 20(2) of the Local Government Elections Tribunals Rules, this Tribunal hereby takes Judicial Notice that Social Cash Transfer and FISIP are Government initiatives.

The latter circumstances require no deliberation because to do so would be a mere academic exercise.

This Tribunal has given much thought to the Petitioners allegation that the Respondent was distributing money to voters. The Petitioner, in Cross-examination, agreed with the Respondent that he had no evidence to show that the Respondent was distributing money. This ties the hands of the Tribunal and leads to the inescapable conclusion that this part of the Petitioner's evidence is inadmissible hearsay. We are in this regard guided by the case of **Mutambo and Five Others vs The People**.

Based on the remainder of the evidence, this Tribunal will now proceed to determine 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 such cases. It is aptly 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 an election 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.

Before considering the evidence on record, the Tribunal wishes to state that it is alive to the order of credibility for witnesses in election petitions. In the case of **Simasiku Namakando and Eileen Imbwae**, the Court in scrutinising the credibility of the witnesses stated that:

"...To aid such analysis I will categorise the witnesses into four groups in this petition. The attachment of weight to evidence follows the order. More weight is attached to the fourth, then third, then second and lastly the first category of witnesses.

- (i) *witnesses who belonged to the Petitioner and Respondents political parties;*
- (ii) *witnesses who were electoral officials engaged by the Electoral Commission the conductor of the elections;*
- (iii) *witness or witnesses belonging to the petitioner's or Respondent's party who gave evidence against their own party candidate;*

- (iv) *monitors or police officers who are not party to these proceedings nor were they party members."*

In view of the above guidance we wish to state that PW2 was a Local Monitor, according to the ID he was given by GGOZA. In cross examination, he accepted that he was a Local Monitor but insisted that his role was not to monitor how the elections were being conducted. He also stated that he supported the Petitioner. It is apparent that the witness was unwittingly co-opted as a PF sympathizer whose true identity was shrouded in legalize resorted to by a purported election monitoring organization, GGOZA. He therefore does not qualify as a monitor neither can we conclusively say which party he belonged to.

This witness's testimony was in part corroborated by the evidence of PW4 who is a witness that belonged to the Respondents political party and gave evidence in favor of the Petitioner's case. This Tribunal therefore finds that the Respondent was entangled in the activities of GGOZA and did give mealie meal and other food stuff to both PW2 and PW4.

Despite the fact that PW3 was a UPND Party Official, his evidence was not discredited in Cross-examination and it was in part corroborated by the Respondent who placed him in the vicinity of the alleged misconduct. It is therefore this Tribunal's finding that PW3 was a credible witness for the Petitioner. Invariably we make a finding that there is sufficient evidence to show that the Respondent was involved in ferrying Voters.

The ferrying of voters was evident in Nzima and Thendele whilst the cooking was done in Mutindya.

It would also be appropriate at this point to state that the Respondent's demeanor during the hearing of this matter left little to be desired. He was jittery and did not take the proceedings seriously. He was also rather discourteous to and dismissive of the Petitioner.

Other than the findings above, there is no evidence that suggests that the Respondent, his electoral or polling agents, or any other person with the

knowledge and consent or approval of the Respondent or his agents solicited for a vote either at the place where the food was being cooked or at the time voters were being ferried to the polling stations. It is therefore apparent that the evidence adduced by the Petitioner does not satisfy all the ingredients of the misconduct envisaged by Regulation 15 (h) of the Electoral Process Act. This is exacerbated by the fact that the Respondent did not win in Mutindya.

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 warrant the nullification of the said election. It is therefore, the finding of this Tribunal that the Respondent was legally elected as Councilor for the Thendele 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

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CASSANDRA SOKO
MEMBER

