

**THE LOCAL GOVERNMENT ELECTION TRIBUNAL
FOR THE LUSAKA DISTRICT HOLDEN AT LUSAKA
[Constitutional Jurisdiction]**

2021/P/LGET/0012

IN THE MATTER OF:

**ARTICLE 47(3), 153 (1) and 159 (3) of the
Constitution of the Republic of Zambia
(Amendment) Act No. 2 of 2016**

And

IN THE MATTER OF:

**SECTIONS 72(1) (B), 96(1)(C)(1), 98(C), 99 and
100(3) of the Electoral Process Act No. 35 of
2016**

And

IN THE MATTER OF:

**The Local Government Election Tribunal
Rules, Statutory Instruments No. 60 of 2016**

And

IN THE MATTER OF:

**Local Government Election for Ward 2,
Chawama Ward in the Constituency, Matero
held on 12th August 2021**

BETWEEN:

TYSON MPHANDE

PETITIONER

and

KARMA JAWARA

1ST RESPONDENT

THE ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

CORAM: I.T Wishimanga, K. Ndulo-Mundia and S. Chisanga-Miti

For the Petitioner : Ms. M. Phiri of PNP Advocates and
Ms. M. Mwiinga of James & Doris Legal Practitioners
For the 1st Respondent: Ms. C. Lungu & Mr. M. Batakathi of Muyatwa Legal
Practitioners
For 2nd Respondent : Mr. L. Mtonga of Philsong and Partners

JUDGMENT

Cases referred to:

- 1. Wilson Masauso Zulu v Avondale Housing Project Limited
(1982) Z.R 172**
- 2. Dean Masule v Romeo Kangombe 2019/CC/A002**

3. **Nkandu Luo and Electoral Commission of Zambia v Doreen Mwamba and Attorney General (selected Judgment No. 51 of 2019).**
4. **Margaret Mwanakatwe v Charlotte Scott (selected Judgment No. 50 of 2018)**
5. **Michael Mabenga v Sikota Wina & Others (2003) Z.R 110 (S.C)**
6. **Chrispin Siingwa v Stanley Kakubo, CCZ Appeal No. 7 of 2017**
7. **Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 2007**
8. **Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13/2017**

Legislation referred to:

1. **The Constitution of the Republic of Zambia (Amendment) Act No. 2 of 2016**
2. **The Electoral Process Act No. 35 of 2015**
3. **The Local Government Election Tribunal Rules Statutory Instrument No. 60 of 2016**

The Petitioner, the 1st Respondent and four others were candidates in the Local Government elections for Ward 2 in Chawama Constituency which were held on 12th August 2021. The Petitioner was the candidate for the United Party for National Development (UPND) in the election while the 1st Respondent was the candidate for the Patriotic Front (PF). The 1st Respondent emerged victorious.

The Petitioner has petitioned the Tribunal and seeks that a declaration be made that the 1st Respondent was not duly elected or returned and that the election was void. It is his allegation that the 1st Respondent was not validly elected as she and her agents had committed several electoral offences under the Electoral Process Act No. 35 of 2016 (hereinafter referred to as the Act). Specific allegations levelled against the 1st Respondent were that, firstly the 1st Respondent's agents on diverse dates committed acts of violence by attacking different members and supporters of the Petitioner's party, one particular incident was the allegation that the

1st Respondent's agents attacked the Petitioner's joint Youth camp popularly known as Patuka House.

That secondly, the 1st Respondent's Agents were seen removing the Petitioner's campaign posters and thirdly, the 1st Respondent and her agents distributed various food items to the electorate in the ward during campaigns. Further, the Petitioner alleges that the 1st Respondent and her agents constantly breached the campaign program that had been drawn up by the parties and the Police, thereby disrupting the Petitioner's campaign. It was the Petitioner's allegation that on polling day, 12th August 2021, the 1st Respondent's agents led by one Francis Kalala enticed the voters to get K50 notes and the purchase of beer for the voters.

The Petitioner further alleges that on polling day, the 1st Respondent's agent attempted to sneak into Methodist Polling Station suspected ballot papers leading to the beating of three of the 2nd Respondent's agents by some Military present. Further, the Petitioner has alleged that the 1st Respondent's agents vandalised a motor vehicle belonging to the Parliamentary Candidate for the UPND while distributing food to the UPND election agents causing a disruption of the voting process.

Finally, the Petitioner alleges that 15 Gen 20 forms were missing and unaccounted for at the time the 1st Respondent was declared Councilor by the 2nd Respondent's Returning Officer. The Petitioner alleges that the missing Gen 20 forms constituted a substantial proportion of votes. The Petitioner contends that despite not being availed with the Gen 20 forms for thirteen different polling stations, the 2nd Respondent proceeded to announce the results reflected in the Record of Proceedings.

The 1st and 2nd Respondents both filed Answers to the Petition. The 1st Respondent vehemently denied all the allegations of violence made by the Petitioner. She said that she never experienced or witnessed the various attacks and most specifically refuted having personal knowledge of the individuals mentioned in the Petition or being her agents.

The 2nd Respondent's Answer discloses that in duly electing the 1st Respondent, it followed the electoral rules and regulations and denies that its three named agents who the Petitioner alleged to have been beaten were merely removed from a vehicle belonging to the 2nd Respondent by soldiers under the authorization of unknown persons and on the premise that the soldiers were instructed not to allow anyone into the polling station. The 2nd Respondent further denies that ballot papers were sneaked into the polling station and that the totaling Centre had about 20 police officers to ensure no suspicious activities occurred. The 2nd Respondent further refuted the Petitioner's claims concerning the missing Gen 20 forms and stated that the declaration of the result of the polls was only produced upon the completion of counting of all Gen 20 forms and subsequently, all agents and/or stakeholders were availed with Gen 20 forms.

The Petitioner filed a Reply to both the 1st and the 2nd Respondents' Answers. In his Reply to the 1st Respondent's Answer, the Petitioner maintained his position that all the persons mentioned in his Petition were indeed agents of the 1st Respondent.

His Reply to the 2nd Respondent's Answer reiterated his averments in the Petition and stated that the 2nd Respondent would be put to strict proof at the hearing. He emphasized that there was failure to announce the results for Ward 2 unlike Wards 1 and 3 due to what the 2nd Respondent referred to as anomalies. The Petitioner concluded that the said anomalies were the missing Gen 20 forms.

At the hearing of the Petition, the Petitioner, PW1, Tyson Mphande testified and called eight witnesses. In his testimony, he relied on the contents of the Petition and Affidavit verifying Petition. He additionally testified that amongst the people already mentioned in his Petition as perpetrators of the various attacks was the 1st Respondent's relative called Andrew

Mukuka popularly known as "General". PW1 further corrected that the incidents that happened in paragraph 10 were between 27th and 29th July 2021 and not between 4th and 8th July 2021 as alleged in his Petition.

In cross-examination, PW1 testified that he was not present when one David Yumba Kazali was attacked between 1st and 2nd August 2021 and conceded that he was not in a position to know the attacker since he received this information via a phone call. He also testified that the Medical Report exhibited as "TM1" as evidence of the aforementioned attack was obtained on 2nd June 2021 which was two months before the incident and that the said report was not confirmed by a Medical Officer.

PW1 further testified that he did not identify the person alleged to have attacked Abigail Simusa and conceded that he failed to mention the date and place of this incidence. It was his testimony that although a Police report was alleged to have been obtained, it was not produced before the Tribunal and that the 1st Respondent was not mentioned in the attack.

PW1 further testified that he did not state the source of the injuries sustained by Terry Chingo and neither did he state the place or location where the attack occurred.

In paragraph 10 of his Affidavit, PW1 failed to state the date and location where this happened and admitted that the 1st Respondent was not present as he received this information through a phone call. Under further cross-examination, PW1 confirmed that he was one of the victims of the attack and the 1st Respondent was not amongst the perpetrators. He further testified that he saw Sosha who he alleges to be an Agent of the 1st Respondent. He stated that he knew that Sosha was an agent of the 1st Respondent because he was among the people that moved with the 1st Respondent on her campaign trail. It was his testimony that the incidences in paragraphs 12 and 13 of his Affidavit transpired on the same day and not on the different dates mentioned therein. He further testified that he was not injured in the said attack but one Andrew Zulu (PW9) was the only

one injured and a copy of the Medical Report was produced as "TM3". In further cross-examination, PW1 conceded that the date thereon was 23rd July 2021 despite testifying that this incidence occurred between 27th and 29th July 2021 and consequently admitted that the report was issued before the attack.

When asked to confirm whether Nathan Phiri and Sosha were the 1st Respondent's agents, PW1 referred to a video that was produced as "TM1" in the Petitioner's Affidavit in Support of Rely to 1st Respondent's Answer. The video clip shown was an excerpt from a program called "The Assignment" that was broadcast on Muvi Television. In the video clip, the said Nathan Phiri and Innocent Kalimanshi were the interviewees of the program and at the end of the clip, the Petitioner conceded that the 1st Respondent was not mentioned in the video. Under further cross-examination, PW1 conceded that the video was actually broadcast on 6th December 2020 which was before the nomination period.

When cross-examined on the incidences that transpired at Patuka House, PW1 testified that he was not present and had received a phone call. PW1 further testified that he was not present during the incidences in paragraphs 17 and 18 and that he did not hear the alleged threats. It was his testimony that he did not see the 1st Respondent or her agents distributing food and did not mention the Polling station where this occurred. He further conceded that he did not witness the beating of the three mentioned Presiding Officers.

PW1 testified that he did not personally see the 1st Respondent distributing mealie meal on 11th August 2021. It was his further testimony that he did not witness the distribution of money and did not bring evidence to prove that one Francis Kalala was an agent of the 1st Respondent. He however testified that he did see him buying assorted beers from a bar near Twatasha Polling station for voters before and after voting.

PW1 further admitted that a Police report was not produced to confirm the incidence concerning Potipher Tembo's vehicle and did not mention which of the 1st Respondent's agents carried out the attack. PW1 testified that he did not see the sneaking in of ballot papers into the polling stations and did not know at which polling station this incidence happened.

In further cross-examination by Counsel for the 2nd Respondent, PW1 stated that he was informed about the ballot papers by Alice Soko (PW4) who phoned him from the polling station and testified that he knew that PW4 was at the polling station through several other witnesses. He further testified that he personally saw that the Gen 20 forms were missing when he was at the totaling Centre. It was his testimony that 13 Gen 20 forms were missing and that the 15 mentioned in his Petition was a typographical error. He further testified that he did not confirm that Innocent Kalimanshi was listed as an agent of the 1st Respondent on her Nomination form.

In re-examination, PW1 testified that his understanding of who an agent is, is one who was campaigning with the 1st Respondent.

PW2, Sabina Bwalya's evidence was to the effect that on 11th August 2021 she was among the recipients of mealie meal, cooking oil and K50 notes distributed by the PF Parliamentary candidate, Tasila Lungu and the Councilor and were being told to vote for them. In cross-examination, PW2 admitted that she did not vote despite being a registered voter and receiving the mealie meal and money from Tasila Lungu.

PW3 was Alice Soko, a Monitor at the Methodist Polling station on 12th August 2021 whose duty was to observe what was happening. Her testimony was that she witnessed voters who had queued up scampering in different directions when some PF cadres were stoning a vehicle belonging to Potipher Tembo that was delivering food for UPND agents. She further testified that at about 17:30 hours, she saw Tasila Lungu and three others arrive at the polling station at Stream 3 where she was. It was

her testimony that she and her colleague, Ireen Sikwale (PW7) attempted to follow them. She testified that they were stopped by a PF member but she stood at the door and watched as Tasila Lungu spoke to John Mbewe who was the 2nd Respondent's official and left thereafter. She further testified that around 20:00 hours, some PF Youth members came to the polling station and issued threats but did not know their names. It was her further testimony that around 21:00 hours when the counting of votes commenced, she witnessed a female official of the 2nd Respondent from Stream 2 get into an unregistered vehicle which drove to the nearby PF office and came back with a black plastic bag. She narrated that as the official was about to enter the polling station, PW3 attempted to grab the plastic bag from her and demanded that the said official opens the bag which she refused to do and stated that the two struggled until she let go of the bag. She testified that the 2nd Respondent's official called another official from Stream 2 who took the bag which he put it in room where nobody else had access. She testified further that shortly afterwards, there was a power cut and she was informed by the Security guard that the electricity units had finished but a man from her group volunteered to purchase units and the counting of votes resumed. PW3 further testified that while the counting was ongoing, some soldiers came to the polling station and enquired on their safety and shortly afterwards, she witnessed the soldiers grab one of the 2nd Respondent's officials from Stream 3 and pushed him to the wall. She testified that they further went to Stream 2 where the soldiers picked two of the 2nd Respondent's officials and when interrogated on what they were doing, the two stated that they got authority from Tasila Lungu and they were beaten up by the soldiers. She further testified that the next morning, the soldiers told the 2nd Respondent's officials that they would transport the ballot boxes and instructed the 2nd Respondent's officials to use their own vehicle and meet them at the totaling center. She closed her testimony by stating that she and her colleagues used a taxi to go to the totaling center at Chawama

school to ensure that the ballot boxes were delivered and then she went home.

In cross-examination, PW3 availed an identification card that showed that she was a monitor under an organization called Operation Young Vote and agreed that it was an independent organization. She testified that she knew the PF cadres because they lived in Chawama where she lives. She further testified that as a monitor, she was not reporting to anyone but admitted that she was chosen to be a monitor by what she called "Friends of UPND" and subsequently admitted to being affiliated to UPND.

She conceded that she did not know the contents of the black plastic bag up to this day and that the counting of votes was not disrupted. She also testified that she did not have a phone on that day and did not call anyone. When asked whether she had called the Petitioner to inform him of ballot papers being sneaked into the polling station, she denied saying that it was impossible because her phone was off but then stated that she could have called the Petitioner before the soldiers ordered everyone to turn off their phones. It was her testimony that the Petitioner was her councilor. In further cross-examination by the 2nd Respondent's Counsel, PW3 testified that there were a lot of monitors and they were told what to do and that she used her phone to call the Petitioner.

PW4 was Terry Chingo whose testimony was that on 27th May 2021, while doing door-to-door campaigns, they saw a group of people running and amongst them was the Petitioner and one of the UPND youths who informed them that they had been attacked by PF cadres. He further testified that when the PF cadres identified him as a UPND member, they grabbed him and beat him up and some other people joined in the beating as they suspected him to be a thief. He testified further that he was rescued when a woman recognized him as a UPND cadre and took him into her house. It was his testimony that he was taken to the Police station

and later to Chawama level 1 hospital where he obtained the medical report produced as "TM2" before the tribunal. He testified that after returning from the hospital, he met some PF members who threatened him for reporting the matter to the Police.

In cross-examination, PW4 conceded that he went towards the danger after hearing about the attacks on his colleagues and admitted that it was possible that other people other than PF members beat him since he was suspected to being a thief. He further testified that after the incident, he did not continue in the campaigns as he feared for his life and left for Ndola but confirmed that he managed to vote for his preferred candidate.

PW5, was Moses Mulela who testified that sometime in July 2021, whilst digging trenches with three colleagues, he saw some people removing UPND posters and replacing them with PF posters and stated that he recognized Innocent Kalimanshi among the said people who was in an unregistered vehicle. When cross-examined, PW5 admitted that he did not see the 1st Respondent and stated that he did not know the connection between the 1st Respondent and Innocent Kalimanshi. He further testified that the posters removed were for the UPND Presidential candidate and the councilor.

PW6, Nathan Shambono's testimony was that around 10:00 hours in July 2021, after putting up UPND posters, he was called by the Petitioner who informed him that the 1st Respondent had informed him that he was seen removing PF posters which allegation he denied. He further testified that three days later around 10:00 hours, PF cadres led by Innocent Kalimanshi and armed with pangas followed him and accused him of removing PF posters and stated that Innocent Kalimanshi told the cadres to let him go. In cross-examination, PW6 admitted that he did not come into any direct contact with the 1st Respondent.

PW7 was Ireen Sikwale who testified that on 12th August 2021, she was a Monitor stationed at Methodist Polling Station. It was her testimony that on the said date, she arrived at the Polling Station at about 03:00 hours in the company of PW3. She stated that she was stationed at Stream 2 while PW3 was at Stream 3 and that the Polling Station was opened at 06:00 hours. She testified that when they arrived, they were shown the ballot boxes which were empty. She further testified that when she attempted to leave the Polling station to get some water, she was informed by a Police officer at the gate that she would not be permitted back into the Polling station until after an hour. She testified that at 17:30 hours, she witnessed Tasila Lungu arriving in the company of two other individuals and she followed the trio when they first entered Stream 3 and thereafter Stream 2. She narrated that she then saw Tasila Lungu speak to the 2nd Respondent's officials and then left the Polling station. She further narrated that shortly afterwards, she heard noises outside the gate and when she went to check, she was informed that the commotion was caused by some PF cadres who were with Tasila Lungu. She testified that she then requested a Police officer to attend to the commotion. She further testified that voting resumed after it became calm and the Polling station was closed at 18:30 hours. As they were about to start counting of votes, some soldiers came to Stream 2 and asked if they were safe and then informed the people in the stream that they were not safe since there were some PF cadres outside. It was her further testimony that counting of votes went up to 01:30 hours and as the counting was being done, the 2nd Respondent's officials from streams 2 and 3 stepped outside to speak to each other but she was unable to hear what they were saying to each other. She then testified that a soldier asked one of the 2nd Respondent's officials what he and his colleague were planning and that shortly after that, the two officials were beaten by the soldiers. She then narrated that at about 05:00 hours, an unknown man came to the Polling station alleging that he was from the office of the President but failed to produce any identification

when requested by the soldiers. She testified that the unknown man was beaten by the soldiers and later stated that he was a resident of Kuomboka. She then testified that at 06:00 hours, some of the 2nd Respondent's officials advised them to leave and she and her colleagues objected since the ballot boxes had not been taken to the totaling center. She stated that the soldiers transported the ballot boxes and upon delivery of the ballot boxes, she went home.

In cross-examination, she confirmed that as a Polling agent, the voting went on well and further testified that people were voting freely until Tasila Lungu came to the Polling station when she saw some voters leave. She however conceded that voting continued after Tasila Lungu left and she was unsure if those who left came back. In further cross-examination by Counsel for the 2nd Respondent, she testified that she did not know the 2nd Respondent's officials but could recognize them and that she informed the Petitioner about the beating of the said officials. She further testified that two of those beaten by the soldiers were the 2nd Respondent's officials while the other two were not. In re-examination, she reiterated her earlier testimony that two officials of the 2nd Respondent were beaten and that she was the one who informed the Petitioner of the beating.

PW8 was Yonah Kalambo whose testimony was that between 22:00 hours and 23:00 hours on 11th August 2021, he accompanied the UPND ward Chairlady, whose name he did not know to Twatasha Primary to write down serial numbers for ballot boxes. He testified that he was appointed as Security for the unnamed chairlady. It was his further testimony that when they got to the ninth classroom to record the serial numbers, they were stopped by a Police officer stating that he needed to confirm with the 2nd Respondent's officials if the two had access. PW8 stated that five minutes later, the Police officer made some calls although he was unable to hear the officer. He narrated that shortly after that, he saw two unregistered vehicles and a grey Vitz arrive. He testified that the

unregistered vehicles did not enter the gate while the Vitz did. It was his testimony that he saw the 1st Respondent emerging from the Vitz with her people and after speaking to the Police officers present, the officers chased him and the chairlady. He narrated that before they left, they notified the officers of the party flyers that were still pasted and the officers assured them that they would be removed. He further stated he decided to stand outside for about 20 minutes to observe if the vehicles would also leave and stated that only the unregistered vehicles left but the Vitz were the 1st Respondent was did not leave. He testified that not too long afterwards, the unregistered vehicles returned with PF cadres popularly known as "Matagwani" armed with pangas. PW8 testified that he then left fearing for his life but the 1st Respondent remained inside the Polling station.

Under cross-examination, PW8 testified that he was not a member of UPND but was merely assigned as security for the chairlady of Mutinta branch in ward 2. He then testified that he volunteered his services. He also testified that the ballot boxes were closed and that the Police and officials of the 2nd Respondent were overseeing the ballot boxes. He conceded that he did not have any form of identification when he arrived at the Polling station but that he was allowed by the chairlady. PW8 testified that he was told by the chairlady that the woman in the Vitz was the 1st Respondent and that he recognized her from campaign posters. He testified further that there were other people who had come to record serial numbers and they too were chased by the Police officers. He stated that there were thirteen officers who chased them from the Polling station and he arrived at this by counting the number of classrooms as each classroom was assigned one officer. He said he did not count the number of people present.

In further cross-examination, PW8 stated that he did not know Sabina Bwalya (PW2) who had testified that she saw the 1st Respondent distributing mealie meal around 18:00 hours despite paragraph 18 of the Petition stating that this was done between 20:00hours and 23:00 hours.

PW8 testified that he was not aware of these events and did not know the whereabouts of the 1st Respondent before and after the incidence at Twatasha Primary school. He then testified that he voted from Twatasha Primary school despite the incidences he mentioned and that he did vote for his preferred candidate. Under further cross-examination by the 2nd Respondent's Counsel, he testified that he was unaware that by recording serial numbers, he was interfering with the election process which was an offence. He testified that he was merely accompanying the chairlady who had an identification card. He further testified that he knew the Petitioner as his councilor because he voted for him.

In re-examination, PW8 stated that there were three police officers with the 1st Respondent but that they were chased by thirteen officers and he would not know the whereabouts of the 1st Respondent before she got to the Polling station and where she went afterwards.

PW9, Andrew Zulu was the Petitioner's last witness and testified that he was the UPND chairman for Chawama Constituency as well as the Campaign Manager. It was his testimony that when campaigns commenced in May 2021, he was tasked with preparation of the campaign program. It was his testimony that around 08:00 hours on 27th May 2021, he met with his team which included the Petitioner, Potipher Tembo, Gabriel Mwale and his Deputy, Rodgers Chimena and agreed on the program. He testified that on that particular day, they went to Mpinga area and notified the Officer in charge of their program as per procedure. He further testified that they started door to door campaigns and just as they covered the twentieth house, he met two notorious boys clad in PF regalia and he realized that the two intended to provoke them by calling them 'cows' and advised his team to ignore them. He narrated that they continued with their campaigns until they encountered the two boys again and this time, the two boys started throwing stones at them and within a short period of time, the number of assailants increased. It was his

testimony that he decided to hide the candidates inclusive of the Petitioner in a nearby house and in the process of doing so, one of their youths, PW4 was apprehended and beaten. He also narrated the incidence involving Abigail Simusa who was alleged to have been stripped of her UPND t-shirt. He testified that having sensed danger, he halted the campaign and proceeded to report the matter at Chawama Police station while PW4 was taken to the hospital where he obtained a medical report marked as "TM2" and a Police report was issued. He proceeded to testify that on 23rd July 2021, he was a victim of an attack during campaigns. He narrated how he was shocked to see a gentleman known as Saidi Phiri clad in PF regalia on a day scheduled for UPND to campaign, following them as they did their door-to-door campaigns. He stated that as Saidi followed them, he was constantly on the phone which prompted PW9 to call the Police and availed his location. He testified that as they approached Shantumbu market, they saw a group of youths in PF regalia heading towards them but luckily, the Police had dispatched a Landcruiser which was behind the group and caused the group to scamper. He stated that the Police assured them of their safety and they resumed their campaign. PW9 testified that as he was addressing a resident, he was shocked to see him fall to the ground after he was stoned by some PF youths who were now hiding in houses while the Police patrolled outside. He stated that he saw the PF carrying pangas and planks and ran to hide in a house but was not allowed to by the owners and when he tried to run, he was stoned in the head by the PF youths and at that point, he did not know where to go. He further testified that he was apprehended, hit with a plank and then stabbed on the wrist with a screwdriver whilst they threatened to behead him. PW9 stated that the youths took his phone and threatened to take him to their commander and he denied being a UPND member in order to save his life. He stated further that someone called Victor Phiri told the group that he was innocent and that they should just take his phone and money which they refused to do. He testified that he was taken to an unfinished building

where he was beaten and that one of the youths made a call informing their commander that they had apprehended PW9. It was his testimony that when his phone rang, the PF cadres told the caller that he had already been beheaded. He narrated that they continued beating him saying that Chawama was for Tasila Lungu until he heard noise from outside coming from loud music being played and heard the youths shouting that the Honourable had come and that they would get paid. It was his testimony that some neighbours rescued him and took him to Kamwala clinic where he received treatment and a medical report was issued and produced as "TM3" and the matter reported to Chawama Police. He further testified that when he arrived at his home, one of the youths from the group called Godfrey Banda, went to apologise and informed him that they had been sent by the 1st Respondent and Tasila Lungu which information he took to the Police and the said Godfrey Banda was arrested. He testified that it became difficult to campaign after these incidences. He concluded his testimony by stating that on 11th August 2021, they had to halt a planning meeting due to another attack by PF cadres.

In cross-examination, PW9 testified that he knew the notorious boys physically but did not know their names and that they were known for attacking people and stealing from them. He further testified that they were about twenty people in his team and that there were about forty youths in the group. He stated that they were about four people in his team inclusive of the candidates. He further testified that they saw the PF group as they were about to cross the road. He testified that they saw the group coming from the other side of the road and the group started throwing stones at them. He testified that PW4 was among the four as he was assigned to provide security for one of the candidates and that PW4 did not confront the group but merely went ahead of everyone when he was apprehended. He testified further that Abigail Simusa was in another group and that he did not see the cadres removing her UPND t-shirt or the

cadres beating PW4. It was his testimony that he had been a UPND member since 2011 and was not in party regalia when he was attacked and that he was the only one captured but could not tell how many people attacked him as they carried him away on shoulders. He testified that he was taken to a two-roomed house and could still hear his phone ring despite being beaten by more than ten people. He stated that the nearest clinic was Chawama level 1 hospital but he was taken to Kamwala clinic and got a Police report from the Police station near Gold Crest Mall. He then testified that he did not mention the 1st Respondent in any of the incidences and that he never had an encounter with her. PW9 conceded that their polling agents were accredited and that if someone was not accredited, he was not an agent. He further conceded that what happened to him was a criminal act.

In further cross-examination by Counsel for the 2nd Respondent, he testified that the 2nd Respondent discharged its duties with regards to Chawama according to how they know it and that the President was duly elected. He further testified that they had a complaint against the 2nd Respondent concerning how they handled issues at the totaling centre at Chawama Basic School. He stated that the 2nd Respondent's official called Jonathan Nkhata did not attend to them when they complained. He also testified that the Petitioner was not at the totaling centre and that 15 Gen 20 forms were missing despite the Petitioner testifying that 13 Gen 20 forms were missing.

In re-examination, PW9 testified that the neighbours hired a vehicle to take him to Kamwala clinic. He also testified that the Petitioner was at the totaling center when he was told by the Returning Officer to call his candidate after the totaling was done and that 13 Gen 20 forms were missing while the other two could not balance.

After the close of the Petitioner's case, the 1st Respondent (RW1) testified and did not call any other witnesses. RW1 relied on her Answer and stated

that she was duly elected and that the elections were free and fair. She added that at the beginning of the campaigns in May 2021, she personally visited the Petitioner at his home in order to agree that they should have a peaceful campaign. She further testified that throughout her campaign, she had agents accredited with the 2nd Respondent as people she would work with during campaigns. She testified that her agents were well aware of the campaign timetable and never campaigned on a date scheduled for the Petitioner. She stated that she had 121 accredited agents and produced all 121 accreditation forms and a list showing that she paid the said agents for their services. She testified further that on 11th August 2021, she received a phone call from a neighbor while she was home who informed her that she had seen the Vitz belonging to the Petitioner at Twatasha Polling station around 22:00 hours. She narrated that she decided to call the PF Constituency Chairman to accompany her to the Polling station to see what the Petitioner was doing there at that hour. She stated that she drove her vehicle while the chairman drove his and they met at the Polling station and upon arrival, they found Police officers and soldiers at the gate and did not enter. RW1 further testified that she recognized the UPND chairlady with seven other UPND members but did not speak to them. It was her testimony that the chairman spoke to the officers enquiring what the UPND members were doing there and one of the UPND members answered that they were looking at the ballot boxes. She testified that she asked the officers why only UPND members were allowed to check the ballot boxes when she had information that the ballot boxes were recorded during the day at Civic center. She narrated that the officer called his colleagues who were not more than 10 and when they returned, they ordered everyone inside the Polling station to leave and she left.

She further testified that there were UPND posters along the road where she resides in the ward which were never pulled down and that her neighbours were free to wear UPND regalia without getting attacked. She

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neighbours were free to wear UPND regalia without getting attacked. She

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also testified that during campaigns, she would freely call the Petitioner to talk about the campaigns and that he never once complained to her about the campaigns being unfair.

In cross-examination, RW1 testified that there was only one type of agent and that is why she had forms for polling agents. She further testified that she visited the Petitioner with two of her agents and that she was always with her agents during campaigns. It was her testimony that she paid the agents from her own pocket. She testified that the PF chairman was driving a Hilux when he accompanied her to Twatasha Polling station and that they used separate vehicles because they lived in different homes. She further testified that the Petitioner was not at the Polling station when she arrived. She conceded that she did not produce proof of having UPND posters along her road and that there was no proof of her conversations with the Petitioner and that further, she had never spoken to the Petitioner about anything other than elections. She also admitted to knowing Tasila Lungu and going on campaigns with her. She further testified that she was at the totaling centre on 14th August 2021 between 10:00 hours and 21:00 hours when candidates from all political parties were called for the declaration of results. She testified that the results were not announced on that day but she did not enquire why as she assumed that the totaling had not been concluded and was not aware that any Gen 20 forms were missing. She further stated that her agents had filed in all Gen 20 forms. She admitted that Gen 20 forms are cardinal in the totaling of results and that they show results obtained by each candidate but that she was not aware that there was no other way for the 2nd Respondent to total results other than through Gen 20 forms. She also testified that despite having agents at Methodist Polling station, she was not aware of any of the incidences mentioned by the Petitioner. It was her testimony that she did not know Innocent Kalimanshi but heard of him from social media and that he was not part of her campaign team and never saw him trailing her

campaign team. In further cross-examination by the 2nd Respondent's Counsel, RW1 confirmed that the majority of voters in Ward 2 turned up to vote and that she was present when the results were officially announced. In re-examination, she testified that the announcing of results is done by the 2nd Respondent and that it is the 2nd Respondent's role to tabulate results.

The 2nd Respondent did not call any witnesses and relied entirely on its Answer and Affidavit in Support of the Answer.

In the written submission by the Petitioner, Counsel for the Petitioner, Ms Phiri alluded to the fact that the Petitioner seeks a declaration that the election of the 1st Respondent be declared void and that the law regarding the declaration of an election as void under the Electoral Process Act No. 35 of 2016 is settled. Counsel submitted that the Electoral Commission of Zambia is the custodian of all elections in Zambia as provided by Article 229 of the Constitution of Zambia (as amended by the Constitution of Zambia Amendment Act No. 2 of 2016) as read with Section 97 (2)(b) of the Electoral Process Act. It was Counsel's submission that the 2nd Respondent did not show proof explaining that there were no anomalies in the Record of Proceedings and that the Gen 20 forms alleged to have been missing were availed to him. Counsel further submitted that there is no law that indicates that any other record can be used in determining results other than the official Gen 20 forms and that the missing Gen 20 forms which were unaccounted for when results were announced, substantially undermine the validity of the results. She also submitted that PW9 attested to the missing Gen 20 forms. Counsel further made specific reference to **Section 83 (1)(c)(ii) of the Electoral Process Act No. 35 of 2016** which provides as follows:

'A person shall not directly or indirectly, by oneself or through any other person-

(a)....

(b)....

(c) do or threaten to do anything to the disadvantage of any person in order to induce or compel any person—

(i)...

(ii) to vote or not to vote;'

Ms. Phiri submitted that PW2 testified that she and some other voters were enticed and bribed to vote for the 1st Respondent by being given cooking oil, mealie meal and K50.00 and that the said items were distributed by the 1st Respondent and the Member of Parliament, Tasila Lungu before the elections. It was Counsel's submission that had it not been for this electoral malpractice on the part of the 1st Respondent, her agents and campaign team, the Petitioner would have won the election. It was her further submission that the 2nd Respondent failed to discharge its duties as set out under Section 3 of the Electoral Code of Conduct in the Electoral Process Act No. 35 of 2016 which provides as hereunder:

The Commission shall, where reasonable and practicable to do so—

(a) meet political party representatives on a regular basis to discuss matters of concern related to on election campaign and election itself;

(b) ensure that political parties do not use State resources to campaign for the benefit of any political party or candidate;

(c) avail political parties with the election timetable and election notices in accordance with the Act;

- (d) censure acts done by leaders of political parties, candidates, supporters, and Government and its organs, which are aimed at jeopardising elections or done in contravention of this Code;**
- (e) declare election results expeditiously from the close of the election day;**
- (f) ensure that a campaign rally or meeting which is legally organised by a political party is not disrupted or arbitrarily prohibited;**
- (g) ensure that an election officer, police officer, monitor, observer or media person is not victimised in the course of their election duties;**
- (h) ensure that police officers act professionally and impartially during the electoral process;**
- (i) ensure that traditional leaders do not exert undue influence on their subjects to support a particular political party or candidate;**
- (j) ensure that equal opportunity is given to all stakeholders, particularly political parties and independent candidates to participate in and conduct their political activities in accordance with the law; and**
- (k) condemn acts of media organisations and personnel aimed at victimisation, punishment or intimidation of media practitioners implementing any of the provisions of this code.**

We note that Counsel has made reference to a blanket provision above and has not specified which of the sections the 2nd Respondent contravened. Counsel submitted that equally, the 1st Respondent failed and/or neglected to adhere to the obligations of a candidate set out in Section 4 of the schedule of the same Act which states that:

A political party and candidate shall—

- (a) establish and maintain effective lines of communication with the Commission and with other registered political parties and candidates, at national, political and local level, including the provision of names and the contact details and addresses of or a candidate's party election agents and of other relevant office bearers and representatives;**
- (b) accept and respect decisions of the Commission in respect of election results announced by returning officers and the Commission in accordance with the law;**
- (c) issue directives to their members and supporters to observe this Code and take any necessary steps to ensure compliance;**
- (d) hold public meetings in compliance with the law;**
- (e) adhere to the election timetable issued by the Commission in conducting election campaigns in accordance with this Act;**
- (f) take appropriate measures to ensure environmental protection and cleanliness in the course of posting or distributing electoral campaign material;**
- (g) remove campaign materials within fourteen days of the declaration of election results;**
- (h) take necessary measures to ensure public safety in the course of posting or distributing electoral campaign material; and**
- (i) carry out campaign meetings and rallies peacefully.**

It was Counsel's argument that the UPND did not have a fair ground to campaign as a result of the violence that was perpetrated in Chawama as attested to by the witnesses. Counsel made further reference to the removal of the Petitioner's posters by the 1st Respondent's agents and/or supporters. She further submitted that it was beyond reasonable doubt that the 1st Respondent committed corrupt and illegal practices either in person, through her agents and her campaign who acted under her direction with her knowledge and approval. In conclusion, it was

Counsel's submission that as such, the Petitioner has fulfilled the requirements of Section 97 of the Electoral Process Act.

Mr. Batakathi, Counsel for the 1st Respondent in his oral submissions to the tribunal stated that the burden of proof in all civil matters rests with the Petitioner and that this position is supported by a plethora of authorities but relied only on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**¹ wherein the Supreme court held that it is up to the Plaintiff or the person bringing an action to prove their case on a balance of probabilities regardless of what the opponent says. He further submitted that in an election petition, the standard of proof is higher than the balance of probabilities as it relates to ordinary matters but not to the degree of beyond reasonable doubt as is in criminal matters. In fortifying this argument, Counsel made reference to the unreported case of **Dean Masule v Romeo Kangombe 2019/CC/A002**² which spelt out the standard of proof in election petitions.

Counsel further argued that the law setting grounds upon which the election of a candidate as Councilor can be nullified is set out in **Section 97 (2)(a), (b) and (c) of the Electoral Process Act No. 35 of 2016**. He argued that the said provisions outline the threshold to which this tribunal must be satisfied based on credible and cogent evidence which the Petitioner must present to a fairly high degree of clarity. It was his submission that for the tribunal to nullify the election of the 1st Respondent, it has to be convinced above a balance of probabilities that:

- (1) There is a breach of the Electoral Code of Conduct in this particular election which can be called a misconduct;
- (2) The misconduct must be committed by the 1st Respondent; or
- (3) The misconduct must be committed with the knowledge or approval of the 1st Respondent's agents;

- (4) As a result of the misconduct, the majority of the voters in the ward may have been prevented from electing their preferred candidate.

Mr. Batakathi further submitted that it is insufficient for a Petitioner to prove that the Respondent committed an illegal practice or misconduct without proving that such acts were widespread. He supported this position by placing reliance on the case of **Nkandu Luo and Electoral Commission of Zambia v Doreen Mwamba and Attorney General**.³

Counsel argued further that it is the position of the law that a candidate cannot be held liable for acts of members of his political party who are not the candidate's agents. He submitted that the Constitutional court had clarified that a candidate's agent is a polling agent, or polling assistants that are accredited with the electoral body as defined under Section 2 of the Electoral Process Act No. 35 of 2016. It was Counsel's submission that in the case in *casu*, the Petitioner brought a number of witnesses including himself that testified to two or three incidences of violence that occurred in the ward during the election period. He argued that while electoral violence is an act of misconduct or a breach of the Electoral Code of Conduct, the Petitioner and his eight witnesses lamentably failed to bring cogent and credible evidence connecting whether directly or indirectly, the 1st Respondent or any of her agents to these incidences. Counsel submitted that on that score, the Petitioner failed the test under Section 97(2) of the Electoral Process Act No. 35 of 2016. He further submitted that the mere fact that the alleged perpetrators of the violence were suspected to be members of the party where the 1st Respondent belongs does not mean they are her agents and that to buttress this point, the 1st Respondent produced accreditation forms of all her agents and none of the said agents were implicated by the Petitioner or his witnesses. He submitted further that

none of the witnesses including the Petitioner brought any credible evidence that the alleged incidences were so widespread that they affected the voting. Counsel reiterated that all of the Petitioner's witness except PW2 testified to the fact that they all managed to vote for their preferred candidates. Counsel referred the tribunal to the case of **Margaret Mwanakatwe v Charlotte Scott**⁴ wherein the Constitutional court dismissed the Petition despite finding that there was misconduct on account of the Respondent, the misconduct was not widespread so as to affect the outcome of the election. In conclusion, Mr. Batakathi submitted that the Petition has not proved any of the required tests and prayed that it be dismissed with costs and that the tribunal exercises its power to declare the 1st Respondent as having been duly elected.

Mr. Mtonga, Counsel for the 2nd Respondent submitted that the Petitioner must prove that the 2nd Respondent substantially failed to conduct the election in accordance with the provisions of the Electoral Process Act and argued that no substantial proof has been given by the Petitioner. He further submitted that the Petitioner lied about the phone call from PW3 and that he further contradicted paragraph 25 of his Affidavit verifying Petition that only 13 Gen 20 forms were missing and yet the Affidavit he swore said 15 Gen 20 forms were missing. Counsel argued that the Petitioner lied about being present at the totaling center as PW9 stated that he was not and that most importantly, he lied that the substantial number of votes were contained in the Gen 20 forms but failed to give a rational answer when asked whether he had seen the missing Gen 20 forms to confirm his allegation. It was Counsel's further submission that PW9, a star witness completely contradicted the Petitioner on the number of the Gen 20 forms that went missing and that the 1st Respondent confirmed that no objection was raised by the Petitioner to the declaration or the announcement of the final results. Mr. Mtonga argued that in the absence of such objection and in the

absence of valid proof, the Petitioner failed to prove that the 2nd Respondent substantially failed to conduct the election in accordance with the law. He further submitted that the Petitioner also failed to prove that an act or omission was carried out by the 2nd Respondent that affected the election result. To conclude, Counsel relied on the case of *Margaret Mwanakatwe v Charlotte Scott* which clearly interpret the meaning of Section 97 of the Electoral Process Act No. 35 of 2016.

We are grateful to Counsel for the submissions and references to various authorities. We have carefully considered the evidence before us in its entirety, the submissions as well as authorities cited by Counsel. The evidence before the tribunal on which there was common ground was that on 12th August 2021, Local Government elections for Chawama Ward 2 of Chawama constituency were held. It is also not disputed that on 15th August 2021, the 1st Respondent, Karma Jawara was declared the winner of the election. It is not in dispute that violence ensued before and after the campaigns. It is further not in dispute that due to the violence, the 2nd Respondent imposed a ban on campaigns in Lusaka. It is also not in dispute that the UPND youth camp known as Patuka house was attacked. Furthermore, it was not in dispute that Innocent Kalimanshi and Nathan Phiri were amongst the perpetrators of this violence. It is worth noting at this point that we take judicial notice of the violent attacks that were covered by the media during election campaigns.

The distribution of mealie meal, cooking and money by Tasila Lungu and a Councilor is also not in dispute. It is further not disputed that six candidates contested the said elections. It is also not in dispute that some UPND members were victims of the violence having been assaulted by some PF cadres.

Being the unsuccessful candidate as the UPND candidate, the Petitioner filed this election petition challenging the election of the 1st Respondent as member of the Lusaka Council for Chawama Ward 2. The Petition is fortified by the provisions of the Electoral Process Act No. 35 of 2016 specifically Sections 96(1)(c)(i), 98 (c), 100(3) and Article 159 (3) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

By the said Petition and in accordance with Section 99 of the Electoral Process Act which prescribes reliefs that maybe claimed in an election petition, the Petitioner advanced a number of prayers arising out of the several allegations and averments in the Petition. The Petitioner's allegations are contained in paragraphs 7 to 26 of the Affidavit verifying Petition.

In summation of the allegations made against the 1st Respondent by the Petitioner, it is our considered view that the issues to be addressed by this tribunal are as follows:

1. Whether the 1st Respondent and/or agents committed these illegal acts.
2. A determination of who the 1st Respondent's agents are.
3. Whether the election results were tabulated regardless of the 13 missing Gen 20 forms.
4. Whether the 1st Respondent was validly elected.

With regards to the first issue, it goes without saying that the bulk of the Petitioner's allegations borders on the perpetrators of the illegal acts being agents of the 1st Respondent. The Petitioner has alleged and PW5 testified that the 1st Respondent's agents led by Innocent Kalimanshi removed UPND posters and replaced them with PF posters. In support of these allegations, particularly that Innocent Kalimanshi and Nathan Phiri were agents of the 1st Respondent, the Petitioner produced a video clip which failed to prove his assertion. He further testified with regards

to the other named perpetrators that his understanding of the meaning of an agent was that an agent is someone who moves with a candidate during campaigns.

It is trite law and imperative to ensure that the evidence to be adduced in support or against an Election Petition is credible, relevant and useful to the Court or tribunal in this instance, for the determination of the Election dispute. The Petitioner subjected the tribunal to a video clip that did not address the substance of his allegations. Moreover, the witnesses who testified that they saw the 1st Respondent's agents commit illegal and corrupt acts could not prove this allegation, for example, PW9 made reference to well-known cadres belonging to the PF as his assailants during the campaigns. We are guided once again by the case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General**, where the Constitutional court held that a candidate cannot be held liable for acts of members of the candidate's political party or other persons who are not the candidate's election or polling agents.

It is therefore insufficient to allege that the act complained of was committed by a member of the 1st Respondent's political party or her supporters. Therefore, from the totality of the evidence through the testimony of all the Petitioner's witnesses including himself, it is necessary to conclude that the Petitioner failed to directly implicate the 1st Respondent or indirectly through her agents to the corrupt and illegal acts. Moreover, the Petitioner, PW3, PW4, PW5, PW6 and PW7 testified that they did not personally see the 1st Respondent or her agents at any of the incidences.

However, PW2 admitted to seeing Tasila Lungu and a councilor distributing mealie meal and other items and this evidence was not challenged. We therefore resolve that from the consideration of this evidence, neither the 1st Respondent nor her agents can be said to have committed these acts.

Secondly, to determine who the 1st Respondent's agents are, we make reference to the provisions of the Electoral Process Act No. 35 of 2016, **section 2 of the Act** defines an election agent **as a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper** while a polling agent is defined **as an agent appointed by a candidate in respect of a polling station.**

We have noted that as a rebuttal to the Petitioner's allegations against her, the 1st Respondent produced before us 121 accreditation forms for polling agents marked "KBJ1-KBJ121" and we are further alive to the fact that the said forms prove that these were the 1st Respondent's agents as named in the accreditation forms. However, the 1st Respondent did not produce her nomination papers to show who her election agents were. We agree with Counsel for the 1st and 2nd Respondent that this was incumbent on the Petitioner to prove this as the onus is on him. In this vein, we refer to the case of **Michael Mabenga v Sikota Wina & Others**⁵ where the Supreme Court held as follows:

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

From the foregoing, it follows therefore that the only persons that can be classified as agents of the 1st Respondent are those named on the accreditation forms. We are alive to the fact that the petitioner and the witnesses kept mentioning Kalimanshi, Nathan Phiri and other party

members of the PF as having been attacked by them but they were not the named polling agents for the 1st Respondent.

We also note that there was no proof that the 1st Respondent instructed the perpetrators of these acts and RW1 denied knowing any of the persons mentioned. The conclusion we draw from this is that these acts were not committed with the knowledge and consent of the 1st Respondent.

We will now address the issue of the missing Gen 20 forms. The Petitioner has cited section 72 (1)(b) in supporting the allegation that the results for the 13 missing Gen 20 forms were reflected in the record of proceedings. For the avoidance of doubt, **section 72 (1) (b)** prescribes as follows:

“Upon receipt of the items mentioned in section seventy-one, a returning officer shall tally the results of the votes received from the polling station in the constituency, district and ward and shall—

(a)

(b) declare the results for the National Assembly and Ward election.”

The 2nd Respondent stated that it followed all the electoral rules and regulations before declaring the results and that the declaration of the results of the polls was only produced upon the completion of counting of all Gen 20 forms. We note that this is in tandem with the provisions of **Section 71 of the Electoral Process Act No. 35 of 2016** which provides that:

(1) After announcing the result at a polling station, a presiding officer shall complete a form, as may be prescribed, reflecting—

- (a) the number of ballot papers supplied to the polling station;**
- (b) the result at the polling station;**
- (c) the number of rejected ballot papers;**
- (d) the number of spoilt ballot papers;**
- and**
- (e) the number of unused ballot papers.**
- (2) When a presiding officer has complied with subsection (1), the presiding officer shall publicly announce the result of the count at the polling station to members of the public, the accredited observers, monitors, election and polling agents present at the polling station.**
- (3) When the presiding officer has complied with subsection (2), the presiding officer shall inform the returning officer of the result of that count at the polling station"**

We are of the firm view that the Petitioner's allegations concerning the Gen 20 forms could not be substantiated as he failed to produce the Gen 20 forms which he alleges to have contained a substantial number of votes. We are in agreement with both Counsel for the 1st and 2nd Respondent that the onus of proof is on the Petitioner and as such, the Petitioner could have compelled the 2nd Respondent to produce these documents. We noted further that the Petitioner did not avail the number of registered voters for ward 2 for the tribunal to have known that a substantial number of votes were missing as claimed since the 2nd Respondent produced the record of proceedings.

The Petitioner further stated in the Reply to the 2nd Respondent's Answer that the 2nd Respondent would be put to strict proof. We are therefore of the view that in light of the contents of the said Reply, the Petitioner should have objected when the 2nd Respondent elected not to call any witnesses,

thereby availing himself the opportunity to cross-examine the 2nd Respondent on the possibility of tabulating results without the missing Gen 20 forms. We noted with shock when the Counsel for the Petitioner had no objection but instead informed the tribunal that the Petitioner would rely on the Reply filed. In this vein, we refer to **Rule 20 (4) of the Local Government Election Tribunal Rules** which provides as follows:

“A tribunal may at any stage of the proceedings make an order requiring the personal attendance of a deponent for examination or cross-examination”.

It follows therefore that since the 2nd Respondent's witnesses were not called, the Petitioner could not put the 2nd Respondent to strict proof as regards the evidence in the Affidavit in Support of Answer, which averred that the Gen 20 forms were availed to all stakeholders thence the results. We further opine that the Petitioner could have also considered calling his polling agents from the 13 named polling stations including those from other political parties to corroborate this allegation.

We now address the issue of whether in light of the foregoing, the 1st Respondent was validly elected. In dealing with this issue, we must consider the provisions of **Section 97 (2) (a) of the Electoral Process Act** which provides that:

“The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that— (a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—

(i) by a candidate; or

- (ii) **with the knowledge and consent or approval of 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;"**

We also make further reference to the **Margaret Mwanakatwe⁴** case wherein the above section was fully interpreted.

As rightly analyzed by Counsel for the 1st Respondent, **section 97 (2) (a) of the Electoral Process Act No. 35 of 2016** illustrates a three-tier test in the which can be summarized as follows:

- i. *Whether a corrupt practice or illegal act or other misconduct has been committed in connection with the election;*
- ii. *Whether the said misconduct was committed by the 1st Respondent or her election agent or polling agent or with her approval or consent.*
- iii. *Whether as a consequence of the corrupt practice or illegal act or misconduct committed, the majority of the voters in the ward were or may have been prevented from electing a candidate of their preference.*

With regards to whether a corrupt practice or illegal act or other misconduct has been committed, this has already been answered in the affirmative. In **section 97 (3) of the Electoral Process Act No. 35 of 2016** provides that:

"Despite the provisions of subsection (2), where, upon the trial of an election petition, the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or

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

The aforementioned provision denotes that even in the event of the misconduct being committed, the same does not render an election void based on these acts only.

It is worth noting that a further reading of section 97 (2)(a) of the Electoral Process Act No. 2 of 2016 reveals that the election of a councilor can only be nullified if the person challenging the said election proves to the tribunal's satisfaction that the candidate in question committed a corrupt practice or illegal practice or other misconduct in relation to the election personally, or by another person with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent. This aspect of the provision has also been answered in the affirmative as the Petitioner failed to prove that the 1st Respondent and/or her agents committed these

as an agent for the purposes of his petition. To buttress this, we make further reference to the **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General**³ case wherein the Constitutional court dealt with allegations made against winning candidates with respect to illegal acts relating to the election attributed to persons other than the candidate's election and polling agents. Furthermore, we are guided by the holding in the case of **Chrispin Slingwa v Stanley Kakubo**⁶ that regulation 55 (1) of the Electoral Process (General) Regulations is clear in its provisions and requires that an election agent must be specifically appointed and named in the candidate's nomination paper.

The Petitioner has failed to prove that all the named perpetrators of the violent acts in his petition were indeed agents of the 1st Respondent.

Finally, it is incumbent on the Petitioner to prove that a candidate committed a corrupt practice or engaged in other misconduct and that the said corrupt practice or illegal practice or misconduct was widespread and as such prevented or may have prevented the majority of the voters in the ward from electing a candidate of their choice. In **Margaret Mwanakatwe v Charlotte Scott**⁴, the court observed that the 1st Respondent failed to adduce any evidence to prove that the prohibited act was widespread and affected the result of the electorate from electing their preferred candidate, as we stated above no register for voters was produced to confirm that the voters did not elect their preferred candidate.

We make further reference to the case of **Mubika Mubika v Poniso Njeulu**⁷ which the Constitutional Court cited with approval in the case of **Jonathan Kapaipi v Newton Samakayi**⁸, the Supreme Court stated that:

As I come to the conclusion of the matter, it should be restated that a parliamentary party candidate cannot be held responsible for every remote action or electoral misconduct or corruption perpetuated or perceived to be perpetuated by party officials or members, simply because of common association or linkage to the party, without proof that such electoral misfeasance was personally sanctioned by the candidate or by his election agent.

CONCLUSION

Having judiciously and painstakingly considered the evidence adduced by the Petitioner, and the Respondent respectively, I have arrived at a safe conclusion that all the allegations pleaded in this petition have not been proved to the required standard to warrant nullification of the election within the purview of the whole section 97(2) of the EPA. Additionally, and for the avoidance of doubt, there is no evidence to find the ECZ wanting to warrant nullification, in particular within the ambit of section 97(2)(b) of the EPA for non-compliance with the EPA, so as to affect the results of the said elections.

And I wish to reaffirm that, it is not sufficient to merely adduce evidence that at the instance of the PF, as a party in general, there was widespread corruption, vote buying, bribery and ferrying of voters to polling stations and rewarding voters with food and money if they voted for the Respondent, as was the case in this petition.

What is fundamentally crucial, as by law required is the production of real evidence that is cogent and convincing to the required standard of proof that the Respondent or his election or polling agent were involved in such acts, and if there is want of such evidence, the election cannot be annulled, unless and until the law is amended. Amended in such a way that widespread illegality, corruption and misconduct by a party sponsoring a winning candidate, which swayed the majority from voting for a candidate of their choice constitute sufficient ground to annul an election, notwithstanding that the party candidate did not sanction such illegality or corruption.

Perhaps in terms of enhancing electoral principles, the paradigm shift is now ripe; that; a candidate should not directly or indirectly derive a benefit or attain an advantage from widespread illegalities of his party impacting on the fairness of the election, regardless of his/her innocence or non-involvement, otherwise complete sanity, integrity, fair competition and propriety in the electoral process will remain elusive due to weaknesses in the law. And those willing to bend the law rather than break it, will always find some room to maneuver.

In view of the foregoing, the petition is dismissed. The Respondent, Robert Kaela Kalimi was duly elected as a Member of Parliament for Malole Constituency in the 2021 general election held on August 12. The petition is entirely dismissed.

Finally, in an election petition, where the petitioner is unsuccessful, costs are awarded against the petitioner if there was no legal or factual justification for the petitioner to petition the election results (see **Lazarous H. Chota v. Patrick Mucheleka & Another (SCZ Appeal No. 18 of 2015)**). The mere fact that the petition is unsuccessful, does not automatically or necessarily mean that there was no legal or factual justification to take out the petition. Accordingly, in the present case, I make no order as to costs.

Leave to appeal granted.

DATED THIS 23RD DAY OF NOVEMBER, 2021.



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THE HON. MR. JUSTICE CHARLES ZULU