(706)

IN THE SUPREME COURT OF ZAMBIA **SCZ APPEAL NO.182 OF 2007**

HOLDEN AT LUSAKA **SCZ Judgment No. 31 OF 2008**

(CIVIL JURISDICTION)

IN THE MATTER OF: **THE ELECTORAL ACT NO.12 OF 2006 SECTION 93 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **PARLIAMENTARY ELECTION FOR CHILANGA CONSTITUENCY HELD ON THE 28TH SEPTEMBER, 2006**

IN THE MATTER OF: **AN ELECTION PETITION**

BETWEEN:

PRISCILLA MWENYA KAMANGA	**-**	**APPELLANT**
AND		
THE ATTORNEY-GENERAL	**-**	**1ST RESPONDENT**
HON. NG'ANDU PETER MAGANDE	**-**	**2ND RESPONDENT**

CORAM : Sakala, CJ.,Chirwa, Mumba, Chitengi and Mushabati; JJS.

On 25TH June, 2006 and 19th August, 2008

For the Appellants : Mr.B.C. Mutale, SC. and Mr L. Kalaluka of Ellis and Company

For the 1st Respondent: Mr M. Mukwasa – State Advocate

For the 2nd Respondent: Mr S.C. Malama, SC. of Jaques and Partners

---

JUDGMENT

Mushabati, JS., delivered the judgment of the Court.

(707)

Cases referred to:

1. **Double Mwale Vs The People [1984] Z.R. 76**
2. **Simwanza Vs The People [1985] Z.R.15**
3. **Jones Vs National Coal Board [1957] 2. ALL E.R. 155**
4. **Re Enock and Zaretzky, Bock and Co. [1910] 1 K.B.327**
5. **Porter Vs Magill [2002] 1 ALL E.R. 465**
6. **Fallow Vs Calvert [1960] 2.Q.B. 201**
7. **Water Welles Ltd Vs Jackson [1984] Z.R. 98**
8. **Zambia Telecommunications Ltd Vs Celtel (Z) Ltd SCZ No. 90 of 2006 (unreported)**
9. **Mazoka and others Vs Mwanawasa and others [2005] Z.R. 138**
10. **Thomas Mumba and others Vs The People SCZ Appeal No. 92-95 (unreported)**
11. **Lewanika and others Vs Chiluba [1998] Z.R. 79**
12. **Mabenga Vs Wina [2003] Z.R. 110**

Legislation referred to:

Criminal Procedure Code, Cap. 87 – S.149

Electoral Act, No.12 of 2006 – SS.102(3) and 103(1)(a) and (b)

Other works referred to:

Halsburys Laws of England 4th Edition Vol. 17 Page 195 Paragraph 281

This is an appeal against the High Court judgment of 30th July, 2007 dismissing the appellant's petition against the election of the 2nd Respondent as a Member of Parliament for the Chilanga Parliamentary Constituency during the Presidential and Parliamentary General Elections held on 28th September, 2006, seeking to

nullify the 2nd Respondent's election on a number of malpractices as pleaded in the petition.

(708)

We wish to state that in the court below, the petition was prosecuted by two Petitioners but the 2nd Petitioner, Capt. Cosmas Moono, is not a party to this appeal. However, for clarity's sake we shall simply refer to the appellant as the Petitioner and the 1st and 2nd Respondents as the 1st and 2nd Respondents respectively, the titles they held in the court below.

The undisputed facts of this case are that both the Petitioner and the 2nd Respondent contested the Parliamentary General Elections held on 28th September, 2006 in the Chilanga Constituency. The Petitioner stood on the Patriotic Front (PF) ticket; while the 2nd Respondent stood on the ticket of the Movement for Multiparty Democracy (MMD).

The 2nd Respondent was declared the duly elected Member of Parliament for the Chilanga Constituency.

The result was unsuccessfully challenged, in the High Court, to have it declared null and void on a number of allegations not relevant to this appeal as it will be seen later in this judgment.

It is also not in dispute that the learned trial judge informed the parties of his intention to call some witnesses after the defence had closed its case. Five witnesses, in total, were called by the court and they were designated as court witnesses.

This appeal is premised on one ground of appeal which is attacking the learned trial judge's jurisdiction to call witnesses on his own motion.

(709)

The witnesses were called to come and testify on some specific issues and for the sake of this appeal; we intend to specifically refer to the relevant evidence on those issues. The allegations are as contained in **Paragraph 5(a)(b) and (f)** of the petition at page 132 of the record of appeal. For ease of reference we reproduce the above sub- paragraphs:

(a) **That Hon. Ngandu Peter Magande and his agents bought a submersible water pump for the Nyembe Co-operative during the campaign period 2006 tripartite election.**

(b) **That he and his agents repaired the hand pump for Julius Compound.**

(f) That, in the Company of Lusaka Province Permanent Secretary went to Chilanga and grabbed land next to Chilanga Basic School which he gave to voters as a market stand in order to induce them to vote for him.

The evidence in support of these allegations, as adduced by the petitioners can be summarized as follows. P.W.1, Barbara Beatrice Mwelwa, owned Plot No. 742 in Chilanga. On 31st July, 2006, she went to Chilanga to do some work on the said plot. As she was there, she saw some people who converged at her plot. Some of the people were clad in MMD attire.

The people told her that they had gone there to grade the plot. She was asked who she was and what she was doing there. Later on the Permanent Secretary for Lusaka Provicne, Mrs Susan Sikaneta, came there. As she was still talking to her, there came the 2nd Respondent.

(710)

The two, i.e the Permanent Secretary and the 2nd Respondent, had a brief discussion between themselves before the 2nd Respondent approached her. The second respondent then addressed her saying they were there to solicit for her vote. She was asked by 2nd Respondent if she knew him. P.W.1 told the 2nd Respondent that she knew him as the former Minister of Finance. Later on, P.W. 1 saw some graders come to her plot to the applause of the people gathered there. When cross-examined by counsel for the 2nd Respondent, P.W.1 told the court that by notice dated 10th July, 2006, the Commissioner of Lands indicated that the plot was to be repossessed for non- payment of ground rent and for non-compliance to develop it within 18 months after it was allocated to her.

On the water pump or borehole at Nyemba Co-operative Union two witnesses, P.W.6, Patricia Bulaya, and P.W.8, Josephine Chikwanza, both testified that the 2nd Respondent addressed a meeting at Sekelela in mid- September, 2006, during the run up period to elections. After his address, the 2nd Respondent asked for and received complaints from the people who attended the meeting. Among the complaints was the need for water at the centre. The 2nd Respondent promised to work on it and indeed after a week or so the water at Nyemba Co-operative Union Centre, was restored by the 2nd Respondent.

P.W.9, Sitete Nasilele, testified that on 13th September, 2006, the 2nd Respondent addressed an MMD meeting at Tikondwe Branch of Julius Compound. After the meeting the people who attended the meeting raised a complaint over their water pump which had not been working since June, 2006. The 2nd Respondent promised to attend to that problem. On 20th September, 2006, some people went to dismantle the pump in order to have it repaired. It was finally repaired

(711)

on 27th September, 2007 by some people, who included one General Yoyo. The water supply was restored.

This is the evidence on the issues which were addressed by the five witnesses summoned by the court.

The 2nd respondent, when testifying in his defence, alluded to the question of the Chilanga plot and the two boreholes. On the Chilanga plot, belonging to P.W.1 he said that he was invited to a gathering near Chilanga Basic School in July, 2006 by the former Permanent Secretary for the Lusaka Province. The 2nd Respondent said he was aware that he had, at one point in time, drawn the attention of the authorities that one of the main problems that obtained in Chilanga was lack of a market. When he got to the site, where he was invited to, he found a lot of people including the Permanent Secretary and the District Commissioner for Kafue. The purpose for the gathering was to ground break the site for a market by the Provincial Roads Engineer with a caterpillar machine (bull-dozer). The 2nd Respondent observed that one lady (P.W.1) looked indifferent and on finding out he learnt that one of the plots, that was affected, was hers. He talked to her, after consulting the Permanent Secretary. P.W.1 narrated her problems to him. The Permanent Secretary had earlier on indicated to him that in fact the said piece of land had already been designated as a

market site by the Commissioner of Lands. The Kafue District Commissioner confirmed that they had the requisite documents from the Commissioner of Lands. Later the 2nd Respondent was sued to court by P.W.1 over the said piece of land. On the boreholes, the 2nd Respondent said that the Cabinet had, through the National Assembly, approved that philanthropic activity could still be carried out by the Cabinet during the elections.

(712)

C.W.1, Susan Sikaneta, the Permanent Secretary for Lusaka Province, testified that on 31st July, 2006, there was a ground breaking ceremony at Chilanga. The gathering for the ceremony was convened by the Provincial Administration. Among the people who attended the ceremony was the 2nd Respondent. His attendance was in his private capacity.

C.W.2, Frightone Laivas Sichone, the Commissioner of Lands, informed the court that he had been in correspondence with Kafue District Council in relation to Plot No. 742 Kafue/Chilanga. He outlined the circumstances and procedures for repossessing a piece of land. One of the grounds is failure to develop it within a given time. The owner of such land is given three months to show cause why it should not be re-entered.

C.W.3, Betty Chilunga, told the court that the pump at Nyemba Co-operative Union was struck by lightning three years before it was repaired on 29th August, 2006 by Moses Nawa, C.W.4. The said pump served the Community of Sekelela area. The said C.W.4 was approached by C.W.3 to have the said pump repaired.

C.W.4, Moses Kalimukwa Nawa, told the court that he tried to repair the pump at Nyemba after he was approached by the officials of the Co-operative Union. He failed to repair it and so he approached a Mr Mfune who had it repaired. He however, bought the pump for which he had a receipt.

C.W.5, Colonel Justin Mulenga merely said though he knew where Julius Compound was, he did not know whether there was a bore-hole there.

(713)

These are the summaries of the evidence relevant to this appeal.

As already indicated above this petition was dismissed. The appeal before us is based on one ground. This ground of appeal is that: **The learned trial judge seriously misdirected himself in law when he unilaterally and without the parties' consent opted to call five witnesses to rebut the appellant's evidence thereby rendering the whole trial unfair and partial resulting in a serious miscarriage of justice.**

The learned trial judge's decision to call the five witnesses is not reflected in the record of proceedings because it was verbally made. This necessitated the swearing of affidavits to prove that the learned trial judge called the said witness. The affidavit evidence was necessary to prove that this order was made by the learned trial judge without consulting the parties.

The petitioner filed written heads of argument. The learned counsel for the petitioner argued that the witnesses that were called by the court below were not of clarification nature i.e they were not called to clarify some points as laid

down in the case of ***Double Mwale Vs The People***[(1)]. It was further argued that it was irregular for the court below to summon the said witnesses. He acted against the decision of this court in the case of ***Simwanza Vs The People***[(2)].

On the Chilanga Township market land it was submitted that the learned trial judge relied and placed much reliance on the evidence of C.W.1 and C.W.2 as being corroborative of the 2nd Respondent's evidence.

(714)

On the water pump at Nyemba Co-operative Society it was argued that the trial judge placed much reliance on the evidence of C.W.3 and C.W.4 because he said: **The evidence of C.W.3 and C.W4 shows that the water pump was bought and installed by C.W.4 Mr Nawa I also do not accept the argument that the two court witnesses lied to cover the 2nd Respondent because no wrong had been proved against him over which he needed the alleged cover up. I find them to be credible and accept their evidence.**

On the water pump at Julius Compound it was submitted that evidence in support of the allegation was adduced by P.W.10. The only evidence in rebuttal as to who had repaired the said pump was from C.W.3 who merely said **"it was Moses Nawa".**

It was strongly argued that the judge's neutrality and impartiality is cardinal in our adversarial system.

The judge was, therefore, not expected to 'descend into the dust of the conflict. A judge in a civil dispute is only allowed to call a witness with the consent of the parties. In the case of **Jones Vs N.C.B**[(3)]. Lord Denning had this to say: T**he judge is**

not allowed in a civil dispute to call a witness whom he thinks might throw light on the facts. He must rest content with the witnesses called by the parties.

If a judge has to call a witness such discretionary power must sparingly be used as enunciated in the case of ***re Enock and Zaretzky, Bock and Co.***[(4)].

(715)

It was argued in this case that the learned trial judge did not seek the consent of the parties before making his decision to call the five witnesses. Though the Advocates were allowed to cross-examine, this did regularize what the judge did.

The counsel further argued that where a judge or court takes a stand, he must take into account the position of the parties before him. In this case it was submitted that the trial judge was biased in favour of the 2nd Respondent. He urged this court to consider the question of bias on the part of the trial judge, bearing in mind the authority of **Porter Vs Magill**[(6)]. The question the court should ask itself is whether **"a fair minded and informed observer"** would not consider the trial judge, in this case, as having been biased by calling the five witnesses without the parties' consent, more so this was done after the parties had closed their respective cases and most importantly the findings of fact were based on the witnesses called by him. The learned trial judge even cautioned the Newspaper Reporter who purportedly questioned the judge's right to call the said witnesses.

It was the petitioner's advocate's view that given the facts of this case **"a fair minded and informed observer"** would conclude that the trial judge was biased.

In his oral submission State Counsel, Mr Mutale, said the trial judge in this case just summoned the parties into his chambers to announce his decision to call the said witnesses without consulting the parties. As he had so resolved nobody could have swayed him away from that course of action. He then reiterated his written argument that the fact that they were allowed to cross-examine the witnesses did not change the fact that the parties were not consulted.

(716)

Reference to ***Section 103(1)*** of the **Electoral Act** did not resolve the matter though it makes a provision for calling of witness by the court different from the common law one which requires that the consent of the parties be obtained before the court can call a witness. ***Section 103(1) of the Electoral Act*** did not, however, apply in this case because none of the witnesses called by the court were involved in the election process. They were instead specifically called to rebut the evidence on the Chilanga Plot, Nyemba Bore-hole and Julius Compound bore-hole. They all had nothing to do with the conduct of the elections. All in all, it was submitted that there was a miscarriage of justice in the case on account of bias towards the 2nd respondent by the court. The trial judge got himself deeply involved in the case.

The counsel for the 1st Respondent merely adopted the arguments made by Mr Malama, on behalf of the second respondent, which we are about to summarize here below.

In his written heads of argument, the State Counsel, Mr Malama, has asked us to consider the question of calling a witness by the judge in a civil or criminal matter. He argued that in a criminal matter a judge has more or less unfettered powers to call a witness without the consent of the parties as long as it is done in the interest of justice. In this regard, he submitted that the authorities relating to criminal proceedings should not be applied here; but be limited to criminal cases. In Civil cases, a judge has power to call a witness not called by any of the parties but it must be by consent or without objection of the parties.

(717)

He referred us to ***Halsburgs Laws of England 4th Edition, Volume 17 paragraph 281 at page 195.*** He also ran us through other English authorities. The learned counsel cited the cases of ***Fallow Vs Calvert(7) and Re Enock(5)*** *above*. In all these cases the bottom line is that in a civil suit the role of the court is to decide cases on the evidence adduced by the parties and that a judge has no right to call a witness without the consent of the parties.

Lord Denning held a similar view in the case of ***Jones Vs National Coal Board(3).*** In the instant case before the court, Mr Malama argued that none of the advocates objected to the calling of the said witnesses by the court even after some days elapsed before they were called to testify.

He, however, argued that **Sections 102(3) and 103(1) the Electoral Act** have since altered the common law on calling of witnesses by the court in an election petition.

As for **Section 103(1) of the Electoral Act,** it must be looked at in light of **Section 32 of the Parliamentary Elections Act, 1968** which also appears as **Section 123 of U.K Representation of the People Act 1999 or Section 140 of the Representation of the People Act 1983.**

It was argued, in the alternative, that the evidence adduced by the five witnesses, called by the court, did not alter or even if it were not called it would still not have altered the court's findings of fact.

(718)

The cautioning of the reporter by the court should not be construed that the trial judge was biased. If this were so, then the complaint ought to have been raised at an earliest opportunity. This could have afforded the trial judge an opportunity to either proceed or not to proceed with the case. He urged us not to consider the question of bias because by doing so, we would be acting as a court of original jurisdiction. He urged the court to dismiss the appeal with costs.

In his oral submission he (Mr. Malama) basically advanced the same arguments as contained in his written heads. The only dimension added to the written heads was that the allegations on boreholes had failed in the court below because it was held that they were provided to the communities on the principle of philanthropy. So even if the evidence by the five witnesses was excluded, the court would still have arrived at the same decision.

In reply, Mr Mutale said the legislation that was referred to was not applicable in this case because the witnesses were not involved in the elections. It was not

every person who could be **subpoenaed** as a witness by the court. On Mr Malama's submission that the court's finding could still stand even if the five witnesses' evidence had not been adduced, Mr Mutale said the issue at hand was one of bias, which was deep rooted in this case and not whether the case could succeed or not with or without the evidence of the said five witnesses.

Mr Kalaluka supplemented Mr Mutale's submission by saying it was not possible for any of the advocates for the petitioners to object to the court's calling of the witnesses because the trial judge had taken a stand as he stated that he was

(719)

not doing so for the first time. This is contained in his ruling at page 281 of the third volume of the record of appeal.

These are the brief summaries of arguments by both learned counsel.

It is clear to us from the arguments and affidavit evidence filed into this court that the learned trial judge called five witnesses without consulting the parties. We must at this stage register our disapproval at the learned trial judge's failure to record his decision to call some witnesses. The High Court is a court of record as constituted under ***Section 9(1) of the High Court Act, Cap. 27*** and as such, all important decisions ought to be recorded.

It is also clear that after the said witnesses were called by the court both learned counsel cross-examined or at least were allowed to cross examine those witnesses.

It is also clear to us that the issues at hand are:

(a) Was it open to the trial judge to summon the witnesses on his own motion?

(b) Did he do so with possible bias towards the respondent?

Our starting point is to look at the **Act** relating to Election Petitions. The election petitions are filed and heard in accordance with provisions of the ***Electoral Act No.12 of 2006.*** This **Ac**t has specific provisions for calling of witnesses by the court. These are ***Section 102(3) and 103(1)(a) and (b)*** of the said **Act.** For ease of reference these Sections are hereby reproduced;

102(3) Subject to the provisions of this Act, the High Court may in respect

(720)

of the trial of an election petition, exercise such powers within its civil jurisdiction as it may deem appropriate.

103(1) On the trial of an election petition, the High Court may-

(a) **order any person who appears to the High Court to have been concerned in the election to attend as a witness at the trial;**

(b) **examine any witness or any person who is present at the trial although such witness or person is not called as a witness by any party to the proceedings;**

Provided that after the examination by the High Court of a witness or person, the witness or person may be cross examined by or on behalf of the petitioner or the respondent.

In arguing this appeal, the learned counsel for the petitioner said the above provisions of the law did not permit the trial judge to summon the five witnesses.

The witnesses in question were neither people concerned with the elections nor witnesses present at the court.

He argued that since those witnesses were not covered under the provisions of ***Section 103(1) of the Electoral Act No.12 of 2006,*** the learned trial judge applied the Common Law when he exercised his discretion to call the said witnesses. The Common Law requires that consent of the parties be obtained before the court can exercise this discretionary power.

In response, Mr Malama submitted that the learned trial judge had powers under the **Sub-Section(1)(a) of Section 103** though it contains a conditional

(721)

phrase. The qualification is that the witness to be called must be **"a person who appeared to the High Court to have been concerned in the election."**

We agree that **Section 103** places some limitations on who should be called as a witness. Sub-Section (b) of this Section requires that the intended witness must be present at court. The question, however, is whether it is anybody present at the court that the court can call as a witness. A witness must be somebody who has some personal knowledge of what is being adjudicated upon. It is, therefore, not open to the court to call witnesses at random. We understand this sub-Section to relate to witnesses who have been summoned by any of the parties as a witness but for one reason or the other such party decides not to call that particular witness to testify. The party will inform the court of this fact and so the witness may be called by the other party or the court. This is the only way the trial judge will know who the possible witnesses, who are in attendance at court, are. In any case, we are satisfied that the witnesses called by the

learned trial judge were not present at court and so they were not covered under **Sub-Section 1(b) of Section 103 of the Electoral Act.**

The arguments were, however, centred on who **"the person who had concern in the election"** was under **Sub-Section(a) of Section 103(1).**

First and foremost, our ***High Court Act, Cap 27*** has no provision for calling of witnesses by the court. The calling of witnesses in civil trials in the High Court is based on common law. Our ***Criminal Procedure Code, Cap.88 of the Laws*** has a specific provision for calling of witnesses by the court in criminal trials. This is **Section 149** of which, however, was inadvertently omitted in our present edition of our laws. The provisions of the present ***Section 149*** are the same as those

(722)

under ***Section 158.*** In the arrangement of Sections, it is still shown that ***Section 149*** relates to the power of the court to summon witnesses and to examine any person present in court and to recall witnesses. It is clear to us that this Section was misprinted and we wish to draw the attention of the Attorney-General to this error or omission so that it can be rectified.

Some of the authorities cited to us namely ***Double Mwale Vs The People***[(1)] and ***Joseph Simwanza Vs The People***[(2)] are based on this Section.

We have no problem in what we expressed in these authorities; but the question remains unanswered whether the trial judge had powers to call the witnesses he called in this case. We say so because the **Act** under review has its own specific provisions for calling of witnesses by the court.

Section 103(1)(a) does not require a judge to seek for the consent of the parties when calling a witness. All that is required is that such witnesses must be concerned with the election. Were the witnesses called by the court covered by this Sub-Section? In answering this question, we must first look at the petition and the allegations contained therein. The five witnesses that were called to court testified on the market land in Chilanga and two bore-holes, one each, at Nyemba Co-operative Settlement and Julius Compound. These issues were raised in the petition as some of the malpractices alleged against the 2nd Respondent.

The alleged malpractices relating to the bore-holes are contained in sub-paragraphs 5(a) and (b) of the petition. The land issue is the subject of sub-paragraph 5(f). The above allegations were the subject of the testimonies of

(723)

the five witnesses. C.W.1, Mrs Susan Sikaneta, the Permanent Secretary, Lusaka Province and C.W.2, Frightone Sichone, the Commissioner of Lands, testified on the Chilanga land. C.W.3, Betty Chilombo Chilunga and C.W.4 Moses Kalimukwa testified on the bore-hole at Nyemba Co-operative settlement.

The alleged malpractices that gave rise to the calling of these witnesses happened during the election period i.e during the campaign period. They must have known what happened, during the elecetion period, regarding the allegations. Such witnesses cannot be excluded as not being **"concerned in the election".** We therefore, understand **Sub-Section 1(a) of Section 103** to include anybody or persons who may have knowledge of the alleged malpractices in an election petition.

The malpractices in issue, as we said above, were raised by the petitioners. In his discretion, the trial judge found that the witnesses he summoned were concerned in the elections that took place on 28th September, 2006. We feel that the phrase **"person concerned with the election"** cannot be limited to actual officers, such as returning officers or polling officers, involved in the running of elections. We have no doubt that the five witnesses called by the court were covered under ***Section 103(1)(a)of the Electoral Act No. 12 of 2006.*** Excluding witnesses like those called by the court, we would be taking a narrow or restrictive interpretation of this Section instead we have to apply the purposive interpretation i.e the purpose for which this law was enacted. It was meant to address all the issues pertaining to elections and so people with useful information that can help the court to arrive at a fair and just decision are

(724)

covered in the umbrella phrase **"any person who appears to the High Court to have been concerned in the election."**

We have no doubt that had the trial judge properly directed himself on the interpretation of this Section, he would still have acted in the same way. We are, therefore, not going to venture into applying the common law in arriving at a decision whether the trial judge had a discretion to call the witnesses he called. We are fortified in this reasoning by ***Section 102(3) of the Electoral Act*** which is very clear. It does not give a trial judge a leeway to resort to common law in a petition trial when the question to call or not to call any witness arises. This Sub-Section opens with the phrase **"Subject to the provisions of this Act…"** This means the High Court has power to call any witness as long as it is done within the confines of the ***Electoral Act.*** Further, this Court's decision in the case of

Water Wells Ltd Vs Jackson*[8]** is clear on application of foreign law when there is no **lacuna** in our own statutes. This is what we said: ***No need arises to draw a parallel between the Rules of the Supreme Court of England and those of the High Court Rules of Zambia when the latter Rules make it abundantly clear as to the position in question.

In like manner, the ***Electoral Act*** has adequately covered or addressed the issue at hand. So reference to Common Law procedure, on calling of the witnesses, requiring consent of the parties, is not applicable here. However, we totally agree with the Common Law that when a judge decides to call witnesses on his own motion, he must guard against such action from being viewed as perceived bias towards one of the parties.

(725)

We now wish to deal with the question of bias as alleged against the trial judge toward the respondent.

The learned trial judge intimated to the parties his desire to **subpoena** some witnesses. No objection was raised by any of the advocates for the petitioners on that day. On the return day, when the witnesses testified in court, there was still no protest or objection from any of the advocates. It was argued that this was not possible because the court was allegedly in a non-comprising attitude, as it had already made its mind.

One of the ethics of the legal profession is to fearlessly defend the interests of one's client. In short an advocate is expected to stand his ground to voice his view or stand even at the pain of any punishment, as long as the law permits it.

In this case, we are left to speculate what the trial judge was going to do had the advocates raised their objections to his calling the witnesses.

The Advocates did not only fail to register their objections against the calling of the witnesses, but they even cross-examined them. The trial judge, as alluded to above, had a discretion to call any witnesses as permitted by the provisions of the law. The question of bias would have been properly raised before us if only the advocates had taken a stand against the calling of the said witnesses.

We wish, therefore, to distinguish this case from our earlier decision in the case of ***Zambia Telecommunications Co. Ltd Vs Celtel Zambia Ltd***[8] in which the question of bias was raised. In that case, the Chairman of an arbitral tribunal was appointed to another tribunal by one of the advocates appearing before

(726)

him in an arbitral tribunal he was chairing. He did not disclose this fact to the opposing party. As soon as this was known to the other party, the award rendered was challenged on the reason of non-disclosure of interest by the Chairman. We held in that case that it was possible for a fair minded and informed person to have concluded that the Chairman's failure to disclose his interest was in conflict with public policy and the possibility of bias could not be ruled out.

In guiding the courts below on calling of witnesses we must repeat what we said in the cases of ***Double Mwale Vs The People***[1] ***and Simwanza Vs The People***[2]. This is what we said;

(**ii**) ***In exercising, its power to call witnesses a court must have regard to the traditional considerations for the exercise of a judicial discretion in criminal matters; and the section could not legitimately be used for***

purposes such as supplying evidence to remedy defects which have arisen in the prosecution case or where the result would merely be to discredit a witness.

In Simwanza's case we said:

(iii) It is the duty of the prosecution to apply to call the rebutting evidence. It is highly undesirable, and procedural irregularity, for the court to take it upon itself to call the rebutting evidence.

We also said in the case of **Thomas Mumba and others Vs The People[9]** as follows: ***We wish, in passing, to comment on the active participation of the trial court in this case. Whereas a court may occasionally ask one or two questions on matters of clarification, it is very undesirable for it to take active role in***

(727)

examining a witness. This may compromise the court's neutral position in the eyes of the parties i.e possible bias on the part of the court may not be ruled out.

What we said in the cases above is also true even in civil cases. However, be that as it may, we are not satisfied that, in exercising his powers to call witnesses in this case, the learned trial judge was biased.

In view of what we have said above, we feel compelled to further comment on these allegations on the basis of the evidence adduced by the rest of the witnesses i.e excluding the five witnesses.

On the Chilanga Market Plot, the only piece of evidence, incriminating the Respondent was that of his presence at the ground breaking. The purported

owner of the Plot P.W.1 revealed that the ceremony was attended by the Permanent Secretary for Lusaka Province and the District Commissioner for Kafue. These were government officials. So on the face of it, what comes to our mind is that the ceremony was a Government function. P.W.1 confirmed that the 2nd Respondent had by then ceased to be a Government Minister. In fact, P.W.1 confirmed that she had received notice to re-enter from the Commissioner of Lands because she had failed to pay ground rent and to develop the said piece of land within eighteen months.

We have said before that the standard of proof, in an election petition trial, is higher than the ordinary standard of proof in civil matters, which is based on a balance of probabilities. We clearly made this point in the cases of ***Mazoka and others Vs Mwanawasa and others[10], Lewanika and others Vs Chiluba[11] and***

(728)

Mabenga Vs Wina[12]. We are not satisfied that the evidence adduced on this issue had attained the high standard we alluded to above.

On the bore-holes, the evidence from the Petitioner's own witnesses was that the people who attended the Respondent's campaign meetings requested for or raised the issue of water. The repairs were not initiated by the Respondent. He only responded to the people's wishes. The repair of the bore-holes, in our well considered view, went beyond a mere act of trying to garner support from would be voters. We totally agree with the Respondent's evidence that the repairing of the boreholes was for philanthropic reasons, which this court held in the case of ***Lewanika and others Vs Chiluba[11]*** as not being prohibited under the ***Electoral Act and Rules.*** The evidence, as it stands on record, is far below the required standard of proof.

In view of what we have said above, on the issues on which the five witnesses were called to testify, we are convinced that this appeal was still bound to fail even if the five witnesses had not testified because the rest of the evidence relating to these issues i.e the Chilanga Market Plot and Bore-holes at Nyemba Co-operative and Julius Compound proved no wrong doing on the part of the second respondent as to have warranted the nullification of his election as Member of Parliament for Chilanga Constituency.

The only ground of appeal having failed, we up-hold the lower court's judgment and dismiss the appeal. We, therefore, declare that Ng'andu Peter Magande

(729)

was duly elected as Member of Parliament for Chilanga Constituency in the elections held on 28th September, 2006.

Costs shall follow the event and in default of agreement they shall be taxed.

……..

E.L. Sakala

CHIEF JUSTICE

……..

D.K. Chirwa

SUPREME COURT JUDGE

……

F.N.M. Mumba
SUPREME COURT JUDGE

……..

P. Chitengi
SUPREME COURT JUDGE

……..

C.S. Mushabati
SUPREME COURT JUDGE