

IN THE HIGH COURT FOR ZAMBIA

2011/HP/EP/54

AT THE PRINCIPLE REGISTRY

HOLDEN AT SOLWEZI

(Constitutional Jurisdiction)

IN THE MATTER OF : Article 72(1) of the Constitution of the Republic of Zambia

AND

IN THE MATTER OF : Article 63, 81 to 86 and 93 to 95 of the Electoral Act No. 12 of 2006

AND

IN THE MATTER OF : The Electoral Code of Conduct Statutory Instrument No. 52 of 2011

AND

IN THE MATTER OF : Zambezi East Parliamentary East Elections held in Zambia on 20th September, 2011

BETWEEN:

**BRIGADIER GENERAL KANKINZA KENNETH
JOSEPH MASOKA
THOM MAKONDO**

**1ST PETITIONER
2ND PETITIONER
3RD PETITIONER**

AND

**SARA SAYIFWANDA
ELECTORAL COMMISSION OF ZAMBIA**

**1ST RESPONDENT
2ND RESPONDENT**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court at Solwezi on this 22nd of March, 2012

For the 1st, 2nd & 3rd Petitioner: Mr. C. Chama – Chola Chama Legal Practitioners
For the 1st Respondent: Mr. S. Sikota, SC – Central Chambers
For the 2nd Respondent: Mr. N. Yalenga – A.M. Wood and Company

J U D G M E N T

Cases referred to:

1. Mlewa v Wightman (1995/97) Z.R. 171
2. Akashambatwa Mbikusita Lewanika and others v Chiluba (1998) Z.R. 49
3. Michael Mabenga v Sikota Wina and others –SCZ Judgment No. 15 of 2003
4. Anderson Kambela Mazoka and others v Mwanawasa and others (2005) Z.R. 138
5. Dr. Kizza Besigye v EC & Museveni Yoweri Kaguta-Election Petition No. 1 of 2006.
6. Nabukeera Hussein Hanifa v Kibule Ronald and another (2011) UGHC 72
7. Mubale v Mukuka and another- Appeal No. 45/2003
8. Mubanga v Samuel Chitonge and another – SCZ Appeal No. 66/2008

Other works referred to:

1. Halsbury's Laws of England 4th Edition Volume 15 paras 697, 698, 774, 776, 780, 784.

Facts

The petitioners, Brigadier General Kenneth Kankinza (independent), Joseph Maseka (United Party for National Development (UPND)) and Thom Makondo (Patriotic Front (PF)), and the 1st respondent Sara Sayifwanda (Movement for Multi Party Democracy (MMD)) were candidates during the tripartite elections held throughout Zambia on 20th September, 2011. They competed for election as Member of Parliament for Zambezi East constituency in North-Western Province. The 2nd respondent, Electoral Commission of Zambia organised and conducted the elections pursuant to its constitutional mandate under Article 76(1) of the Constitution of Zambia.

Following the elections the Returning Officer, Mr. Reuben Kaponde declared the 1st respondent Sara Sayifwanda, as the winner of that seat and the duly elected Member of Parliament for Zambezi East constituency. The Record of Proceedings at the Totalling of the Votes-Parliamentary for Zambezi East has not been produced, but it seems that Sara Sayifwanda polled 3,813 votes, the 1st petitioner polled 2,902 votes and, the 3rd petitioner polled 2,328 votes. There was one other contestant in the race Samakai Falliot (ADD) who polled 90 votes. The difference in the votes between the 1st petitioner and the 1st respondent was only 162 votes; between the 2nd petitioner and 1st respondent it was 911; and between the 3rd petitioner and the 1st respondent it was 1,485 votes.

Pleadings

The petitioners filed this petition on 20th October, 2011 through Messrs Ferd Jere & Company, advocates of Lusaka. The petition is brought under Article 72(1) (a) of the Constitution and section 93(1) of the Electoral Act No. 12 of 2006. The petitioners at a later stage on 4th November, 2011 instructed Messrs Chola Chama Legal practitioners, advocates of Lusaka to take over the prosecution of this petition. The petitioners have alleged in para 7 of the petition that contrary to the declaration by the Returning Officer that the 1st respondent was duly elected; she was not validly elected. The reasons for that allegation are given in para 7(i) to (vii) of the petition. There is also an affidavit in support of the petition. I will deal the allegations in detail later in my judgment.

The petitioners allege in para 8 of the petition that as a consequence of the alleged illegal practices committed by the 1st respondent and her election and other agents, the majority of the voters at the affected areas and/or polling stations were prevented from exercising their freedom of electing the candidate in the constituency whom they preferred. They pray for a declaration that the election of the respondent as a Member of Parliament for Zambezi East constituency is void; and that the illegal practices committed by the respondent and/or her agents so affected the election results that the same ought to be nullified. They pray for costs and any other relief the court deems fit.

The 1st respondent filed her answer on 9th December, 2011. She pleads in para 2 of the answer that the election was valid and she was duly elected. She denies all allegations in para 7(i) to (vii) of the petition. She contends that the final results of the election were a true and accurate reflection of the votes cast; that the electorate elected a candidate of their choice; and that it is inconsistent for the petitioners to contend that she had an undue advantage when the results as declared in all the wards where she is alleged to have engaged in malpractices were in favour of either one or the other of them. She prays for a declaration that she was duly elected as Member of Parliament for Zambezi East constituency and that the said election was neither void nor a nullity and the election results be upheld as true and accurate. She also prays that the petitioners are not entitled to any further relief and that the petition be dismissed with costs.

The 2nd respondent was first to file the answer on 6th December, 2011. They confirmed the results for the four candidates and clarified that the 3rd petitioner polled 2,902 votes and not 2,901 and aver that the elections in Zambezi East were conducted in accordance with the established laws and procedures; that the allegations in para 7 do not relate to them and that the petitioners are not entitled to the reliefs claimed.

The law on setting aside an election

Section 93 of the Electoral Act No. 12 of 2006, is the section which deals with the grounds upon which the election of a Member of Parliament shall be void or may be set aside if proved to the satisfaction of the trial court. That is to say, under subsection 2 (a) that by reason of any corrupt or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate whom they preferred; (b) that there has been a non-compliance with the provisions of the Act relating to the conduct of elections, and it appears to the trial court that the election was not conducted in accordance with the principles laid down in such provision and the non-compliance affected the results of the election; and (c) that any corrupt or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of the candidate's election agent or polling agent.

Subsection 3 provides that where, the trial court finds that any corrupt or illegal practice has been committed by, or with the knowledge and consent or approval of, an agent of the candidate whose election is the subject of such election petition, and the court further finds that such candidate has proved that:- (a) no corrupt or illegal practice was committed by the candidate personally or by the candidate's election agent, or with the knowledge and consent or approval of the candidate or his/her election agent; (b) such candidate and the candidate's election agent took all reasonable means to prevent the commission of a corrupt or illegal practice at the election; and (c) in all other respects the election was free from any corrupt or illegal practice on the part of the candidate or his/her election agent; the court shall not, by reason only of such corrupt or illegal practice, declare the election of the candidate void.

Subsection 4 provides that no election shall be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the trial court that the election was so conducted as to be substantially in accordance with the provisions of the Act, and that such act or omission did not affect the results of that election.

In *Mlewa v Wightman* (1), the Supreme Court clearly stated that the four paragraphs in s. 18 (2) of the Electoral Act No. 2 of 1991 (Now s. 93 (2) of the Electoral Act 2006) are independent and separate paragraphs and that an election shall be void if any of the paragraphs is proved to the satisfaction of the court. The Court also stated that where it is proved that there is wrong doing of a scale or type which has adversely affected an election, regardless of who the wrong doer is and even if the candidates personally were not involved, the election may be declared void in terms of s. 18 (2) (a). What this means is that even one proven instance of corrupt practices or illegal practices if such incident is established using the higher standard of proof as was held in *Lewanika and others v Chiluba* (2) can cause the election to be nullified on that ground. Sections 81 to 86 of the Act provide for several corrupt and illegal practices and election offences.

Burden and standard of proof

It is settled law that the burden of proof in an election petition lies upon the petitioner. In *Lewanika and others v Chiluba* (2) the Supreme Court stated that "parliamentary election petitions are required to be proven to a standard higher than a mere balance of probabilities". The Court also said where the petition had been brought under constitutional provisions and would impact on the governance of the nation and deployment of constitutional power, no less a standard of proof was required and that issues raised are required to be established to a fairly high degree of convincing clarity. In *Mabenga v Wina and others* (3) the Supreme Court said that "an election petition is like any other civil claim that depends on the pleadings and that the burden of proof is on the challenger to that election to prove "to a standard higher than on a mere balance of probability; issues raised are required to be established to a fairly high degree of convincing clarity".

In *Mazoka and others v Mwanawasa and others* (4) the Supreme Court said at p. 173 line 31 to p. 174 line 4: "...that for the petitioners to succeed..., it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters."

This was also the principle followed in the Ugandan Presidential election petition No. 1 of 2006, Col (Rtd) *Dr. Besigye v EC & Museveni Yoweri Kaguta*, (5). The Supreme Court of that country said that the burden of proof lies on the petitioner to satisfy the court on balance of probabilities that the non compliance under the law and principles affected the result of the election in substantial manner; that the standard of proof is higher than in an ordinary civil case and is similar to standard of proof required to establish fraud, but it is not as high as in criminal cases where proof beyond reasonable doubt is required. Clearly the standard of proof is higher than the ordinary balance of probabilities because the subject matter of the petition is of critical importance to the welfare of the people and their democratic governance. Therefore, a petitioner has a duty to adduce credible or cogent evidence to prove his allegations on the required standard of proof. The evidence must be free from contradictions and truthful so as to convince a reasonable tribunal to give judgment in the party's favour. On both principle and on authority, it also appears to me that the allegations made in the petition if proved **must** affect the results of the election in a substantial manner.

Perhaps I should also borrow a caution from the Ugandan jurisdiction where it has been stated that in an election petition, just like in the election itself, each party is set out to win. Therefore, the court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection.

It has also been stated in that jurisdiction that “it would be difficult indeed for a court to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of the devil; further that “in election contests of this nature, witnesses most of them motivated by the desire to score victory against their opponents deliberating resort to peddling falsehoods. What was a hill is magnified into a mountain”; and that “.....The evidence of both parties is, in its entirety subjective and cannot be relied upon without testing its authenticity from a neutral and independent source” [See Nabukeera Hussein Hanifa v Kibule Ronald and another (6)]. I cannot agree more with these observations of my learned brothers and sisters in Uganda.

The issues for decision

From the evidence I heard, I think that three main issues arise for decision:

1. Whether the 1st respondent committed any corrupt practice or illegal practice within the meaning of Part VII of the Act, either by herself or through her election agent or polling agent or any other person with her knowledge and consent;
2. If so, or by reason of other misconduct whether the majority of voters in Zambezi East constituency were or may have been prevented from electing the candidate whom they preferred; and
3. Whether the elections in the constituency were not conducted by the 2nd respondent in accordance with the electoral laws and if so whether the non-compliance affected the results of the said election in a substantial manner.

To resolve these issues I will give a brief review of the evidence on each specific issue as raised by the petitioners in para 7 (i) to (vii) of the petition. I shall also review the submissions where necessary and conclude with a resolution of the issue.

The evidence

The petition came up for hearing on 9th January, 2012 at Solwezi in North-Western Province. The Petitioners called a total of ten witnesses. The 1st respondent called four witnesses, while the 2nd respondent has adduced no evidence. All the parties filed written submissions.

1. Diversion of Constituency Development Funds (CDF)

It is alleged in para 7 (i) of the petition that prior to the election date, in the course of her campaigns, the 1st respondent and her agents with the intention of procuring votes from the electorate did divert funds from the Constituency Development Fund from the official bank account in Zambezi to Solwezi, where the funds were eventually used by the 1st respondent and her agents for campaign purposes. The 1st respondent has denied this allegation and avers that no CDF were used to finance her campaign because as at September, 2011 no CDF had been distributed and the only CDF was that transferred for the year 2009 to the North-Western Province Permanent Secretary's account by a full council resolution and the money is still in the said account and that she and her agents never gained any undue advantage over the petitioners.

The evidence on this issue is first from the 3rd petitioner, PW2. He is 48 years old and resides in Lusaka. He is a clergyman and administrator. He testified that during the past elections they experienced a lot of malpractices by the 1st respondent and her agents resulting in her unlawful declaration as winner and that he was aggrieved. He was informed by his supporters that the 1st respondent had diverted the CDF for Zambezi East from the bank in Zambezi to a bank in Solwezi which funds up to September, 2011 had not been accounted for by the council. He said the matter was reported to the Drug Enforcement Commission and Anti-Corruption Commission.

In cross examination by Mr. Sikota, SC he expressed ignorance of the projects approved for the CDF for 2009 to 2011. He said the funds were transferred in August, 2010, but he has no idea why the transfer was made. He wants the election to be nullified as he strongly believes that the CDF was diverted from developmental projects and used in the campaigns because the funds have not been accounted for. He admitted that the 1st respondent is not a signatory on either the Zambezi or Solwezi accounts and that he has no idea whether or not the funds have been withdrawn from the Solwezi account. He said since the funds have not been utilised by the council, the 1st respondent should prove that the funds were transferred back to Zambezi. At the same time he said that he is aware that the funds do exist somewhere.

PW3, Rodney Mbundu aged 56 years, a small scale farmer of Mwalya section in Zambezi is the petitioners' key witness on this issue. His evidence is that between March and April, 2010 while he was the council secretary for Zambezi District Council he received a letter from the 1st respondent who was area Member of Parliament and Minister in charge of Gender directing him to transfer a sum of K500,000,000.00 from the Zambezi East Development Fund account to the Provincial account at Solwezi to be used for maintenance of some selected feeder roads in Zambezi mainly Zambezi-Chitokoloki up to Mpidi and Zambezi-Nyakulenga and Katontu roads.

She indicated to him that she had consulted the Minister of Local Government and Housing who did not raise any objection. He had difficulties to effect the transfer because according to section 45(1) of the Local Government Act, Cap. 281 and the guidelines on the management and utilisation of the CDF, the authority to determine the usage of these funds lies with the council. As controlling officer he wrote to the Ministry of Local Government through the Provincial Local Government Officer as to how to proceed, but the Ministry did not revert back to him in time. Meantime pressure mounted from the 1st respondent, as to why he was not releasing the funds as directed.

He also continued to ask the Provincial Local Government Officer why they were delaying in providing the guidance sought, who in turn said he was awaiting a feedback from the Ministry. Before he could get any guidance from Local Government, it was time for a full council meeting. The 1st respondent attended the meeting as the Member of Parliament is a member of the CDF committee and a member of the council. PW3 presented the matter to the council and the letter from the 1st respondent and his correspondence with the Provincial Local Government Officer for a decision. A decision was made by the council to transfer the money as directed. After the meeting in July he made arrangements with the Provincial Permanent Secretary to provide details of the account where the money should be transferred to, but they also took their time. In the meantime the District Commissioner gave him details of an account on a piece of paper, but he did not follow it because it was not official. In August at the Lunda-Lubanza traditional ceremony the Deputy Permanent Secretary gave him details of the account.

He immediately instructed his treasurer to effect the transfer and it was done, but up to the time he left office in December, 2010 the funds had not been applied to the stated purpose. He said the decision on what to use the CDF which is meant for capital projects within the District is made at two stages. First, the CDF committee appraises and decides on projects to be funded that year and recommends to the planning sub-committee for technical appraisal and final recommendation to the council. Second the council makes the final decision. He said that they lost control of the funds after the transfer and that the correspondence he has referred to is in the office. When asked by Mr. Sikota he reiterated that the 1st respondent was not a signatory to the CDF account and is not aware if any money was withdrawn from the account at Solwezi.

Evidence in rebuttal is from the 1st respondent (RW1). She is 49 years old, an educationist and politician and current Member of Parliament for Zambezi East constituency. She denied being a signatory to the CDF account or to the Permanent Secretary's account or that she used CDF for her campaigns. Her evidence is that Senior Chief Ishindi is biologically her uncle, but socially their relationship is not good. In July, 2010 he went to her office at Ministry of Gender and asked for the CDF for 2009, amounting to K500,000,000.00 to use for his fees and lodging at University of Zambia where he was studying public administration. She refused his request because he wanted her to write to the Council Secretary, so that the latter could release the money to him. She said he was very bitter, but she told him that the money was already allocated for major projects for the two feeder roads in the Province.

When asked by Mr. Chama she said she was a member of the CDF committee, a council member and area MP, presiding over the funds, not the custodian of the funds and that she has no power to give out the money. She said the MP is the overseer of the CDF which is meant for immediate capital projects to be implemented by the MP and councillors, so members of the public would be comfortable to approach her over the funds, but the senior chief did not access the money because she refused to write a letter to the council. She said she is not aware that the senior chief's fees were paid by the House of Chiefs from his allowances.

She said the CDF is not yet used because capital projects need a lot of money, so it would take time to source for more money; and that the money is kept for the intended purpose in the Permanent Secretary's account. She insisted that the CDF committee sat to approve the projects before she instructed the Council Secretary to transfer the money; and that the full council approved transfer of the money. She said the delay made her to question as her role is to make sure that projects take off in her constituency; and that she goes round to monitor and find out what people need.

Submissions

In brief counsel for the petitioners submits that the 1st respondent transferred the K500,000,000.00 CDF from Zambezi to Solwezi and confessed that she had no power to disburse the funds as that power was exercised only by the CDF committee through the District Council. He says that the CDF committee was the authority which identified the projects to be funded, but the 1st respondent transferred the money for road works and usurped the functions and powers of the CDF committee to decide on the projects to be funded. He questions why the purported projects were not undertaken in the whole 2011 since the money was transferred in 2010. He says under cross-examination the 1st respondent failed to give satisfactory answers to these questions and that the only logical and plausible explanation for her conduct is that she diverted the money for her campaign. He concludes that the 1st respondent was not validly elected as Member of Parliament for Zambezi East constituency and that her purported election should be nullified with costs.

On his part State Counsel submits that PWs 2 and 3 could not produce any written document to show that the 1st respondent transferred and cashed the K500,000,000.00 if at all. He asks how far prior to the election date the transfer of funds was done; if it was in the course of her campaigns; what acts, if any, she and her agents did with the intention of procuring votes from the electorate when she diverted the funds; and where and how the funds were eventually used by her and her agents for campaign purposes. He says document 13 in her Bundle of Documents shows that the transfer of funds was done in June, 2011, before the campaign period.

He submits that no evidence was adduced that any of these funds were used and that no attempt was made by the petitioners to subpoena the bank account records to show that these monies were withdrawn. He says that it is unreasonable to expect the court to delve into this matter any further when the petitioners and their witnesses have offered no evidence and they have fallen far short of the burden of proof which is put on them.

Decision

Clearly the main evidence relating to this allegation is that of PW3 because PW2 was only reliably informed by his supporters that the 1st respondent had diverted CDF for Zambezi East from the bank in Zambezi to a bank in Solwezi. PW2 did not even know why the transfer was made, when exactly it was made and what projects were approved for that particular fund. He acknowledged that the 1st respondent is not a signatory to the two accounts. He has no idea whether or not the funds have been withdrawn from the Solwezi account. In his words since the funds have not been utilised by the council, he wants the 1st respondent to prove that the funds were transferred back to Zambezi. He only strongly believes that the funds were used in the campaign because they have not been accounted for, but again he believes that the funds do exist somewhere. In my judgment there is nothing in the evidence of PW2 to prove to the required standard that the funds were eventually used by the 1st respondent and her agents for campaign purposes. PW2's evidence is mere suspicion. But this is not sufficient.

On the other hand, although the evidence of PW3 establishes that the 1st respondent directed him by letter to transfer the K500,000,000.00 from the Zambezi account to the Provincial account at Solwezi to be used for maintenance of selected feeder roads in the area, and she indicated that she had consulted the Minister of Local Government and Housing who had no objection, he did not immediately transfer the money because there were guidelines on the management and utilisation of the money. Instead he sought advice from the Ministry of Local Government through the Provincial Local Government officer. Further though there was mounting pressure by the 1st respondent as to why he was not releasing the money, he still did not transfer the money. Instead he tabled the issue before a full council meeting for a decision. The 1st respondent was only one of the members who attended the meeting, as she was entitled to.

However, it was the full council meeting that eventually sanctioned the transfer of the CDF to the Provincial account and subsequently it was the Deputy Permanent Secretary, and not the 1st respondent who gave PW3 the account details and he effected the transfer. I accept that the 1st respondent was not a signatory to the CDF account in Zambezi or to the Provincial account. PW3 too is not aware if any of the money was withdrawn. The letter at page 13 to 14 of the 1st respondent's Bundle of Documents shows that on 20th July, 2011 the acting council secretary had written to the Permanent Secretary following earlier discussions and commencement of the Zambezi Katontu Road project that the money be transferred back to Zambezi. There is no evidence of what happened thereafter. Most importantly as rightly submitted by State Counsel, there is no evidence whatsoever that any of these funds were withdrawn by the 1st respondent and used for her campaign to the disadvantage of the petitioners.

I agree entirely with the argument by State Counsel that the petitioners should have adduced evidence from the Permanent Secretary or subpoenaed the bank account records to show that the monies were withdrawn. It cannot be true as submitted by Mr. Chama that the 1st respondent confessed that she transferred the money from Zambezi to Solwezi or that she usurped the functions and powers of the CDF Committee to decide on the projects to be funded by CDF. Her evidence that the projects were approved by the committee before she asked for the transfer of the funds is not disputed. The fact that the projects were not undertaken in the whole of 2011 since the money was transferred in 2010 does not lead to a logical and plausible conclusion that the 1st respondent diverted the money for her campaign.

In conclusion on this point, a lot was said about Senior Chief Ishindi asking to use the CDF for his lodging and tuition fees at University of Zambia and the refusal by the 1st respondent to accede to such request. If at all that was the reason for the transfer of the funds to Solwezi, it still begs the question. The fact remains that the money was held by the Permanent Secretary and no effort has been made by the petitioners to adduce evidence from that office to prove that the money was withdrawn by the 1st respondent for her personal use. This allegation fails and is dismissed for lack of proof.

2. Use of Government schools for lodging and campaign purposes

It is alleged in para 7(ii) of the petition that between 1st and 20th September, 2011 the 1st respondent and her agents in the course of her campaigns and with the intention of procuring votes from the electorate used Kadihombo, Kayula and Nyilamba government schools for lodging and campaign purposes. In answer the 1st respondent avers that there is no regulation that prohibits the use of government schools for lodging and meetings as long as the school authorities authorise the use for the said purpose, more so in rural areas where such schools are in central places. She further avers that all the petitioners also benefited from the use of numerous schools for their campaigns and as such she had no undue advantage over them in terms of influencing the electorate.

The only evidence by the petitioners on this issue is from PW6 that chieftainess Nyakulenga addressed a meeting at Katontu Basic School. The 1st respondent's evidence is that when they go to these various places, schools are central places where most activities take place and that for that particular tour the handing over was done at Nyilamba Basic School and according to Government policy as a cabinet minister she had to register her presence to the headmaster of the school and the Head of State ought to know where she was, so she recorded in the school log book, as shown at pages 31 and 32 of her Bundle. She said that at page 29 is a copy of the school log book for Hamukeng'a Community School in Nyakulenga ward in which at page 30, she made the second entry on 1st September, 2011, but did not use the title of cabinet minister because she was no longer a Minister.

The other evidence on this point is from RW4 Antony Kaumba Samahandu aged 44 years, a resident of Zambezi Township. He was also the 1st respondent's election agent. When he was cross examined by Mr. Chama he admitted that they spent two days and nights at Kadihombo School, one night at Kayula School and one night at Nyilamba School and that they were not paying for use of the schools. Further in re-examination he said no one pays for lodging at the schools, as there are no charges; that to his knowledge the 1st and 2nd petitioners have used the schools for lodging; and that nothing was provided by the schools; they just slept there on bare floors.

Submissions

Mr. Chama submits that the Electoral (Code of Conduct) Regulations, 2011 prohibit the use of government resources or institutions for campaign purposes without paying for them; that the testimony of RW4 proves the petitioners' allegation that the 1st respondent used government schools for lodging and campaign; and that the allegation by RW4 that even the petitioners used Government schools for their campaign, was a futile attempt to justify a wrong and is untenable at law. He submits that the witness did not see the petitioners using Government schools for lodging and campaigning and that even assuming that they did, he would still not know whether they paid for the use. He says that it is not the petitioners who are on trial, but the 1st respondent whose purported election has been challenged on account of her committing electoral offences such as this one and, that in any case once an offence is committed; it is no defence that another person committed the same offence. He says on this count alone, the petition must succeed and the purported election of the 1st respondent nullified.

On the other hand State Counsel has argued that no single paragraph in the Electoral (Code of Conduct) Regulations refers to the payment for the use of government institutions and that by virtue of being an MP and a tax payer, the 1st respondent has the right to use government schools considering the situation in rural areas where there are no guest houses, as long as permission is granted by the school authority. He submits that the petitioners decided not to bring any evidence in rebuttal of the testimony given on behalf of the 1st respondent that all candidates were using schools without any charge. He says that he who comes to equity must come with clean hands and that the petitioners cannot be seen to complain of an act they themselves also did. He says that the 1st respondent merely spent the four nights at the said schools, but there is no evidence that they were campaigning whilst at the schools. He states that the schools do not charge people who sleep in the corridor floors; that the other candidates were not stopped from spending nights at the schools and they did; and that the use of the schools was not widespread by the 1st respondent and did not affect the results of the election such that the majority of the electorate were unable to choose a candidate of their choice.

Decision

The 1st respondent does not dispute having used the three schools for lodging during her campaign. Her defence is that there is no regulation that prohibits the use of government schools for lodging and meetings as long as the school authorities allow, more so in rural areas where such schools are in central places. Reg 21(1) of the Electoral (Code of Conduct) Regulations in para (k) prohibits use of Government or parastatal transportation or facilities for campaign purposes, except for the President and Vice-President. The penalty for such offence in sub-reg (2) is a fine not exceeding five thousand penalty units or imprisonment for a term not exceeding two years, or both. Nothing is said about payment for the use of such facilities for campaigns.

In *Mabenga v Sikota Wina and others* (3) the applicant used Government vehicles to campaign during the 2001 general elections. He also established his campaign centre at a Government school house from which medical kits were distributed to Rural Health centres by unqualified persons. The applicant argued that he was authorised to use the facility by school authorities. On appeal the Supreme Court held that the use of Government transport and facilities is prohibited and that school authorities cannot authorise that which is prohibited by law. It follows that payment would not make the use of such facilities legal. Be that as it may, the petitioners have not shown that the 1st respondent gained logistical or tactical advantage by sleeping at the named schools during her campaigns.

Moreover, her testimony that the petitioners also benefitted from the use of numerous schools for their campaign and as such she had no undue advantage over them in terms of influencing the electorate has not been seriously disputed by the petitioners. Of course, Mr. Chama is right that once an offence is committed, it is no defence that another person committed the same offence. However, the 1st respondent is not on trial, though it is her election that has been challenged on account of alleged electoral offences. The burden is on the petitioners to prove to the requisite standard the allegations made in the petition. In this case they have not proved undue advantage over them in terms of influencing the electorate. This allegation should also fail.

3. Cash and material donations to the electorate

The allegation in para 7 (iii) of the petition is that between 1st and 20th September, 2011 the 1st respondent and her agents made cash and material donations to the electorate of (a) a cheque of K2,000,000.00 to Kwasha Mukwemu women's club, (b) chitenge material in Dipalata, Mpidi and Kakonga wards, (c) a sum of K500,000.00 to women in Dipalata ward, (d) cash donations to various women in Zambezi Central and Kakeki wards, (e) hammer mills to Chileng'a, Nyilamba, Lwitadi and Nyakulenga wards, and (f) sports equipment to Mukandankunda and Chileng'a wards.

The 1st respondent has denied these allegations and averred that neither she nor her agents handled or distributed cheques in the constituency; that the said cheque was given to the club by the District Commissioner as part of a country wide Government program meant at empowering women and that at the time of the donation she had ceased to be a Cabinet Minister and Member of Parliament due to the dissolution of Parliament and was not privy to Government programs. She contended that campaign materials are permissible to be distributed to the electorate as long as they carry party or an independent candidate's campaign message and that the petitioners equally distributed the same which are still on the ground.

She says that the donation of hammer mills was a nationwide Government support program masterminded by the Ministry of Gender and that all Members of Parliament in the ruling party or the opposition were given the hammer mills and tasked to distribute them in their constituencies and that no hammer mills were distributed by her or her agents during the election campaign period, but only after the elections in October, 2011. She denies the distribution of sports equipment and pleads that she was on that day in Chileng'a-Chizozu ward some 78 kilometers from the alleged locality and the only time she was in Nyakulenga ward was from 30th August to 1st September, 2011.

She further averred that the Zambezi Conflict Management Committee had on its records a complaint against the 1st petitioner for donating balls and money in Mumbenji-Chizozu polling station in Mpidi Kakonga ward such that the 1st petitioner emerged victorious at that polling station.

The 1st petitioner (PW1) aged 59 years, a resident of Kabwe and a peasant farmer has testified that the election of the 1st respondent was not free and fair as it was marred by malpractices and irregularities contrary to the Electoral Code of Conduct. He said a lot of cash and material were spent to lure the electorate by the ruling party, MMD and the 1st respondent in particular during the campaign period. He said cheques worth K2,000,000.00 were given by the District Commissioner to Mukandankunda and Chileng'a; that sports equipment was given to Mukandankunda and Mumbenji wards; and that there was a dishing out of hammer mills. He said the cheques were government cheques and were handed over by Government officials; and that the program of empowering women's clubs was being done nationwide, but given during the campaign period they were meant to woo voters and that words were used that "should you vote for MMD and Sara Sayifwanda, more would come your way."

The main evidence on cash donation is from Martin Kadochi Kudoma (PW10) aged 43 years, a resident of Mumbenji. He said that a week before 20th September, 2011 he went to greet Chief Chizozu when he saw some women belonging to Kwasha-Mukwenu club being addressed by their chairperson, Mary Chipondu (RW3) the chief's wife who was in MMD at provincial level that they had been given a cheque of K2,000,000.00 by the District Commissioner, so that they could vote for MMD and Sara Sayifwanda. He said the amount on the cheque was read out because some people were illiterate and the women were told that whoever would not vote as directed would be removed from the club. He said the women were happy with the money as every person would be.

When asked by Mr. Sikota, SC he admitted that when the cheque was given the 1st respondent was not present; that he was one of the 1st petitioner's campaigners; and that he did not inform the police about the cheque. He only told the 1st petitioner and his other supporters and the Conflict Management Committee. He said he gave a written report to the officer-in-charge for Zambezi police on 28th September, 2011. He said he waited for 15 days before making the report because that was when the women wanted to deposit the cheque and he wanted the Committee to have evidence from the bank.

He denied knowledge that the 1st respondent has never been called by the Committee over his report or that if the Committee did not satisfy him he could appeal to the 2nd respondent. He said he went to the Committee three times so that they could hear his complaint and give him a copy of the cheque and that the case cannot die.

In cross-examination by Mr. Yalenga, he said he was aware of the functions of the Conflict Management Committee which was set up to manage conflicts before elections and to ensure that the elections were free and fair. He said after 20th September people had voted, so there were no campaigns, but the Committee was supposed to receive complaints. He admitted that the 2nd respondent had given chance to all citizens to report cases of malpractices before the elections date. He said the 2nd respondent should be answerable because of the date on the cheque.

Evidence in rebuttal is from Mary Masumba (RW3). She confirmed that on 12th September, 2011 she held a meeting within the palace with Kwasha-Mukwenu women's club members and addressed them on the cheque she had received from the District Commissioner for empowerment of women and that she encouraged them to help look after their children. She refused that PW10 was present and said the chief was at the field. When asked by Mr. Chama she admitted that she is the MMD women's provincial treasurer and that she is supposed to support the 1st respondent because she is also MMD, but refused that she was stopped from attending the Lunda-Lubanza traditional ceremony. She said she was chased by Senior Chief Ishindi from entering the arena on the ground that she voted for the 1st respondent.

On the hammer mills PW1 said he made an issue of the donations because they were given during the campaign period with a message that should people vote for the 1st respondent, more would come, so they were used to woo the electorate; and that the MMD which was the ruling party sponsored the 1st respondent. PW2's evidence is that he reported to the police after being informed by supporters that the 1st respondent was keeping hammer mills at a private ware house to dish out to the electorate; that three were seized on 6th January, 2012, while others ended up in the hands of private people.

He agreed in cross examination that women's clubs and the youth were supposed to benefit from the hammer mills program, but he is aggrieved because the hammer mills ended up in wrong hands, in particular with Kalukangu, a losing MMD councillor and was at headman Mupasha's home. He refused that a headman has a civic responsibility to keep things in a village set up, though he is a trustee for the people. He said the hammer mill was handed over between October and November, after the polls and that he did not know the actual arrangement as regards that hammer mill. He admitted that it is part of an MP's and councillor's duty to distribute items like hammer mills on behalf of Government; and that there is nothing wrong with an MP receiving Government items to distribute to the people and delegating to a councillor who is a Government agent.

Christopher Kasweka (PW7), aged 36 years, a resident of Chingalaba in Zambezi testified that in August, 2011 he saw a canter belonging to the 1st respondent with five hammer mills which were offloaded and hided in her warehouse. He said one hammer mill was taken to Lwitadi to Mr. Mulweji and that in October another hammer mill was given to Mr. Kalukangu to take to Dipalata, but was hidden in Chingalaba. He said he is a member of Patriotic Front and a publisher whose role is to gather information and take it where it is needed. He said the remaining hammer mills were collected by the police.

When asked by Mr. Sikota he said he took the news about the hammer mills to the police when he saw them being hidden as he was standing in PF. He said this was not just a complaint of theft, but giving out hammer mills during the campaign period and hiding what had remained; and that had it not been for him and those who witnessed the offloading, people would not have known and the hammer mills would have rotten in the ware house. He said the women of Kudinung'a women's club did not see the hammer mill which was taken to Lwitadi in September by Leonard Samalanda using a canter for a teacher at Kadihombo School, but he did not know the instructions the people were given. He said he was not there when a person was given a hammer mill to give to a club, but he followed-up with Moses Walyaka after they were informed during the campaign and they found it put in the person's house. He said the hammer mill was given out in October to Mr. Kalukangu.

The 1st respondent testified that the hammer mills were a continued Government program to empower women, the youth and vulnerable in society, enacted by Parliament under Gender Division and benefited all members of parliament. She said as a sitting MP, her role is to provide service to her community and to lobby for developmental projects. She said in 2010 she benefited two hammer mills which she took to Nyilamba Central women's club and Sunrise women's club in Chileng'a on 18th and 20th October, 2010 respectively. She said MPs were working with various District Commissioners because it was a Government program and that she was accompanied to Chaleng'a and Nyilamba by the District Commissioner, other Government officers and her constituency officer employed by the National Assembly, as evidenced by handover reports to Chileng'a community on 17th October, 2010 at pages 33 to 36 of her Bundle of Documents and to Mpidi-Kakong'a ward, Sunrise farming group, compiled by Charity Liswaniso Lyeneno who was acting as professional assistant.

She said in 2011 all the constituencies again benefited from the program and that the document at pages 47 and 48 is the handover report of a hammer mill to Lwitadi's Kudinung'a women's club on 26th October, 2011 which was compiled by her professional assistant Collins Chinsembu. She said PW7 is not a police officer, but a PF cadre who does not hold any position in Government; that the offices of the Deputy Minister Gender, the DC and the constituency officer have a record of the hammer mills taken by her professional assistant in July, 2011 on a hired truck. She said the other hammer mills were earmarked for Kudizoza and Kayula women's clubs among others.

When asked by Mr. Chama she said the hammer mills arrived in the District a week before the dissolution of Parliament and were put in the ware house belonging to late Mr. Samahande by the DC and her professional assistant because it was found suitable and there was no warehouse at the DC's office. She said she intended to go to Zambezi to distribute the hammer mills to the beneficiaries, but was given an assignment outside the country and when she returned it was time for campaigns. She refused knowledge that the DC was retired for being partisan. She said the message on the hammer mills was "Gender" and not a campaign message.

She denied that Christopher Kalukangu received one hammer mill and installed it at Mupasha's home. She said she gave the hammer mill to Kudizozu women's club; that she became aware in court that the remaining three hammer mills were seized by the police; and was not aware that the police recorded a statement from her election agent.

When asked by Mr. Yalenga she denied donating the hammer mills or threatening the electorate that she would never hand over the hammer mills if they did not vote for her. She said she even gave out a hammer mill to Kudizozu women's club in October, 2011 when the 3rd petitioner had won in that ward. She said the hammer mills were stored at the warehouse for RW4 before he was appointed her election agent.

RW4 admitted that he kept five government hammer mills in his family warehouse which is on business. He said the DC asked for storage and that the 1st respondent was paying K200,000.00 per month up to 7th January, 2012. He said other institutions also store Government property at the warehouse and at that moment they were keeping fertilizer for the Ministry of Agriculture. He said on 26th, October, 2011 one hammer mill was collected by Mr. Chikamefo and the constituency officer and another one was collected by the same officers in November. He would not know where they took them. He said it was not allowed to deliver things because of elections. He denied that he took a hammer mill to Lwitadi on 26th October. He confirmed that the remaining 3 were picked on 7th January, 2012 by police officers and that they recorded a statement from him; but denied knowledge that the hammer mills are under police investigation.

With regard to the donation of sports equipment the evidence has come first from Mathew Kapusa Sikwela (PW8), aged 24 years a resident of Mukandankunda. He is the sports general secretary for Lunda-Lubanza Sports Amateur Association. He testified that in the first week of September, 2011 while at Zambezi Boma he received information that the District Commissioner would visit the area to have a meeting with them, so he should mobilise the youths of his association. On the agreed day the DC arrived in the afternoon with his official Government vehicle a Land Rover accompanied by the District Administrative officer and the driver.

He said the DC told them that they should vote wisely, meaning for Sara Sayifwanda and not Kankinza or Masoka. After the meeting the DC presented to them a set of 11 football jerseys and a set of 8 netball jerseys and told them that if they voted for Sara Sayifwanda they would be receiving more of such items. He then told them that he was going to other areas to see their fellow youths. Although PW8 said that he had the jerseys, they were not produced.

When he was cross examined by Mr. Sikota, he admitted that the 1st respondent was not present at the meeting and that he only told the 1st petitioner about the incident after the elections. He said he reported because he realised that it was not good conduct. He said the youths ranged from 18 to 35 years and that after the elections he was reading the Electoral Code of Conduct, but before that he was not interested in how elections were conducted.

The evidence of Morgan Madichi (PW9) aged 29 years, a resident of Chileng'a is that in the run-up to the elections he received information that all the youths in the area were wanted to attend a meeting by the DC. He attended the meeting where the DC gave out jerseys for all the youths in Chileng'a. He said the DC told them that they should not vote for any other party, but for Sara Sayifwanda and that if they make her go through they would receive more from her. When cross-examined by Mr. Sikota, he admitted that the 1st respondent was not present at the meeting; that he has not reported the matter to the police or any of the petitioners to date; and that he just travelled from Zambezi in the hope that he would give evidence without talking to any of the petitioners. At the same time he said he was called by the court to testify.

I should add that earlier when PW1 was asked by Mr. Sikota, he admitted that his people were summoned by the Conflict Management Committee because there was a football which was given to some group, but he did not ask them to complain about the unprecedented malpractices by the 1st respondent. It is the 1st respondent's evidence on this issue that she never appointed the District Commissioner, who is a government worker to be her campaign manager and never assigned him to campaign for her.

Submissions

Counsel for the petitioners contends that the Electoral Act and Code of Conduct prohibit donations of materials and cash by candidates and/or their agent during electoral/campaign time, however the 1st respondent and/or her agents with impunity engaged in numerous acts of bribery to induce the electorate to vote for her. On the cash donation he argues that though RW3 denied that PW10 was present at the palace when she addressed the women and donated the cheque, given her position in the MMD and the role she played in the 1st respondent's purported election, her denial is expected; and therefore, the 1st respondent and/or her agents engaged in and committed several acts of voter bribery and breached the Electoral Code of Conduct and that for this reason alone, the 1st respondent's purported election must be nullified.

He submits that the issue on the hammer mills is that Government property was fraudulently delivered by the 1st respondent to a private warehouse belonging to the family of her own election agent; that none of the hammer mills was given to the intended beneficiaries, the women's clubs; and that three had to be seized from the ware house by police. He asks why the 1st respondent took Government property to a private warehouse owned by the family of her election agent and hid them and why one hammer mill was given to an individual. He says the 1st respondent and RW4 failed to give satisfactory answers in cross-examination; and that the only plausible explanation for her behaviour is that she was using them for improper motive in aid of her campaign to the disadvantage of her competitors and for post-election gratification of unintended beneficiaries and personal gain. On the sports equipment Mr. Chama has argued that though the District Commissioner like Chieftainess Nyakulenga, was not an official election agent of the 1st respondent, his conduct shows that he was campaigning for the 1st respondent as an unofficial agent, donating things and asking people to vote for her.

State Counsel submits that the allegations are terribly wanting in that the petitioners are supposed to bring evidence to prove that the donations were made during the campaign period by agents of the 1st respondent with the purpose of getting the electorate to vote for her; and that the donations were improper.

On the donation of the money, he says if an offence was committed, it would not take PW10 all that time to report; that this is a concocted lie to help the petitioners who failed to produce written evidence to support their allegation. He said that RW3's inclination to MMD made Senior Chief Ishindi to chase her from the Lunda-Lubanza ceremony. On the hammer mills he submits that if they were hidden up to January, 2012 as stated by PW7, they could not have influenced the electorate who had no means of knowing about them. He says according to PW7 one hammer mill was donated to Lwitadi in October, 2011 which was well after the elections and of no influence on the election; that the other was given to some individual in November, again which was outside the election period; and that PW7 is a busybody who sees himself as a modern day vigilante and is concerned with what he perceives to be theft of the hammer mills which has nothing to do with the petition.

He says according to the 1st respondent the hammer mills were taken to the warehouse by the DC and her professional assistant in July, 2011, before the campaign period, since the DC's office has no storage facility, and she was paying for storage; that the first hammer mill was handed over on 28th October and that this is supported by documentary evidence and by RW4 who said their family building was rented out commercially. He says no inferences can be made as suggested by the petitioners as there is another inference that the 1st respondent stole the hammer mills (not that she did) and that in any event a perfectly logical explanation has been given.

On the sports equipment, State Counsel submits that none of the football and netball jerseys were produced in evidence and no reason was given; and that no evidence was given to show that the DC was an agent of the 1st respondent or that she knew what he was doing or indeed condoned it. He says in the circumstances this court will never know as to whether indeed the jerseys were donated and whether that was done with the permission of the 1st respondent. He argues that PW9 was not telling the truth when he said that he just decided to come and testify evidence without having reported to any of the petitioners while at the same time saying he was called by the court. He says the demeanour of the witness is such that he cannot be believed without corroboration.

He has urged that this allegation also fails for lack of clear and compelling evidence reaching the required standard of proof. He says that PW1 donated some balls in the same area and the offence was reported to the Conflict Management Committee as per documents 15, 16, and 23 to 28 on the Bundle of Documents.

Decision

The allegations under para 7(iii) of the petition, fall under the offence of bribery, which is a corrupt practice. A person is guilty of bribery if he, directly or indirectly by himself or by any other person corruptly does any of the acts prohibited in section 79(1) (a) to (h) of the Electoral Act. According to Halsbury's Laws of England, 4th Edition Volume 15, at para 776, in order to constitute the offence of bribery, it does not matter how long before an election a bribe is given provided the bribe is operative at the time of the election. Time is, however, material when considering the question of evidence. If considerable time elapses between a bribe and an election the difficulty of proving bribery is much increased, but if the act of bribery is committed shortly before the poll, the act will be assumed to be bribery until the contrary is shown.

Further if the act of bribery is committed after the voter has voted, it must be shown to have been done **corruptly** and for this purpose it is at least important to see whether it was done in pursuance of an antecedent promise. Bribery after the election is a difficult charge to establish, but if clearly made out it is sufficient to avoid the election.

At para 780 the learned authors (supra) state that due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery may, however, be implied from the circumstances of the case.

The learned authors also state at para 697 that a candidate's liability to have his election avoided under the doctrine of election agency is distinct from and wider than his liability under the criminal or civil law of agency; and that once agency is established, a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the act was not authorised by the candidate or was expressly forbidden. The authors explain that the reason for this stringent law is that a candidate put forward agents to act for them; and if it were permitted that these agents should play foul, and that the candidate should have all the benefit of their foul play without being responsible for it in the way of losing his seat, great mischief would arise.

At para 698, they say that to prove agency it is not necessary to show that the person was actually appointed by the candidate. The crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of his work when done. In the absence of authorisation or ratification the candidate must be proved either by himself or his acknowledged agents to have employed the agent to act on his behalf, or to have to some extent put himself in the agent's hands. The candidate must have entrusted the alleged agent with some material part of the business of the election. Mere non-interference on the candidate's part with persons who, feeling interested in the candidate's success, may act in support of his canvass is not sufficient to saddle the candidate with any unlawful acts of theirs of which the candidate and his election agent are ignorant.

Finally at para 774 they explain that the distribution of genuine charitable gifts to voters has always been allowed and that if a gift is charitable, it will not become bribery because of the use of made of it, even if political capital is made out of the gift; it is not possible by any subsequent act to make that which was legal at the time illegal and criminal. It is also legitimate for a Member of Parliament to benefit his constituency and the court will not draw any adverse inference from the fact that he confines his charity to his constituency. When *Lewanika and others v Chiluba (2)* was decided, the Supreme Court recognised that public philanthropic activity was not prohibited by the Regulations.

Suffice to add that after the Electoral Act, 2006, it must be established that the donation or gift was corruptly given for it to be caught by section 79 (1) of the Act. In the present case, of the five allegations of bribery made by the petitioners, no evidence, as properly observed by State Counsel was led to prove the allegations under para 7(iii)(b)(c) and (d). There is really nothing to say about these allegations other than that they have not been proved and must fail. The issues to decide fall under sub-paras (a) donation of K2,000,000.00; (b) donation of hammer mills; and (c) donation of sports equipment. I will deal with these issues in the order raised.

a. Donation of K2,000,000.00

It is not disputed that K2,000,000.00 was donated to Kwasha Mukwenu women's club on 12th September, 2011, whether or not PW10 was present at the palace when RW3 addressed her members concerning the cheque. But in PW10's words RW3 told the women that their club had been given the cheque so that they vote for MMD and the 1st respondent and warned that anyone who would not vote for the 1st respondent would be removed from the club. In my view PW10's evidence should be treated with caution. As submitted by Mr. Chama PW10 was a supporter of the 1st petitioner and he reported what he had witnessed to the Conflict Management Committee, but only on 28th September, 2011 after the elections. His complaint was not resolved by the Committee for obvious reasons and the report submitted to the officer-in-charge of Zambezi police station and the chairperson of the Committee has not been produced. Although the cheque is not produced, the donation is common cause.

In my view the question of whether or not RW3 was properly married to Chief Chizozu is not relevant and there is no clear proof that she was chased by Senior Chief Ishindi from the Lunda Lubanza ceremony because of her marriage. Clearly it is not disputed that RW3 was the MMD Provincial women's treasurer or that she supported the 1st respondent as a fellow party member. For this reason she too is a suspect witness. However, as I see it the question really is whether the 1st respondent and/or her agents engaged in and committed the alleged act of voter bribery.

In my judgment the K2,000,000.00 was donated to Kwasha Mukwenu women's club by the District Commissioner. Although RW3 was the Provincial women's treasurer for MMD and a supporter of the 1st respondent, I am convinced that the money donated by the District Commissioner was a charitable gift even though it is alleged that when addressing the women RW3 urged them to vote for the 1st respondent. There is no evidence at all connecting the 1st respondent to the donation of the K2, 000,000.00 by the District Commissioner or evidence showing that the 1st respondent had knowledge or consented to or approved the statement attributed to RW4 by PW10. The 1st respondent was aware of the donation as seen from her answer, but she says this was a Government program in which she was not involved. The document at pages 51 and 52 of the 1st respondent's Bundle shows that the Department of Community Development under the Ministry of Community Development Mother and Child Health received thirty cheques for women empowerment. The cheques were distributed under the supervision of officers from Community Development in Zambezi District. At page 52 is a list of the beneficiaries and Kwasha Mukwenu club was one such beneficiary.

I accept that the cheque was meant for women empowerment and that the donation was a Government initiative for which the 1st respondent had no in-put and there is no evidence that the donation was corruptly done by the DC. As the Supreme Court said in *Mubale v Mukuka and another* (9), mere knowledge of a corrupt or illegal practice is not enough. The candidate must also consent to or approve of the corrupt or illegal practice. It is not even clear how many women comprised this particular club. I do not see how the donation of the K2,000,000.00 to the club by the DC would have influenced the electorate in the whole constituency to vote for the 1st respondent and not a candidate of their own choice. Further the 1st respondent was not present when RW3 addressed the women and there is no evidence that she appointed the DC as her agent or that she made common measure with him for the purpose of promoting her election. I am not convinced that the DC was the 1st respondent's agent or apparent agent. With the greatest respect for the spirited arguments by Mr. Chama, that the 1st respondent and/or her agents engaged in and committed several acts of voter bribery, I do not think they are guilty of this allegation. This allegation also fails.

b. Donation of Hammer Mills

There is no dispute that the hammer mills program was enacted by Parliament under Gender Division or that it was a country wide program benefiting all the 150 constituencies. There is clear evidence by the 1st respondent and RW4 that the first two hammer mills were taken to Nyilamba central women's club in Chilenga on 18th October, 2010 and to Sunrise women's club on 20th October, 2010. There is no evidence to show that the donation of the two hammer mills in 2010 to the two women's clubs, which donation is supported by documentary evidence at pages 34 and 44 of the 1st respondent's Bundle, was a bribery meant to influence the electorate to vote for the 1st respondent. In so far as para 7(iii)(e) alleges that hammer mills were donated in Chileng'a and Nyilamba prior to the elections day but between 1st September and 20th September, 2011 by the 1st respondent and her agents, the allegation is false and cannot be sustained. Page 34 of the Bundle of Documents confirms that the hammer mill to Sunrise women's club in Chileng'a was donated on 17th October 2010 (not 18th October) and page 44 of the same Bundle shows that the hammer mill to Nyilamba community was donated on 20th October, 2010.

I accept that the hammer mill program continued in 2011. There is no dispute that five hammer mills were sent to Zambezi East constituency by the 1st respondent in July, 2011 or that these were Government hammer mills though they were transported in a truck hired by the 1st respondent. I accept that the hammer mills were stored in a private ware house belonging to the family of RW4, who was later appointed as the 1st respondent's election agent.

However, I accept that the warehouse was on hire as a business and that it was the District Commissioner and the 1st respondent's professional assistant who made the arrangement for storage because there was no other suitable warehouse in Zambezi. I accept that the 1st respondent was paying K200,000.00 per month for storage of the hammer mills and that Government did not suffer any loss in storage charges. I also accept that other Government institutions such as Ministry of Agriculture used the same facilities for storage of fertilizer.

PW7 is the only one of the petitioners' witnesses who witnessed the offloading of the hammer mills. In his words if it was not for him people would not have known about the hammer mills apart from the people who had witnessed the offloading in the evening and the hammer mills would have rotten there as they were hidden from the public. He refused that the women of Kidinung'a, a women's club in Lwitadi saw the hammer mills as they were hidden. I agree with State Counsel that the electorate could not have been influenced to vote for the 1st respondent by hammer mills of which they were not aware. As regards the donation of hammer mills to Lwitadi and Nyakulenga wards, it is PW7's evidence that one of the hammer mills was taken to Lwitadi in September to a person known as Mr. Mulweji by Samalanda but this is not confirmed by anyone else.

On the other hand, the 1st respondent's evidence shows that the hammer mill to Lwitadi was delivered on 26th October, 2011, one month and six days after the elections. Indeed the handover report at pages 47 to 48 of the 1st respondent's Bundle confirms that the hammer mill was handed over by the 1st respondent's professional assistant on 26th October, 2011 to Kidinung'a women's club. RW4 confirmed that one hammer mill was collected by Mr. Chikanga from Ministry of Community Development and the constituency officer from Zambezi East although he did not know where they took them. The 1st respondent has not stated exactly when the second hammer mill was donated or to whom, but RW4's evidence is that the second hammer mill was taken in November, 2011 by the same officers. The remaining three hammer mills were collected from the warehouse by the police on 7th January, 2012, but there is no clear evidence to establish why they were seized.

Other than the evidence of PW7 that the first hammer mill was taken to Lwitadi in September 2011, there is no other independent evidence. Moses Walyaka mentioned by PW7 as the person he investigated the hammer mill with which they found put in a person's house has not testified. In addition PW7 said the hammer mill given out to Mr. Kalukangu to take to Dipalata was given out in October, but RW4 said it was collected in November, 2011.

There is no clear evidence that any of these two hammer mills were given out during the campaign period between 1st and 20th September, 2011 to individuals and it is not clear why Kalukangu hid the hammer mill at Chingalaba instead of taking it to Dipalata. PW7's evidence is not supported by independent evidence.

Further still there is no proof that the hammer mills given out in October and/or November, 2011 after the elections were to honour campaign promises made by the 1st respondent. In my judgment it must be shown that the hammer mills were given out corruptly and that it was done in pursuance of promises made during the campaign by the 1st respondent and/or her agents. On the evidence the hammer mill was donated to Lwitadi even though the 1st respondent lost in that ward. Her evidence that the 3rd petitioner won is not disputed. As regards the election agent RW4 there is no evidence that he committed any corrupt or illegal practice in connection with the hammer mills, other than that they were stored in his warehouse. The other three hammer mills remained in the warehouse until they were seized by police because they were yet to be distributed to the beneficiaries. There is no evidence that the hammer mills were fraudulently delivered to the private ware house. I am satisfied that the distribution of the hammer mills falls within the ambit of philanthropic activities. This allegation too fails.

c. Donation of Sports Equipment

Although the jerseys have not been produced in court, and PW8 in particular seemed to be confused over how he found himself in court, the donation of jerseys by the District Commissioner to Mukandankunda and Chileng'a wards, has not been disputed. I am inclined to accept that the jerseys were donated by the District Commissioner to both clubs as alleged. However, as rightly submitted by State Counsel there is again no evidence linking the 1st respondent to the District Commissioner as her agent or that the 1st respondent knew or approved or sanctioned the donation of the jerseys. In addition the petitioners have not shown that because of the donation of the jerseys to the two youth groups the voters in the area were influenced to vote for the 1st respondent and not a candidate they preferred. There is not even evidence that the donation of jerseys by the District Commissioner was wide spread in Zambia East constituency.

On the evidence this was restricted to the two youth groups and it had no bearing on the results of the whole constituency. Moreover the petitioners have not disputed that PW1 donated some balls in the same area or that the offence was reported to the Conflict Management Committee. This argument is really covered by what I have already said about agency on the cash donation. This allegation too has not been proved with convincing clarity and must fail.

4. Threats and intimidation, campaigns and use of police vehicle by Chieftainess Nyakulenga

It is alleged in para 7 (iv) of the petition that on 16th September, 2011 the 1st respondent and Chieftainess Nyakulenga, in the course of her campaigns did threaten and intimidate the electorate at a meeting held at Nyakulenga palace, where the 1st petitioner's agents, Chidikita, Musekengi, Kanogasha and Samalesu were summoned and warned that if they continued campaigning for the petitioner and the opposition political parties, they would be expelled from the land and that this was done to instill fear and coerce the electorate to vote for the 1st respondent. The latter says that on that day she was 78 kilometers away in Chileng'a-Chizozu ward. She further avers that Senior Chief Ishindi campaigned for and intimidated his subjects on behalf of the 1st petitioner during the campaign period in Chizozu, Lwitadi and Chivatu with the aid of his royal council members Iseki Costa of Dipalata, Lusesa of Chileng'a, Mushinji Smart of Dipalata and Nyawaseka of Mukandankunda.

It is also alleged in para 7 (v) of the petition that on the 17th September, 2011 in the course of her campaign, the 1st respondent and her agent Chieftainess Nyakulenga used public vehicle Registration No. ZP 2000 to address a rally at Katontu Basic School at Nyakulenga ward, meant to lure the electorate to vote for the 1st respondent by disadvantaging the petitioners. The 1st respondent denies this allegation and avers that she was neither in the company of the chieftainess nor used a police vehicle to address a rally, as she was about 140 kilometres away in Kakonga area on the stated date. I will deal with these issues together as they are interrelated.

PW1 said his supporters were called at the palace and castigated by the chieftainess for supporting him; she told people not to vote for him lest they be evicted from the area; and that the voters were scared because they were told during the campaign meetings that if they voted otherwise, the computers would reveal. He said he was demonised and cursed by the chieftainess all because he had decided to exercise his democratic right of standing for an election; that it has been difficult to secure witnesses because of the threats and intimidation. He said the populace was politically traumatised; and that there was no free atmosphere for an election, the ground was not level.

He testified that the support he got from Senior Chief Ishindi was different as the latter was not involved in his campaign and did not go round wooing or threatening voters. He accepted that the senior chief was present in court, but denied that the chief's vehicle brought his witnesses to court. He said Chieftainess Nyakulenga used paramilitary officers to campaign. He denied knowledge that she had asked for police protection because Senior Chief Ishindi locked her out of the palace. He said from his experience in the military, for security personnel to have moved from Kitwe to Zambezi, there must have been movement orders also known as signals. He wants the court to declare the election of the 1st respondent null and void because of the disregard of the law.

When questioned by State Counsel, he said the only intimidation he suffered by the chieftainess was when he went to pay a courtesy call at the palace between February and March, 2011 and she sat him on the floor for more than three hours and lectured him in the presence of his brother Crispin Kankinza, Timothy Iseki and Edwin Mungulunga and others who were later part of his campaign team, as to why he should not stand, but the threats did not affect them as they all decided to go ahead. He admitted that he did not personally complain to the Conflict Management Committees. He said they were in the field about twenty-one (21) kilometers from where the Committee was until the campaigns were over. He admitted that Timothy Iseki, Costa Iseki, Smart Mushinji and Mr. Kasweka, were all members of Senior Chief Ishindi's royal council and that campaign managers are formally appointed and that the affidavits they swear are public documents and can be accessed from the 2nd respondent.

When cross-examined by Mr. Yalenga, he said that the Conflict Management Committees were set up by the 2nd respondent to manage conflicts arising from the elections and campaigns and that in Zambezi East the Committee met to resolve reported complaints, but none were reported by him. He admitted that at the time he was subjected to harassment by the chieftainess, he was not yet a parliamentary candidate as he submitted his nomination in August, 2011.

Phillimon Musekengi (PW4) aged 65 years a resident of Nyakulenga area testified that he was called by Chieftainess Nyakulenga and asked why he was supporting Mr. Kankinza and was told that if he voted for him he would die. He said one of the retainers, when invited to say something said that "there was nothing to say about people like him; that they are supposed to be killed and their heads cut off and hanged somewhere." He said another retainer said that "in fact we know their village, we will go there with spears" and that the chieftainess then told him that in her area she did not want anyone supporting Mr. Kankinza, that if he wanted him it was better that he went to stand elsewhere like in Mukandankunda; and that if he went through and the 1st respondent failed, she would hold funerals at their houses. He said the court had seen him that day because the 1st respondent won otherwise they would have been dead. He said further that he saw the 1st respondent at their village only once holding meetings.

When cross examined by State Counsel, he said when they were called to the palace, on a date he could not recall, there were five indunas; and that none of his friends have been killed. He said they were frightened and took the threats seriously, but they did not run away from the village or report to the police. He said they told the 1st petitioner that they were dying for him, but he never advised them to report to the police. He said he did not do so himself because of fear of the chief. He denied that he was campaigning for the 1st petitioner, but said the others were his agents. He said the campaign he did was at his village after he was cursed twice and that as a result of the threats he started campaigning highly for the 1st petitioner and put in hundred percent. He said they all went out to campaign for him.

When asked by Mr. Yalenga, he said he voted after the threats and curses made by the chieftainess and that the 2nd respondent provided security for voters at his polling station.

Moses Kanoka Samalesu (PW5), aged 44 years, a resident of Nyakulenga testified that in the September, 2011 elections, he was standing as an independent in Nyakulenga ward and supporting the 1st petitioner and that they started their campaigns well in the ward. They had a lot of people with them. To his surprise Chieftainess Nyakulenga travelled to Lusaka and returned with police officers. He said three days later the 1st petitioner went to his village to campaign and he accompanied him to the chieftainess, but she refused to see them. On 16th September, 2011 they were summoned by the chieftainess. They found a lot of people from other wards. The chieftainess told them that they were the senior politicians in the area and asked why they were campaigning for the 1st petitioner in her jurisdiction as he had brought confusion hence police presence in the area; that the 1st petitioner was an ex-soldier who was working hand-in-hand with Senior Chief Ishindi; and that they wanted to shoot her. He said she cursed them with their children and grandchildren and told them that in her area she wanted the MMD and the 1st respondent to win and that if they helped the others they would bring war and her people would go to Angola.

He said one of her retainers, Mr. Konde stated that people like them were just supposed to die and another retainer, Luka Sandomu said if the 1st respondent lost and the 1st petitioner went through they would spear them as they knew their villages. He said he was with some of his supporters and that the chieftainess told them to even leave her area. He said his supporters became tired and scared that he was dying. He said the following day the chieftainess and her supporters went with the police to Katontu to campaign using a police vehicle although he was not there. He said by supporting the 1st respondent, the chieftainess scared their supporters and contributed to their failure. He attributed his loss as councillor to the 1st respondent. When asked by Mr. Sikota, he said PW4 became a campaigner for the 1st petitioner after they were talked to by the chieftainess.

He admitted that the chieftainess' palace was once locked up by Senior Chief Ishindi's prime minister. He said most times the chieftainess is on the move, so he did not know her movements with the paramilitary officers and he was also going out to campaign. He did not know how the chieftainess got back into the palace. He said he failed to report the electoral malpractices to the Conflict Management Committee because it was far away and they had only three days to the elections.

Juberg Kambenja (PW6) aged 37 years a resident of Katontu testified that on 18th September, 2011 he attended the meeting where the chieftainess emphasised that they should vote for the 1st respondent; that she would chase anyone who voted for the 1st petitioner; and he was one of those supporting him. He said he was at the site of the meeting when the chieftainess arrived in a police vehicle and that he left and went to the headman where food was being prepared for her and then went to his wife. He said Katontu has a population of 800, but people were scared and only about 300 voted.

When asked by Mr. Sikota, he said he does not know the total number of registered voters or polling stations in Nyakulenga ward; and that due to his ignorance, since he is not educated and cannot even count, he said 350 people voted, but most people did not. He said he heard from the people from Central Statistics about the population. He said Mr. Masoka went through as councillor in Katontu. He said the meeting was on 18th and not 17th September; and that he had no information about the issue of witchcraft. He said he was at the meeting for just a few minutes, and immediately the chieftainess started talking about the 1st petitioner he left. He did not know where the chieftainess came from. He found that the meeting had started. He said it is not possible to report a chief to the police; and he did not report to the 1st petitioner as he stays in Lusaka.

Evidence in rebuttal has come first from the 1st respondent. She testified that Jonas Kantumoya was her campaign manager while Antony Kaumba (RW4) was her election agent. She said Chieftainess Nyakulenga is her aunt and the elder sister to Senior Chief Ishindi and that according to Lunda tradition, she could not send a traditional leader to campaign for her as it is a taboo and she never requested her to do so.

She said the relationship between the two chiefs is bad to the extent where the senior chief locked the chieftainess out of her palace. She said the issue was reported to the DC and to her office as area MP and the Government was informed. She said the Inspector General provided paramilitary officers to guard her palace as there were threats from the senior chief to harm her.

Her evidence is further that under the Electoral Code of Conduct and the Electoral Act, a candidate is supposed to have an election agent to monitor the election process; that her agent RW4 was appointed in writing through her party as shown by the letter at page 4 of her Bundle; that at pages 5 to 8 of the Bundle is a list of polling agents for her constituency ward by ward; and at pages 9 to 12 is her tentative campaign program from 30th August to 18th September, 2011 to which the officer-in-charge Zambezi District had no objection, but advised them to maintain peace and order.

She said on 17th September, 2011, she was in Impedi-Kakong'a ward completing her campaigns in the company of her campaign manager and councillor, Kingstone Kasoneka. She said her constituency is vast and has 10 wards, and 44 polling stations and polling Districts; and that Katontu Basic School and Kakonga are approximately 130km apart in the south part of the District. She said she was not with Chieftainess Nyakulenga at Katontu Basic School and that the petitioners' own witnesses have testified that she was not with her on that date.

When asked by Mr. Chama she denied that she has stayed at Chieftainess Nyakulenga's Lodge in Zambezi except to pay a courtesy call or that her team camped there during nomination and run up to the elections or that the chieftainess broke taboo and danced in front of her subjects after she was interviewed at constituency level. She denied that she was part of the program for the chieftainess or that she gave K50,000,000.00 to the chieftainess to campaign for her or K18,000,000.00 to the MMD Provincial committee at the time of her interview. She said she would not know detailed Lunda custom of when a palace can be closed and by whom and was not aware that the chieftainess did not attend last year's Lunda-Lubanza traditional ceremony.

She refused that the palace was closed to compel the chieftainess to attend before the senior chief upon her return from Lusaka or that the palace had become one of her campaign centres. She said that a letter, exhibit R1 has been written refusing use of police vehicle. She stated that there is evidence that Museka and others of the royal establishment of the senior chief were campaigning for the 1st petitioner.

In cross examination by Mr. Yalenga, she said the paramilitary officers were present at the palace on elections day; that the 2nd respondent provided security for all the polling stations and the constituency for assurance that the voters would be safe; and that the 2nd respondent ensured that the elections in the constituency were free and fair. She said the 2nd respondent took time to advertise in all the electronic and print media about rules of elections and sensitised the public about what would amount to bribery and corruption; and that giving out materials and gifts during campaigns for the sole purpose of inducing the electorate to vote for a candidate, apart from chitenges and party materials which are allowed by the 2nd respondent, is an offence and could lead to a nullification of an election, but no one complained to the Committee or the 2nd respondent that she was engaging in electoral malpractice.

Daimon Kanoka Konde (RW2) born in 1932 is the prime minister for Chieftainess Nyakulenga. He confirmed that the prime minister from Senior Chief Ishindi closed the palace when the chieftainess was on the Copperbelt and wanted to collect the chief's symbols and they had to accommodate the chieftainess' husband in town. He confirmed that the palace was opened by the police when the chieftainess returned and that the police stayed for almost a month because the chieftainess was living in fear. He said to date the senior chief has not resolved the issue with the chieftainess.

In addition he said on 15th September, 2011 three people from the mine at Katontu, Ngombo, Yowani Chalesa and Headman Chimanda reported to the chieftainess that they were experiencing nightmares connected to witchcraft, so the chieftainess promised to go there on 17th September. He said he knows Chidikita, Musekengi, Kanongesha and Samalesu, but because there were many people, he did not see them.

He said on 16th they were not at the palace as they were not working and he did not know what was going on there. He testified that on 17th September he and two other prime ministers and, the chieftainess's husband accompanied the chieftainess to Katontu; she was driven by the police officers. The 1st respondent was not there. He said at Katontu the chieftainess dealt with the witchcraft issue and warned the people that if she received the same information she would do the next appropriate thing.

He said on their way back two headmen, Chimbunju and Chimbanda invited the chieftainess to pass at the school where people were gathered just to greet them and she agreed. He said headman Samwimbila thanked the chieftainess for talking to the people at the mine and the chieftainess repeated her warning after which she bade farewell. He said the chieftainess was offered food which the prime ministers ate and they continued their journey back to the palace. He refused that they summoned or threatened to kill the people supporting the 1st petitioner or to display their heads. He said the chieftainess was not in court because Lunda tradition does not allow a chief to go to court; and that Senior Chief Ishindi was in court contrary to Lunda tradition.

In cross-examination by Mr. Chama he agreed that threatening to kill a person is a very serious offence, but refused uttering the statement attributed to him. He denied that the chieftainess was moving around with police officers campaigning or that they went to the mine to campaign. He insisted that the police were patrolling the palace because of the threats and that they went with them to Katontu for reasons of security as they would have been answerable if anything happened to her. He said he is well versed in custom; that according to their culture it is a taboo to close a palace unless the chief has died or there is a serious illness like leprosy or the chief is failing to walk and a report is made to the senior chief. He said he learnt what he is testifying to from the chieftainess' father when he was prime minister and that he has been a traditional minister for 20 years, 15 years under the first chief and 5 years under the chieftainess. He said during that period he never saw a palace closed apart from the recent one and that they will get to know the reasons when the senior chief calls the chieftainess.

RW4 confirmed that he was an election agent in the September, 2011 elections. He refused that the DC and Chieftainess Nyakulenga were also election agents for the 1st respondent. He said the other agents were polling agents as appear on the list at page 5 to 8 of the Bundle of Documents. He confirmed too that the document at pages 9 to 12 was a permit for their campaign. When asked by Mr. Chama, he said that he knew all the people that campaigned for the 1st respondent, who they were moving with, but not others because the constituency is big.

Submissions

In brief Mr. Chama submits that PWs 4 and 5 testified as to how Chieftainess Nyakulenga summoned them and threatened them with reprisals if they continued to support the 1st petitioner instead of the 1st respondent and that the witnesses said from there they stopped attending the petitioner's meetings for fear of their lives. On the other hand State Counsel submits that PWs 4 and 5 denied the presence of the 1st respondent during the alleged meeting which was confirmed by PW1 and RW2; that this allegation was false or manipulated; that PWs 4 and 5 said that they went on with the campaigns and did not adhere to threats from the chieftainess and her indunas. He submits that RW4 said that RW2 is a humble and God fearing person who could not utter such threats and that the latter denied issuing such threats. He contends that according to PW1 the threats were issued in March, 2011 way before the campaign period and could not be said to have affected the election result.

On the use of the police vehicle Mr. Chama contends that the evidence of PW6 established that the 1st respondent and her agents used government transport and resources to Katontu Basic School to campaign. He says that the 1st respondent did not say what harassment necessitated police protection for Chieftainess Nyakulenga; that the evidence of RW2 confirmed that the motor vehicle they used was a police vehicle driven by police officers and that from these testimonies, it is not in dispute that the chieftainess used Government transport, fuel and human resources and all at the tax payer's expense.

State Counsel submits further that to succeed there is need for evidence to be given to show that Chieftainess Nyakulenga was an agent of the 1st respondent or that acts done by her were sanctioned, approved or even known by the 1st respondent. He submits that PW6 was not among the people who gathered to pay a courtesy call on the chieftainess; that he left the school and did not stay to listen to all of what the chieftainess said; and did not report the issue to the police or Conflict Management Committee, but only to the 1st petitioner who also testified that he never had time to report such an important case to the police or the Committee; and that the only reasonable inference is that the allegation was not true. He argues that since the petitioners allege that the 1st respondent and her agent Chieftainess Nyakulenga used a public vehicle to address a rally and there is evidence by PW6 and RW2 that the 1st respondent was not in Katontu that allegation is totally false.

Decision

On the issue of intimidation and threats by the chieftainess, Regulation 20 of the Electoral (Code of Conduct) Regulations, prohibits a person or a member of a law enforcement agency, civil society, a church, faith based organisation, traditional leader, political party or media, by means of threats, violence or sanction, to coerce or intimidate another person during campaigns, public debates or elections. Under Regulation 21(1)(i) a person shall not abuse or attempt to abuse a position of power, privilege, or influence, including parental, patriarchal or traditional authority for political purposes including any offer of a reward or for the issuance of a threat.

Further by section 82(1)(b) and (c)(iii) and (iv) of the Electoral Act, (1) no person shall directly or indirectly, by oneself or by any other person, (a) make use of or threaten to make use of any force, violence or restraint upon any other person; (b) do or threaten to do anything to the disadvantage of any person; in order to induce any person (c) to vote or not vote for any registered party or candidate; and (d) to support or not to support any registered party or candidate. This is an illegal practice under Part VII of the Act and if proved can nullify or void an election.

Clearly the Electoral Act and the Electoral (Code of Conduct) Regulations do not allow chiefs to exert undue influence on their subjects to vote for a particular political party or candidate. In addition the learned authors of Halsbury's Laws of England (supra) at para 784 state that in order to constitute undue influence a threat must be serious and intended to influence the voter, but it would appear that the threat should be judged by its effect on the person threatened and not by the intention of the person using the threat. Therefore a threat may amount to undue influence even though the person using the threat has no power to carry it out.

In this case though the 1st petitioner said that people were told by the chieftainess not to vote for him, his evidence is hearsay as he was not present himself. The evidence to support this allegation has come from PWs 4 and 5. PW4 said that the chieftainess summoned them and asked why they were supporting the 1st petitioner and were told that if they voted for him they would die and that two of the indunas added that they were supposed to be killed and their heads hanged, after which the chieftainess said in her area she did not want anyone supporting the 1st petitioner. But PW4 could not recall the date when they were called to the palace. In addition, he said there were only five indunas and the four of them at the palace. Two of his friends have not testified.

On the other hand PW5 said the chieftainess told them not to campaign for the 1st petitioner in her jurisdiction as he had brought confusion, hence police presence; and that the 1st petitioner was an ex-soldier who was working hand-in-hand with Senior Chief Ishindi and they wanted to go and shoot her. He also said that she cursed them with their children and grandchildren; and said that she wanted MMD and the 1st respondent to go through and if they helped the other people they would bring war and her people would go to Angola. He said they were called on 16th September and that they found a lot of people from other wards. From the evidence the two witnesses were called to the palace on the same date and, at the same time, but the words attributed to the chieftainess by PW4 are different from what PW5 has said and yet the chieftainess spoke to them both.

Furthermore, PW5 mentioned that Mr. Konde was the one who said people like them were just supposed to die. Although PW4 did not mention the names of the retainers, I believe that one of them was RW2. On the other hand RW2 categorically stated that the meeting was on 15th September at which the report of witchcraft at the mine at Katontu was made; and that on 16th September he was not at the palace as they were not working and that on 17th September they went to Katontu. The chieftainess herself has not testified, but RW2 has disputed the words attributed to him during the alleged meeting of 16th September, 2011. I think that the evidence on behalf of the petitioners is fraught with contradictions which cannot be ignored, such as the words uttered by the chieftainess and the number of people present. It is not even certain when the two were called to the palace.

Moreover, the two witnesses and the 1st petitioner did not report such serious threats to the District Conflict Management Committee or to the police. I do not believe that fear of the chieftainess prevented them from doing so. Indeed if there were many people at the palace from different wards, some independent witness, would have confirmed the holding of the meeting on the 16th and not 15th and the alleged threats and intimidation. Clearly this issue turns on the question of the credibility of PWs 4 and 5 on one hand and RW2 on the other hand. Having assessed the demeanour of these witnesses, I believe that RW2 is a more honest and reliable witness than PWs 4 and 5, as he is not supporting any of the petitioners. I accept his evidence and reject that of PWs 4 and 5.

However, if it were true that the alleged threats were made by Chieftainess Nyakulenga, the ultimate question would still be whether her conduct influenced the voters in the constituency to vote in a particular way. In *Mubanga v Chitonge and another* (8), the Supreme Court held that a chief should not actively participate in partisan politics and nullified the election of the 1st respondent because the conduct of Senior Chief Mwata Kazembe was such that a good number of voters were prevented from freely and fairly choosing or electing a candidate of their own choice. That is not the case here. PWs 4 and 5 were not affected by the threats. In fact PW4 admitted that as a result of the threats they started campaigning highly for the 1st petitioner and put in hundred percent.

He even became a campaigner as conceded by PW5 and he voted. And if there were only five indunas and the four of them when they were threatened, I fail to understand how their supporters would have been scared.

There is evidence by the 1st petitioner that the chieftainess had intimidated him when he went to pay a courtesy call between February and March 2011 and lectured on why he should not stand. If this incident did occur, it never recurred. Though he and his supporters were moved by the threats and he was demonised and cursed because he had decided to exercise his democratic right of standing for an election, they all decided to go ahead as the threats did not affect them. Further he conceded that this happened outside the campaign period before he was officially a parliamentary candidate. This could not have affected the election result. Considering the difference of only 162 votes between the 1st petitioner's and the 1st respondent's votes, I am convinced despite the alleged threats and intimidation that the former still attracted a lot of support.

I turn now to the alleged campaign at Katontu and use of police vehicle. In my judgment it is the duty of the Zambia police under Regulation 12(b) of the Electoral (Code of Conduct) Regulations, to ensure that police officers do not abuse their authority or Government to campaign for the benefit of any political party or candidate. In this case, there is undisputable evidence that the 1st respondent was not with Chieftainess Nyakulenga on 17th September, 2011 when the latter allegedly used the police vehicle to address a rally at Katontu Basic school. Therefore, it cannot be true as alleged in paragraph 7(v) of the petition that in the course of her campaign, the 1st respondent and her agent Chieftainess Nyakulenga used a public vehicle to address the rally which was meant to lure voters to vote for the 1st respondent to the disadvantage of the petitioners.

Secondly, although PW1 testified that Chieftainess Nyakulenga held meetings and toured the area campaigning for the 1st respondent with the aid of paramilitary police officers from Kamfinsa and paramilitary transport, he conceded in cross examination that he did not personally witness any of the alleged malpractices as those were witnessed by his campaign team.

None of the petitioners saw the 1st respondent in the company of the chieftainess in the police vehicle. PW1 admitted that the document at page 53 of the 1st respondent's Bundle of Documents is from Central Chambers about alleged use of police vehicle for election campaigns and that the response is at page 54 of the same Bundle. He said had he made a similar request the police would not have responded; and that his lawyers could equally have asked the police, but they did not. The original of that letter was produced and marked R1. In my view the letter and its contents are hearsay although there was no objection to its production. Therefore I will attach little weight to its contents.

As I have already said, it is also PW5's testimony that the chieftainess and her supporters went with the police to Katontu to campaign using a police vehicle. But he admitted that most times the chieftainess was on the move, so he did not even know her movements with the paramilitary officers. He may have seen her get on a police vehicle to go to Katontu, but he cannot state with convincing clarity that the chieftainess went out to Katontu to campaign. He was not there. Moreover he was supporting the 1st petitioner, so his evidence must be received with caution as he is a suspect witness.

PW6 confirmed that the chieftainess arrived at Katontu for a meeting in a police vehicle, but he conceded that he did not know where she came from. He said that the chieftainess told them to vote for the 1st respondent and, threatened to chase anyone who voted for the 1st petitioner. But in cross-examination he said he was at the meeting for just a few minutes and that immediately the chieftainess started talking about the 1st petitioner he left. Surprisingly he never reported the incident to the 1st petitioner or the police or any other people. I think that PW6 is not being very truthful. He too was supporting the 1st petitioner. His evidence ought to be treated with the same caution, as he too falls in the category of suspect witnesses. I think that since the chieftainess addressed a lot of people at the school, I am sure that there were people who were non partisan and, could have been called by the petitioners to confirm PW6's evidence that the chieftainess was campaigning for the 1st respondent.

RW2 confirmed that the chieftainess was driven to Katontu by police officers in the police vehicle. According to him they went to the mine to sort out the issue of witchcraft and on the way from the mine the chieftainess was invited by headmen to meet her subjects at Katontu Basic School and she obliged. He denied that the chieftainess was campaigning with the police vehicle. I have no reason whatsoever to doubt RW2's evidence on this issue. I am not persuaded that the chieftainess used the police vehicle to campaign for the 1st respondent. On the other hand the alleged campaign by Senior Chief Ishindi for PW1 with members of his royal council is not even seriously disputed.

There is also evidence which I accept that the chieftainess was given police protection because of harassment by her brother Senior Chief Ishindi who locked up her palace. PW5 admitted knowledge that the palace was locked up by the senior chief's prime minister and the locking up of the palace is confirmed by RW2, a man of 20 years distinguished service at the palace. I believe that this is again a matter of credibility. Having carefully observed all the witnesses testify, I am convinced that RW2 is a more truthful witness. He is an independent witness who told the truth that the chieftainess was given police protection because of threats and harassment by the senior chief after the palace was locked and that up to now the senior chief has not disclosed why he locked the palace. There is no proof that the palace was closed because it had become the 1st respondent's campaign centre. I conclude that the petitioners have not proved this allegation to the required standard of convincing clarity. I am not satisfied that alleged threats by Chieftainess Nyakulenga prevented the majority of the electorate in the constituency to vote freely and fairly for a candidate of their choice or that the populace was politically traumatised. This allegation too fails and is dismissed.

5. Use of public motor bike

It is alleged in para 7(vi) of the petition that between 18th and 20th September, 2011 the period when campaigns were banned, the 1st respondent and her agents using a government motor bike belonging to Ministry of Health did distribute cash and other materials to the electorate in Kamakonga, Katontu and Nyakulenga areas with the intention of enticing the electorate to vote for the 1st respondent.

The 1st respondent denies this allegation and avers that she was between 18th and 20th September, 2011 in the Boma at Zambezi. This allegation has not been pursued by the petitioners and no evidence was led. I agree entirely with the submission by State Counsel that this allegation has been abandoned and must fail.

6. Barring of agents

Lastly it is alleged in para 7 (vii) of the petition that on 20th September, 2011 the 1st respondent and her agent Chieftainess Nyakulenga barred the petitioner's agents and prevented them from monitoring the elections and that this was meant to procure votes from the electorate by creating an environment for electoral malpractices and rigging of elections. The 1st respondent's answer is that she had gone to cast her vote at Chizozu. The only evidence on this issue was from PW1 in cross-examination by Mr. Yalenga that the barring of his agents was done by the indunas, but he did not say how they managed to do so and he did not report the matter to the police. Clearly no convincing evidence was adduced by the petitioners to prove this allegation which also fails.

In conclusion on the allegations against the 1st respondent, Mr. Chama urged that the 1st respondent was not validly elected as Member of Parliament for Zambezi East constituency because she engaged in numerous acts of bribery, intimidation and abuse of Government facilities and institutions to aid her campaign and to induce or coerce the electorate to vote for her as they did, contrary to the Electoral Act and the Electoral (Code of Conduct) Regulations, 2011. I answer the first question posed above in the negative and find that the 1st respondent did not commit any corrupt or illegal practices within the meaning of Part VII of the Act, either by herself or through her election agent or polling agents or any other person with her knowledge and consent.

I also answer the second question in the negative and conclude that the majority of voters in Zambezi East constituency were not by the alleged misconduct by the chieftainess and the District Commissioner prevented from exercising their freedom of electing the candidate in the constituency whom they preferred.

This brings me to the third question of whether the elections in Zambezi East constituency were not conducted by the 2nd respondent in accordance with the electoral laws. The only piece of evidence against the 2nd respondent was by PW2 that one of the malpractices in the area was the transfer of 350 election officers from Zambezi East to Zambezi West and that those never voted for them. This was not even pleaded. On the other hand the 1st respondent said that all the applications for election officers are done at a central place at Zambezi, but she could not confirm that 350 officers crossed over to Zambezi West. She said that the recruitment was for the 2nd respondent. Nevertheless this incident would have affected all the candidates. Admittedly even if the 350 votes were added to the 3rd petitioner's votes, he would not have won the election.

As properly stated by Mr. Yalenga, the only allegation in the petition against the 2nd respondent is under para 6 to the effect that the election was conducted by the 2nd respondent established under article 76(1) of the Constitution. There is no wrong doing attributed to the 2nd respondent. I am inclined to agree with Mr. Yalenga that the petitioners did not disclose any cause of action against the 2nd respondent. The 1st and 3rd petitioners conceded that the elections were conducted in accordance with the law. The 2nd petitioner has not attended the proceedings.

Further still, the 1st respondent admitted that the elections as conducted by the 2nd respondent were conducted in accordance with the law. The petitioners never raised a complaint against her or the 2nd respondent before the Conflict Management Committee set up to deal with any pre-election concerns by any candidate or concerned member of the public as regards the conduct of any party to the elections. The 2nd respondent did not give her any favourable treatment that would affect the outcome of the election or in any way give her an advantage over the other candidates. Clearly the 2nd respondent had provided a level and fair playing field for all the contestants. I accept that it is not enough for the petitioners to merely allege wrong doing on the part of the 2nd respondent, but to prove the same on the requisite standard, which they have not done. I am convinced that the electoral officers were never guilty of any impropriety in the conduct of the election.

I conclude that the election in Zambezi East constituency was so conducted as to be substantially in accordance with the provisions of the electoral law. Clearly the petitioners are not entitled to any of the reliefs claimed.

As I come to the end of my judgment, I wish to comment on one last issue. It came out in this trial that that PW2 and two colleagues on 2nd January, 2012; met the 1st respondent at Parliament Motel. They suggested to her that the 3rd petitioner would drop the petition if she gave him money. PW2 has refused and said when they saw the 1st respondent they were just chatting and taking wine and that nothing significant happened. If what is alleged did occur, it would only show the selfishness of individuals and the extent of bribery and illegal practices being perpetrated in the political arena. Such practices should be condemned with the contempt they deserve and reported to relevant authorities as they tarnish the names of Government institutions and politicians. I have made the point that the standard of proof required in an election petition is higher than the ordinary balance of probabilities because the subject matter of the petition is of critical importance to the welfare of the people and their democratic governance. Politicians represent the people and should never take the electorate for granted.

On the whole of the matter I find and hold that the 1st respondent, Sara Sayifwanda was validly elected as Member of Parliament for Zambezi East constituency and that the election was free and fair. Accordingly I dismiss the petition with costs to both respondents to be taxed if not agreed. Leave to appeal is granted.

Delivered in Open Court at Solwezi this 22nd day of March, 2012

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R.M.C. Kaoma
JUDGE