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**IN THE HIGH COURT FOR ZAMBIA
AT THE NDOLA DISTRICT REGISTRY
HOLDEN AT NDOLA
(CIVIL JURISDICTION)**



IN THE MATTER OF: THE ELECTORAL PROCESS ACT NUMBER 35 OF 2016

AND

IN THE MATTER OF: PARTS V AND VI OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT, NO. 2 OF 2016

IN THE MATTER OF: THE PARLIAMENTARY ELECTION FOR THE ROAN CONSTITUENCY OF THE LUANSHYA DISTRICT HOLDEN ON THE 11TH DAY OF AUGUST, 2016

BETWEEN:

ANDREW KAFUTA KAYEKESI

PETITIONER

AND

**CHISHIMBA KAMBWILI
ATTORNEY GENERAL**



1ST RESPONDENT

2ND RESPONDENT

Before the Honourable Mr. Justice C. Chanda in Open Court on the 11th day of November, 2016.

For the Petitioner: Mr. C. Magubbwi, Messrs Magubbwi & Associates.

For the 1st Respondent: Mr C. Mukonko, Messrs Caristo Mukonka Legal Practitioners
Mr.T. Ngulube, Messrs F N Nanguzyambo & Associates

For the 2nd Respondent: Mr F. Mwale, Snr State Advocate and Mr M. Hamanyati, Assistant Senior State Advocate

JUDGMENT

Cases referred to:

1. *Akashambatwa Mbikusita Lewanika & Others Vs Frederick Jacob Titus Chiluba (1998) ZR 79*
2. *Anderson Kambela Mazoka & Others Vs Levy Patrick Mwanawasa (2005) ZR 138*
3. *Matildah Macarius Mutale Vs Sebio Mukuka Appeal No. 45 of 2003*
4. *Christopher Lubasi Mundia Vs Sentor Motors Limited (1982) ZR 66*
5. *Steven Katuka & Laz Vs The Attorney General, Ngosa Simbyakula & 63 Others*
6. *Wilson Masauso Zulu Vs Avondale Housing Project Limited (1982) ZR 1*

Legislation referred to:

1. *The Constitution of Zambia (Amendment) Act, No. 2 of 2016*
2. *The Electoral Process Act, No. 35 of 2016*

ANDREW KAFUTA KAYEKESI, the Petitioner herein, has presented the petition against **DR CHISHIMBA KAMBWILI** and the **ATTORNEY GENERAL**, as first and Second Respondents respectively. This petition has been presented in terms of the provisions of Parts VII and IX of the Electoral Process Act, No. 35 of 2016 as read together with Parts V and VI of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

By this petition, the Petitioner seeks to nullify the election of the 1st Respondent as Member of Parliament for Roan Constituency. It is alleged that the 1st Respondent or his agents or other persons committed certain illegal and corrupt electoral offences which influenced the outcome of the election to his favour and to the detriment of the Petitioner.

The petition shows that the Petitioner was a candidate for the Roan Parliamentary elections held on 11th August 2016 on the United Party for National Development (UPND) ticket. The other candidates were **DR. CHISHIMBA KAMBWILI** of the Patriotic Front (PF), **DANIEL CHIBWE** of the Rainbow Party (RP), **BASILIO MULENGA** of the Forum for Democracy and Development (FDD) and **DITAR MUNSANJE** an Independent Candidate. Following the said elections the Returning Officer for the Luanshya District on 12th August, 2016 declared the 1st Respondent as the duly elected Member of Parliament for Roan Constituency. The Petitioner, however, contends that the 1st Respondent was not validly elected on allegations that he committed proscribed electoral offences.

The following were the detailed allegations made against the 1st Respondent.

- 1. That the 1st Respondent by himself, his agents, and other persons on his behalf, with his full knowledge and consent, was guilty of general illegal and corrupt electoral offences which inter alia included;*

- (a) *After the dissolution of Parliament on or about 10th May 2016, the 1st Respondent actively participated in the illegal decision by the PF government to and did remain in the office of Minister of Information and Broadcasting and retain the emoluments, privileges, influence and authority therewith residing. That he used and abused same in his campaigns for his candidate in the elections despite knowing that same contravened the law.*
- (b) *That the 1st Respondent using and abusing his illegal stay in office, aforesaid, employed and applied the public media, propaganda weapon for himself and his PF party against his competitors, particularly the UPND and its candidates which included the Petitioner.*
- (c)(i) *The 1st Respondent vide the authority, privilege and influence of his illegal stay in a ministerial office or howsoever else in that regard, was using a government hired helicopter bearing identification or registration number ZS-RZR for purposes of campaigning and canvassing for votes for himself and the PF party in Roan Constituency and the country at large.*

- (ii) *Used and abused government or parastatal transportation, facilities and resources for campaign purposes.*
- (d) *The 1st Respondent used and/or abused his position of power, privilege, influence and authority as Information Minister for political purposes and ends, which he used dominantly, to the total exclusion of his competitors, to have his and the PF's campaign meetings and messages widely covered and circulated by the national television, the Zambia National Broadcasting Corporation (ZNBC) and the public print media the Zambia Daily Mail and the Times of Zambia.*
- (e) *Using his authority and influence as Minister, the 1st Respondent on the 3rd August 2016 called two meetings for teachers which he addressed at Roan Antelope Secondary School and Nkulumashiba High School where he promised the teachers plots and asked them to make applications thereafter and give them to his campaign manager, a Mr Matobwe.*
- (f) *At the said meetings, the 1st Respondent distributed PF regalia, chitenge, caps and T. Shirts to the teachers who are civil servants and should be absolved from partisan politics.*

(g) *During the campaign period, using and/or abusing his ministerial authority and influence, and in contravention of the established procedure for acquisition of plots from the local authority, the 1st Respondent convened a meeting with the Miners at Mpatamato Sports Complex hall and told them that himself and the PF government was giving them plots through the Council and that the plots were being given at a discount amount of K700.00 as opposed to K1,500.00.*

(h) *Again using and/or abusing his authority the 1st Respondent got and used Zambia Telecommunications Company Limited (Zamtel) green T-shirts which were meant for the 2015 Youth Day celebrations and rebranded same into his campaign material for the subject election.*

2. *That the 1st Respondent was by himself, his agents and other persons on his behalf guilty of the corrupt practices of bribery, inter alia as follows:*

(a) *The contents of paragraphs 1(e) and (g) were repeated and the Petitioner alleged that same were given and promised by the 1st Respondent for purposes of canvassing for votes and*

inducing the miners and teacher to vote for the 1st Respondent and the PF.

- (b) *On election day, the Roan PF Youth Chairman, BILLY CHANDA was seen and caught giving the electorates (one of whom was Priscilla Mukuka) sums of K30.00 at Mangano Polling Station for purposes of inducing them to vote for the Respondent. Both Billy Chanda and Priscilla Mukuka were reported and remanded at Roan Police Station.*
- (c) *Also, on the day of elections, at St. Thomas Catholic Church polling station in the Maposa area, a Mrs Mwansa a PF Cadre and wife to a former PF Councilor, was also similarly found paying money to the voters and asking them to vote for the 1st Respondent and the PF in return. The bribery was reported by ABSTONE MUBANGA and GETRUDE KASHIMBO to the Presiding Officer, a Mrs Mwaanga.*
- (d) *A few days before the elections the 1st Respondent met a group of about 1000 youths from the International Ministries Fellowship Affiliated Church (INFAC) who were protesting about nonpayment of their K500 each allowances for the exercise of sensitizing the general public about the elections and*

referendum. He canvassed for their votes and promised them that once voted back into office he would pay them K1,000.00 each.

3. *The 1st Respondent by himself, his agents and other persons on his behalf, with his full knowledge and consent, breached the electoral code and were guilty of committing various general electoral offences, inter alia;*

(a) *The 1st Respondent during his campaign meeting at Kalulu Primary School in Section 27 Mpatamato, in the Roan Constituency, made false, defamatory, inflammatory and discriminatory tribal charges and remarks against Hichilema Hakainde (HH) and the UPND in general. Saliently and in connection with the elections, he said*

- Tongas were very selfish people who should not govern Zambia.*
- Hakainde Hichilema was a selfish man who could not do anything for the electorates and Zambia.*
- Hakainde Hichilema owned a lot of cattle but because he was selfish the cost of meat was still very expensive; and*

- *that the 1st Respondent equally said Geoffrey Bwalya Mwamba (GBM) was another rich and selfish person like HH who had failed to reduce the cost of mealie meal.*

(b) That the 1st Respondent during his campaign also made false, defamatory and inflammatory allegations concerning the Petitioner and in the main stated the following:-

- *That the Petitioner had abused and misused money meant for a charitable organisation and thus he could not be trusted.*
- *That the Petitioner came all the way from North-western Province to set up an NGO which he was using to steal money meant for the poor, children and HIV patients; and*
- *That, without grounds, the Petitioner had sponsored students to tertiary institutions whom he had abandoned because he had abused donor funding.*

It was for the above allegations that the Petitioner sought the following reliefs:

- (i) That it be determined and declared that the 1st Respondent was not duly elected or returned*

- (ii) That it be determined and declared that both his election and return were null and void*
- (iii) That it be declared and ordered that the 1st Respondent's seat be vacated.*
- (iv) That it be directed and ordered that costs of this Petition be borne by the 1st Respondent.*

In his Answer, the 1st Respondent confirmed having been such a candidate together with others and that he emerged the winner after polling 11,397 votes whilst the Petitioner polled 5,099 votes. The 1st Respondent however denied the allegations that he had engaged either by himself, agents or other persons acting on his behalf in any general illegal offences. He specifically denied that there was a meeting at which the decision for Ministers to remain in office was made. He averred that he was directed to remain in office by the appointing authority in line with Article 116 (3) (e) of the Constitution of Zambia (Amended) Act No.2 of 2016. He denied ever using the public media by virtue of that position as a propaganda weapon for himself against his competitors nor did he exclude the Petitioner from using the public media. He stated that he had no control over the journalists as to whom they were covering during elections and the Petitioner was free to contact the media houses for his own advertisements.

The 1st Respondent categorically denied using a government hired helicopter but that the PF Party hired five (5) helicopters from the Republic of South Africa using its own resources. It was thus

denied that the 1st Respondent ever used government or parastatal transportation facilities and resources for his campaign purposes. And equally so, he denied ever using Zamtel green t-shirts but that he paid for all the t-shirts he was using for his campaign.

The 1st Respondent further denied that he used any corrupt practices of bribery for purposes of canvassing for votes and inducing miners, teachers and youths. He averred that he merely informed the miners who were retired or declared redundant that the Government was going to help them acquire plots as that was a philanthropic activity of the government. With regard to the teachers, he averred that he was invited to a public debate organised by the teachers on what each candidate would do for the constituency. He thus denied promising teachers any plots but that he only responded to a question on the PF Government continued citizen housing empowerment policy which had been undertaken by previous governments before the PF administration. He also denied the allegation concerning the 1000 youths whom he did not know. He averred that he met only four (4) youths who had gone to his home complaining about nonpayment of their agreed allowances on a referendum sensitization exercise and advised them to report the matter to the Police.

Finally, the 1st Respondent denied breaching the electoral code and denied having ever made false defamatory, inflammatory or discriminating tribal charges or remarks against Hakainde Hichilema to the effect that Tongas were selfish people who should not govern Zambia. He averred instead that his reference to

Hakainde Hichilema was in relation to him not telling the people the truth about reducing the cost of living as the beef was still expensive when he was a major supplier of beef. That similar remarks were made in relation to Geoffrey Bwalya Mwamba who was a miller and yet the price of mealie meal was not going down. The 1st Respondent further denied having ever made any remarks against the Petitioner as being a person who had misused donor funds and could not be trusted, that the Petitioner was a person who came all the way from North Western Province to come and steal money for HIV patients or that the Petitioner had sponsored students to tertiary institutions and had abandoned them. It was the 1st Respondent's position that he won the elections purely based on his good works he did for the people of Roan Constituency whilst serving as their Member of Parliament. It was therefore his prayer that the Petitioner was not entitled to the reliefs he sought.

The 2nd Respondent generally denied the allegetions and put the Petitioner to the strict proof thereof. It was the 2nd Respondent's prayer that the Petitioner was not entitled to any of the reliefs sought.

In his Reply to the Answer, the Petitioner refuted the 1st Respondent's denials and reiterated his allegations in the petition.

At the hearing of the Petition, the Petitioner testified in his own right and called nine (9) witnesses.

PW1 was the Petitioner himself who stated that he was a 56 years old Businessman and a Pastor residing at House No. 61, Section

26, Mpatamato, Luanshya. That he was a parliamentary candidate for Roan Constituency in the just ended Presidential and General Elections under the UPND ticket. His other contestants were Dr. Chishimba Kambwili (PF), Ditar Munsanje (Independent), Daniel Chibwe (Rainbow) and Basilio Mulenga (FDD). After the election, the 1st Respondent was declared winner and returned as the Member of Parliament for Roan Constituency.

The Petitioner then walked through the detailed allegations contained in his petition. He alleged that because the 1st Respondent remained in office as Minister of Information and Broadcasting as well as Chief Government Spokesperson, he was able to influence the electorates and thereby disadvantage other candidates. The Petitioner stated that he was disadvantaged because the 1st Respondent was using a helicopter and was able to move from one ward to another and at the same time the 1st Respondent was alleged to have controlled the media both print and electronic. It was the Petitioner's testimony that the 1st Respondent was everyday on television and in the Daily Mail and Times of Zambia which media were used as a tool for PF Propaganda and for himself.

In elaborating on the allegation of influencing the media, the Petitioner testified that the 1st Respondent used hate speech against HH (UPND President), GBM (UPND Vice President), the Petitioner himself and the mayoral candidate Nathan Chanda. The Petitioner lamented that he was never covered in the media. He gave two (2) instances where he was interviewed by a Daily Mail Reporter who

assured him that his interview would be reported the following day but that did not happen. Similarly, journalists from ZNBC went to interview all the aspiring candidates with an assurance that the interview would be aired but only the 1st Respondent's interview was aired. That this "*media blackout*" of the Petitioner happened between June to August 2016 before the elections. He complained that his lack of coverage was at the instance of the 1st Respondent who used to talk about himself and alleging that the Petitioner would do nothing for the Constituency because he came from Northwestern Province and that Tongas were bad and selfish people.

The Petitioner continued with his testimony about a meeting the 1st Respondent held at Kalulu Primary School. He stated that his Agents attended that meeting and they reported to him that the 1st Respondent and his campaign manager said he had been given a helicopter by the President to campaign in Northern, Luapula and Copperbelt Provinces especially Roan Constituency. He stated that Roan Constituency had 14 wards and as such the 1st Respondent was able to visit every ward in a short time without any problems. He complained that every time the 1st Respondent visited a ward, the Petitioner's name was scandalized with his hate speech. On the helicopter, the Petitioner complained that the 1st Respondent just said the Republican President had given him but he did not say the PF Party President. He therefore saw that the 1st Respondent being a Minister had all those privileges and resources. It was the Petitioner's position that the 1st Respondent participated in the

illegal decision to stay in office because he continued as a Minister to draw a salary, allowances and influence. He stated that at all material time the 1st Respondent controlled everything in Roan Constituency as he was Minister.

I was then referred to the newspaper article appearing on page 3 of the Petitioner's bundle of documents to the effect that when Parliament dissolved Ministers were asked to stay in office. This article appeared in the Zambia Daily Mail of 12th May 2016. The Petitioner also referred me to pages 4 and 5 of his bundle of documents which were newspaper articles that appeared in both the Zambia Daily Mail and Times of Zambia of 13th May 2016. By these articles, the Petitioner complained that the 1st Respondent was being referred to as a Minister and used it as his tool to exert his influence. The Petitioner complained on the newspaper articles that appeared from pages 6 to 18 of his bundle of documents that were used by the 1st Respondent as a propaganda tool for the PF and himself in that he was still being referred to as a Minister and also had his pictures published. In addition he complained that some of the headings and contents negatively affected him because his party UPND and its leadership were painted in a bad light and no one would want to associate himself/herself with a violent party. Finally, his conclusion on the media was that since the 1st Respondent was a Minister he had the control and authority over government run media houses to advance the PF and his own propaganda.

I was then referred to page 19 of his bundle of documents which is also a newspaper article which appeared in the Daily Mail of 9th August 2016 in which the Constitutional Court ruled that the Ministers stay in office was illegal. He complained that they stayed in office during the campaign period from 12th May 2016 to 9th August 2016.

In relation to the 1st Respondent's answer, the Petitioner insisted that the 1st Respondent was part of Cabinet and therefore participated in the illegal decision to stay in office. In addition it was his contention that the 1st Respondent could have resisted from participating in the illegality. The Petitioner also reacted that they were not given such opportunity as candidates to access the media because they were from the opposition political parties. On the issue of the said helicopter having been hired by the PF Party, the Petitioner stated that his agents told him that both the 1st Respondent and his campaign manager said he had been given the helicopter by the President of the country to campaign in the mentioned provinces.

On the allegation of using government transport, the Petitioner stated that the Respondent was using a helicopter and since he continued as a Minister he was using his ministerial vehicle and drawing fuel and government workers. Further that he exerted his influence as a Minister by holding two meetings with the teachers at Nkulumashiba High School and Roan Antelope where the teachers who were civil servants were told to vote for PF and were asked to apply for plots through his campaign manager. Also the PF

campaign regalia, chitenge material, t-shirts and caps were distributed. The Petitioner denied that there was any such debate organised because he did not know what the motion was and he was never availed any invitation otherwise he would have attended. He disputed the letters on pages 6 and 7 of the 1st Respondents bundle of documents insisting that he never got the invitation which should have gone to all candidates. He also doubted that the organisation whose mandate was corruption could organise a political debate. He then characterized the letters as a fabrication to cover a political meeting organised by the 1st Respondent using his influence as a Minister which was contrary to the reason he had given in the visitor's book of addressing the Teachers on elections.

The Petitioner also reacted to the answer given in relation to the miners. He stated that the 1st Respondent between May and July addressed a meeting with the Miners at which they were promised to be offered residential plots and used his influence as a Minister to ask the Council to generate offer letters at a discounted cost from K3,500 to K700 as per pages 1 and 2 of his bundle of documents. He complained that the voting pattern was influenced to his disadvantage and the offer letters were given to two miners who never even applied for them nor were interviewed. That this was done during the campaign period to influence their thinking and vote for the 1st Respondent. He emphasized that Roan Constituency was a mining area and most of the miners were not going for work and they saw an opportunity for them to have a plot which could help them make money by selling it to other people. He complained

that the timing was wrong but was intended to sway the miners into voting for the 1st Respondent as the miners have never gotten the plots as at the time he testified.

On the allegations of t-shirts, the Petitioner stated that he had been informed by his campaign manager Lloyd Chibombya that the 1st Respondent had rebranded the Zamtel 2015 Youth Day celebration t-shirts and made them into his campaign material. He identified three (3) t-shirts in Court which were a Zamtel t-shirt, another 2015 Youth Day celebration and a third t-shirt bearing the 1st Respondents portrait and an inscription "*Vote Dr. Chishimba Kambwili, Roan Constituency 2016*". The Petitioner complained that the t-shirts were from a parastatal company and thereby amounted to using public resources for his campaign because he was a Minister which was an abuse of his office.

With regard to the events that happened on the election day, it was the Petitioner's testimony that he was informed by his election agent Pastor Mukuni that at Mangano Polling Station Billy Chanda was seen giving some voters money and they were apprehended and taken to Roan Police Station where they were detained for some time. Unfortunately the following day these people were not found at the Police. Similarly at St Thomas Catholic Church in Maposa, his agents who went to distribute food for his polling agents found a wife of a former councilor giving money to the voters. He emphasized that he knew Billy Chanda who was the PF Youth Chairperson.

On the allegations concerning the youths, the Petitioner testified that few days, before elections he met a group of protesting youths who were heading to Mpatamato Police Station. He stopped them and inquired as to what was happening. They told him that they were engaged to do a sensitization exercise which they did but were not paid K500.00 promised to them. Hence they were marching to the Police so that either the 1st Respondent, as Minister, or the Mayor addressed them concerning their money. That these youths were singing and chanting and some of them had no shirts. The Petitioner then pleaded with them not to be violent and requested them to go in peace and talk to their leaders. However, these youths continued and reached the Police and became more violent. They were then taken to the 1st Respondent's residence. After that these youths told him they had been to the 1st Respondent's residence and he promised to give them K1000 each if they voted for him and PF.

The Petitioner continued with his testimony about a rally that the 1st Respondent held at Kalulu Primary School between 2nd July and 2nd August 2016. He stated that he was informed by his three agents, Masialeli, Chibombya his Campaign Manager and another Pastor whose name he had forgotten that the 1st Respondent used hate speech against HH, GBM and himself. He referred to HH and Tongas of being selfish as HH failed to reduce the price of meat when he was a supplier of meat, and that he would allow the mines to be closed. As regards GBM that he was also greedy and selfish who despite being the main supplier of mealie meal, the price of

mealie meal kept on increasing. The Petitioner's complaint about remarks against HH and GBM was that being leaders of UPND their dented image affected his candidature and those of the local government elections.

The Petitioner also complained that at the same rally the 1st Respondent called him a thief who could not be trusted. That the 1st Respondent alleged that the Petitioner misappropriated K1 billion and had abandoned children in school whom the 1st Respondent had continued providing for. That these remarks were recorded on a video by the said agents.

In concluding his testimony, the Petitioner lamented that he lost elections because of the 1st Respondent's hate speech and scandalous language and his name was brought into disrepute. He was portrayed as a thief, a liar and untrustworthy person when he had sacrificially and wholeheartedly served the community. The Petitioner also complained that as the 1st Respondent remained a Minister and a candidate at the same time, he used his influence and government resources at his disposal. He alleged that the 1st Respondent controlled the government run media houses to advance his propaganda message which influenced the voters as they believed his lies. The Petitioner prayed for the reliefs contained in his petition as set out above.

In his cross examination, the Petitioner stated that he had lost the elections because he only got 5,099 votes whilst the 1st Respondent got 11, 300 plus votes. That he had been a mayor for Luanshya for two (2) terms under the MMD government and his contention was

that because the 1st Respondent remained a Minister, he used his influence on the elections. However, on his allegation about the 1st Respondent having participated in the alleged illegal decision to remain in office, the Petitioner conceded that he was not there when the decision was made and did not know nor did he have any set of minutes when the said decision was made. That although he was partly familiar with the Constitution he was not familiar with the Article that allows Ministers to remain in office and he was basing his complaint on the Ruling of the Constitution Court.

The Petitioner insisted that the 1st Respondent won elections because he used his position as a Minister. The Petitioner, however, conceded that there were the likes of Hon. Mwenya Musenge (Copperbelt Minister), Hon. Yamfwa Mukanga (Minister of Works and Supply) and Hon. Davis Mwila (Minister of Home Affairs) despite being Ministers and remaining in office lost the elections. He also conceded that the 1st Respondent when he became an MP, he defeated Hon. Joseph Chilambe who was a Deputy Minister at a time. He explained that to win an election also depended on the performance of the candidates, his influence and the tools used in the campaign. In this case he contended that the 1st Respondent used the print and electronic media as his propaganda tools and also influenced the teachers and miners with offer letters.

On the issue of the media, it came out in cross examination that the Petitioner never went to any of the media houses to place adverts and neither was he turned down by any media house. That the 1st Respondent did not stop him from going to any media houses and

he had no knowledge as to whether the 1st Respondent interfered with the two journalists who had interviewed him between July and August. Regarding the ZNBC journalist's interview the Petitioner stated that he was informed by the journalist that he had been to the 1st Respondent and saw the interview on television, whilst his interview was not aired. The Petitioner admitted that he did not know how the media houses were run on a daily basis but what he knew was that the Minister had a say on what was aired. Otherwise the Petitioner went round campaigning and was not stopped by the 1st Respondent. Neither was he stopped from rebutting any allegations made against him.

On GBM and the price of mealie meal, the Petitioner confirmed that GBM had a milling company and he recalled the price of mealie meal was not going down. His complaint was, however, that GBM was painted as being a greedy person although there was nothing wrong in the 1st Respondent responding to GBM's allegations.

Coming to the newspaper articles produced, the Petitioner conceded that these articles were of a general nature and never mentioned the Petitioner or where they related to Roan Constituency. The Petitioner admitted that in these articles the 1st Respondent was responding to the issues in his capacity as Government spokesperson to other people and not the Petitioner. The contention of the Petitioner was rather that because the 1st Respondent was functioning as Minister and Government spokes person his authority and influence was exerted in Roan Constituency.

On the issue of the helicopter, the Petitioner conceded that there was no specification as to where the helicopter came from and could have come from anywhere. That the 1st Respondent only identified the person where the helicopter came from and not who paid for it. And on invitation by teachers the Petitioner stated that he was not aware of such invitation as he had not received any invitation otherwise he would have availed himself and sold himself to the electorates.

Although the Petitioner conceded that the offer of plots was done by Luanshya Municipal Council in line with the government empowerment program, he complained about the timing as it was done during the campaign period. Also that he never attended that meeting but it was attended by his agents. But when he was shown the date of the Council minutes as being February 2016 the Petitioner conceded that the decision to offer the miners plots was made long before Parliament was dissolved. The Petitioner also admitted that at the time the Council resolved to offer the said plots to the miners neither the Petitioner nor the 1st Respondent were adopted as parliamentary candidates and it was not known as to who would stand for elections by then.

On the t-shirts that he identified in Court, the Petitioner conceded that the photos appearing on pages 20 and 21 were not taken from the t-shirts that he identified in Court. He explained that the photos were given to him through his investigations as to how the rebranding was done. Be that as it may, the Petitioner admitted that the said photos differed from the actual t-shirts he identified

and also conceded that in today's era the rebranding could have been done by anyone. He further explained that he produced the photos of the t-shirts in his bundle of documents merely to demonstrate the process of rebranding. He however conceded that he did not know if the 1st Respondent had anything to do with the 2015 Youth Day which was long before the elections in 2016. And that at the time the people wore the t-shirts the Zamtel logo was not showing they only realised after the elections as to what had happened.

In his further cross examination on the allegation of distribution of cash, the Petitioner conceded that he had no evidence of the 1st Respondent distributing cash but all he had was what he was told by his agents. The Petitioner confirmed that a candidate was entitled to one (1) Agent but he never knew who the 1st Respondent's Agent was. As such he was not able to tell whether Billy Chanda was the 1st Respondent's agent. The Petitioner also conceded that he never saw the alleged K30.00 but it was the Petitioner's position that his agents had reported Billy Chanda to the Police and was detained on the material day but was not found the following day. That he had never made a complaint of bribery to the Police from the date of elections. The Petitioner conceded that he never knew Priscilla Mukuka and as such he had never gone to confirm the allegation.

In relation to the allegation concerning the distribution of cash at Maposa Polling Station again the Petitioner conceded that he never saw the 1st Respondent distributing any cash and neither did he

know whether Mrs Mwansa was the 1st Respondent's agent. That although he knew Mrs Mwansa as they stayed in the same community he never confronted her nor did he take the Police to her home. It also came out that there was no formal complaint lodged or registered nor endorsed on the result declaration form by the Petitioner's agents. That his agents signed the results declaration form and accepted the results. The Petitioner never raised issue with the declaration of the results by ECZ and neither did he have any of his supporters who had voted for the 1st Respondent because he/she had been given K30.00. Similarly, the Petitioner had no person who was prevented from voting because of any intimidation or bribery. He conceded that in his bundle of documents there is no document in which the Petitioner was scandalized. He confirmed that the incident at Maposa was reported by Abstone Mubanga and Gertrude Kashimbo although he never made any follow up.

In relation to the alleged 1000 youths, it came out of the Petitioner's further cross examination that he did not know who had engaged the 1000 youths to conduct the sensitization exercise for which they were never paid their K500.00 allowance. That they were violent when he met over 100 of them in his capacity as a community leader but he never campaigned. That these youths demanded to see the 1st Respondent who was alleged by two (2) youths he met afterwards that he had canvassed for votes and gave them K30.00 each which money he did not see and did not know the purpose for which it was given. The Petitioner conceded that it was difficult for

him to know whether the 1000 youths were registered voters and whether they indeed voted. And finally on this issue the Petitioner conceded that there was nothing wrong with the 1st Respondent campaigning to the youth as he himself was not prevented from doing so. He complained that money was promised to them to induce their voting.

On the allegations of electoral offences, the Petitioner in his cross examination stated that no one went to tell him that the 1st Respondent had said HH was selfish. His complaint was that such remarks affected him. The Petitioner also confirmed that it was true he was from North Western Province and was running an NGO which he maintained was still running in Luanshya dealing in HIV and children. He confirmed that he sponsored some students to tertiary education depending on funding and some of them were only helped half-way. His complaint was that those statements attributed to the 1st Respondent amounted to practicing regionalism.

In his final bout of his cross examination, the Petitioner confirmed that his complaint was that because the 1st Respondent remained in office, he had exerted some influence on the election. He however conceded that there were other Ministers who remained in office but lost the elections. Similarly the Petitioner confirmed that he did not know how much money or litres of fuel from the government that the 1st Respondent used in a vehicle whose registration number he had forgotten. He however confirmed that every payment made by government was backed up by documents but he had not produced

any such documents. That the Republican President was the same person as president of PF.

On the media articles, the Petitioner conceded that he won in 1 polling station despite the publication of the articles complained of. He however never conducted any research on the voting patterns and that he had no complaint against ECZ. And finally that the alleged youths came all over the Copperbelt towns and he never filed any formal complaint as to how the elections were conducted.

In his re-examination, the Petitioner stated that he produced the newspaper articles to demonstrate that the 1st Respondent remained in office and was referred to as Minister and also as Chief Government Spokesperson. That the 1st Respondent's statements painted the UPND as a violent party whose leaders were selfish. He complained about the timing of the offer letters having been given during the campaign period. With regard to Billy Chanda and Mrs Mwansa, the Petitioner explained that he never personally reported these matters to the Police but his agents did. That he never obtained the names and voters cards for the youths to know them and he never knew how they voted because a vote was secret. He denied abandoning any of the children he was sponsoring and that it was difficult to obtain documents to prove government expenditure. He denied that the only reason he had petitioned was because he had lost but rather the reasons he petitioned were contained in the petition itself.

PETER KATELE a 63 years old farmer of House No. 3, Section 6, Mpatamato, Luanshya was **PW2**. He stated that he belonged to the

UPND and had attended a meeting at Kalulu Basic School addressed by the 1st Respondent on 8th July 2016 at around 16:00 hours. PW2 testified that at that meeting the 1st Respondent stated that the Petitioner came from Northwestern Province and had misappropriated donor funds meant for the vulnerable people. That the Petitioner stopped supporting students at colleges whom the 1st Respondent took over. It was also his testimony that the 1st Respondent stated that he was the only one suited to develop the Constituency because he was born and grew up in Luanshya as opposed to the Petitioner who came from Northwestern Province.

Under cross examination PW2 stated that he was a UPND member who used to also attend PF meetings and in fact he voted for the 1st Respondent. That the meeting was held on a Sunday, 8th July 2016. He said he knew the Petitioner for a long time as a truthful and honest person and his perception of him never changed. However, that because the 1st Respondent was Minister of Information he thought what he said was true and that was why he voted for the 1st Respondent and not for the Petitioner.

In his further cross examination, PW2 conceded that 8th July was not on Sunday but was on Friday. That he was not aware that the 1st Respondent was not in Luanshya on the 8th July 2016. PW2 denied having been paid money to come and testify but that he was in Court as a witness on behalf of both parties. That although he had an interest in UPND he was not a full time member of UPND. Equally so that he was not a decided member of any political party

and as such used to attend PF meetings to get ideas of their programmes. That he attended the meeting with a Mr Masialeli.

PW2 stated further that he could not prove that he voted for the 1st Respondent as he was alone when voting. He also confirmed that the Petitioner runs an NGO but denied that he failed to finish sponsorship of the children. That when he was voting he freely voted for the 1st Respondent without being paid or forced to do so. As for the Presidential candidate and Councilor, he voted for UPND candidates. As such he had no complaint for voting for the 1st Respondent and never even made any complaint to ECZ after voting. That he kept it a secret for having voted for the 1st Respondent which he did not share with any one and only mentioned it for the first time in Court.

Finally in his further cross examination PW2 stated that the meeting at Kalulu was the third meeting the 1st Respondent held as he remembered it because of the allegations of misappropriation of money made against the Petitioner and ill words spoken about HH. That despite being in talking terms with the Petitioner he opted to vote for HH even if he had never spoken to him. That he never believed the Petitioner when he denied being a thief that was why he never voted for him. Also that he had no knowledge of how the NGO was being run and as such he could not tell whether or not other students were not finishing.

In his re-examination PW2 stated that he never attended all PF meetings in Luanshya but he was influenced to vote for the 1st Respondent because of the words that he had used. That he was

still UPND even though he did not know the number of wards in Milyashi and that he was not offered any reward for his testimony.

PW3 was **CHARLES MASIALETI**, a 70 years old Farmer of House No. 58, Section 26, Mpatamato Luanshya. He testified that he also attended a meeting held by the 1st Respondent at Kalulu Basic School between the 8th and 10th July 2016. He stated that the 1st Respondent had informed the people that he was given a helicopter by the President to campaign in the Copperbelt, Northern and Muchinga Provinces. That the 1st Respondent told the gathering not to vote for HH as he had failed to reduce the price of beef and equally so GBM had not reduced the price of mealie meal despite them being major suppliers. PW3 also stated that the 1st Respondent alleged that the petitioner had misappropriated funds for orphans and that the 1st Respondent had taken over paying school fees for some of the students. In concluding his testimony PW3 alleged that the 1st Respondent stated that in the event the Petitioner asked them of what he had done that they should point to the road that he was using.

Under cross examination, PW3 stated that he was a Nkoya and not a Tonga and the Petitioner was a Lunda and not Tonga. His view was that Tongas should also be allowed to stand just like any other tribes and should not be discriminated against. PW3 stated further that he was UPND and although the words spoken by the 1st Respondent affected him he freely voted for his preferred candidate. That he understood a campaign to be an opportunity to tell the electorates what the candidate would do for them or what he had

already done before. And as such there was nothing wrong with the 1st Respondent pointing to the road he had done which he was happy about. PW3 did, however, not know what the Petitioner did for Luanshya when he was a Mayor since he only went to Luanshya four (4) years ago, long after the Petitioner had been a Mayor. That he had no relatives in any college sponsored by the NGO run by the Petitioner and as such he had no knowledge about the plight of those students.

In his re-examination, PW3 stated that he went to Luanshya in 2012 and he had no information about any students whom the Petitioner failed to sponsor.

STEPHEN PHIRI a 52 years old Peasant Farmer of House No. 47, Section 23, Mpatamato Luanshya was **PW4**. His testimony was that on the 11th August 2016 he was assigned together with **GETRUDE KASHIMBO** and the driver to deliver food to Polling Agents at St Anthony Polling Station in Maposa. That they arrived there between 11 and 12 hours and parked their vehicle outside the ribbon about 100 meters away. That they sat in the vehicle for about 10 minutes and observed people passing through two (2) ladies from Mpatamato namely **BEVERLYN MUTALE** and **IDAH MFULA** who were PF officials. They were instructing people to vote for the 1st Respondent and Famous Kabwe after which they were being given money blue in colour although they did not know its denomination. That they disembarked and confronted them thereafter he reported the matter to a Police Officer who took him to the Presiding Officer. The Presiding Officer Ms Mwaanga then asked the Police Officer to

accompany him to the scene of the alleged crime. On their way the two ladies started leaving and eventually disappeared into the bush. He then informed the Police Officer that he knew them as they stayed together in Mpatamato.

In cross examination PW4 stated that he had parked about 20 metres away from the two ladies and he saw and heard what was happening whilst seated in the car. That he was unable to tell how long the voting process was taking because he never entered the Polling Station but he saw queues of about 25 metres long. PW4 insisted that he was the one who had reported to the Presiding Officer and not Abstone Mubanga and the reporting did not even take him five minutes and as such the people he saw being instructed were still on the queue.

In his further cross examination, PW4 stated that this was the only incident he witnessed 20 metres away from where they had parked. He confirmed that he went alone and he was the one who reported the incident while **GETRUDE KASHIMBO** remained behind. That he also saw two people with ink on their thumbs having received money, whom he never spoke with. This was so because he was still seated in the car when he saw people exchanging money but he never arrested them.

In his final round of cross examination, PW4 stated that he was the UPND Roan Constituency Secretary and they were four in the car. He confirmed that he was not there when the two (2) people he saw receiving money went into the Polling Station. That although he knew the two people who were giving money as being PF members

he never reported them to the Police after the elections even if he knew where they stayed. That he left St Thomas Polling Station after 14:00 hours.

When re-examined, PW4 confirmed that he was the one who had reported the matter to the Police Officer and also that he had spoken to the two ladies immediately he disembarked and confirmed that he left the Polling Station past 14:00 hours.

PW5 was **GERTRUDE KASHIMBO** a 42 years old Business Lady of House No. 179, Section 6, Mpatamato Luanshya. Her short testimony was that on the 11th August 2016 she was together with **STEPHEN PHIRI** (PW4), Abstone Mubanga and Faustina Mutamba in a car taking food to St. Thomas Polling Station in Maposa. That before reaching the place they saw two (2) women under the tree inside the ribbon talking to people who were going inside and those who came out collected something from them. They then decided to confront them and when they disembarked, they recognised the two ladies as being Mrs Mwansa and Idah Mfula from Mpatamato belonging to PF. When they asked them what they were doing the two ladies told them to mind their own business. That they asked the two people who had received the money they told them that they were told to vote for the 1st Respondent. She then stated that she remained behind while PW4 went alone to report to the Police and Presiding officer. And shortly PW4 came with the Police Officer and the Presiding Officer and the two women ran away and disappeared.

Under cross examination, PW5 confirmed that they arrived at St Thomas Polling Station between 11 and 12 hours and only spent about 20 to 30 minutes and they left after 12:00 hours. That they were three men in the car and that it was Mr Phiri (PW4) who went to report and came back with the Police Officer and the Presiding Officer. She further stated that there were altogether 5 people in the car. That the money was given quietly to those who had voted and nothing was said. She maintained that she only saw money being given to one person and because of their presence everything was disrupted. That she was with PW4 when they saw only one person who had ink on the right thumb. She then denied these ladies being 20 metres away from them but that they were just about a metre from where they had parked the car. That she only saw one blue note being given and although they knew these women they never took the Police to their places.

Furthermore, PW5 stated that she was the Constituency Vice Secretary and on the voting day they had five (5) groups going round the polling stations and their group visited five polling stations. That she only saw one (1) person who was told to go and vote for the 1st Respondent that although Mr Mubanga was there, he was not feeling well as he complained about his legs.

In her re-examination, PW5 explained that although Mr Phiri went alone Mr Mubanga after some time followed him and they had visited five polling Stations in total.

NORMAN YORUM MUKUNI, a 52 years old Businessman of House No. 437, Section 9, Roan Township, Luanshya came in as **PW6**. He

stated that he was a Polling Agent for UPND stationed at Fisansa Club, Mangano Polling Station. That whilst he was inside, he was informed by a Malama also a Polling Agent from the Rainbow Party to the effect that **BILLY CHANDA** of Section 9 and a PF member was giving money to women outside. That he went outside and he found the said BILLY with Priscilla Mukuka whom he had paid K30. He then apprehended both **BILLY CHANDA** and Priscilla Mukuka who were taken to Luanshya Police Station. At the Police the two were detained and he was asked to go to the Police the following day. When he went to the Police the following day, he never found them. It was his testimony that he heard Priscilla Mukuka say *"give me money as you had promised I have now voted"*.

What came out of PW6's cross examination was that he only witnessed one incidence involving one person giving money and one person receiving it. He stated that **BILLY CHANDA** was not a Roan PF Youth Chairperson but a Branch Youth Chairperson for PF. That since he was inside the Polling Station he never saw when Priscilla Mukuka arrived and never witnessed what she had been promised except that she said *"now that I have voted give me what you promised"*.

In his further cross examination, PW6 stated that he was about 40 metres away and never heard what they were talking about but he was told by Malama. That he did not know whether Billy Chanda was a Polling Agent and neither did he know whether he was sent by the 1st Respondent nor was he given money by him. Although he

had reported **BILLY CHANDA** to the Police he never got the OB number nor signed any statement at the Police.

Finally in his cross examination, PW6 stated that he never went with the Petitioner to the Police and neither did he go back to inquire from the Police. Similarly, that even though he knew where Billy Chanda and Priscilla Mukuka stayed, he never inquired from them as to why they were released.

In his re-examination PW6 explained that it was Malama who told him that **BILLY CHANDA** and **PRISCILLA MUKUKA** were busy exchanging money outside.

The next witness called was **DOREEN NAKANYIKA** a 24 years old unemployed youth of House No. 220, Section 25 Mpatamato as **PW7**. Her testimony was that she was one of the 1000 youths engaged by INFAC to conduct a sensitization exercise on the referendum and were promised to be paid K5,000.00. That she paid K60 for registration and K25 for her passport size photos. That the person who was in charge was a Nicholas from Lusaka and they were just meeting at a certain house. However, after the exercise, the youths were not paid and they decided to march to the 1st Respondent's residence but were intercepted by the Police at the cemetery. That those who were marching were 78 in number and after the Police phoned the 1st Respondent he allowed the Police to take them to his place.

It was PW7's testimony that they decided to go to the 1st Respondent's place because they were of the view that a referendum

was a government programme and they wanted him to help them get their payment. She alleged that the 1st Respondent gave them t-shirts, caps and chitenge material for the PF campaign and K30 each whilst promising them K1,000.00 each if they voted for him. She insisted that they were 78 and not 4.

In her cross examination PW7 confirmed that they were 1000 youths in total but only 78 went to the 1st Respondent. That these youths came from Roan and Mpatamato townships as when they were being given the t-shirts they said they were for those from Roan and Mpatamato. She also confirmed that she was a UPND member and the other youths belonged to different political parties.

As for their encounter with the Petitioner PW7 stated in her cross examination that the Petitioner just passed them by and he never talked to them and neither did he advise them to be non violent. That it was the youths who requested to meet with the 1st Respondent and not the 1st Respondent after they were intercepted by the Police at the cemetery. She denied that all the 1000 youths met the 1st Respondent but only 78 as they were counted outside his residence by those who were distributing the t-shirts and giving the money. That the youths were given K30 with the promise to be given K1,000 if he went through.

PW7 further stated that INFAC promised them K5,000.00 and not K500.00 and it was the youths own decision to go to the 1st Respondent who saw them even if they had no appointment with him. Further that it was the Police who ferried them to the 1st Respondent's residence and she voted for the 1st Respondent

because he had promised them K1,000.00 each which he was still owing them. Finally in her cross examination, PW7 stated that she had no contract with the 1st Respondent and neither did she sign any contract with INFAC. That they only worked for 3 days and were promised to be paid K5,000.00 but she was in Court merely as a witness without any promise for a reward.

In her re-examination, PW7 explained that she believed the sensitization exercise to be a government programme because that was what they were told. That she voted for the 1st Respondent because he had promised them money.

PW8 was **LLOYD CHIBOMBYA** a 49 years old Businessman of Plot 135, Section 26, Mpatamato, Luanshya. His unchallenged evidence was that he served as the campaign Manager for the Petitioner. In that capacity he came across information from Mr Masialeti that the 1st Respondent had addressed a meeting at Kalulu Primary School where he uttered tribal, regional, inflammatory, derogatory and injurious statements of the Petitioner and all the campaign for UPND. That he was the one who got the Zamtel t-shirts that the Petitioner had identified in court from Lusaka.

The last witness the Petitioner called was **MODERN HACHINGALAP W9** a 43 years old Farmer and a resident of House No. 519, Section 26, Mpatamato, Luanshya. His testimony was that he was working at Luanshya China Copper Mines (LCM) until the 7th September 2015 when he was sent on forced leave. He stated that the 1st Respondent on the 15th July 2016 between 14:00 hours and 17:00 hours addressed a meeting attended by all miners who were sent on

forced leave held at Mpatamato Sports Complex. At that meeting he alleged that the 1st Respondent went with offer letters and started giving them to the miners and he was given a copy appearing on page 1 of the Petitioner's Bundle of documents. He alleged that when giving the letters the 1st Respondent was saying "*I want a vote.*" That these letters required him to pay the sum of K1,500.00 and another K50.00 to make the total K2000.00.

It was PW9's further testimony that the offer letters came from Luanshya Municipal Council but he was surprised to receive such a letter when he had not applied for a plot nor attended any interviews as was the laid down procedure. He complained that on the 4th August 2016 he went to the Council but they told him that they did not know where the plots are and he was advised to wait. And finally that he was not given a plot but only an offer letter.

Under cross examination, PW9 said that the offer letters were authored by the Town Clerk and not the 1st Respondent. He denied the possibility that the union may have negotiated for the plots. That he had been in Luanshya for 14 years and had heard that at one time the Miners were given houses. He however denied that civil servants were sold houses and was not aware of the government selling houses to civil servants and had never heard of the slogan "*PHI*". In relation to the date when the decision to give them plots as indicated in the offer letters, PW9 confirmed that the decision was made in February 2016 and at that time the 1st Respondent was not adopted or nominated as a candidate but rather he was still an MP for Roan and it was his role to represent the people of Roan.

In his further cross examination, PW9 stated that although he never applied for a plot and what he had was just a paper, he nonetheless needed a plot. That the Council sourced his details from the records at his place of work. He confirmed that as at 11th May 2016 the date of the letters, there were no campaigns nor were there any campaigns in February 2016. That he wanted the plot even if he had not paid anything for it. It was PW9's position that although the offer expired for his none payment to him the offer was still valid because it constituted an agreement between the miners, the 1st Respondent and the Council working together so that they are given plots which were clear and at a low price. That the agreement to give them plots at cheaper prices was reached in February 2016. PW9 still insisted that the offer letters were still valid because before voting day they had followed up the matter with the Council and were given an opportunity to pay.

PW9 also admitted in his further cross examination that his intention was to testify that the 1st Respondent promised them plots on 15th July 2016 and used it for his votes. That he did not know that the 1st Respondent was not in Luanshya between 4th July, 2016 to the 17th July 2016. He insisted that the 1st Respondent addressed the meeting on 15th July 2016 but he did not know how he had moved. Again PW9 stated that the 1st Respondent had promised them plots between 14th and 17th July 2016 and they received their offer letters on 15th July, 2016. He however, admitted that the 1st Respondent addressed the miners on several dates but he only remembered the date 15th July 2016 when he received the

offer letters. He also confirmed that after the miners were sent on forced leave the 1st Respondent addressed a meeting with the union where the miners were assured that they would go back. And also that he knew that they would be given plots way before they received their offer letters.

In his final round of his cross examination, PW9 stated that he was a UPND member and the total number of the miners who were sent on forced leave was 1,640. He, however, did not know that in Mufulira miners were also sent on forced leave but he confirmed that only those who were sent on forced leave were given offer letters. That he never knew this was a government programme to empower the miners who had been placed on forced leave. He complained that to date he had not been shown his plot although he admitted that he never paid for it as per the terms of the offer.

In his re-examination, PW9 explained that he was not aware that these plots had been negotiated by the union. That he did not know about the sale of government houses because he never worked for the government. He insisted that he got the offer letter on 15th July 2016 and that the reason he had not yet paid was because he wanted to know where the plot is located first but they told them to wait. He agreed that the offer could have lapsed at the time of elections. That marked the close of the Petitioner's case.

The 1st Respondent opened his defence as RW1. He stated that he was Hon. Dr. Chishimba Kambwili, 48 years of age and a resident of House No. 9 West Area Avenue, Luanshya. That he was Cabinet Minister of Information and Broadcasting and a Member of

Parliament for Roan Constituency for which he was serving his third (3) term. In his testimony, he denied participating in the meeting where a decision was made to have Ministers remain in office but rather that it was the President's prerogative to appoint or dissolve Cabinet. He denied having abused his authority or government resources to advance his campaigns. That throughout the campaigns he stayed in his personal house and he was using his personal vehicles for which he owns more than 10, and never used a government driver but his own personal driver. And that PF as a Party had hired eight (8) helicopters which were given to different officials in PF who were involved in long distance campaigns and produced document 5 in his bundle of document which is an invoice for the said hire of the helicopter that he used. RW1 also denied using any propaganda through the public media. His testimony was that he issued a number of statements for and on behalf of the Government of the Republic of Zambia for which he was and still is its Chief Spokesperson. RW1 denied calling any meeting with the teachers but rather that he was merely invited for a debate as per page 7 of his bundle of documents. He also stated that the Petitioner was equally invited as could be seen on page 6 of his bundle of documents. It was his position that there was nothing discussed outside the topics except that during the question and answer session one teacher asked why PF was not giving teachers plots and in his response stated that it was PF's policy to give all civil servants plots and advised all the teachers who wanted the plots to approach the Council. He denied distributing PF regalia to the teachers at that meeting.

On the issue of his meeting with the miners, RW1 explained that on the 7th September 2015, 1,640 miners were put on recess following the placing of Baluba Mine on care and maintenance. These miners then requested for his audience as their salaries had been reduced from K3,000.00 to about K900.00 per month. That meant they would be unable to meet their rental obligations and they asked to be allocated plots to build their own houses. That the request was beyond his powers and he then consulted His Excellence the President who agreed and directed Luanshya Municipal Council to create the plots to be given to all the miners on recess at discounted rates. That he informed the miners and asked them to wait for the Council to undertake all procedural requirements. The Council then reported to him on the 10th May 2016 that the offer letters were ready which they wanted to distribute on the 12th May 2016. On the 12th of May 2016 he went to Luanshya and accompanied the Council officials to Mpatamato Sports Complex and his role was merely to address the miners that government had fulfilled its promises and he left the venue.

He denied personally issuing the letters but that they were issued by Council officials and such issuance was not meant to induce the miners to vote for him as he was not even a candidate at the time and the campaign period had not yet been declared by ECZ. He insisted that the offer letters were issued on the 12th May 2016 and not 15th July 2016 as alleged because as he was in Northern Province then where he spent for two weeks having left by road to Kasama on 4th July 2016 with his personal driver using his Ford

Ranger CK 200 and as such could not have been both in Luanshya and Kasama at the same time.

In relation to the alleged vote buying at Mangano and St. Thomas Catholic Polling Stations, he denied having any agents in the names of **BILLY CHANDA** or **MRS MWANSA**. That all his agents were registered with ECZ and had their identity cards. He stated that **FRANK CHANA** was the youth Chairperson and not **BILLY CHANDA** as alleged.

On the further allegation about the 1000 youths who were engaged by INFAC and thereafter abandoned or duped, RW1 denied the allegations made. He explained that between July and August he received a phone call from the Officer in Charge at Mpatamato who informed him that there were some youths who had been swindled by some Pastors coming from Mpatamato wanting to have an audience with him. He then advised the Police to pick 4 representatives whom he met at his home. These youths informed him that they were engaged to do sensitization on the referendum and they were promised K5,000.00 each after the exercise but the organisation did not come forth after they had done the work. He was informed that they were asked to pay K85 for a t-shirt and an ID and most of them had borrowed the money from money lenders who were pursuing them. That he advised them to report to the matters the Police and instructed the Police to take action against the people who had swindled them. He denied giving them K30s and also denied promising them K1,000.00 in exchange for his

votes in Roan Constituency when these youths came from all over the Copperbelt Province.

It was RW1's position that the allegations concerning the meeting he held at Kalulu Primary School were a total fabrication and denied having made any tribal remarks against HH and GBM who was his tribesman. He explained that he was merely reacting to the statement HH and GBM had made when they addressed the people of Luanshya to the effect that they would reduce the cost of living specifically the cost of beef and mealie meal when they formed government. That he wondered how the two will reduce the prices of those commodities when they were the major suppliers of the same and yet the prices remained high. That he went on to say government did not fix prices of commodities but it was the businessmen and gave the example of Dangote whose coming on the market saw the reduction of the price for cement from K90 to K57. He also denied making any tribal remarks against the Petitioner but that he said he was a better person to be voted for as he was more suited to know Luanshya where he grew up as opposed to the Petitioner who grew up and was educated in Northwestern Province. He also denied making any statements that the Petitioner had misappropriated donor funds.

In emphasizing his denial of distributing offer letters to the miners, RW1 stated that he only lobbied for all miners on the Copperbelt to be given residential plots and the President ordered the local authorities to find land. He denied having met PW9 and asking a vote from him.

In relation to the many newspaper articles produced and complained of by the Petitioner, RW1 explained that what he expressed therein was for and on behalf of government and was not on his own behalf. That as Chief Government Spokesperson he is directed to communicate Cabinet's position on issues and those articles attest to that. In short, he was the government's microphone.

RW1 then denied using the alleged t-shirts appearing on pages 20 and 21 of the Petitioner's bundle of documents which he said he had never seen before in Roan Constituency. He went further to observe under the t-shirts on page 20 some writings with an H and "**WILL FIX IT**" which was similar with the UPND campaign "**HH WILL FIX IT**". He confirmed that the photos of the helicopter appearing on pages 22 and 23 of the Petitioner's bundle of documents, was the one he was using hired by PF.

Finally in his evidence in chief, RW1 stated that he had never bribed people in his political life but that he developed a good rapport with the people of Roan whose vote he was privileged to be a Minister. He explained that his campaign was based on "**SONTAPO**" that is to say on showing what he had done for the Constituency where he built hospitals, clinics and his hard work earned him the 3rd term as their Member of Parliament. He denied using any Zamtel t-shirts which he stated were gotten from Lusaka and that no Zamtel official came to confirm except that it's the Petitioner who knew how they were branded.

In his cross examination, RW1 confirmed that after dissolution of Parliament he retained his portfolio as Minister with his attendant entitlement of two (2) government vehicles and the driver. He stated that his remaining in office was on instructions of the President who was the appointing authority. RW1 admitted that the articles complained of were published between May to July 2016 which was during a campaign period and at that time Parliament had been dissolved. He however could not confirm that in the said articles he was prominently covered because he never saw the full newspaper as what were produced were newspaper cuttings which reported him as Chief Government Spokesperson. In relation to articles appearing on pages 7 and 12, he denied canvassing for his votes but that he was canvassing for votes for PF as a Member of its Central Committee and not as government. He went on to state that in the article in issue, the newspaper merely quoted and reproduced his interview. He denied that the Zambia Daily Mail and Times of Zambia fell under his Ministry but that they fell under the Industrial Development Corporation (IDC) a wing of government. That his office had nothing to do with the day to day running of media houses but only provided the policy of government regardless of whether it was public or private media. He denied having received prominence by virtue of being a Minister and also denied having used a government vehicle in his campaigns.

RW1 further confirmed attending a meeting with the teachers for a debate/talk but he could not recall what the purpose of his visit he had put in the visitor's book. That he did not find out about the

others who were invited for the debate but rather that he was not expecting to find other contestants. He denied distributing campaign regalia at that meeting even if no such denial was made in his Answer.

On the issue of plots, RW1 stated that on 27th September 2015 he assured the miners that he would secure plots for them and the President gave a directive to the local authorities. That all the miners applied as they were asked to indicate their intention and submit their particulars in the form of their letter of forced leave and NRCs which in itself constituted the application to the Council. He also denied that the letters of offer were distributed in his presence but that he only addressed the meeting and left.

On the issue of the said offer letters having been distributed on the 15th July 2016, RW1 stated that although it was possible with a helicopter to fly from Kasama to Luanshya, he was in Luwingu on that date and after that went to Nakonde. That he drove to Kasama with his personal vehicle but the helicopter found him in Kasama. He denied being at Mpatamato Sports Complex on 15th July 2016 even if PW9 was not examined about him being in Luwingu because he was giving his own evidence.

Furthermore, RW1 denied meeting PW7 at his house or promising her money nor distributing any campaign material to her. He also denied addressing a meeting at Kalulu on 8th July, 2016 and denied using the word "*foreigner*". He equally denied making any allegations about the operations of the Petitioner's NGO or that he

had misappropriated any donor money or that the Petitioner had abandoned any children.

In re-examination, RW1 explained and insisted that he was not present when the miners received their offer letters but he simply addressed them about government fulfilling its promises and he left the venue. That Cabinet proceedings were secret and could not be divulged except with permission given by the President. He emphasized that when campaigning he campaigned as a Member of the Central Committee of PF and that he had no control of how he was reported. That in his campaigns he referred to PF as a party and not government and the article on page 14 was reporting what he had said at a rally in Chingola and there was nothing referring to Roan Constituency. He explained that in his Answer on the meeting with the teachers he did not mention that he denied the distribution of campaign material because the issue never arose at the meeting and he never promised teachers any plots.

Finally RW1 denied that PW7 went to his home and that he had never seen her before in his life except in Court. He explained that his campaign was regional and from the 8th to the 15th July 2016 he was stuck in the Northern Province. And finally that IDC falls under Ministry of Finance and media houses were run by board of directors, management and editorial teams. His ministry only provided government policy to both public and private media.

JABES MUMBA, a 56 years old Teacher of House No. 135, Section 24 Mpatamato, Luanshya was **RW2**. He stated that he was the Executive Secretary of the National Association of Teachers Against

Corruption (NATAC) whose membership is made of teachers both in the civil service and from the private sector. After setting out the objectives of the Association, RW2 testified that on the 27th July 2016 he authored letters inviting all Parliamentary aspiring candidates to a Talk to be held at both Roan Antelope Secondary School and Nkulumashiba High School which letters appear on pages 6 and 7 of the 1st Respondents Bundle of Documents.

It was his testimony that Parliamentary candidates from Rainbow Party and the Forum for Democracy and Development (FDD) were equally invited. That of all the candidates invited it was only the Petitioner from UPND who never attended the talk. He maintained that the topics discussed were confined to those outlined in the invitation letters but there were also a question and answer session. He recalled regarding the 1st Respondent's talk that one teacher wanted to know how teachers could acquire plots. That the 1st Respondent advised the teachers to engage the Council on the procedures to be followed. Finally that his Association had participated in elections before which they started in 2011 and their intention was to continue engaging Parliamentary candidates in future elections. He denied there being any political campaigns or distribution of campaign materials at their talks.

In cross examination RW2 stated that all the Parliamentary candidates were invited and three of them had attended on different dates. He explained that he personally delivered the invitation letters to the Secretariats of the political parties concerned. That for the Petitioner, he delivered it to UPND Secretariat located in

Mpatamato Township and was served on a **MOSES KAYOMBO** who acknowledged it and assured him that it would be passed on to the Petitioner. That similarly, he delivered the one for the 1st Respondent to the PF Secretariat located at Kafubu House and was served on a Mr. **FELIX MATOBWE**.

RW2 denied that his Association was affiliated to the Anti Corruption Commission (ACC) or any government body. He equally denied that its Association needed clearance or authority to conduct its activities because it was an independent private organisation. He denied that the 1st Respondent had made any promises to the teachers or there being any distributing of PF campaign material. Finally RW2 denied being a sympathizer of PF but that he had been attending these proceedings regularly because he had obtained prior permission from his Head and this was an examination period for which he was not involved in any. He was not re-examined.

RW3 was **MISHECK BWALYA**, a 47 years old Driver of House No. 6, Section 6B, Roan Township, Luanshya. He stated that he was employed by the 1st Respondent as his private driver in September 2015 and he had been working as such up to date. That his salary was paid by the 1st Respondent's private company Mwamoneni Engineering. He testified that on Monday 4th July 2016 he undertook a trip with the 1st Respondent to the Northern Province using a Ford Ranger, blue in colour registration number CK 200. He stated that they remained in Northern Province from the 4th of July 2016 and only to return to the Copperbelt on Sunday 17th July 2016. That on this trip a Mr **CHRISTOPHER MUTALE** also

accompanied them. Finally, RW3 testified that on the morning of 15th of July 2016 he recalled taking the 1st Respondent to the airport where he left him boarding a helicopter to Luwingu and Nakonde for his continued campaigns. And later in the evenings he went to pick him up from the airport.

In cross examination RW3 stated that he had undertaken many trips with the 1st Respondent between May and August 2016 whose actual dates he had forgotten. He, however, remembered this particular trip because it was the first trip he had with the 1st Respondent in July. He conceded that since he left the 1st Respondent at the airport and because he was not with him, he was not in a position to tell where he had actually gone to.

In his re-examination, RW3 explained that he remembered this particular trip as the first trip because it was the longest trip.

CHRISTOPHER MUTALE, a 54 years old Farmer of House No. 86, Section 4, Roan Township, Luanshya came in as **RW4**. He stated that he was the Vice District Chairperson for PF, Luanshya and had accompanied the 1st Respondent to Northern Province on the 4th July, 2016. That they went by road using the 1st Respondent's Ford Ranger, registration number CK 200 which was being driven by **MISHECK BWALYA (RW3)**. The others who came on the said trip were **BONIFACE SICHONE** and **FRANK CHONA**. It was his testimony that they held many campaign meetings in the entire Northern Province and only came back to Luanshya on Sunday 17th July, 2016. One such campaign meetings he remembered were the

two meetings which were held on the 15th July 2016 in Luwingu in the morning and in Nakonde later in the afternoon.

In cross examination, RW4 said that they had many meetings in the Northern Province such as Kaputa, Mporokoso, Luwingu and Nakonde. That although he could not remember the exact dates when the meetings were held in Mporokoso, he however, remembered the date of the meetings held in Luwingu and Nakonde to have been the 15th of July 2016 because those were the last two meetings they had held. He denied the suggestion that he had discussed the exact dates with the people he went with. In re-examination, RW4 explained that he remembered the date 15th July 2016 because that was when the last meetings were held and they came back to Luanshya on 17th July 2016.

The “*last man to beat*” called by the 1st Respondent in his defence was **DEOPHILLY KASONDE**, a 45 years old miner on forced leave with Luanshya Copper Mines and a Union’s Shop Steward. His testimony was that on the 8th day of September 2015 he suffered the misfortune of being sent on forced leave by his employer as one of the offshoots of the infamous load shedding the country was experiencing, and the mine was placed under care and maintenance due to the reduction in the supply of power. The resultant negative effect was that the miners basic salary was reduced from about K3,000.00 to K900.00 per month which made them unable to meet their basic needs especially rentals, utility bills and school fees for their children.

As concerned union leaders, a meeting was held with the miners on 6th October, 2015 to look at the issue of their forced leave. It was at that meeting that they sought the intervention of the 1st Respondent to look into the plight of the miners. That the 1st Respondent urgently responded to their call and they presented their issues and requested that he helps them with plots where they could settle. On the plot issue, the 1st Respondent told them that he had no authority but that he would present their request to the Republican President and asked to be given time.

RW5 further testified that between December, 2015 and end of January 2016, the 1st Respondent phoned them and he requested to meet all the miners on forced leave at 28 Shaft. At that meeting, the 1st Respondent told them that their request had been granted by the President who had directed the Luanshya Municipal Council to create plots for them. That the 1st Respondent then advised them to go and register themselves with the Council using their letter of forced leave and their National Registration Cards (NRC). He stated that all the 1,640 miners on forced leave registered with the Council.

It was RW5's further testimony that on the 11th day of May 2016 through a mobile public address system all the miners on forced leave were invited for a meeting at Mpatamato Sports Complex to be held on 12th May 2016 at 14:00 hours. That on the 12th May 2016 all the said miners gathered at the venue and he saw Luanshya Municipal Council Deputy Director of Planning a Mrs Phiri and the Mayor, Gordon Siwale who were joined by the 1st Respondent. The

1st Respondent then addressed the miners where he thanked them and told them that the plots they were asking for had now been fulfilled. That the 1st Respondent spent about 30 minutes at the most and left as he had other national duties and assignments to attend to.

Finally, it was RW5's further testimony that after the 1st Respondent left, that was when the Council officials including himself started distributing the offer letters to the miners. That due to the large number, the exercise was done within four (4) days from the 12th to the 15th of May 2016. He then identified the letters appearing on pages 1 and 2 of the Petitioner's bundle of document as the offer letters that were distributed and were the same as his letter which he got on 12th May 2016. He however, stated that the plots have not been given to them as the exercise was put on hold in view of the impending general elections after which they were promised the exercise would continue. He denied that the 1st Respondent was the one distributing the said offer letters.

Under cross examination, RW5 stated that he had been requested to come and testify only on the 7th of November 2016 by his neighbour a Mr Kapelwa. He confirmed that he received his letter to go on forced leave on 8th September 2015 and that the offer letters produced by the Petitioner were not his. He insisted that the offer letters were distributed on the 12th May 2016, and not on 15th July 2016. He denied that the 1st Respondent distributed a single offer letter. He explained that they had not yet been given the plots and they have not yet paid for them as they have not been working.

It finally came out in cross examination that not all the 1,640 miners came from Roan Constituency but some of them came from Luanshya Constituency although Hon. Stephen Chungu MP for Luanshya was not present. He stated that it was the union leaders who had requested the 1st Respondent to help them on the issue of plots.

In re-examination RW5 explained that after they received their offer letters the exercise was put on hold in view of the elections. He also confirmed that some of the miners came from Roan Constituency while others came from Luanshya Constituency. That although the letters on pages 1 and 2 of the Petitioner's bundle of documents were not his, he got the same letter of offer which he had on him. That marked the close of the 1st Respondent's case and the 2nd Respondent never called any witness.

The above is a summary of the material evidence I received from all the parties as they sought to substantiate their allegations and averments contained in the Petition, the Answers and the Reply thereto. Although the parties indicated their desire to file in their written submissions, due to the limitation of time at my disposal I have proceeded to deliver this judgment without their submissions. And if any submissions were filed, I have not looked at them nor considered them in this judgment. In any case it is trite law that submissions are for the convenience of the court only and are not binding on the Judge.

Before I proceed, I wish to observe that election petitions are a necessary evil. They offer the only legitimate means through which

the principles of democracy in which our country is constitutionally rooted are vindicated so that the expressed free will and choice of the people is not subverted. The principle of democracy is an immutable part of the constitutional bedrock upon which our country has been founded. As a nation, we have committed ourselves as evident in the Preamble to our Constitution, to upholding the principles of democracy and good governance. To this end we have resolved that Zambia shall forever remain a unitary, indivisible, multi-ethnic, multi-racial, multi-religious, multi-cultural and multi-party democratic sovereign state. The Constitution vests the sovereign authority in the Zambian people which is exercised either directly or through elected or appointed representatives and institutions.

Elections therefore play a pivotal role in our society in that through them we uphold our national values and principles of democracy and constitutionalism, human dignity, equity, social justice, equality and non-discrimination, good governance and integrity. It is for this reason that we have given ourselves an electoral system and process that guarantees equal and universal adult suffrage. An electoral process and system that ensures

- (a) that elections are free and fair;**
- (b) that elections are free from violence;**
- (c) independence, accountability, efficiency and transparency of the electoral process;**
- (d) a simple and practical system of voting and tabulating votes; and**

(e) timely resolution of electoral disputes.

Only when the above are adhered to can that will of the people expressed through enfranchised citizens transform into a representative government dubbed a “*government of the people, by the people and for the people*”.

In this regard, the Courts have been entrusted with the onerous responsibility to maintain and enforce the principles of a representative democracy and so jealously guard against any infringement or erosion thereof. Needless to say that democracy in this country was attained at a high price through great sacrifice and suffering. It is for this very reason that we recognise and honour the freedom fighters who fought for the independence of our great nation in order to achieve liberty, justice and unity for the people of Zambia.

No doubt these fundamental values and considerations must have prevailed on the Legislature’s collective mind when it passed the newly enacted **Electoral Process Act No. 35 of 2016**, hereinafter referred to as the Act. The Legislature devoted the entire Part IX of the said Act to election petitions and sets out the law that governs the nullification of the election of a candidate as Member of Parliament. The insightful provisions of that Part are found expressed in Section 97 thereof which enacts as follows:-

“97 (1). An election of a candidate as a member of Parliament, Mayor, Council Chairperson or Councilor shall not be questioned except by an election petition presented under this Part.

(2) *The election of a candidate as a Member of Parliament, Mayor, Council Chairperson or Councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High court or a tribunal, as the case may be that-*

(a) *a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-*

(i) *by a candidate; or*

(ii) *with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent, and*

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

(b) *subject to the provisions of subsection (4), there has been non compliance with the Provisions of this Act relating to the conduct of elections and it appears to the High Court or tribunal that the election was not conducted in accordance with the*

principles laid down in such provision and that such non-compliance affected the result of the election, or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.

(3) Despite the provisions of subsection (2), where upon the trial of an election petition, the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by or with the knowledge and consent or approval of any agent of the candidate whose election is the subject of such petition, and the High court or a tribunal further finds that such candidate has proved that-

(a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election or with knowledge and consent or approval of such candidate or that candidate's election agent;

(b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt

*practice or illegal practice at the election;
and*

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent;

the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

(4) An election shall not 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 High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election." (Underlining for emphasis)

The enactment of Section 97 in its current form heralded the dawn of a new era in our jurisprudence and revolutionised the grounds upon which an election of a candidate can be avoided. Specifically Section 97 (2) has done away with the popular "strict liability" clause that had characterized the previous electoral laws and on which clause there is a wealth of case authority. This therefore

means that not all principles of law decided in previous case is applicable to election petitions. The law now as enacted is pinned on the conduct of the candidate himself/herself or through the conduct of his/her election or polling agents or by their knowledge, consent or approval. Anything short of that is no longer the basis upon which an election can be avoided.

For purposes of emphasis, I wish to reproduce yet again the profound provisions of Section 97 (2) of the Act which enacts as follows:-

“97 (2). The election of a candidate as a Member of Parliament, Mayor, Council Chairperson or Councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High court on a tribunal, as the case may be that-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate’s election agent or polling agent; and

the majority of voters in a Constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred. (Underlining for emphasis)

It is trite law that the primary rule of statute interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the Legislature, that recourse can be had to the other principles of interpretation.

By this Petition, the Petitioner seeks to avoid the election of the 1st Respondent as Member of Parliament for Roan Constituency. The nullification is sought on the ground that the 1st Respondent, by himself, his agents or other persons on his behalf, with his full knowledge and consent committed general illegal and corrupt electoral offences and breached the Electoral Code of Conduct which influenced the outcome of the election to his favour and to the detriment of the Petitioner. The issue I have to determine is whether or not the Petitioner has proved to the requisite standard that the 1st Respondent committed the alleged electoral offences and as a result the majority of the voters in the Roan Constituency were or may have been prevented from electing a candidate among the five (5) contestants whom they preferred.

What Section 97 (2) literally means is that an election of a Member of Parliament can only be avoided if its proved to the satisfaction of

the High Court that such candidate or with his knowledge and consent or approval or that of his election or polling agents committed corrupt practices, illegal practices or other misconduct. It is however not enough to just prove the commission of these corrupt or illegal practices but by the use of the conjunctive word **“and”** in the said section entails that it must also be proved that as a result of such illegal practices the majority of voters in a constituency were or may have been prevented from electing the candidate of their choice. This in fact is what constitutes the cause of action in any election petition where a candidate has been declared a winner. This was earlier held to be the position by the Supreme Court in the case of **AKASHAMBATWA MBIKUSITA LEWANIKA & OTHERS VS FREDERICK JACOB TITUS CHILUBA** when dismissing the presidential petition as follows:-

“As to the allegations of bribery and corruption the government’s established programme of selling council houses, which was taken advantage of by discounts in an election year, did not amount to the corruption practices of bribery... it was doubtful whether the house sales could have significantly affected the election results in a nationwide constituency ... it had not been shown that it prevented the majority of voters from electing the candidate of their choice.” (Underlining for emphasis)

In the same **AKASHAMBATWA MBIKUSITA LEWANIKA** case, the Supreme Court went further when dealing with allegations of

irregularities and malpractices, to reiterate the “majoritarian principle” when it held as follows:-

“As to allegations of irregularities, although there was some evidence of irregularities and malpractices, there was no evidence that the respondent personally or his lawful election agent was privy to them. In any event, it was not established that the proven irregularities were such that nationally the majority of the voters were or might have been prevented from electing the candidate of their own choice or that such irregularities affected the election result to any significant extents.” (Underlining for emphasis)

Similarly, in case of **ANDERSON KAMBELA MAZOKA & OTHERS VS LEVY PATRICK MWANAWASA**, the Supreme Court dismissed the presidential petition on the basis of the majoritarian principle even when the petitioners had proved six (6) of their allegations. Incidentally, this case involved the leader of UPND at the time, the Party that the Petitioner herein belongs to. The Supreme Court categorically held inter alia that;

“According to the findings, 30 allegations out the 36 were not proved. The few partially proved allegations were not indicative that the majority of the voters were prevented from electing the candidate whom they preferred or that the election was flawed that dereliction of duty seriously affected the result which could no longer reasonably be said to reflect the true choice and

free will of the majority of the voters. (Underlining for emphasis)

It follows, therefore, that the fundamental principle of law that can be distilled from these two authorities and many others is that the election results should not be challenged merely because one lost but rather only in those circumstances where it is demonstrative that the conduct of the winning candidate or that of their registered agents and with their knowledge, consent or approval, was such that the majority of the voters were or may have been prevented from voting a candidate whom they preferred. And it is not surprising in this regard that the Supreme Court never missed an opportunity in those cases to pronounce itself on the standard of proof required to sustain an election petition.

In the **AKASHAMBATWA** case, the Supreme Court held that parliamentary election petitions are required to be proven to a standard higher than a mere balance of probability. And in the **ANDERSON MAZOKA** case the Supreme Court had this to say:-

“It follows that for a petitioner to succeed in the present petition, the petitioner must adduce evidence establishing the issues raised to a fairly high degree of convincing clarity in that the proven facts and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred...”

It is self-evident on the available evidence before me and these are my findings of fact that both the Petitioner from UPND and the 1st Respondent from PF were among the Parliamentary candidates for the Roan Constituency in the August 11, 2016 presidential and general elections. The 1st Respondent got 11,397 votes and was declared the duly elected Member of Parliament while the Petitioner got 5,099 votes. The votes the other candidates from Rainbow, FDD and the Independent got remained unknown in these proceedings. It is also not in dispute that the 1st Respondent remained in office as Minister of Information and Broadcasting as well as the Chief Government Spokesperson during the campaign period and he was covered in the media. It is equally not in dispute that the 1st Respondent was using a hired helicopter registration number ZS-RZR for campaigning and had addressed meetings at Roan Antelope Secondary School, Nkulumashiba High School, Mpatamato Sports Complex Hall and at Kalulu Primary School. It is also common cause that there were 1000 youths engaged by INFAC to conduct a sensitization exercise on the referendum who were not paid their allowances and also that the Petitioner runs an NGO. It is also common cause that 1640 miners from Luanshya Copper Mines (LCM) were sent on forced leave in 2015 and they subsequently received letters of offer of residential plots from Luanshya Municipal Council.

What seems to be in dispute, however, are what the 1st Respondent is alleged to have said or done at these meetings and when same were held. It is also disputed that the 1st Respondent in his position

of influence as a Minister abused government and parastatal resources for his own benefit and that of the PF.

Given that the disputes arise from the not so disputed facts, this Petition clearly turns on the credibility of the witnesses. In assessing their credibility, I will focus on the particular allegation raised and on the peculiar testimony of each witness to either substantiate or in defence. I will begin with the Petitioner's evidence because he is the one who bears the onus of proving his allegations to a fairly high degree of convincing clarity.

There is no doubt, and this the Petitioner graciously conceded, that he had no personal knowledge of most of the allegations he raised but rather he was merely told by his agents. What is within his personal grips is the allegation that the 1st Respondent abused his position and influence as a Minister because he remained in office during the campaign period. His contention is that the 1st Respondent used government resources by drawing his emoluments and attendant benefits and privileges pertaining to the office. The Petitioner also contended that the 1st Respondent used his position and influence to advance his propaganda and that of the PF to the exclusion of others for which he was widely covered both in the print and electronic media.

It remains to be seen that the Petitioner's allegations as particularized under paragraph 4A of his Petition are anchored on the Selected Judgment No. 29 of 2016 of the Constitution Court in the case of **STEVEN KATUKA & LAZ VS THE ATTORNEY GENERAL, NGOSA SIMBYAKULA AND 63 OTHERS** to the effect

that at dissolution of Parliament, Minister also ought to have vacated their offices. This is even the reason the Petitioner produced the newspaper articles on pages 3 and 19 of his bundles relating to the President's decision to have Ministers remain in office and the Constitutional Court Ruling on the same respectively. Under the first limb of this complaint, the Petitioner, did not prove that a Cabinet meeting was held and the 1st Respondent attended same and participated in the decision for Ministers to remain in office.

To the contrary and as pleaded and testified by the 1st Respondent, the decision to appoint and disappoint Ministers remains the prerogative of the President under Article 116 of the Constitution as amended. Thus it was not enough just to rely on the Ruling of the Court or draw inferences therefrom. The Petitioner ought to have proved in what manner the 1st Respondent had abused government resources as a result of his continued stay in office. Above all, this was not an individual decision that was made by the 1st Respondent but was one that was made by the appointing authority. Not forgetting that some of the other Ministers who had equally remained in office lost their elections.

Connected to the issue of having stayed in office, the Petitioner complained about the helicopter given by the President. His complaint was that when the 1st Respondent and his campaign team told the gathering that he had been given the same by the President, it was not specified that it was the PF President who had

given him. Of course the Republican President and the PF President is one and the same person.

The 1st Respondent in his testimony stated that the PF Party had hired 8 helicopters from South Africa and he was one of the privileged few members of the PF Central Committee involved in long distance campaigns who were assigned the use of the helicopter. But he denied that the helicopter was procured using government resources rather it was the PF using its own resources as per the Corporate Air Invoice appearing as document number 5 in his bundle of documents. Otherwise it can reasonably be concluded that had the 1st Respondent mentioned that the PF President had given him a helicopter which was hired using PF money, he would not have raised any issue with it.

The Petitioner also contended that the 1st Respondent abused his position and influence as Minister and applied the public media to himself and his PF Party as their propaganda tools to the exclusion of other competitors. As proof of this allegation, the Petitioner relied on newspaper articles he produced from pages 3 to 19 of his bundle of documents. The 1st Respondent denied this allegation and his position was that he only issued statements for and on behalf of government as its Chief Spokesperson. And where he was campaigning, he only campaigned as a member of central committee of PF and not as government. Again the 1st Respondent's position was that he had no control whatsoever over the running of the public media and neither did he have any control of what the reporters decided to cover. He explained that his office as Minister

is to provide government policy regarding both public and private media and their day to day running of their business were conducted by their respective Boards of Directors, Management and editorial teams.

I now proceed to review the articles complained of in the Petitioner's bundle of documents. The article on page 3 entitled "*Parley dissolves, Ministers Stay*" which appeared on 12th May 2016 in the Zambia Daily Mail has nothing to do with the 1st Respondent but it was about the Republican President when he dissolved Parliament and decided that Ministers stay in office. Regarding the articles which appeared on 13th May 2016 in both Zambia Daily Mail and Times of Zambia entitled "*Kambwili Warns Rabble-rouser GBM*" and also "*Kambwili canes GBM*", it is clear that in those articles the 1st Respondent was quoted in his capacity as Chief Government Spokesperson. In those articles the 1st Respondent was reacting to the call by Geoffrey Bwalya Mwamba (GBM) the UPND Vice President who had been reported to have called on people to effect citizen's arrest on Ministers who had remained in office after dissolution of Parliament. I have read through those articles and I am satisfied that there was no mention of Roan Constituency and neither was the Petitioner scandalized.

Coming to the article on page 6 which appeared in the Zambia Daily Mail of 18th May 2016 entitled "*Take Legal action, ECZ accusers told*". In this article too the 1st Respondent was responding in his capacity as Chief Government Spokesperson to the people who were accusing ECZ to have registered foreigners advising them to take

legal action against ECZ. Again in this article I did not find anything against the Petitioner or relating to campaigning for Roan Constituency.

On the article on page 7 whose title is incomplete but just reads "*Kabwili Con ...*" as it was cut, it related to the internal affairs of PF regarding the adoption of their candidates. In that article the 1st Respondent commended his Party President for taking the initiative to meet with his party's unsuccessful aspiring candidates to foster unity in their party. Again that article had nothing to do with the Petitioner or Roan Constituency.

The other article complained of is on page 8 which appeared in the Zambia Daily Mail of 6th June 2016 entitled "*HH, GBM combination uninspiring*". That article was about the interview that the Fourth Revolution (4R) party president **ERICK CHANDA** had concerning HH's adoption of GBM as his running mate which led Canisius Banda go into "*prayer*" for 48 hours. The 1st Respondent said nothing in that article whatsoever for it to be attributed to him as having painted a bad image about UPND leadership.

Although the article on page 9 which appeared on 13th June 2016 in the Times of Zambia whose title is not clear is attributed to the 1st Respondent, that article was reporting what the 1st Respondent had said at a public rally in Kitwe's Kwacha East Township. This indeed was at a PF campaign rally and naturally the 1st Respondent was within his rights to campaign for the political party that he belonged to especially that nothing was said about the Petitioner or Roan Constituency.

On page 10 is an article which appeared on 22nd June 2016 in the Zambia Daily Mail entitled "*HH, GBM Clumsy, you don't fix what is not broken, Lungu.*" The Title of this article say it all. It was the President himself who said those words at a campaign rally in Chongwe and not the 1st Respondent nor was the Petitioner or Roan Constituency mentioned therein.

On page 11 under the title "*No Hand in Post Closure*" the 1st Respondent gave a statement in his capacity as Chief Government Spokesperson responding to the allegations that the government had influenced Zambia Revenue Authority (ZRA) to close the Post Newspaper for its failure to pay taxes. Again in that article the Petitioner and not even UPND was mentioned or Roan Constituency.

And on page 12 is an article entitled "*PF Govt has linked all towns – Kambwili.*" In that article, the 1st Respondent was reported on his interview when he had featured on SUN FM Radio in Ndola where he generally talked about the successes that PF had scored since it took over the reins of power. There was nothing adverse that was mentioned about the Petitioner or his party UPND.

Yes articles on pages 13 and 14 which appeared in the Zambia Daily Mail of 11th July 2016 and 19th July 2016 entitled "*Mumbi's comment personal – State*" and "*Mines to resume operations, says Kambwili*" respectively, the UPND Party and its leadership were mentioned by the 1st Respondent not in the headline but in the body of the articles.

In relation to the articles on page 15 which appeared in the Zambia Daily Mail of 5th August 2016 entitled "*UPND's behavior irks PF*" was not issued by the 1st Respondent but it was the PF aspiring Councilor in Livingstone who was condemning the behaviour of the UPND supporters who were hijacking and maliciously damaging ECZ motor vehicles. This too was not attributable to the 1st Respondent.

As for the article on page 16 which appeared in the Zambia Daily Mail whose date was not provided entitled "*Ignore doomsayers, urges Kambwili.*" In that article the 1st Respondent never mentioned the names of the opposition leaders who had teamed up to discredit President Lungu during an interview he gave in Kitwe. Here again the Petitioner nor the party UPND or Roan Constituency were never mentioned but he was quoted as Chief Government Spokesperson.

Concerning the article on page 17 which appeared in the Zambia Daily Mail of 9th August 2016 entitled "*GBM bashed church, politicians demand respect for Head of state*", it was not by the 1st Respondent but rather it was Church groupings and other politicians who were condemning UPND's Vice President GBM's insults against President Lungu. In fact in that article UPND Secretary General Stephen Katuka was even quoted defending the party that it did not encourage the use of unpalatable language.

And finally the article on page 19 which appeared in the Zambia Daily Mail of 9th August 2016 entitled "*Zambia managed better economically-Kambwili*" was reporting of the special Sunday Interview that the 1st Respondent had on ZNBC. In that article

UPND was not mentioned not even Roan Constituency nor the Petitioner.

I have delved into these newspaper articles in detail because the Petitioner complained that the 1st Respondent painted a bad image about him and his UPND leadership and the people who read had a negative attitude about UPND and his candidature. Similarly, the Petitioner contended that by the 1st Respondent being reported in the media exerted influence on the voters in Roan Constituency to his disadvantage.

Well it is for everyone to see if indeed those articles were campaigns in Roan Constituency. Most importantly those who read them never got any negative image about UPND nor his candidature and that was why he had even emerged the winner at one polling station.

Sight should not be lost about the issue of the Petitioner's access to the media. The Petitioner did concede that he never went to any media house and neither was he stopped from going there nor were his campaign material rejected. It becomes as clear as day light that his "*media blackout*" was his own doing and cannot be blamed on the 1st Respondent which in any case he failed to prove. The instances of his encounter with only two journalist throughout the campaign period is so insignificant on which to build any allegation of the 1st Respondent denying access to other competitors which like I said was not even proved. Similarly the two articles I have found in which reference was made to UPND leadership by the 1st Respondent fell under headlines which were not scandalous in any way and the reader understood the import of those articles.

Could those articles have influenced the people's perception of the Petitioner, I do not think so.

I now turn to the allegation that the 1st Respondent used his authority and influence as Minister and held two meetings with the teachers on 3rd August 2016 at Roan Antelope Secondary School and Nkulumashiba High School where he distributed campaign materials and promised the teachers plots. This allegation was denied by the 1st Respondent who stated that he was invited by an association of teachers called National Association of Teachers Against Corruption (NATAC) for a Debate/Talk. He produced letters appearing on pages 6 and 7 of the 1st Respondent's bundle of documents.

The contention by the Petitioner's is that this was not a debate because he was not invited otherwise he would have attended. On the letter of invitation on page 6 addressed to the UPND, his contention was that he never received such an invitation letter. The 1st Respondent called Mr Jabes Mumba as RW2 the Executive Secretary of NATAC who testified that all the aspiring candidates were invited on separate dates and he personally delivered the invitation letter to UPND secretariat and served it on a Mr Moses Kayombo who assured him that the letter would be given to the 1st Respondent. I have looked at the invitation letters they are just addressed to the Aspiring candidates and no names are mentioned. The invitation was for a Talk and not a debate. In fact the Petitioner was invited to such a Talk on 2nd August 2016 and therefore there is no way that he could have debated with the 1st Respondent who

was invited on 3rd August, 2016. What is, however, fundamental about this claim is that the Petitioner does not say it was wrong to meet the teachers but that he was not informed about the Talk otherwise he too would have attended and sold himself to the electorate. I am satisfied that the invitation letter for the Petitioner was delivered as the name of the recipient was not disputed or challenged in any way in RW2's cross examination. I am also satisfied that the topics discussed as testified by RW2 were confined to the invitation letters and the issue of the plots arose in the question answer session. In any case it was not shown that all these teachers were residents of Roan Constituency and neither was it shown that it was a bogus Association. The claim that PF regalia was distributed was not proved as none was produced in Court and no witness who had received same was called to testify.

Regarding the meeting with the miners at the Mpatamato Sports Complex hall, firstly it was established that the 1st Respondent had meetings with the concerned miners. These miners were placed on forced leave and they were the ones who had requested him to intervene in their plight. To prove this allegation, the Petitioner called Mr Modern Hachingala PW9. According to PW9, the 1st Respondent called this meeting on 15th July 2016 and he distributed the offer letters to all the 1640 miners between 14:00 hours and 17:00 hours. I must observe here that the number 1640 represents a mountain of over 3 reams of paper, which feat was allegedly single handedly accomplished by the 1st Respondent in a record time of less than 3 hours. PW 9 alleged that when the 1st

Respondent was giving out this mountain of over three (3) reams of offer letters, he was saying to each recipient *'I want a vote'*. These allegations were denied by the 1st Respondent and he called Deophilly Kasonde, RW5 who was a Mine Shop Steward. RW5 explained that the 1st Respondent in 2015 after the miners had requested for his assistance to look into their plight following their forced leave, he told them that he had no authority over land and assured them that he would table the issue before the Republican President. And indeed they were later informed that the President had agreed and directed the Council to secure residential plots and were requested to submit their details together with their letters of forced leave and copies of NRCs to the Council which they did. That these letters were given to them on 12th May 2016. That at that occasion the 1st Respondent only addressed them for a few minutes that the government had fulfilled its promises and left. RW5 insisted that the said letters were not distributed by the 1st Respondent but by officials from the Council and the exercised was carried out over a period of four (4) days. Already the version of the same event as narrated by PW9 and RW5 are different. What is of interest and material to these proceedings is that PW9 conceded in his cross examination that before they received the offer letters he already knew that they would receive the plots. He, however, did not mention when exactly he came across such information if not at the times as testified by RW5. I found PW9 not a credible witness because he was economical with the truth. Strangely, even if PW9 characterized offer letter as not a plot but a mere paper which he disowned that it was meant to entice the miners for votes because

he had not applied for a plot nor was he interviewed by the Council as per the procedure. He nonetheless refused to let go of the offer of the plot for which he was grateful and insisted he needed the plot as the offer constituted the agreement between the miners, the 1st Respondent and the Council. According to him, this agreement was reached long before there was even a campaign. I am satisfied that this claim was not proved in so far as it was alleged that the plots were used as an inducement for votes. Firstly, as it came out in RW5's cross examinations, these 1640 miners did not come from Roan Constituency but also came from Luanshya Constituency. How then can the 1st Respondent be asking people who are not from his constituency to vote for him? Similarly, how feasible was it that the 1st Respondent could personally distribute all the 1640 offer letters within three (3) hours? I believe the evidence of RW5 that these offer letters were distributed by Council officials over a period of four (4) days beginning 12th May 2016 long before even the 1st Respondent became a candidate and long before there were elections. The mere fact that the exercise was put on hold, does not necessarily follow that this was a campaign issue. I am satisfied that this was a government programme intended to cushion and alleviate the sufferings of the miners and I take judicial notice that it was not just peculiar to Luanshya but to other Copperbelt towns as well.

It was held in the case of **MATILDAH MACARIUS MUTALE VS SEBIO MUKUKA** that distribution of a government programme however bad the timing, did not amount to corrupt practice or

illegal practice warranting the nullification of the election of a candidate. By these offer letters produced by the Petitioner himself who had been a Mayor before, clearly show that the decision to offer the miners residential plots was made in a Council meeting way back in February under Minute Number LMC/PWD & REC/314/02/16. There was no contrary evidence produced by the Petitioner to the effect that no such Council meeting was ever held.

Coming to the allegation concerning the Zamtel t-shirts, this claim was not proved which led to rejection of admission of the said purported t-shirts into evidence. Firstly, the Petitioner alleged these t-shirts were distributed in Roan Constituency in Luanshya and were rebranded by the 1st Respondent for which his campaign manager was alleged to have had more information. The said t-shirts were purported to be those discovered and produced in the Petitioner's bundle of documents on pages 20 and 21. The Petitioner however admitted that the t-shirts he had identified in Court were not the same as those he had discovered in Court. In fact the Petitioner's campaign manager Lloyd Chibombya actually confirmed that the t-shirts that were identified in Court were gotten from Lusaka and not Roan Constituency from an unnamed source. The 1st Respondent denied this allegation and he even demonstrated that on page 20 of the Petitioner's bundle of documents underneath the said t-shirts there is a blue item with inscription "*HH will Fix it*". The strange thing about this t-shirt was that the Petitioner knew how the rebranding was done. Surely, if these t-shirts were distributed in Roan Constituency, such t-shirts

could have been easily obtained and produced in Court without manufacturing new t-shirts. I find that this claim too has not been established and I am satisfied that the 1st Respondent never used any parastatal resources.

I now turn to deal with the allegations of corruption and bribery under paragraph 4B of the Petition. Under this head, the 1st Respondent was alleged to have addressed a group of 1000 youths who were engaged by INFAC and canvassed for votes and promised them the sum of K1,000.00 each. The testimony of the Petitioner was that a few days before elections he met a group of these youths about 100 who were protesting and were violent and some of them had no shirts on. That he addressed them and pleaded with them not to be violent but to go and talk with the people who had swindled them money calmly. Further that afterwards he met two (2) of them who told him that they had been to the 1st Respondents residence and he canvassed for votes, gave them K30 and promised to give them K1000 each if they voted for him. In support of this allegation, the Petitioner called Doreen Nakanyika, PW7 who was one of those 1000 youths. Her testimony was that they were only 78 youths who had gone to the 1st Respondent's residence after they had requested to see him to help them get their money. She also testified that they were given K30 and were promised to be given K1,000 each if they voted for him and that was why she had voted for him and now she was expecting the 1st Respondent to pay her the K1,000. PW7's evidence dramatically differed with that of the Petitioner. Whilst the Petitioner said the 1st Respondent met 100

youths, PW7 said they were just 78 even less than the 100 that he alleged he had met. While the Petitioner alleged that these youths were entitled to receive K500.00 from INFAC PW7 said their entitlement was K5,000.00. Whilst the Petitioner testified that he met the youths and addressed them, PW7 stated that they just saw him and never addressed them. PW7 also claimed the 1st Respondent gave them PF regalia, but she never produced any such regalia that she had received from the 1st Respondent.

Indeed this allegation is very startling. There is no doubt that it was the youths themselves who had requested to meet with the 1st Respondent. In fact these youths had been violent and in my mind the 1st Respondent was seen and in fact was the pacifier of this seemingly volatile situation such that the youths were ferried under Police protection to his residence. The Respondent denied these allegations and said he met only four (4) from the group and advised them to go and report the matter to the Police. The truth of the matter is that the 1st Respondent never met 1000 youths as alleged. PW7 stated that they were only 78 and she knew the total number because they were counted outside the 1st Respondent's residence by the people who gave them the PF regalia and K30. In cross examination PW7 admitted that these youths came from all over the Copperbelt and it was not reasonable for the 1st Respondent to canvass votes from people who were not from his own constituency.

Again under this head, it was alleged that the 1st Respondent's agents were caught giving money on the voting day to the voters at

Mangano and St Thomas Catholic Church Polling Stations. Concerning the Mangano issue, it was alleged that one Billy Chanda, Roan PF Youth Chairperson was caught by PW6 Yorum Mukuni, the Petitioner's Polling Agent. His testimony was that while he was inside the polling station, Malama from Rainbow Party informed him that Billy Chanda was giving money outside. That he then went out and found a lady by the name of Priscilla Mukuka asking Billy to give her what he had promised now that she had voted. He alleged that she was given K30 which money Billy got back and were both taken to the Police. On this allegation, it was not proved that Billy Chanda was the 1st Respondent's registered agent and neither was it established that the money came for the 1st Respondent or whether it was given with his knowledge, consent or approval. The fact that these people they took to the Police were released their release cannot be attributed to the 1st Respondent. In any case these are people known to them but they have decided to follow the matter or take the Police to their own home. The same considerations apply to the alleged incident at St Thomas, where people very well known to PW4 and PW5 and where they stay have not been pursued.

Regarding the St Thomas incidence, I find major contradictions in the testimonies of both PW4 and PW5. They differ as to how many they were in the car between 4 or 5, about the distance as to whether it was 20 metres or just a metre from where they parked their car and where the alleged ladies sat. Although the Petitioner alleged in his petition that the persons who reported this incidence

to the returning officer and the Police was Abstone Mubanga together with PW5, and yet it was actually PW4 alone who had reported. There was also a contradiction in that PW4 said that he only came back with the Police Officer, PW5 insisted that he came back with both the Police Office and the Presiding Officer Ms. Moonga. Not forgetting their contradiction as to the time they spent at the polling station in issue. PW4 said they left after 14:00 hours while PW5 said they left after 12:30 hours because they only stayed there for about 30 minutes.

Despite the differences in their testimonies, PW4 and PW5 were in agreement that they only witnessed a single act of alleged bribery. Given the many contradictions, I am not satisfied that the alleged act of bribery actually took place. But if the incident indeed happened which is doubtful, I am still satisfied that it was not on a large scale especially that the perpetrators left the polling stations.

And finally there was an allegation that the 1st Respondent addressed a meeting at Kalulu Primary School on the 8th of July 2016 where he was alleged to have uttered tribal remarks concerning HH and the UPND leadership. That at the same meeting he also practiced politics or regionalism and made false accusations against the Petitioner about misappropriating money for the NGO and abandonment of the sponsored students at colleges. Although the 1st Respondent admitted holding such a meeting, he denied that same was held on the 8th of July 2016 as he was out of Luanshya. He also denied having made false accusations against the Petitioner

or uttering tribal or regional remarks against HH and the UPND leadership.

To prove these claims the Petitioner called PW2 and PW3 who attended the said meeting as per their testimonies summarized above. To refute this claims, the 1st Respondent called RW3 and RW4 who testified that they were with the 1st Respondent in the Northern Province from the 4th of July 2016 to the 17th of July 2016. Since the 1st Respondent admitted holding such a meeting, in my view it matters not what the exact date was. The 1st Respondent explained that he mentioned HH and GBM in response to their claim when they visited Luanshya that they would reduce the cost of living especially the cost of meat and mealie meal. That he only wondered as to how the two would do that since the price of beef and mealie meal were still high and yet the two were major suppliers of the same. He denied making tribal remarks against HH and worse off against GBM who was his tribesman. He equally denied making any regional remarks against the Petitioner. He explained that he was merely stating the obvious by pointing out that the Petitioner came from Northwestern Province and he was better suited to develop Luanshya because he was a product of Luanshya.

On this issue, I find that PW2 and PW3 were consistent in their testimonies and taking into account the 1st Respondent's explanation, I am satisfied that the remarks made were tribal and regional in nature. This allegation has therefore been proved. What is of prime importance however, is the effect, if any such tribal and

regional remarks had on the majority of the people of Roan Constituency. The witnesses who testified as to the effects of such remarks were the same PW2 and PW3. PW2 testified that he had known the Petitioner as an honest man who had actually dismissed those allegations against him. However, PW2 testified that he ended up voting for the 1st Respondent as opposed to the Petitioner on account of the remarks made at this meeting. As for the presidential and local government candidates, he still voted for the UPND candidates. PW3 on the other hand was not influenced in any way as he voted for the candidates of his own choice at all levels.

For if out of these two people, only one was affected at one level only, it shows that the majority were not prevented from voting for a candidate whom they preferred. It is even doubtful if PW2 voted for the 1st Respondent because there was no proof to that effect. And if he did, the reason for doing so were not formed by those remarks but had more to do with his undecided membership with UPND and was attending both UPND and PF rallies and maybe the messages by the PF persuaded him to vote otherwise. I am satisfied that PW2 had PF leanings because even in Court he said he was in court as a witness on behalf of the both political parties.

After analyzing the evidence before me and assessing the credibility of the witnesses, I bear it in my mental spectacles once again that the Petitioner and not the 1st Respondent bears the onus to prove his allegations to a fairly high degree of convincing clarity. Thus it is not about what the 1st Respondent failed to prove in his defence as was characteristic of the cross examination of the 1st Respondent's

witnesses especially RW2 and RW5 where they were taken to produce documents to support their testimonies. I must say this was fruitless labour as our court rules of procedure is that it is the parties to the case and not their witnesses who discover and produce documents. And if the other party want a certain document to be produced, that party is entitled to serve upon the other party a notice to produce the document in issue. There is no such notice to produce that was issued by the Petitioner requiring the 1st Respondent to produce the documents they wanted to see. I must additionally say that was tantamount to shifting the burden of proof on the 1st Respondent.

It has long been settled, and the wise words of the Learned Ngulube, DCJ as he then was, in the case of **WILSON MASAUSO ZULU VS AVONDALE HOUSING PROJECT LIMITED** shall continue ringing in our minds. In that case, His Lordship opined as follows:

“It appears that the appellant is of the view that the burden of proof lay upon the respondent and it is on this that I would like to say a word. I think it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent’s case.”

In short, he who alleges must prove! Has the Petitioner proved his allegations to the requisite standard? It is difficult in the circumstances of this case for one to say that the Petitioner has really proved his allegations. To a large extent, the Petitioner's case as pleaded in the petition is at variance with the evidence that he adduced. Significantly, the Petitioner alleged that the 1st Respondent met and addressed 1000 youths who had not been paid their K500s and solicited for votes from them. The evidence from his own witness was that only a handful of 78 youths went to the 1st Respondent's residence and the amount they had been swindled was not K500 but K5, 000.00. The Petitioner also alleged that the St. Thomas incident was reported to the presiding officer by Abstone Mubanga and Gertrude Kashimbo (PW5). And yet the evidence from Gertrude herself was that it was Stephen Phiri (PW4) alone who reported to the presiding officer.

My predecessors, who sat in these same courts and whose robes of justice I have inherited, long dealt with the effect of the evidence being at variance with the pleadings. Chirwa J, as he then was, in the case of **CHRISTOPHER LUBASI MUNDIA VS SENTER MOTORS LIMITED** held as follows:

“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Where the pleadings are at variance with the evidence adduced in court, the case fails since the plaintiff's case

is completely re-cast without actual amendment of the statement of claim, and not only will the court record be incorrect as a reference thereafter but the other party will be unable to meet the case having had no correct notice."

I wish also to comment on the direction some cross examination took where witnesses were put to task over their evidence on matters which were not pleaded. It is trite law as was held by the Supreme Court in the **ANDERSON MAZOKA** case cited above as follows:

"In cases where any matter not pleaded is let in evidence, and not objected to by the other side, the Court is not precluded from considering it. The resolution of the issue will depend on the weight the court will attach to the evidence of unpleaded issues."

Given the totality of the evidence before me, and bearing in mind my findings, can it be said that the majority of the electorates in Roan Constituency were robbed of the opportunity to elect a person of their own free will and choice? There is no doubt that there was a wide difference of over 6000 votes between the Petitioner and the 1st Respondent. But sight should not be lost that the alleged corrupt practice took place on the voting day at only two polling stations, Mangano and St Thomas, of a one off incidence each. It could not therefore be reasonably said that the election was so flawed that the defects seriously affected the results which no longer represented the true free choice and free will of the majority of the voters in

Roan Constituency. For the above reasoning and conclusions, I find and hold that the Petitioner has failed to prove his petition to the requisite standard and it lacks merit.

Although costs are in the discretion of the Court, the exercise of such discretion in election petitions is regulated by Section 109 of the **Electoral Process Act, No. 35 of 2016**. The primary issue to consider in my view is whether any of the parties had been guilty of vexatious conduct in the presentation and trial of the petition. And in this petition, I have not found any such vexatious conduct.

In the result this petition is dismissed and it is hereby determined that **DR CHISHIMBA KAMBWILI** was duly elected Member of Parliament for Roan Constituency.

It is further ordered that each party shall bear its own legal costs.

Leave to appeal to the Constitutional Court is hereby granted.

Dated at Ndola this 11th day of November, 2016.


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C. CHANDA
JUDGE

