

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA

(Civil Jurisdiction)



IN THE MATTER OF: ARTICLE 73(1) OF THE CONSTITUTION OF  
OF THE REPUBLIC OF ZAMBIA

AND

IN THE MATTER OF: SECTION 96(1) OF THE ELECTORAL  
PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: MONGU CENTRAL PARLIAMENTARY  
CONSTITUENCY ELECTIONS HELD IN  
ZAMBIA ON 11<sup>TH</sup> AUGUST, 2016

B E T W E E N:

JOSEPH MULYATA

PETITIONER

AND

MWILOLA IMAKANDO

RESPONDENT

BEFORE THE HON. MRS. JUSTICE P. K. YANGAILO IN OPEN COURT ON  
5<sup>TH</sup> DAY OF OCTOBER 2016

*For the Petitioner:*

*Mr. L. Mayembe - Messrs KBF & Partners*

*For the Defendant:*

*Ms. M. Mushipe - Mesdames Mushipe & Associates*

*Mr. N. N. Inambao - ICN Legal Practitioners*

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## J U D G M E N T

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**CASE AUTHORITIES REFERRED TO:**

1. *Michael Mabenga Vs. Sikota Wina and Others (2003) ZR 110;*
2. *Mlewa Vs. Wightman [1995] ZR 17;*
3. *Misheck Mutelo Vs. Eileen Mbuyana Imbwae SCZ Appeal No. 113/2012;*
4. *Alex Codman Luhila Vs. Batuke Imenda 2002/HP/0012;*
5. *Kalenga Vs. Munshya, Electoral Commission of Zambia and The Attorney General SCZ Appeal No. 115 of 2012;*

6. *Reynold Chanda Bowa Vs. Puma Energy [Ireland] Limited [2011] ZR 481;*
7. *Michael Mabenga Vs. Sikota Wina, Mafo Wallace Mafiyo & George Samulela SCZ Number 15 of 2003;*
8. *Priscilla Mwenya Kamanga Vs. Attorney General, Ng'andu Magande (2008) ZR 7 Volume 2;*
9. *Mazoka and Others Vs. Mwanawasa & Others (2005) ZR 138;*
10. *Lewanika & Others Vs. Chiluba (1998) ZR 79;*
11. *Christopher Kalonge Vs. Annie Munshya 2011/HK/EP/03;*
12. *Phillip Mutantika & Mulyata Sheal S. vs. Kenneth Chipungu & ECZ - 2011/HP/EP/42*
13. *Enock Maseka Kaleka vs. Carlos Jose Antonio & ECZ - 2011/HP/EP/017*
14. *Chizonde vs. The People (1975) ZR 66*
15. *Emmanuel Chilubanama vs. Felix Mutati SCZ NO. 8 of 2012*
16. *Henry Sinkala vs. ECZ & Daudi M. Mukwasa*

**LEGISLATION AND OTHER WORKS:**

1. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*
2. *The Electoral Process Act No. 35 of 2016*
3. *Halsbury's Laws of England 4<sup>th</sup> Edition Volume 15*
4. *Black's Law Dictionary by Bryan A. Garner, 2004, Eighth Edition West Publishing Co.*

On 26<sup>th</sup> August, 2016 the Petitioner, JOSEPH MULYATA, who was an unsuccessful candidate in the Mongu Central Constituency Parliamentary Elections held on 11<sup>th</sup> August, 2016 having been adopted by his political party, the Patriotic Front (PF), caused to be filed a Petition challenging the election of the Respondent as area Member of Parliament for Mongu Central Constituency in the Western Province of Zambia, on the ground that the Respondent MWILOLA IMAKANDO, from the United Party for National Development (UPND), was not validly elected. The five political parties that participated in the said election are United Party for National Development (UPND); Patriotic Front (PF); United National Independence Party (UNIP); Movement for Multi-Party Democracy (MMD); and Rainbow Party. The election results as declared by the Returning officer where as follows: -

- ii. That before the election, the Respondent engaged in violence which resulted in a PF member, campaigning on behalf of the Petitioner, being abducted and beaten by the Respondent's supporters, who held him captive overnight. Further, that the Respondent's supporters included the Respondent's campaign manager called Mr. Charles Akende. In addition, that the Petitioner and the Mayoral candidate for the Patriotic Front had their cars broken by the Respondent's supporters thus creating a climate of fear aimed at intimidating the supporters of the Petitioner and preventing them from openly supporting and/or voting for the Petitioner;
- iii. That the Respondent engaged in misinformation and slander against the Petitioner meant to discredit and reduce the Petitioner's standing in the eyes of the electorate. He went on to add that the Respondent was continuously heard telling the electorate that the Respondent being Mbunda and not Lozi was unfit to be the area Member of Parliament. According to the Petitioner, these sentiments were repeated at a scheduled meeting in Mongu Central leading to all Mbunda tribes men walking out of the said meeting. Further, that the Respondent told the electorate that the Petitioner, if elected, would sell all the lakes in Western province to non-Lozis and give all the land to the government.

The Petitioner asserted that as a consequence of these issues the majority of the voters in Mongu Central Constituency were prevented from electing the candidate of their choice. By reason of the foregoing, the Petitioner prays that/for: -

1. A Declaration that the election of the Respondent as a Member of the National Assembly for Mongu Central Parliamentary Constituency is null and void;
2. A Declaration that the illegal practices committed by the Respondent and/or his respective agents so affected the election result that the same ought to be nullified; and
3. An Order that the costs occasioned by the Petition be borne by the Respondent.

The Petitioner filed an affidavit in support of the Petition on 26<sup>th</sup> August, 2016. The same is a repetition of the Petition and need not be reproduced here.

In response to the Petition, the Respondent filed into Court an Amended Answer wherein he stated that on 13<sup>th</sup> August, 2016 the Returning Officer from the Electoral Commission of Zambia in exercise of the power vested in him pursuant to the provisions of inter alia; **Section 72 (1) (b)** of the **Electoral Process Act No. 35 of 2016**, declared the Respondent as duly elected Member of Parliament for Mongu Central Constituency. The Respondent went on to state that he was duly and validly elected as Member of Parliament for Mongu Central Constituency as can be evidenced by his Party's popularity in all the wards without exception and the

voting pattern similar for all the UPND candidates at Presidential, Mayoral and Councillor levels.

It was stated by the Respondent, that neither the Respondent nor his servants were apprehended for paying residents of Mongu Central Constituency to surrender their NRCs and Voters' cards. Further, that the electorate were not induced in any way to vote in a particular pattern. In addition, that the said agent arrested for card buying confessed in the presence of Police Officers that he was in fact a PF member acting on the Petitioner's agents' instructions.

The Respondent asserted that the Petitioner's poor performance in the election is attributed to the fact that the Petitioner was engaged in the following acts of violence and electoral malpractices, namely:-

- a) that the Petitioner's agent/and servant was caught removing UPND campaign posters as such he was apprehended and taken to the Respondent's Campaign Manager Mr. Charles Akende, who instructed that the culprit be taken to the police immediately where he was detained, charged and now awaits trial before a court of law;
- b) It was stated that the Petitioner's agents/and servants damaged the rear screen of the Respondent's minibus and the matter was reported to the police who instructed that the said offender replace the damaged property;
- c) Further, that the Petitioner's agents/and servants threatened the Respondent's Constituency Chairman with violence during a meeting at the Harbour and the Petitioner was heard saying

that "Kinda should not support Mwilola a Lozi instead he should support his fellow Mbunda";

- d) That the Petitioner's agents and/or servants broke three teeth of the Respondent's security guard, a matter that was reported to the Police;
- e) that on 29<sup>th</sup> July, 2016 the Petitioner and his Mayoral candidate in the company of his campaign team and PF cadres provoked the Respondent by becoming a public nuisance by the gate of the Respondent's house in Mongu. The matter was reported to the police where in a joint meeting, the Petitioner was admonished and advised to avoid such provocative actions;
- f) that the Petitioner has a history of violence including pulling out a gun and threatening to shoot the then Vice Provincial Political Chairman and sending of MMD cadres to beat up members of the public at Mongu Community Hall in 2011 whilst serving as Mongu Central Member of Parliament;
- g) That in March, 2016, the Petitioner sent cadres to destroy the UPND offices in Mongu and on 12<sup>th</sup> March, 2016, the Petitioner sent cadres to destroy Kuomboka Restaurant situated at the main bus stop in Mongu.

Further, the Respondent contends that the Petitioner was engaged in misinformation and slander meant to discredit the Respondent to the electorate wherein he told the electorate that the Respondent was a foreigner, who did not have a house in Mongu, as such they ought not vote for him.

The Respondent stated that it was in fact the Petitioner and his agents that breached the electoral provisions in carrying out acts that included the following: -

- i. buying of animals and distribution of carcasses to Lulambo, Ndaou and Kama for redistribution among their communities;
- ii. distribution of ZMW200.00 to taxi operators at Imwiko Polling Station overspill North Park as inducement to vote for the Petitioner and on his party ticket;
- iii. giving of a bag of mealie meal each to a Mr. Shakadonga and Mr. Sindandumuna both of Katongo Ward in order for the said to vote in a particular pattern, which is and was for the Petitioner;
- iv. Further, that the Petitioner breached another electoral code of conduct in the week of elections when he donated money, over ZMW2,000.00, for the purchase of 20 iron sheets and poles for the construction of a community school at Namusa Polling Station.

It was stated that the Respondent was freely and fairly elected as Member of Parliament for Mongu Central without any vitiating factors and in accordance with the Constitution and the electoral regulations. Further, that in fact the Petitioner ought to be disqualified from contesting any by-election for not complying with the provisions of the **Constitution** and the **Electoral Process Act**.

The Respondent prayed that the Petition be dismissed with costs as it is frivolous and lacks merit.

The Respondent filed herein an Affidavit in Opposition to the Petition, dated 9<sup>th</sup> September, 2016, which is also a repetition of the Answer save for the following facts, namely that; the police managed to maintain a conducive environment in which parties could hold their campaign activities without fear or intimidation and that issues of concern were discussed and attended to by the Parties; that the Respondent did not discuss the sale of land or lakes in Western Province to non-Lozis nor giving of land to the government as the Respondent is fully aware that in Western Province traditional land is fully administered by the Barotse Royal Establishment; in addition that all meetings were graced by *Makishi* dancers, a sign that Mbunda speaking people were happy with the UPND campaign meetings in Mongu Central Constituency; and that the Respondent believed that the Petitioner's public image and standing declined as a result of the following :-

- i. the Petitioner was a key witness in identifying youths, who were believed to have participated in the January, 2011 Mongu riots, which angered the electorate as the Petitioner was then Member of Parliament, who ought to have protected them;
- ii. when the Petitioner lost the Mongu Central seat in 2011 he went and uprooted taps and water pipes that he had helped construct as a way of punishing the electorate for not voting for him;



- iii. the Petitioner defected to PF after having supported the UPND in the January 2015 elections, where he had taken a lot of defectors from the MMD, his previous party;
- iv. following the PF Parliamentary adoption process in which the Petitioner ousted the incumbent Hon. Nathaniel Mubukwanu, a number of PF members that supported the latter defected to UPND in protest and supported the Respondent's candidature; and
- v. that the Petitioner has a history of violence.

When the matter came up for trial, the Petitioner called six (6) witnesses. PW1 was Joseph Mulyata, the Petitioner herein. He stated that he filed herein the Petition against the Respondent owing to the fact that the Parliamentary Elections for Mongu Central Constituency were marred with violence, corruption, malpractice and intimidation. That some individuals were beaten and injured by UPND supporters on the Respondent's instruction. He went on to state that the individuals that were beaten include Miriam Njala, Joseph Kachana (PW5) and Levy Nawa Siwisha, who was killed. In addition, that some of the cases are in Court and that medical reports were issued indicating the various injuries sustained by those beaten.

It was PW1's testimony that PW5 was never the same after the beatings and he still has bruises to date as a result of the beatings. Further, that Levy Nawa Siwisha was killed, before the elections, by UPND supporters who were his neighbours. PW1 added that the atmosphere in Mongu Central Constituency was violent,

threatening and intimidating because of the beatings and killing that took place immediately before the elections.

PW1 testified that the corrupt practices occurred in many ways such as the giving of money to the electorate and Lozi traditional dresses (*Misisi* and *Liziba*) to some Indunas in Tapo, Namukelako and Nikatondo areas before the elections. Further, that this was meant to entice the electorate to vote for the Respondent.

PW1 stated that a UPND supporter called Mushobosho was caught with National Registration Cards (NRCs) and voters' cards, in Mongu Central Constituency, belonging to unknown individuals. Further, that when queried as to who the NRCs and voters' cards belonged to, the said Mushobosho stated that he was sent by the Respondent to collect them in exchange for money. PW1 went on to state that the said Mushobosho was convicted and sentenced for being in possession of eleven (11) NRCs and seven (7) voters' cards.

It was PW1's testimony that the Respondent was seen at polling stations in the company of his supporters, some of whom were clad in UPND regalia chanting UPND slogans, making Party symbol gestures and soliciting for votes from the electorates. Further, that the Respondent moved from one polling station to another on polling day soliciting for votes. He added that the polling stations the Respondent visited included Overspill Polling Station, Kanyonyo Polling Station, Mwiko Polling Station and Katomo Polling Station.

PW1 stated that Mongu Central Constituency had about forty-nine (49) polling stations for the fifteen (15) wards registered at the just ended elections.

It was PW1's testimony that during the campaign period, there was name calling and maligning of the Petitioner by the Respondent, who stated that being a Mbunda by tribe and not Lozi, PW1 was unfit to be the area Member of Parliament and was only fit to be a traditional dancer known as *Chikuza*, a *Likishi* dancer. Further, that the Respondent urged the electorate at a gathering in Mandanga ward not to vote for him on this account. He added that some of the Mbundas at the said gathering, having felt offended by those remarks, walked out. PW1 went on to state that he did not subscribe to being called a *Chikuza* as he found it unacceptable, painful and offensive. Further, that Mongu Central Constituency is home to many tribes including Mbundas. In addition, that the electorate were convinced not to vote for PW1 as he was said to be a *Chikuza*.

PW1 urged the Court to nullify the election of the Respondent as area member of parliament for Mongu Central Constituency owing to the irregularities and malpractices that marred the said election.

Under Cross examination PW1 testified that he had contested the Mongu Central Parliamentary seat on four (4) occasions; in 2001 under the FDD, in 2006 under the MMD, in 2011 under the MMD and under the PF in 2016. Further, that he only won one of these elections under the MMD in 2006. He added that during the

Presidential by-election in 2015 he was a member of the MMD but supported the UPND.

PW1 testified that he does not recall announcing his defection to the UPND on radio in 2015. Further, that during the MMD primary elections he was adopted as the representative for MMD in the 2011 parliamentary elections for Mongu Central Constituency instead of the Respondent.

PW1 stated that he knew a person called Yowano Chisambwe, a Vice Constituency Chairman in the PF. Further, that the said Yowano Chisambwe was a member of MMD in 2011 and he campaigned for the said party that year. PW1 conceded, after having been shown a Judgment appearing at pages 46 - 49 of the Respondent's Bundle of Documents, that the said Yowano Chisambwe was convicted for assaulting the Respondent in 2011.

It was PW1's testimony that Yowano Chisambwe was his campaign manager in the just ended parliamentary elections. Further, that Levy Nawa Siwisha was killed by unknown UPND cadres who had been arrested. He went on to state that he did not know the exact date when the said Levy Nawa Siwisha was killed but that the post-mortem report does indicate the date and cause of death. He added that he did ask the Court to change the venue of the hearing on account of threats following the death of Levy Nawa Siwisha.

PW1 testified that the late Levy Nawa Siwisha was his potential witness. Further, that Joseph Kachana (PW5) was taken to the UPND centre in Mongu Central Constituency by UPND cadres who

beat him as instructed by the Respondent although he conceded that he was not there when these instructions were allegedly given by the Respondent. When it was put to him that he was the one who was in the habit of actually intimidating the UPND, PW1 testified that he does not have a history of intimidating UPND cadres, neither did he go to the Respondent's house to intimidate him.

When cross-examined on his allegations of corruption against the Respondent, it was PW1's evidence that the person who was given money by the Respondent was the person that was caught with NRCs and voters' cards. Further, that the person found with the NRCs and voters' cards told PW1 that he was given ZMW100.00 by the Respondent. When referred to the statement of facts appearing at pages 11 -18 of the Respondent's Bundle of Documents, PW1 conceded that the record did not indicate that the accused person received money nor chitenge material from the Respondent.

PW1 reiterated the fact that the Respondent gave lozi traditional dresses to some Indunas, who hailed from Tapo, Namukelako and Nikatondo areas. However, he conceded that he did not witness the giving of the traditional attires and never pleaded the said issue in his Petition. Further, he conceded that he did not see the Respondent at different polling stations on polling day and the said allegations were not pleaded. Neither did he see the Respondent showing UPND symbols at polling stations on polling day. He went on to state that he did not plead these issues as they came to his

attention after the originating process was already filed. He also conceded that he did not apply to amend his Petition and Affidavit.

It was PW1's testimony that he did not in fact witness the Respondent addressing a gathering in Mandanga, where he was allegedly called a *Chikuza*. He conceded that Mandanga was predominantly a Mbunda area and was aware of the fact that the people of Mandanga voted for the Respondent. He added that he was also aware that a *Chikuza* is a very dignified *Likishi* and head of all *Makishi*, although not every Mbunda would be happy to be referred to as such.

PW1 stated that all the allegations he testified to were told to him by his witnesses who were there. Further, that he was not aware that Mbunda people including Musanga Nyamba, Kinda Simba, Chinga and Mrs. Kayombo attended the gathering where the Respondent purportedly referred to PW1 as a *Chikuza*.

In re-examination, PW1 stated that Mr. Chisambwe was charged for assault after the 2011 elections and that he belonged to MMD at that time. Further, that the gathering at Mandanga where he was called a *Chikuza* took place before the elections.

Mwendabai Mukubesa was PW2, a member of Imwiko Neighbourhood Watch since 2011. He stated that while he was playing pool, on 9<sup>th</sup> August, 2016, at Mubita's (PW6) bar, an unknown boy informed him that there was a thief at Imwiko Market. Further, that when PW2 went there with the boy, he found

the 'thief' running away, but they managed to apprehend him. He had a bag with him.

It was PW2's testimony that since a crowd was forming around the thief, he informed the thief that he would take him to Imwiko Police Post, but when they got to the Police Post, he found it closed. At that point, he then proceeded to search the thief's bag. According to PW2, he found NRCs and voters' cards in the bag. He went on to state that when asked where he was taking the NRCs and voters' cards, he was informed by the thief that the Respondent and his grandfather Kusiyo had sent him to give people *chitenge* materials and ZMW100.00 in exchange for their NRCs and voters' cards.

PW2 stated that Mubita (PW6) went to the Police Post at Imwiko where, having found it closed and in a bid to avoid the thief being harmed by the mob that had gathered, advised that the thief be taken to Mongu Central Police but that first they had to go to PW6's shop so that PW6 could lock up his shop before proceeding to the Police Station. Further, that the thief was taken to PF offices before he was taken to the police. He added that at the PF office, when asked why he was carrying NRCs and voters' cards, the thief restated that he was sent by the Respondent and his grandfather Kusiyo to collect them in exchange for *chitenge* materials and money.

It was PW2's evidence that PF members called Mongu Central Police officers namely; Inspectors Lungu and Kalomo, who picked up the thief from the PF offices and took him to Mongu Central Police

Station. Further, that at the police station the police recorded a statement from PW2 and detained the thief. He went on to add that the person that he apprehended and was detained in police custody was called Muyunda Mushobosho.

Under cross examination PW2 testified that he was a dependant and that he lives with his younger brother. He further testified that he apprehended the thief on 9<sup>th</sup> September, 2016 contrary to what he testified in Examination in Chief.

It was PW2's testimony that he recalled testifying on behalf of Zaza Simenda in other proceedings and that his testimony therein was similar to that tendered herein. Further, that he did not in fact see Mr. Mushobosho giving out money in exchange for NRCs.

When PW2 was referred to page 18 of the Respondent's Bundle of Documents, he conceded that the record does not show that the Respondent and Kusiyo sent Mushobosho. PW2 stated that he did not know which party Mushobosho belonged to until he informed him that he belonged to the UPND. Further that Mushobosho did not state who the owners of the cards were although his card was amongst the said cards.

It was PW2's testimony that Mushobosho did not inform him that he wanted to use the NRCs and voters' cards to collect *chitenge* materials from the Respondent but reiterated that Mushobosho was sent by the Respondent and his grandfather Kusiyo.



PW2 stated that he joined the neighbourhood watch at the time that he was resident at Imwiko. Further that it is possible for one to be a member of the neighbourhood watch in an area where he does not reside. He added that he did not find any money on Mushobosho at the time that he apprehended him and stated that he was not a member of any political party.

It was PW2's evidence that his role as a neighbourhood watch member was to protect every person in the neighbourhood. Further, that Mushobosho was still under his and PW6's protection when he was taken to the PF offices in the absence of his relatives or the police and that he was not putting his life at risk by taking him to the PF offices. He added that when the crowd formed around Mushobosho, he was not in fear as PW2 was there to protect him. In addition, that PW2 was not aware who called the police officers to pick up Mushobosho from the PF offices.

Counsel for the Petitioner, stated that he did not have any question in re-examination.

Kasole Kalwiji was PW3, a Branch Vice Chairperson for the PF in Kambule Ward. She stated that she attended a meeting called and addressed by the Respondent sometime in July, 2016 at Kaunda Square in Mandanga of Mongu Constituency. She added that before the meeting started, the Respondent was welcomed and the national anthem was sung. Further, that at the same meeting the Respondent called the Petitioner a *Likishi* dancer/*Chikuza* and wondered what a *Likishi* dancer would do for the people of Mongu

Central Constituency if elected as Member of Parliament. She explained that a *Likishi* is a traditional dancer who is normally camped at a place called 'Mukanda'. She went on to state that she did not vote for the Petitioner owing to the derogatory remarks issued by the Respondent against the Petitioner.

Under cross examination PW3 stated that she was born in 1964 and had never attended any school but she recalled that the meeting in question took place sometime in July, 2016. She reiterated that the meeting took place at a place called Kaunda Square in Mandanga, Kambule Ward.

PW3 reiterated the fact that the national anthem was sung before the meeting addressed by the Respondent started. When asked to sing the national anthem, PW3 said that she knew the national anthem but she could not sing it in Court. When pressed to sing even a verse or just a tune of the national anthem PW3 stated that she did not know it. She added that she did not know the other speakers at the meeting although she recalled that a person called Akende was in attendance. Further, that she knew that the meeting was called by the Respondent as there was an announcement to that effect the previous day.

It was PW3's evidence that she attended meetings addressed by the Respondent. Further, that even if she was a PF Branch Vice Chairperson she attended UPND meetings just for the sake of listening as she was not aware that there were any 'differences' between the parties. She added that there was no division between

the parties as the atmosphere in Mongu Central Constituency was peaceful.

PW3 testified that she had been a PF Branch Chairlady for about three (3) years. Further, that the Petitioner only joined the PF recently. She added that the Petitioner is popular among the PF members because he goes around all the wards. When asked who was the PF area Member of Parliament before the Respondent, PW3 stated that it was the Petitioner. When told that the PF area Member of Parliament before the Respondent was actually Nathaniel Mubukwanu and that the Petitioner had never been a PF area Member of Parliament, PW3 stated that the Petitioner was in MMD and it was for that reason that he lost the elections. PW3 further stated that the Respondent is popular as can be evidenced from the fact that he is the one they voted for and that he was chosen by God.

In re-examination, when asked to clarify her statement that the Petitioner lost the elections because he was MMD, PW3 stated that the Petitioner lost the elections because he is a *Chikuza*.

PW4 was Lungowe Mundia. She testified that her brother Nawa Siwisha was murdered. She went on to state that he left home on 5<sup>th</sup> August, 2016 clad in PF regalia. Further, that when he disappeared for a week, the family got concerned and started to search for him.

According to PW4, some people informed her family members that the deceased had been seen drinking beer at a bar in a PF shirt.

After reporting the matter to the police, Nawa Siwisha's body was found at the mortuary. Further, that the body had cuts caused by a screw driver and a hammer. The family identified the body as Nawa Siwisha's.

Under cross examination, PW4 testified that the late Nawa Siwisha left home at around 14:00 hours. Further, that she had heard that he was murdered at the harbour. She went on to state that she did not know the date or time when the said Nawa Siwisha was murdered. She added that she was aware that suspects were arrested in connection with his death although she did not know who they were.

When asked if she had not heard that the suspect was Shiwanga Mwala, PW4 stated that she had heard that one of the suspects was called Shiwanga Mwala. Further, that she had heard the allegations that the deceased was found stealing from the said suspect's shop at night. She went on to state that she had heard from her relatives that the injuries on the deceased's body were inflicted by a screw driver and a hammer.

PW4 stated that the deceased was 25 years old at the time of death and that he was a PF member. Further, that she did not support any political party. PW4 said that she had no comment when it was put to her that the suspect was a Member of the PF.

Counsel for the Petitioner indicated that he had no questions for PW4 in re-examination.

24 years old Joseph Kachana was PW5. According to him, he was beaten on the night of 8<sup>th</sup> August, 2016 along airport road on his way from Kapulanga to town. He stated that when he reached the Sugar Company, he noticed a vehicle trailing him. Further, that when the vehicle got close, one of the persons in the vehicle called Vincent Limande instructed some men to beat him claiming that he was one of the PF members who are troubling people in Mongu. He went on to add that when he asked why he was being beaten, he was told that it was because of the PF shirt that he was wearing underneath an Arsenal jersey.

It was PW5's evidence that he was electrocuted using a teaser by his attackers and whipped. Further, that he was put in the back of the vehicle and taken near the house of the Respondent, which is near Lilelelo where his attackers continued to pour water on him and electrocute him using a teaser, whilst whipping him. He added that when his attackers called the Respondent to ask him what they should do with PW5, they were advised to take him to Akende's house, where he was taken to. PW5 went on to state that when they arrived at Akende's house, Akende opened the rear door of the vehicle and asked him what the problem was. That before PW5 could respond, he was electrocuted some more and it was at that point that Akende advised that he has been beaten enough and should now be taken to the Police. At the Police Station, no statement was taken from him, but he was held in custody for two (2) days until the PF officials came to have him released.

PW5 testified that he was only issued with a medical form on 15<sup>th</sup> August, 2016. Further, that only one person was arrested in connection with the beatings and that the matter is in court. PW5 did not produce before this Court any medical or police report.

Under cross examination PW5 testified that he was the Petitioner's campaign agent and that he could not recall the exact time when he started being beaten. Further, that he was never found removing campaign posters as alleged by the Respondent. He went on to state that he did not know why he was detained in police custody. PW5 added that at no point did the Respondent's supporters keep him overnight as alleged by the Petitioner and denied having been in police custody for four (4) days.

It was PW5's testimony that he was taken to Akende's house in North Park and that he knew exactly where the said house was. However, when asked to state any features near Akende's house, PW5 stated that he wouldn't know because he was taken there at night. Further, that a person called Mike was apprehended in connection with his beatings. Even though PW5 had earlier testified that the Police refused to get a statement from him, in cross-examination, he stated that his complaint to the Police was that he was beaten on the instruction of the Respondent and Akende. He conceded that the Respondent and Akende have never been arrested for assaulting him and that they are not amongst the accused persons in the complaint that he reported to the Police.

PW5 stated that he discussed the fact that he was beaten with the Petitioner during the campaign period. He reiterated that he was not kept overnight by the Respondent's supporters as alleged by the Petitioner and that if the Petitioner swore an Affidavit to say that he was held overnight, then he would be telling lies.

It was PW5's evidence that he could not spell his name as he has never attended school. Further, that on the day of the beatings he did not meet the Respondent and that he was not aware that the Respondent was at his home on the material day. PW5 denied knowing a person called Shadreck Shinga.

PW5 reiterated the fact that he did not know what time it was when he was being beaten. He stated that he stays on his own in a house that his parents left for him when they moved to North-Western Province, although they send him ZMW1000.00 per month for his up keep. PW5 was evasive when asked when they actually moved into the said house and when his parents left for North Western Province, but when he was repeatedly asked the same question, PW5 relented and stated that they moved into that house in 2006 and that in the same year his parents left him alone in the said house. That since then he has been living alone. When questioned if he had been living alone since the age of 14 years old, PW5 stated that he would not know how to calculate because he was illiterate.

There were no questions posed to PW5 in re-examination.

PW6 was Mubita Mubita Innocent. His testimony regarding the apprehending and eventual arrest of Muyunda Mushobosho, who

was allegedly caught with NRCs and voters' cards, was a repetition of PW2's evidence save for the following facts namely; that PW2 went to him with the suspect that he had apprehended, followed by a multitude of people and that he then followed PW2 and the suspect to the Police Post; that they found the Police Post closed and thus they decided to take the suspect to the Police Station; that as they were going to the Police Station, he informed some senior personnel at the PF offices about the person who had been apprehended, who had in his possession NRCs and voters' cards and a Mr. Tembo instructed him that they should take the suspect to the PF offices; and that while at the PF offices photographs were taken of the NRCs and voters' cards found with Muyunda Mushobosho. Further, that PW6 did not give a statement at the police station because the officers told him that PW2's testimony was enough.

It was PW6's testimony that the person that was apprehended, Muyunda Mushobosho, was convicted by the Court for being in possession of NRCs and voters' cards.

Under cross examination, PW6 stated that he was familiar with the case in which Mushobosho was convicted. He conceded that the record under cause number SIT/73/2016 shows that Mushobosho had gotten the NRCs and voters' cards from people that he lived with. He went on to state that Mushobosho must have changed his statement in Court.



It was PW6's testimony that Mushobosho informed him that he was collecting NRCs and voters' cards so that he could take them to the Respondent and Kusiyo in exchange for Chitenge materials and ZMW100 notes. When shown a copy of a statement of facts appearing at page 18 of the Respondent's Bundle of Documents, PW6 conceded that the statement of facts do not state that Mushobosho was sent by the Respondent. Further, that PW6 did not take time to note the names of the owners of the NRCs and voters' cards found with Mushobosho.

According to PW6, he only took Mushobosho to the PF offices to allow for the PF officials to take photographs of the NRCs and voters' cards found in the possession of Mushobosho. Further, that Mushobosho was only found with NRCs and voters' cards.

There was no re-examination of PW6.

This was the close of the Petitioner's case.

The Respondent, on his part, called six (6) witnesses in aid of his case. Mwilola Imakando (RW1), who is the Respondent herein, testified on his own behalf. His testimony was a repetition of the Amended Answer and Affidavit in Opposition to the Election Petition filed herein save for the following facts namely that; he did not at any point appoint any person called Mushobosho as his agent or give him any money or campaign materials. Further, that he only came to learn of the person called Mushobosho when he read the Judgment wherein the said Mushobosho was convicted for having been in possession of NRCs and voters' cards. He added that his

name does not appear in the said Judgment as having any connection, whatsoever, with Mushobosho.

RW1 told the Court that the said Mushobosho was not apprehended while paying people money in exchange for their NRCs and voters' cards. According to RW1, this evidence was consistent with the Petitioner's witnesses' evidence namely, PW2 and PW6. He added that Mushobosho was apprehended on his way to collect campaign materials from the UPND office. He went on to state that he did not use the UPND office as his campaign centre as he had his own campaign centre elsewhere.

It was RW1's testimony that at no time did any of his agents engage in acts of violence during the entire campaign period as evidenced by the fact that the Respondent and his supporters were never reported to the police, monitoring bodies or the Electoral Commission of Zambia (ECZ) for having caused any violence. Further, that the death of one Levy Nawa Siwisha was as a result of beatings, by a shop owner called Shiwanga Mwala, after he was caught stealing from the said Shiwanga Mwala's shop. He added that Shiwanga Mwala is currently in police custody awaiting trial. RW1 stated that he did not know the said Shiwanga Mwala.

According to RW1, at no point did he and his supporters engage in any violence as there are no police reports or medical reports obtained by those injured as a result of the alleged violence perpetrated by RW1 and his supporters. Further, that PW5 was apprehended around midnight by RW1's supporters while removing

UPND posters. He added that he came to know about PW5 being apprehended when his campaign manager, RW3, informed him on the morning after he was apprehended. He went on to state that PW5 was not apprehended while campaigning on behalf of the Petitioner as alleged by the Petitioner. Further, that after his apprehension, PW5 was not kept overnight or beaten but that he was taken to Mongu Central Police where he was kept in custody for about two days.

It was RW1's testimony that his election agents did not damage the Petitioner's vehicle. Further, that the Petitioner failed to indicate the dates and places where the damage took place making the allegations vague. He went on to state that there are no police reports produced before this Court indicating that RW1 indeed damaged the Petitioner's vehicle.

RW1 stated that the election period in Mongu Central Constituency was peaceful as the police ensured that the campaign schedules did not clash between political parties. Further, that the police were in attendance to keep vigil during all campaign meetings. He added that even PW3 conceded that the election period was peaceful owing to the fact that even a PF member like herself was able to attend UPND meetings.

RW1 told the Court that contrary to PW3's testimony, he held a meeting in Mandanga area at Kaunda Square on 20<sup>th</sup> June, 2016. RW1 referred the Court to a Campaign program appearing at page 1 of the Respondent's Bundle of Documents. Further, that the said

area is predominantly inhabited by Mbunda speaking people. He added that he did not refer to the Petitioner as *Chikuza* at that meeting. He went on to state that he only talked about several *Makishi* dancers including; *Ndondo*, *Chileya* and *Chikuza*, to demonstrate to the people his knowledge about the culture of the Mbunda people from whom he sought votes. He stated that the people in the crowd are the ones that shouted the Petitioner's name when he mentioned one of the *Likishi* dancers called *Chikuza*. Further, that in any event '*Chikuza*' is a prestigious title as a *Chikuza* is a top notch *Likishi*.

It was RW1's testimony that in fact the Petitioner called himself '*Chikuza*' when he was Member of Parliament from 2006 to 2011. Further, that he referred to the Petitioner with respect at meetings. RW1 showed the Court clips of videos of his campaign rallies, which are on record. RW1 added that Mbunda speaking people did not get offended and walk away from his meetings due to his remarks, as alleged by the Petitioner. The Court was referred to pages 43 – 46 of the Respondent's Bundle of Documents showing pictures of crowd that attended RW1's gatherings. RW1 went ahead to state that senior members of the UPND in Mongu Central Constituency are in fact Mbunda and that these included; Musangu Njamba, Kinda Samba, Mrs. Kayombo and Nchinga.

RW1 stated that it was not true that he told the electorate in Mongu Central Constituency not to vote for the Petitioner owing to the fact that he was going to sell all the lakes and give the land to the government. RW1 testified that he could not have said that as he is

fully aware that land and lakes in Western Province are administered by the Barotse Royal Establishment.

It was RW1's evidence that PW3's testimony regarding the singing of the national anthem was not correct as the national anthem was not sung at any of RW1's meetings owing to the fact that his meetings were not official government meetings. Further, that RW1 spoke last at all these meetings. He added that it was likely that PW3 did not attend RW1's meetings contrary to what she alleged.

RW1 told the Court that he did not give any of the Indunas in Mongu Central Constituency traditional dresses. Further, that the Petitioner did not even mention the names of the Indunas that he allegedly gave the traditional dresses to.

RW1 stated that the Petitioner did not meet him on polling day campaigning with his supporters otherwise he would have reported RW1 to the Police or ECZ. Further, that campaigning on polling day would have in fact put RW1 in a precarious position, which would have led to his being disqualified from the elections.

It was RW1's testimony that it was in fact the Petitioner that was engaged in electoral malpractice either by himself or his agents. RW1 restated the allegations appearing in his Amended Answer and Affidavit in Opposition. He however added that the Petitioner drove to his house a few days before the elections with his cadres and started to provoke RW1 and his supporters by waving fists at them. Further, that when the Petitioner saw RW1 recording a video he told

his supporters to leave. RW1 stated that he reported the matter to the police where the Petitioner was summoned and admonished.

RW1 told the Court that the Petitioner's allegations have not been substantiated by any facts and there was no mention of dates or places. RW1 urged the Court to make an Order barring the Petitioner from participating in future parliamentary elections. Further, the Court was beseeched to uphold the election of the Respondent as Member of Parliament for Mongu Central Constituency.

In cross examination RW1 stated that he was aware that threatening someone with a gun was a serious offence. Further, he conceded that he was not present when Njamba Musangu (RW2) was being threatened with a gun by the Petitioner. He further conceded that the Petitioner was not incarcerated after the alleged incident and there is no matter in Court concerning the said threat.

RW1 told the Court that the reference to violence by the Petitioner was in 2011, a period when the Petitioner was in MMD and was only meant to reinforce his assertion that the Petitioner has a history of violence. When referred to a copy of the Judgment appearing in the Respondent's Bundle of Documents involving an assault on RW1, RW1 stated that he knew three of the accused persons in that case. Further, that he was the victim of the assault. RW1 conceded that the Petitioner did not assault him.

It was RW1's testimony that he contested the primaries for the MMD parliamentary candidacy for Mongu Central Constituency in

2011 and lost to the Petitioner. He added that he did not lose because he was unpopular.

RW1 told the Court that Kuomboka Restaurant is an existing restaurant in Mongu Central Constituency that was damaged at one point. He added that the matter is before the police and is being investigated. He conceded that there was no report before the court on that allegation. When referred to paragraph 10 of his Answer where he made allegations of slander against the Petitioner, RW1 stated that he has not sued the Petitioner for defamation for the allegations contained in his Answer.

It was RW1's testimony that the Petitioner bought cattle for the electorate and asked them to vote for him. He conceded, that he did not have any pictures showing the said animals or the people eating the meat. He added that he did not have any photographs or video clips showing the Petitioner making donations although he had pictures of the poles bought using the money the Petitioner donated, but conceded that those pictures were not brought before Court. He further conceded that he did not report the Petitioner to the police for corrupt practices.

On his allegation that the Petitioner went to the gate of his house where he became a nuisance, RW1 conceded that he did not have any document nor video clip before Court to prove that allegation. When referred to a charge sheet appearing at pages 11 - 12 of the Respondent's Bundle of Documents, RW1 stated that Muyunda Mushobosho, the person charged is neither linked to the PF nor the

UPND but conceded that he had the intention of getting *chitenge* material from UPND.

RW1 told the Court that he knew Mr. Charles Akende (RW3) as he was his campaign manager throughout the campaign period. Further, that the said RW3 owns a restaurant called Kuomboka restaurant. He testified that he had worked in the Ministry of Agriculture where he rose through the ranks to the position of Director. He went on to state that while working there he did not author any letter that put a ban on the purchase of livestock by the government. Further, that there was no letter that he authored which made the farmers in Mongu Central Constituency to be unhappy with him.

RW1 stated that he knew Yowano Chisambwe, one of the convicts in the case involving his assault. Further, that Yowano was convicted in 2012 and that he belonged to the MMD at that time. He added that the said Yowano Chisambwe now belongs to the PF.

RW1 told the Court that Mushobosho, the person found with NRCs and voters' cards was arrested on 9<sup>th</sup> August, 2016. RW1 maintained that despite this conviction of Mushobosho, there was peace and tranquillity during the elections in Mongu Central Constituency.

In re-examination RW1 testified that in the context of the recent election, the Petitioner did not assault him. Further, that the nuisance caused by the Petitioner and his supporters at his gate brought about memories of the time that RW1 was attacked by the



Petitioner's supporters led by Yowano Chisambwe. He added that a conviction of a person engaged in illegal practices can bring about tranquillity in the community as that person would no longer be in that community.

Musangu Njamba was RW2. He stated that he knows both parties herein very well and that he knew the Petitioner during his time as a Member of FDD. Further, that the Petitioner defected to MMD, a party that RW2 left him in when he defected to UPND. He added that the Petitioner supported the UPND in the 2015 presidential by-election. He went on to add that the Petitioner joined PF after the UPND lost the presidential by-election.

RW2 stated that he knew the Respondent in 2011 when he contested the MMD candidacy for Mongu Central Constituency with the Petitioner during the MMD primary elections. Further, that there was confusion during the primary elections to the extent that the Petitioner's supporters beat up the Respondent at Central market. He went on to state that the people that beat up the Respondent included Mbangu Mbangu, Vincent Chipunga, who was popularly known as Sakachokwe and Eddie Chisambwe.

It was RW2's testimony that the Respondent did not ask the people of Mongu Central not to vote for the Petitioner because he was a Mbunda. He added that the reason he was the presidential campaign manager for the UPND was to ensure that the UPND gets the Mbunda vote in the August, 2016 elections. He went on to state

that the Respondent was not campaigning on tribal grounds and that the Respondent won the parliamentary seat on merit.

RW2 told the Court that the Respondent did not call the Petitioner a *Chikuza*. He explained to the Court that for those Mbundas who get circumcised, after the healing period, there comes a stage when they come to know the Makishi by their ranks and one may see all the other types of Makishi, but if one has not seen a *Chikuza*, then it means that one has not seen any *Likishi* at all as a *Chikuza* is a highly ranked *Likishi* dancer and any Mbunda would be proud to be referred to as such. He reiterated that one cannot qualify to be called a Mbunda if you did not know *Chikuza*.

RW2 narrated how the UPND campaign rallies were organized and stated that the Ward Chairperson would speak first before a prayer was given. Further, that the *Makishi* dancers would dance before RW3 would nominate people to speak. He added that no national anthem was sung at the said meetings. He went on to state that if he was present at the meeting he would speak after the Respondent.

RW2 told the Court that the Petitioner, a person called Jeff and another called Chisambwe destroyed a restaurant belonging to RW3. Further, that the Petitioner wanted to take possession of the UPND party offices claiming that he was the one that paid for the building.

It was RW2's testimony that the Petitioner threatened him with a gun while at Mongu Central Police Station. He added that a docket

was opened against the Petitioner regarding the threat. RW2 stated that he later withdrew the complaint by letter as the Petitioner was his cousin.

RW2 testified that he campaigned in fear in Mongu Central owing to the fact that a person called Liseli was beaten by the Petitioner's supporters to the extent that his front teeth were broken. That this incidence was reported to the police and the Petitioner was warned in the presence of Mr. Kamaya Katongo, Mr. Chisambwe, RW3 and the Respondent.

RW2 stated that Petitioner lost the elections because of the violence exhibited by the Petitioner and his supporters in Mongu Central. He also stated there was no time that the Petitioner's supporters were threatened by UPND officers and that the Respondent won the election because the electorate in Western Province and Mongu Central, in particular, made it clear that they wanted change. That they were also in agreement with the ten (10) guidelines drawn by the Respondent.

Under cross examination, RW2 conceded that the Petitioner did not assault the Respondent. Further, that the Judgment appearing at page 46 of the Respondent's Bundle of Documents does not indicate that the convicted persons therein were PF cadres. On his allegation that many people were beaten, when referred to paragraph 3 of page 46 of the Respondent's Bundle of Documents, RW2 conceded that only one person, the Respondent, was assaulted.

RW2 conceded that his name does not appear in the Amended Answer as having been threatened with a gun (pistol) by the Petitioner. Further, that the case is not reported at the police because RW2 withdrew the case. He also conceded that the letter that he wrote withdrawing the case was not before Court.

RW2 told the Court that he was present at the time that there was an attack on Kuomboka Restaurant. Further, that the matter was in fact reported to the police. He added that the said restaurant is still operational. He went on to state that he could not comment on the extent of the damage to the restaurant as he was not the owner of the restaurant, but stated that glasses to the building were broken and its interior was damaged. RW2 conceded that there were no pictures showing the damages occasioned to this restaurant. He also conceded that there were no documents or police reports nor medical reports before Court to support his allegation that many people were beaten.

On his allegation that he withdrew the complaint against the Petitioner because they were related, RW2 conceded that he had no proof before Court showing that he was in fact related to the Petitioner and that he did not know the Petitioner's last name as the family is big. He maintained that he was the Petitioner's cousin despite them having different last names, although he did not clearly state how they were related

In re-examination RW2 stated that he knew the Petitioner's name as Joseph Mulyata and that he would not be aware if there were any other names for the Petitioner.

Charles Akende was RW3. He told the Court that he was the Respondent's campaign manager in the August, 2016 elections. Further that his role was to organize and lead campaigns in all the fifteen (15) wards in Mongu Central Constituency.

RW3 testified that he was not aware of a case involving a person called Mushobosho in relation to NRCs and Voters' cards. Further, that no person called Joseph Kachana was abducted and brought to RW3's house, neither was such a person beaten.

RW3 stated that he received a phone call from one of the UPND members informing him that a person had been apprehended whilst removing UPND posters. Further, that when they asked whether they should bring the culprit to his house, he informed them that they should take and report him to the police. He added that he was not aware whether or not the person apprehended was taken to the police. This is contrary to RW1's testimony, who deposed in paragraph 10 of his Affidavit in Opposition that a person was caught removing UPND campaign posters, apprehended and taken to the Campaign Manager Mr. Charles Akende, who instructed that the culprit be taken to the Police immediately.

RW3 testified that he drafted the Respondent's campaign program which ran from 17<sup>th</sup> June, 2016 to 10<sup>th</sup> August, 2016. Further that the same was approved by the police. RW3 confirmed that the

meeting held at Kaunda Square was on 20<sup>th</sup> June, 2016. RW3 proceeded to describe the conduct of the Respondent's meetings. His testimony in this regard was similar to that of RW2 and need not be repeated. RW3 also maintained that the national anthem was not sung at the meetings organised by the Respondent.

It was RW3's testimony that the Respondent moved with Makishi dancers at his rallies so as to entertain the people that attended the meetings. Further, that the Respondent did not refer to the Petitioner as *Chikuza*. He added that the Respondent did not state at any of the meetings that the Petitioner was going to sell the land and lakes in Western Province. He went on to add that the Respondent did not give any of the Indunas traditional dresses as alleged by the Petitioner.

RW3 denied the allegations against the Respondent to the effect that he and his supporters moved from one polling station to another campaigning on polling day. He further stated that if the said allegations were true, a report would have been made to the police.

Under cross examination RW3 testified that the Respondent's campaign program was approved in the morning on 17<sup>th</sup> June, 2016 and that the Respondent had a rally on that same day at 14:00 hours.

RW3 reiterated the fact that he did not know a person called Mushobosho although he heard that the said Mushobosho was convicted of having been in possession of NRCs and voters' cards.

He added that Mushobosho was arrested on 9<sup>th</sup> August, 2016 during the election campaign period.

There were no questions in re-examination for RW3.

Fwanyanga Fwanyanga was RW4. He testified that the Petitioner and a Mr. Simenda held a meeting at Ndao where a cow was slaughtered for those that attended the meeting. Further, that the money to buy the cow was given to RW4's brother called Namayanga Fwanyanga by Mr. Simenda. He added that the Petitioner and Mr. Simenda came to the meeting using a speed boat bearing a government registration mark.

RW4 told the Court that the cow was slaughtered so that the people of Ndao would eat. The Petitioner then asked that the people gathered should vote for him. Further, that the people gathered were urged not to vote for the Respondent as he was a stranger, who does not have a house in Mongu.

Under cross examination, RW4 stated that the meat was given to the people freely. Further, that the Petitioner's 'corrupt' actions were not reported to the police. He added that there are no photos or documents showing that the Petitioner indeed gave people meat.

RW4 told the Court that he was not present when the Petitioner gave his brother money in the sum of ZMW2, 500.00. Further, that only one cow was bought.

There were no question in re-examination for RW4.

RW5 was Kamocha Kwandu. He testified that on 18<sup>th</sup> July, 2016 he heard that the Petitioner would visit Lulambo on 19<sup>th</sup> July, 2016, which he did. Further, that the Petitioner got to Lulambo in the company of Mr. Simenda and a person called Jere. He went on to state that RW5's elder brother was sent to buy mealie meal, cooking oil and salt amounting to ZMW265.50. He added that his elder brother was sent to buy a cow by the Petitioner for those gathered whom the Petitioner urged to vote for him having bought them a cow.

It was RW5's testimony that the Petitioner gave the women and men that had gathered chitenge materials and shirts. That among the men gathered, those who did not receive shirts were given the sum of ZMW300.00 to share amongst them. He stated that the Petitioner urged the people gathered not to vote for the Respondent as he was a stranger. He went on to add that a person called David Pelekelo was called and given the sum of ZMW200.00 while an Induna called Imakumbili was given the sum of ZMW300.00 so that he could assist the Petitioner campaign among his people.

Under cross examination RW5 stated that he did not know the number of people at the gathering addressed by the Petitioner. He further stated his brother purchased the items from his shop although RW5 did not keep a record of his daily sales. He added that he did not bring any sample of the chitenge materials or shirts distributed by the Petitioner. He went on to state that he did not know if these issues were in the pleadings.



RW5 told the Court that he did not bring any video recordings or photographs to show the items that the Petitioner gave to the people gathered at the meeting. Further, that he did not take any photographs of the speed boat used by the Petitioner.

No questions were put to RW5 in re-examination

Mayumbelo Muzumi, the Officer-in-Charge at Mongu Central Police station, was RW6. He testified that there were several reports of violence recorded in the Occurrence Book (OB) some of which are as follows; under OB No. 10679/2016 a person called Liseli Lungowe aged 50 reported that he had been assaulted by unknown people causing him to sustain general body pains. Further, that this occurred on 11<sup>th</sup> June, 2016 at Mumwanjia village. He added that the victim was given a medical report form.

He added that OB No. 10627 was a complaint by Mwangala Siyandwa who reported that his vehicle a Toyota Hiace Registration Mark ALV 7686 had its rear windscreen damaged by four persons namely; Kalengesa Kandasha, Danny, Chikusu, Getto Kulalela and Musimu Simunji. This incident, it was stated by the Office-in-Charge, occurred on 14<sup>th</sup> June, 2016 at Mandanga market in Mongu. He added that the persons involved in this complaint were called, talked to and the complaint was withdrawn.

RW6 testified that four related complaints were recorded on 12<sup>th</sup> March, 2016. OB No. 293/2016 was a complaint by Kalaluka Muya to the effect that around 11:30 hours UPND cadres had removed PF

campaign materials, which were hanging around Mongu main bus station.

RW6 stated that OB No. 295/2016 involved a complaint made by Muyunda Munale, who reported that around 13:50 hours on 12<sup>th</sup> March, 2016, he was assaulted by suspected PF cadres at Mongu Bus Station, causing him to sustain a cut at the back of his head. He added that a medical report form was issued to the victim and that no arrests were made.

OB No. 297/2016 was a complaint by RW3 to the effect that his property at Kuomboka Restaurant at Mongu Bus Terminals was damaged by suspected PF cadres causing damage in the sum of ZMW15, 000.00 on 12<sup>th</sup> March, 2016 at 13:50 hours. He added that a docket was opened but no arrests were made.

It was RW6's evidence that OB No. 299/2016 was a complaint made by Simbula, who reported that on 12<sup>th</sup> March, 2016 at 13:40 hours, he was assaulted by suspected PF cadres at Kuomboka Restaurant, resulting in the loosening of his lower front teeth. He stated that a medical report form was issued to the victim.

Regarding the incident, alluded to by other witnesses in this matter, at the gate of the Respondent's house, RW6 stated that the matter in question was not recorded in the Occurrence Book, but both parties herein were summoned and the accused person apologised. He added that since the matter was not recorded he could not tell who the accused person was.

Under cross examination RW6 informed the Court that the use of the word 'suspected' in the occurrence book meant that the issue was not definite. He added that the medical reports issued by the police are not in the Respondent's Bundle of Documents. He went on to add that he would not know whether the Petitioner was not around when the incidences occurred because he was merely making reference to the Occurrence Book.

RW6 told the Court that there was no record of a person called Joseph Kachana in the Occurrence Book on 8<sup>th</sup> August, 2016. He added that no arrests were made regarding the complaint under OB No. 299/2016. He conceded that since there were no arrests made, no one can know if the suspects were guilty or not.

Under Re-examination RW6 testified that when the police have not made arrests it means that the matter is still being investigated to identify the perpetrators.

This was the close of the Respondent's case.

The Petitioner filed into Court written submissions dated 14<sup>th</sup> October, 2016 wherein it was argued that the election of the Respondent be nullified owing to the fact that the Respondent and his agents contravened the provisions of **Sections 81, 83 and 97** of the **Electoral Process Act No. 35 of 2016**. **Section 81**, which speaks on Bribery and provides that: -

- (1) *A person shall not, either directly or indirectly, by oneself or with any other person corruptly—*

- (a) give, lend, procure, offer, promise or agree to give, lend, procure or offer, any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election;**
- (b) give, lend or procure, offer, promise or agree to give, lend, procure, offer or promise, any money to a voter or for the benefit of a voter or to any other person or on behalf of that person on behalf of any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;**
- (c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;**
- (d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure, the return of any candidate at any election or the vote of any voter at any election;**
- (e) advance or pay or cause to be advanced or paid any money to or for the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or partially expended in bribery at any election;**

- (f) before or during any election, receive or contract for any money or loan for oneself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any election;*
- (g) after any election, receive any money on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any election; or*
- (h) convey or transfer or be concerned with the conveyance or transfer of any property, or pay or be concerned with the payment of any money, to any person for the purpose of enabling that person to be registered as a voter, thereby to influence that person's vote at any future election, or pay to or be concerned with the payment of any money on account of any voter for the purpose of inducing that person to vote or refrain from voting.*

*(2) A person who contravenes any provision of subsection (1) commits an offence.*

*(3) Nothing in this Act shall be construed as applying to any money paid or agreed to be paid for, or on account of, any expenditure bona fide and lawfully incurred in respect of the conduct or management of an election.*

**Section 83**, which speaks to Undue Influence provides that: -

- (1) A person shall not directly or indirectly, by oneself or through any other person—*

- (a) *make use of or threaten to make use of any force, violence or restraint upon any other person;*
- (b) *inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means, or pretended supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person;*
- (c) *do or threaten to do anything to the disadvantage of any person in order to induce or compel any person—*
  - (i) *to register or not to register as a voter;*
  - (ii) *to vote or not to vote;*
  - (iii) *to vote or not to vote for any registered political party or candidate;*
  - (iv) *to support or not to support any political registered party or candidate; or*
  - (v) *to attend and participate in, or not to attend and participate in, any political meeting, march, demonstration or other political event;*
- (d) *interfere with the independence or impartiality of the Commission, any member, employee or officer of the Commission;*
- (e) *prejudice any person because of any past, present or anticipated performance of a function under this Act;*
- (f) *advantage, or promise to advantage, a person in exchange for that person not performing a function under this Act; or*

- (g) *unlawfully prevent the holding of any political meeting, march, demonstration or other political event.*
- (2) *Subject to the other provisions of this Act, a person shall not prevent another person from exercising a right conferred by this Act.*
- (3) *A person, knowing that another person is not entitled to be registered as a voter, shall not—*

  - (a) *persuade that other person that, that other person is entitled to be registered as a voter; or*
  - (b) *represent to anyone else that the person is entitled to be registered as a voter.*
- (4) *A person, knowing that another person is not entitled to vote shall not—*

  - (a) *assist, compel or persuade that other person to vote; or*
  - (b) *represent to anyone else that the other person is entitled to vote.*
- (5) *A person who contravenes any of the provisions of subsections (1) to (4) commits an offence.*
- (6) *A person who, by abduction, duress or any fraudulent device or contrivance, impedes or prevents the free exercise of the vote of any voter or thereby compels, induces or prevails upon any voter either to give or to refrain from giving the person's vote at any election, commits an offence.*

**Section 97** of the **Electoral Process Act No. 35 of 2016** provides that: -

**"(1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor 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 councillor shall be void if, on the trial of an election, 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 election petition, and the High Court or a tribunal further finds that such candidate has proved that: -*
- (a) *a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;*
  - (b) *such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and*
  - (c) *in all other respects the election was free from any corrupt practice or illegal practice, declare that election of the candidate void..."*

The said Sections generally prohibit illegal acts or any form of misconduct in the conduct of elections.

The Petitioner referred the Court to a number of cases dealing with the standard of proof in election cases and instances when the Court would be mandated to nullify an election. The following cases were cited by the Petitioner: **Michael Mabenga vs. Sikota Wina and Others**<sup>1</sup>; **Mlewa vs. Wightman**<sup>2</sup>; **Misheck Mutelo vs. Eileen Mbuyana Imbwae**<sup>3</sup>; **Alex Codman Luhila vs. Batuke**

**Imenda<sup>4</sup>**; and **Kalenga vs. Munshya, Electoral Commission of Zambia and The Attorney General<sup>5</sup>**.

It was the Petitioner's contention that the conduct of Mushobosho, the Respondent's agent amounted to an illegal act, as defined under **Section 2** of the **Electoral Process Act No. 35 of 2016**. It is provided under the said **Section 2** that: -

***"illegal practice" means an offence which is declared under this Act to be an illegal practice***

The Petitioner further contended that this one illegal act by Mushobosho is sufficient for the Court to nullify the election of the Respondent as per the case of **Mlewa vs. Wightman<sup>2</sup>**.

The Petitioner argued that the Respondent and his agents were engaged in various acts of violence and lawlessness in Mongu Central contrary to the **Electoral Process Act No. 35 of 2016** warranting the nullification of the Respondent's election.

It was the Petitioner's contention that the acts of name calling by the Respondent amounted to an illegal practice, contrary to the Electoral Process Act. Further, that the statement made by the Respondent to the effect that the Petitioner was going to sell the lakes and the land also amounted to an illegal practice as envisaged by **Section 97 of the Electoral Process Act**. It was added that the Court ought to take judicial notice of the issues regarding the government and the Barotse Agreement in relation to the significance of the statements made by the Respondent. The Court was referred to the case of **Reynold Chanda Bowa vs. Puma**

**Energy [Ireland] Limited**<sup>6</sup> regarding the definition of judicial notice.

The Respondent also filed into Court written submissions, dated 11<sup>th</sup> October, 2016. It must be noted that the said submissions contain, substantially/heavily, the interpretation of evidence before Court as tendered in by the witnesses. Therefore, the said interpretation and analysis will not be repeated here save to say that the same have been fully considered by the Court. The Court will make its own analysis and findings on the evidence tendered herein.

It was the Respondent's argument that the evidence adduced by the Petitioner falls short of the required standard of proof in an election petition. Further, that in order for an election petition to succeed the standard of proof required is higher than the balance of probability, but less than beyond reasonable doubt.

The Respondent laid down the three (3) grounds, raised by the Petitioner in challenging the Respondent's election as appearing in the Petition. He contended that the evidence adduced by the Petitioner should not be addressed by the Court as the same falls under hearsay evidence as he did not perceive the evidence with his own senses. Further, that hearsay evidence is inadmissible by the Court.

It was argued that the Petitioner has not proved any of the grounds raised in the Petition. Further, that the Mongu resident arrested with voters cards and NRCs got the said cards from the people that

he lives with so that he could get UPND Chitenge and T-shirts. This, according to the Respondent, was evidenced by the Court record (cause number SIT/73/2016) in which the accused person was convicted.

The Respondent argued that despite the Petitioner's allegations to the effect that the Respondent was engaged in violence, observers including Transparency International and FODEP declared the elections of 11<sup>th</sup> August, 2016 as violence free. The Court was urged to take judicial notice of this fact.

The Respondent contended that the Petitioner raised issues which were not pleaded namely; that a person called Levy Nawa Siwisha was killed by UPND cadres and that the Respondent gave some Indunas traditional Lozi dresses called *Misisi* and *Liziba*. Further, that the Respondent was seen campaigning on polling day. The Court was urged not to put any weight on these issues that were not pleaded and referred to the case of **Michael Mabenga vs. Sikota Wina, Mafo Wallace Mafiyo & George Samulela**<sup>7</sup> wherein the Court held that: -

***“An election petition is like any other civil claim which depends on the pleadings.”***

The Respondent submitted that the Petitioner bears the burden of proving all the allegations to a standard higher than the balance of probability. In support of this point the Respondent cited the case of **Michael Mabenga vs. Sikota Wina, Mafo Wallace Mafiyo & George Samulela**<sup>7</sup> where the Supreme Court stated that in an

election petition the standard of proof is higher than the balance of probability but less than beyond reasonable doubt.

It was contended that none of the allegations of malpractice brought by the Petitioner implicated the Respondent and none have been proved to the required standard. Further, that as was held in the following cases, namely: **Priscilla Mwenya Kamanga vs. Attorney General, Ng'andu Magande**<sup>8</sup>; **Mazoka and Others vs. Mwanawasa & Others**<sup>9</sup>; **Lewanika & Others vs. Chiluba**<sup>10</sup>; and **Mabenga vs. Wina**<sup>1</sup>, election malpractices are required to be established to a fairly high degree of convincing clarity.

The Respondent argued that it is the duty of the Petitioner to adduce evidence that not only proves the illegal and corrupt practices but also that the said acts had an effect on the results of the election. In support of this proposition, the Court was referred to the case of **Christopher Kalonge vs. Annie Munshya**<sup>11</sup> where the Court held that: -

***“Allegations made in the petition if proved must affect the results of the election in a substantial manner. Without a bearing on the results, the election cannot be avoided.”***

It was contended that none of the allegations have been proved by the Petitioner. The Court was implored to take judicial notice of the gap of 21,511 votes in the election results. Further, that the said gap cannot be as a result of alleged election malpractice.

The Respondent argued that the Petitioner failed to prove his case. It was his prayer that the Court dismisses the Petition with costs

and declare the Respondent as having been duly elected as Member of Parliament for Mongu Central Constituency in the Western Province of Zambia.

I have carefully considered the submissions by Counsel for both parties herein, as well as the authorities cited, for which I am very grateful for. I have also considered averments in the Petition, Affidavit Verifying Facts, Amended Answer, Affidavit in Opposition filed herein by both parties and carefully analysed the evidence adduced before this Court by both parties.

The following issues are not in dispute in this matter, namely that: the Petitioner herein has contested the Mongu Central seat on four occasions: in 2001 on the FDD ticket where he lost; 2006 on the MDD ticket where he won; 2011 on the MDD ticket where he lost; and 2016 on the PF ticket where he lost to the Respondent herein. The Petitioner was Member of Parliament for Mongu Central Constituency between 2006 and 2011 on the MMD ticket. In 2011, the parties herein both opted to contest the Mongu Central parliamentary seat under the MMD. The Petitioner was adopted to represent the MMD following the primary elections held by the party. The Petitioner lost the 2011 parliamentary election. The Respondent joined the UPND after the 2011 Presidential and Parliamentary elections.

During the 2015 presidential by-election, the Petitioner while still in MMD, gave his support to the UPND presidential candidate, who lost in those elections. The Petitioner then joined the PF shortly

after the presidential by-election in 2015, a party he represented in the just ended Presidential and Parliamentary elections held on 11<sup>th</sup> August, 2016. Both the Petitioner and Respondent contested the Parliamentary General Elections held on 11<sup>th</sup> August, 2016 in the Mongu Central Constituency. The Petitioner stood on the PF ticket, while the Respondent stood on the UPND ticket. The Respondent was declared duly elected.

It is imperative to note that the law and practice regarding the hearing and determination of Election Petitions is found mainly in **Sections 96 - 109** of the **Electoral Process Act No. 35 of 2016**.

Looking at **Section 97**, which is reproduced above, it is my view that the election of a candidate as a Member of Parliament will be rendered void if any one of the grounds set out in **Subsection 2 (a) - (c)** is established and also if the provisions of **Section 97(2) (a)** of the **Electoral Process Act No. 35 of 2016** as regards the effect on the overall outcome of an election as was confirmed in the case of **Christopher Kalonge vs. Annie Munshya**<sup>5</sup>.

A party such as the Petitioner, who alleges has the burden of establishing any one of the allegations in the election petitions, in keeping with the well settled principle in civil matters of "*Affirmati Non Neganti Incumbit Probatio*" in English translated as, "*he who alleges must prove*". However, it is also pertinent to state from the outset that the standard of proof required in an Election Petition is higher. Election petition proceedings, despite being civil proceedings, require a higher standard of proof than a

preponderance of probability. This is because most allegations in election petitions are of a criminal nature. However the standard employed is not like that in criminal proceedings, therefore proof of allegations ought not to be beyond reasonable doubt. The Supreme Court has in a plethora of cases discussed the standard of proof in election petitions. In the case of **Michael Mabenga vs. Sikota Wina & Others**<sup>7</sup> the Supreme Court held as follows: -

*“proof of an Election Petition, although a civil matter was higher than balance of probability but less than beyond all reasonable doubt... As the allegation[s] in an election petition are of a criminal nature...”*

The Supreme Court went further and stated that: -

*“An election petition is like any civil claim that depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a balance of probability...”*

In the cases of **Lewanika and Others vs. Chiluba**<sup>10</sup> and **Mazoka and Others vs. Mwanawasa**<sup>9</sup>, the Supreme Court held that the burden of proof required is a fairly high degree more than a balance of probabilities. I am therefore of the view that the standard of proof in election petitions is indeed above one on the balance of probabilities, but less than beyond reasonable doubt.

Having established the standard of proof expected in election petition cases, I now turn to the issues raised herein by the Petitioner. I am of the view that the issues raised by the Petitioner, which this Court has been called upon to determine are as follows;



1. *Whether or not the Respondent either by himself or his agents was paying money to people/voters of Mongu Central Constituency for their voters' cards and NRCs before the August, 2016 elections;*
2. *Whether or not the Respondent was engaged in acts of violence and other vices, as defined under the relevant laws referred to in this matter, that may have substantially affected the outcome of the August, 2016 election results; and*
3. *Whether or not the Respondent was engaged in misinformation and slander meant to discredit the Petitioner thereby substantially affecting the outcome of the August, 2016 elections.*

I will proceed to determine this matter by addressing the first issue raised in the Petition regarding the allegation, by the Petitioner, to the effect that on or about 27th July, 2016, a known agent of the Respondent was apprehended while paying money to residents of Mongu Central Constituency for their voters' cards and NRCs in Somboko area, which allegation the Petitioner in his submission, states is an illegal act defined under **Section 2** of the **Electoral Process Act** to mean "***an offence which is declared under this Act to be an illegal practice***".

In examination in chief, the Petitioner, PW1, testified that a UPND member called Mushobosho was caught with NRCs and voters' Cards by PF party members. That when asked, the said Mushobosho stated that he was sent by the Respondent to get NRCs and voters' card so that he could give him money. The record will show that in paragraph 4 (i) of his Election Petition and

paragraph 10 of his Affidavit in Support of Election Petition, PW1 stated that a known agent of the Respondent was apprehended while paying money to residents of Mongu Central for their voters' cards and NRCs in Somboko area, contrary to his testimony adduced before the Court. The record will also show that PW2, Mwendabai Mukubesa, and PW6, Mubita Mubita Innocent, gave evidence in support of this first allegation made by the Petitioner. The evidence adduced by both PW2 and PW6 was that on 9<sup>th</sup> August 2016, a person called Muyunda Mushobosho was caught with voters' cards and NRCs. Further, that the said Mushobosho confessed to them on separate occasions that he was sent by the Respondent and his grandfather, Kusiyo, to collect the voters' cards and NRCs in exchange for chitenge materials and ZMW100.00 notes. The two witnesses further testified that they had taken Mushobosho to the PF offices before taking him to Mongu Central Police Station, but significantly none of them confirmed whether or not Mushobosho personally spoke with the Petitioner or if indeed the Petitioner was present at the PF offices when they took Mushobosho there, as stated by the Petitioner in cross-examination. They went on to testify that they were told that he (Mushobosho) was not the only one engaged in these activities on behalf of the Respondent.

In cross-examination, PW1 testified that Mushobosho personally told him, on a date that he had forgotten, at the PF offices, that he was given ZMW100.00 by the Respondent for the NRCs and voters' cards. However, he conceded that pages 11 - 18 of the

Respondent's Bundle of Documents did not show that Mushobosho got the money from the Respondent or that he was sent by the Respondent to collect NRCs and voters' cards in exchange for money. Under cross examination both PW2 and PW6 also conceded that the said Mushobosho was not apprehended while paying off the electorate for their voters' cards and NRCs, as alleged by the Petitioner. They were shown page 12 of the Respondent's Bundle of Documents which states that Mushobosho wanted to get the chitenge material from the UPND office and in response to that they testified that Mushobosho changed his statement from what he actually told them, which was that he was sent by the Respondent and Kusiyo.

In his evidence before this Court, the Respondent denied knowing a person called Mushobosho. Further, Musangu Njamba, RW2, and Charles Akende, RW3, the Respondent's agents, also denied in their respective evidence before this Court knowing a person called Mushobosho. The Court was urged, by the Respondent, to take judicial notice of the case in which Mushobosho was convicted of having been in possession of voters' cards and NRCs, which was shown at pages 11 -18 of the Respondent's Bundle of Documents. In the said case, Mushobosho was charged with being in possession of voters' cards and NRCs belonging to other persons. The particulars of offence were that Muyunda Mushobosho on the 9<sup>th</sup> day August, 2016 at Mongu in the Mongu District of the Western Province of the Republic of Zambia, had in his possession of 12 voters' cards and 7 NRCs belonging to other persons during the

campaign period. The Respondent urged the Court to take judicial notice of the said case in the context that Mushobosho was convicted for being in possession of 12 voters' cards and 7 NRCs. Further, that Mushobosho when admitting the charge stated that these cards were for people whom he lives with and that he wanted to get the chitenge material from the UPND office.

The author of **Black's Law Dictionary**, at Page 863 defines judicial notice as: -

*“A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact, the court's power.”*

The record will show that the excerpts of the said case involving Mushobosho were produced by the Respondent in his Bundle of Documents in the form of the Judgment, statement of facts, charge sheet and selected portions of the proceedings at pages 11 - 18.

A perusal of the said documents reveals that Mushobosho, the accused person therein gave a version of events different from that of the Petitioner and his witnesses. Mushobosho, in that matter, stated that the voters' cards and NRCs in his possession belonged to people he lived with and that he intended to use them to collect *chitenge* materials and T-shirts from the UPND offices. The said Mushobosho did not implicate the Respondent in any way.

I am of the considered view that the Petitioner has not adduced sufficient evidence linking Mushobosho or anyone else buying voters' cards and NRCs in Mongu Central Constituency to the

Respondent relating to the August 2016 election. Further, PW2 and PW6 conceded that the said Mushobosho was not found paying money to the residents of Mongu Central for their cards, as alleged by the Petitioner. Neither was Mushobosho found with any money on him. PW2 in cross-examination further conceded that what was read to him on page 12 of the Respondent's Bundle of Documents is what Mushobosho told him. The only statements made in this regard to this Court by PW2 and PW6 was hearsay. These two witnesses stated that Mushobosho told them that he was sent by the Respondent and Kusiyo to pay off the electorate in exchange for their voters' cards and NRCs and that many others were engaged by the Respondent to do so. No witnesses were called by the Petitioner before this Court to testify with cogent evidence that their voters' cards were taken and/or bought by the Respondent or his agents. The Petitioner never led evidence to show how the alleged NRCs and voters' cards obtained by Mushobosho influenced the outcome of voting in the August 2016 election. Pictures of the NRCs and voters' cards allegedly taken at the PF offices were not produced before this Court. The owners of these NRCs and voters' cards are not particularised and were never called to testify before this Court, as already observed above. This omission, on the part of the Petitioner, did not assist his case at all.

Further, the Petitioner contradicted his testimony in Court and the facts he deposed to in his Affidavit in Support and averments in his Petition. In his Election Petition at paragraph 4 (i) and Affidavit in Support at paragraph 10, he stated that the Respondent's Agent

was caught by PF members paying people money in exchange for their voters' cards and NRC, while in his testimony, adduced before the Court, he stated that a UPND member was sent by the Respondent to get NRCs and voters' card so that he (the Respondent) can give him money. It will also be seen from the record that PW2, who allegedly apprehended Mushobosho testified in cross-examination that he did not belong to any political party, while the Petitioner testified that Mushobosho was apprehended by PF members. The Petitioner has not established before this Court that the said Mushobosho was in fact the Respondent's agent. Neither was any proof adduced before this Court to show that the Respondent had knowledge or consented to the actions complained of and attributed to Mushobosho. Here I refer to the case of **Akashambatwa Mbikusita Lewanika and Others vs. Fredrick Titus Jacob Chiluba**<sup>10</sup> where the Supreme Court held that:

*"We are mindful of the provisions of the Electoral Act as that a candidate is only answerable for those things which he had done or which are done by his election agent or with his Consent. In this regard, we note that not everyone in one's political party is one's election agent. An election agent has to be specifically so appointed" [Emphasis mine]*

I also refer to the case of **Philip Mutantika and Mulyata Sheal S. vs. Kenneth Chipungu and ECZ**<sup>12</sup> where in considering and dismissing the allegation, in that petition, of voter buying, the Judge held that: -

*"In arriving at the said finding I have considered the evidence by the Petitioner and their witnesses which demonstrates that most if not all acts complained of were not committed by the First Respondent but rather MMD officials. Further no evidence was lead to prove that the MMD officials were the First Respondent's agents".*

The Respondent, in the matter before this Court, denied ever appointing a person called Mushobosho as his agent during the campaigns of the August 2016 election. Further, the Respondent's witnesses namely, RW2 and RW3 claimed that they did not know a person called Mushobosho. No evidence to link Mushobosho as an agent of the Respondent was adduced by the Petitioner before this Court. The Petitioner merely wants the Court to make assumptions that Mushobosho was the Respondent's agent. That cannot be. This is an Election Petition which requires to be proved by cogent evidence. The evidence required is on a standard higher than one on a balance of probability but less than beyond reasonable doubt. As such I opine and find as a fact that Mushobosho was not the Respondent's agent. No evidence was adduced by the Petitioner to show this Court that Mushobosho's acts were done with the knowledge and consent or approval of the Respondent and his agents.

I am therefore of the considered view that the allegation regarding the buying of voters' cards and NRCs lacks merit as it was not properly substantiated by the Petitioner. I refer to the case of **Enock Maseka Kaleka vs. Carlos Jose Antonio And Electoral**

**Commission of Zambia**<sup>13</sup> wherein the Court made the following observation: -

*“considering the evidence before this court, where the petitioner relied on hearsay evidence of allegations that were not properly substantiated or even independently investigated by himself, especially considering the inconsistencies and contradictions in the evidence of the petitioner’s witnesses and the 1<sup>st</sup> respondent’s witnesses, I am not satisfied that the petitioner has established or proved the allegations to the required standard or at all.”*

Further, the evidence referred to in the Respondent's Bundle of Documents at pages 11 - 18, clearly states that Mushobosho was taking the voters cards and NRCs to UPND to obtain *chitenge* materials and T-shirts and not that he was sent by the Respondent. This evidence was corroborated by RW2 and RW3. This fact was also conceded to by PW2 and PW6. The said Mushobosho was charged and convicted for being in possession of the said voters' cards and NRCs. No evidence was adduced before this Court to show that any charges were laid against the Respondent or indeed any of his agents for this allegation of Mushobosho's acts. I therefore find the allegation that the Respondent either by himself or his agents was paying people of Mongu Central Constituency for their voters' cards and NRCs before the August, 2016 elections lacks merit and fails. I accordingly dismiss it.

I now move on to the second pleaded allegation by the Petitioner. One to the effect that the Respondent and his agents engaged in



acts of violence contrary to the **Electoral Process Act No. 35 of 2016**, which acts, it is alleged, affected the outcome of the August, 2016 election results. PW1 (Petitioner), Lungowe Mundia, PW4 and Joseph Kachana, PW5, gave testimonies in support of this allegation.

It was PW1's testimony that named individuals were beaten and injured by UPND supporters on the Respondent's instruction. PW1 stated that the individuals that were beaten include; Mwilanjala, Joseph Kachana (PW5) and Levy Nawa Sishiwa who was killed. Further, that PW5 was kept overnight and beaten by the Respondent's agents.

PW1 added that the atmosphere in Mongu Central Constituency was threatening and intimidating because of the beatings and killing that took place immediately before the elections.

PW5 testified that he was beaten by UPND supporters, but denied having been kept overnight by the Respondent's agents, as alleged by the Petitioner. PW5 was inconsistent in his testimony and very evasive as could be deduced from his demeanour. PW5 alleged that he was severely beaten and electrocuted with a teaser many times. During his testimony, PW5 offered to show the Court the wounds that he had sustained. However, he did not produce any document in the form of medical report from the Police or hospital to substantiate his testimony. I found him not to be a credible witness and refer to the case of **Chizonde vs. The People**<sup>14</sup> where the Supreme Court held that: -

***“An adverse finding as to credibility may be based, for instance on discrepancies on the witness’ evidence or on a previous inconsistent statement or on proved bad character or an evasive demeanour and so on”***

PW4 was Levy Nawa Siwisha’s sister, a PF supporter allegedly killed by UPND supporters. In cross-examination PW4 testified that she did not know for sure who murdered her brother, but that she had also heard that he was caught stealing from Shiwanga Mwala's shop the night that he was murdered and that the said Shiwanga Mwala was a suspect in his murder apprehended by the Police.

The Respondent on the other hand stated that at no time did any of his agents engage in acts of violence during the entire campaign period as he and his supporters were never reported to the police, monitoring bodies or the Electoral Commission of Zambia (ECZ) for having caused any violence. The Respondent added that the death of one Levy Nawa Siwisha was as a result of beatings, by a shop owner called Shiwanga Mwala, after the deceased was caught stealing from the said Shiwanga Mwala’s shop. RW1’s testimony was consistent with PW4’s testimony in this regard. He testified that the said Shiwanga Mwala is currently in police custody awaiting trial.

The Respondent told the Court that PW5 was apprehended around midnight by RW1’s supporters while removing UPND posters and that he was not kept overnight, as alleged by the Petitioner. Although PW5 alleged that he had been beaten, he conceded that he

was not kept overnight by the Respondent's agents but was taken to the police station.

I am of the considered view that that the Petitioner has not substantiated the allegation of violence against the Respondent to the required standard of proof. The Petitioner never pleaded in his Petition that a person called Levy Nawa Siwisha was murdered by UPND supporters. Apart from his own testimony, no other evidence was adduced in support of his allegation that the said Levy Nawa Siwisha was beaten and killed by the Respondent's agents. Further, even PW4, the Petitioner's own witness conceded that she did not know for sure who had killed her brother and that she had heard that he was caught stealing and beaten on the night of his death. A version of events supported by RW1's testimony.

With regards the beatings of PW5, the Respondent and his witnesses stated that PW5 was found removing posters belonging to the Respondent in the night and was apprehended and taken to the police station where he was detained for a few days. PW5 conceded that he was not kept overnight by the Respondents agents and his campaign manager, RW3, as alleged in the Petition. PW5 did not give any explanation as to why he was detained by the police despite him not having committed any offence, as alleged. PW5 testified that he was not allowed to give a statement when he was taken to the Police Station and was only issued with the medical report on 15th August 2016. RW6 who is the Officer in Charge at Mongu Central Police Station testified that there was no record in the Occurrence Book for PW5's alleged incident.

The Petitioner also alleged in his Petition that the Petitioner and the Mayoral candidate for the PF had their cars broken, but did not adduce any evidence to that effect. This remained a mere allegation and unsubstantiated.

I am, therefore, of the considered view that the Petitioner has also failed to establish the second allegation with the requisite clarity and standard of proof required under the relevant applicable laws. The Supreme Court in the case of **Anderson Kambela Mazoka vs. Levy Patrick Mwanawasa And Another**<sup>9</sup> discussed how a Petitioner is expected to adduce evidence in election proceedings. The Supreme Court in the said case stated that: -

*“For the petitioner to succeed in the present Petition, he must adduce evidence establishing the issues raised to a convincing degree of clarity in that proven defects and flaws were such that the majority of Voters were prevented from electing the candidate who they preferred or that the election was so flawed that the defects seriously affected the result which can no longer be said to represent the true and free choice of the majority of voters.”*

The record will show that in fact PW3 conceded that the election period was peaceful. Further, that she was even able to attend UPND meetings despite being a PF ward chairlady.

**Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 15**, states that in order to constitute undue influence, a threat must be serious and intended to influence the voter. The threat should be judged by its effect on the person threatened and not by the intention of the person using it.

The Petitioner did not call any witnesses to give evidence to the effect that they were threatened or informed of the threats and/or acts of violence and that they failed to cast their vote in the general election as a result of the purported threats and/or acts of violence.

I am, consequently, of the view that the allegations of violence have not been proved by the Petitioner to the standard of proof required. I find no merit in this allegation and dismiss it accordingly.

The third issue, raised by the Petitioner, was whether or not the Respondent was engaged in misinformation and slander meant to discredit the Petitioner, contrary to the provision of **Section 97** of the **Electoral Process Act**, thereby affecting the outcome of the August, 2016 elections.

The gist of the allegation by the Petitioner in this regard was that the Respondent repeatedly called him '*Chikuza*' at his meetings owing to the fact that he was a Mbunda by extraction/ethnicity. He argued that a '*Chikuza*' was a *Likishi* traditional dancer and that it was unacceptable for the Respondent to call him by that name as it was not his name.

The Respondent denied having called the Petitioner '*Chikuza*'. The Respondent argued that he in fact went around with Makishi traditional dancers to entertain the people at his meetings/rallies. He further, argued that he could not have stated that the Petitioner being Mbunda by tribe was a '*Chikuza*' owing to the fact that some senior members of his party were in fact Mbunda by tribe. Indeed, the Petitioner himself under cross examination conceded that some

of the senior members in the Respondent's party were in fact Mbunda by ethnicity.

The record will show that the Petitioner under cross examination conceded that he did not in fact hear the Respondent call him a 'Chikuza'. Only PW3 stated in her testimony that she attended a meeting where the Respondent called the Petitioner a 'Chikuza'.

On his part, the Respondent produced before Court video footage of some of his meetings, which was admitted in this Court and marked "**R1**". The record will show that in that video recording played before Court and translated in Court by the Court Clerk from Lozi to English, the Respondent referred to the Petitioner by his ordinary name.

With regards the allegation that the Respondent told the electorate at his meetings that the Petitioner was going to sell land and lakes in Western Province to the government; no evidence was adduced by the Petitioner to support this claim save for his own testimony to that effect. No witnesses testified having heard the Respondent informing the electorate that the Petitioner was going to sell land and lakes to the government. Further, no witness came forward to adduce evidence that such alleged utterances attributed to the Respondent caused them not to vote for the Petitioner.

As a result, I am of the view that the Petitioner did not prove any of the allegations made against the Respondent in this respect, especially considering the fact that the standard of proof in election petitions is higher than on a balance of probabilities. I refer to the

Supreme Court case of **Emmanuel Chilubanama vs. Felix Mutati**<sup>15</sup> where Mwanamwambwa, J. noted that: -

*“The Appellant was expected to prove his case on a standard higher than the balance of probabilities. To that effect, he should have adduced actual evidence to prove the allegations ...”*

On the issues that were not pleaded, the Respondent in his submissions urged the Court not to put any weight on these issues. The issues not pleaded by the Petitioner were the allegations on the killing of Levy Nawa Siwisha; the giving of traditional Lozi dresses called Misisi and Liziba; and that the Respondent went to polling stations on polling day raising his party symbol. He referred this Court to the case of **Michael Mabenga vs. Sikota Wina & Others**<sup>7</sup> where it was held that: -

*“An election Petition is like any other civil claim which depends on the pleadings...”*

There is a plethora of case law where our Courts have held that where evidence not pleaded is let in and not objected to by the other side, the Court is not precluded from considering that evidence. For example I refer to the case of **Damales Mwansa vs. Ndola Lime Company Limited**<sup>16</sup> where it was held that: -

*“In a case where any matter not pleaded is let in evidence, and not objected to by the other side, the Court is not and should not feel precluded from considering it”.*

In the case of **Mazoka and Others vs. Mwanawasa and Others**<sup>9</sup> Chief Justice Sakala, as he then was, observed that the plaintiffs

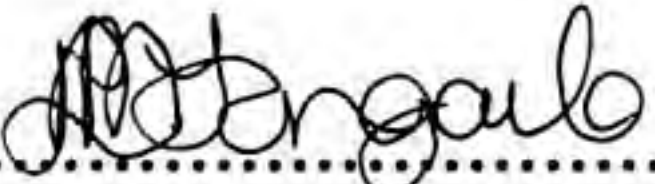
had departed from their pleadings in presenting their case and in some instances presented a completely new case. However, since the respondents did not object to the evidence immediately, the Supreme Court held that it could not be precluded from considering that evidence which was let in and was not objected to.

From the foregoing, this Court in determining this particular matter did consider the weight of the unpleaded issues that were let in without objection of the other side.

Having found that the Petitioner has not proved his case to the requisite standard, in accordance with the burden of proof which required him to establish and prove the allegations raised in the Petition with a fairly high degree of convincing clarity, I find that the Petition lacks merit and is hereby dismissed. I, therefore find, as declared by the relevant Returning Officer, that Mwilola Imakando, the Respondent herein, was duly elected as Member of Parliament for the Mongu Central Constituency in the August 2016 election. I make no order as to costs.

Leave to appeal is granted.

**Delivered at Lusaka this 23<sup>rd</sup> day of November, 2016.**

  
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**P. K. YANGAILO**  
**HIGH COURT JUDGE**