

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Constitutional Jurisdiction)**



**2016/HP/EP/0013**

IN THE MATTER OF: THE PARLIAMENTARY PETITION RELATING  
TO THE NALOLO PARLIAMENTARY  
ELECTIONS HELD IN ZAMBIA ON THE 11<sup>TH</sup>  
DAY OF AUGUST, 2016.

IN THE MATTER OF: ARTICLES 46, 51, 54 AND 73 OF THE  
CONSTITUTION OF ZAMBIA ACT, CHAPTER  
1, VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: SECTIONS 81, 82, 83, 84, 86, 87, 89, 91, 92,  
94, 96, 97, 98, 99 AND 100 OF THE  
ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016

**BETWEEN:**

**ENOCK KAYWALA MUNDIA**

**PETITIONER**

**AND**

**GEORGE MUHALI IMBUWA**

**RESPONDENT**

**Before the Hon. Mr. Justice Mathew L. Zulu in Open Court on the  
21<sup>st</sup> day of November, 2016**

*For the Petitioner: Mr. E. Eyaa & Ms. D. Mwewa of KBF & Partners*

*For the Respondent: Mr. W. Mweemba of Mweemba & Company*

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## **JUDGMENT**

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### **Cases cited**

1. *Mabenga v. Wina and others* (2003) ZR 10.

2. *Akashambatwa Mbikusita Lewanika and others v. Chiluba* (1998) Z.R. 79 (S.C.)
3. *Paul John Firmino Lusaka v. John Cheelo* (1979) Z.R. 99 (H.C).
4. *Batuke Imenda v. Alex Cadman Luhila* (SCZ No. 5 of 2003).
5. *Mateo B. Mwaba v Anthony Kunda Kasolo* (Appeal No. 27 of 2003).
6. *General Nursing Council of Zambia v. Ing'utu Milambo Mbangaweta* (2008) ZR. 105.
7. *Kamanga v. Attorney General and another* (2008) ZR 7.
8. *Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others* (2005) ZR 138.
9. *Benson Chola Christopher Nyampande and Nelson Sichula v. The People* (1988-89) ZR 103.
10. *The people v. George Misupi*, (1971) ZR 110.
11. *Sithole v. State Lotteries Board* (1975) ZR 106.
12. *Joseph Gereta Chikuta v. Chipata Rural Council* (1983) ZR, 26.
13. *Khalid Mohammed v. The Attorney General* (1982) ZR 49.
14. *Lazarous Chota v. Patrick Mucheleka* SCZ NO. 18 Of 2015.
15. *Mulondwe Muzungu v. Elliot Kamwendo* (2010/HP/EP/001).
16. *Simasiku Kalumiana v. Gregory Lungwangwa & ECZ* (2006/HP/EP/17).

**Legislation referred to:**

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Electoral Process Act No. 35 of 2016*
3. *The Electoral (General) Regulations, 2006.*

On 26<sup>th</sup> August, 2016, the Petitioner Enock Kaywala Mundia, presented this Petition with a supporting Affidavit pursuant to Articles 46, 51, 54 and 73 of the Constitution as read with Sections 81, 82, 83, 84, 86, 87, 89, 91, 92, 94, 96, 97, 98, 99, 100 and 110 of the Electoral Process Act. The Petitioner alleges that the declaration of the Respondent, Muhali George Imbuwa, as duly elected Member of Parliament (MP) for Nalolo Constituency was invalid due to non-compliance with the provisions and procedures prescribed under the Constitution and the Electoral Process Act.

The Petitioner alleges that as a consequence of the said illegal practices committed by the Respondent and his election and other agents, the majority of the voters at the affected areas and or Polling Stations were prevented from exercising their freedom in electing the candidates in the Constituency whom they preferred.

In response, the Respondent filed an Answer with a supporting Affidavit on 16<sup>th</sup> September, 2016. The Respondent denied all allegations of non-compliance with the provisions of the Constitution and the Electoral Process Act or any other relevant law cited in the Petition and prayed that the same be dismissed with costs to the Respondent.

The background to this matter is that the Petition under cause number 2016/HP/EP/0013 (hereinafter the 'first Petition') proceeded as per the Order for Directions dated 14<sup>th</sup> September, 2016 and the matter was heard at Livingstone High Court from 5<sup>th</sup> October to 12<sup>th</sup> October, 2016. At the close of the case, I was alerted of the Petition filed in Lusaka relating to the same Constituency, Nalolo, under cause number 2016/HP/EP/0063 (hereinafter 'the second Petition'). The second Petition had been allocated to Judge D. Mulenga and was scheduled for hearing on 17<sup>th</sup> October, 2016. However, by the Order dated 17<sup>th</sup> October, 2016 and in accordance with Section 23 of the High Court, Mr. Justice D. Mulenga transferred the matter to this Court.

On 19<sup>th</sup> October, 2016, Counsel for the Petitioner in the second Petition applied to have the two Petitions under cause numbers

2016/HP/EP/0013 and 2016/HP/EP/0063 consolidated as a prudent way to avoid conflicting decisions. I ruled that two actions could not be consolidated because the Petitioner in the first Petition is also the 2<sup>nd</sup> Respondent in the second Petition. However, having noted some common questions of law and fact in the two Petitions and noting that the first Petition was heard and was pending Judgment, I ordered a stay of the first Petition pending the hearing of the second Petition after which I would render judgment.

Having heard the two Petitions separately and having considered the evidence in both Petitions, I find it imperative to render two separate judgments, one after the other.

The detailed allegations in this Petition under cause number 2016/HP/EP/0013 are contained in paragraph 5 of the Petition. I shall consider the said allegations in much more details at a later stage in this Judgment.

According to the Petitioner, the said illegal practices committed by the Respondent prevented the electorate from exercising freedom in electing their preferred candidate.

Consequent to the foregoing, the Petitioner seeks the following reliefs:

- (i) A declaration that the election of the Respondent as MP for Nalolo Constituency is void;
- (ii) An order that the Respondent did not comply with Article 51 of the Constitution of Zambia;

- (iii) An order that the declaration of the winning of the Respondent was null and void and must be set aside;
- (iv) A declaration that the election is invalid by reason of non-compliance with the Constitution and with the Electoral Process Act and the procedure for the conduct of elections prescribed by the Electoral Commission of Zambia (ECZ) pursuant to the provisions of the Electoral Process Act;
- (v) An order that the Respondent is disqualified from being a candidate in the by-election for not complying with the provisions of the Constitution and Electoral Process Act;
- (vi) An order that the Respondent bears the costs in this cause; and
- (vii) Any other relief the Court may deem fit.

The hearing of the Petition commenced on 6<sup>th</sup> October, 2016 and ended on 12<sup>th</sup> October, 2016. The Petitioner testified and led evidence from 16 witnesses. The Respondent also gave oral evidence and called 3 witnesses.

PW1 was Kumoyo Sishekanu, a peasant farmer aged 34 who stated that he is the PF Chairman for Kambai Ward. It was his testimony that on 5<sup>th</sup> August, 2016 around 14:00 hours, he attended a campaign rally at Namalilo village convened by the Respondent. At the meeting, the Respondent told people to vote for him and that they should not be confused by the Petitioner who was resident in China. He testified that the Respondent said that the Petitioner is a satanist who intended to sell the people. That the Respondent urged voters not to use the pens

provided in the Polling booths because they were allegedly procured by the Petitioner who was associated with Satanism. He added that the Respondent offered to provide pens to voters that did not have their own pens.

PW1 testified that as the Respondent wrapped up the meeting, he distributed Chitenge materials imprinted with his portrait to the people in the audience regardless of their political affiliation. When the materials ran out, the Respondent advised those that did not collect to see him after the rally. PW1 stated that after the meeting, the Respondent gave him K600.00. According to him, it was a token of appreciation for him to share with other people that did not collect Chitenge materials.

It was PW1's evidence that on 11<sup>th</sup> August, 2016, he went to vote at Mwandi Polling Station in Kambai Ward and carried his own pen. He stated that he observed that other people had also carried their own pens in accordance with the Respondent's instructions.

Under cross examination, PW1 told the Court that he was able to exercise independent judgment when voting. He stated that he believed the Respondent's words that the Petitioner was involved in Satanism. He stated that he does not know where the Petitioner works or resides or his religious beliefs.

PW1 testified that he was not aware how the voters acquired the pens they carried to the Polling Station. Further, that he only visited one Polling Station and as such would not know what transpired in other Polling Stations.

PW2 was Boyd Ziyenzi, aged 50, who was the Presiding Officer for Mwandia Polling Station. He testified that on voting day, he discovered that the voters on the queue inside the Polling Station carried their own pens. Going by the ECZ regulations, he directed the voters to only use the pens provided by ECZ. However, that the voters explained that they could not use the ECZ pens because they were made in China by the Petitioner who is a Satanist. That after hearing his explanation, he observed that the voters started hiding their pens when entering the polling booths.

PW2 testified that as he was monitoring the election, he discovered that one pen from one of the booths was missing. He replaced it and went outside the Polling Station where he announced to the voters that they should only use the pens provided by ECZ and that they should not take them away after voting. He stated that the voters told him that if they used the ECZ pens, the mark on the ballot paper would shift to the Petitioner. However, that the voters continued using their own pens and the trend continued until the close of the Polling.

Under cross examination, PW2 stated that he is a civil servant and was neutral in carrying out his duties as presiding officer. He testified that there were many people who carried their own pens. He knew that the voters were hiding their pens because he observed that they were removing them from the booth when voting. He stated that it was the voters that informed him that the Respondent told them not to use the pens provided by ECZ. He added that a report of the proceedings was generated stating

that voters were in possession of foreign material. And that the said report was submitted to ECZ together with the ballot boxes.

PW3 was Kasanga Maybin, aged 65, the Ward Secretary for Kambayi Ward for PF. His evidence was that on 5<sup>th</sup> August, 2016 he attended the Respondent's campaign rally held at Nasikona village under the mango trees. At the said meeting, the Respondent asked people to vote for him as one of their own and not the Petitioner as he was a Satanist and lived in China. That as the Respondent was speaking, a snake dropped from a mango tree and the people scampered. The Respondent called the people back. When the meeting continued, the Respondent told people that the Petitioner was satanist because a snake dropped just after talking about him. PW3 stated that the Respondent also urged voters to carry their own pens because the ECZ pens were from the underworld provided by the Petitioner so that the ink would shift in his favour. He added that during the meeting, the Respondent pointed out that there were PF members present at the meeting but that he did not mind because he needed support.

It was PW3's evidence that after the meeting ended, the Respondent called him to his car and gave him K500 in K100 denominations with two Chitenges imprinted with a picture of a 'mortar'. After receiving the money, he went to meet his colleagues from the PF. He testified that he gave Japhet Kababa K100 and one Chitenge material, Akufuna Mubita K100 while he kept the other Chitenge material and used the rest of the money.

He stated that on voting day, he found that each person had a pen of their own so he was prompted to buy one for himself. He

testified that he voted for the Respondent and not the Petitioner because he feared that the Petitioner would kill him using his satanic powers. He added that people feared that they would be taken to China if they voted for the Petitioner. He went further to state that the Respondent won the election because he bought them with money. However, PW3 stated that he is no longer afraid because no one has died.

Under cross examination, PW3 said there was no record of what was said at the Respondent's campaign rally. He stated that there was also no witness when the Respondent called him to his car and gave him the money. According to PW3, when the Respondent gave him money, he said that he should share it with other people and vote for him.

He stated that he decided to buy his own pen when he went to vote after he saw people with their own pens. When further cross examined, he reiterated that the Respondent advised them to provide their own pens because the pens provided by ECZ were satanic.

Further in cross examination, PW3 stated that he voted for the Respondent because he gave him money and that he feared death from the Petitioner. PW3 further disclosed that he did not ask the Respondent the reason why he gave him the money. However, according to him, the Respondent chose him because he knew that he was the Ward Secretary for PF.

PW4, Japhet Kababa, 26, a health worker at Nasikona Rural Health Centre told the Court that he voted from Nasikona Polling Station.

He testified that on 27<sup>th</sup> July, 2016, he attended a rally held by the UPND Presidential Candidate Hakainde Hichilema. He stated that Hakainde Hichilema urged the addressees not to make a mistake of using pens provided by ECZ because the pens were tainted with satanic influence.

He testified that on 5<sup>th</sup> August, 2016, he went to attend another meeting held under the mango trees at Nasikona village. He found the Respondent telling the audience not vote for the Petitioner because he was engaged in a 'bad job' in China. That the Respondent added that the Petitioner was cohabiting with another woman who was not his wife in China. And that if they voted for him, the Petitioner would go to China and never return. The Respondent also said that the Petitioner was a Satanist and that if they voted for him, they would all be sold to China. That he further informed people that that even the pens that they were going to use were procured from China where the Petitioner gets his money from the sea.

PW4 testified that as the meeting went on, a snake fell from the mango trees and people dispersed. That the Respondent immediately told people that the Petitioner was a Satanist and the falling of the snake at the mention of his name was confirmation. PW4 said his reaction was that he wondered if it was true that the Petitioner was a satanist.

Thereafter, some people mentioned that there were some PF members in the group and that the PF Ward Secretary for Kambai (PW3), was present. Shortly thereafter, he saw the Respondent calling PW3 to his motor vehicle. When PW3

returned, he had some money in his hands with two Chitenge materials. That at that time, he was with Muwana Mubita. He stated that PW3 went and showed them what he had been given. PW3 gave him K100 and a Chitenge material and gave Muwana Mubita K100 while he (PW3) kept the rest of the money and the other Chitenge materials. According to PW4, the money was intended to buy their votes.

PW4 further disclosed that on 11<sup>th</sup> August, 2016, he carried his own pen for fear of being initiated into Satanism. According to him, it was well known that ECZ pens were satanic.

In cross examination, PW4 said that the Respondent was not present at the campaign rally convened by Hakainde Hichilema. He also confirmed that HH was campaigning for himself, his MP and counsellor and not the Respondent who was an independent candidate. PW4 testified that it was at the meeting at Nasikona at which he heard the Respondent telling voters not to use ECZ pens because they are satanic. That although he knew that ECZ provides pens, he used his own pen because of what the Respondent said at the meeting.

PW4 said the Petitioner hails from Lilume village and that he knew him in February, 2016 such that he could not say anything about him prior to that. He also stated that he never attended any campaign rally for the Petitioner.

Further, PW4 stated that the beneficiaries of the money from the Respondent were himself, PW3 and Mubita Muwana. When further cross examined, he said there was a person by the name of Akufuna Mubita.

In re-examination, PW4 explained that he was with Muwana Mubita Akufuna when receiving the money from PW3.

PW5 was Akufuna Mubita, aged 45, who is the PF youth Chairman for Kambai Ward. His testimony was that on 5<sup>th</sup> August, 2016, he attended a campaign rally Nasikona at which the Respondent was informing people that they should vote for him because he was their own. That they should not vote for the Petitioner because they did not know where he comes from. The Respondent also said that the Petitioner is a Satanist. That the Respondent further told people not to use the pens provided by ECZ saying they were satanic. Shortly thereafter, a snake dropped from the tree and people dispersed. Then word went round that the Petitioner whom they spoke about was a Satanist. PW5 said he could not ascertain the number of people present but it was a big gathering.

He testified that at the end of the meeting, the Ward Secretary for Kambai (PW3) called him in the presence of PW4. That PW3 told them that the Respondent gave him K500 to share. PW5 said he and PW4 were given K100 each. According to him, the purpose of the money was for them to vote for Mundia Imbuwa.

He went further to state that on Election Day, voters followed the instructions they were given by Mundia Imbuwa at Nasikona to carry their own pens because if they failed, the results would be different.

Under cross examination, PW5 said he knew the Petitioner who lives in Lusaka. That he does not know where he works or goes to

worship. That the Petitioner held a meeting during campaigns at Mwandi Primary School in February, 2016.

PW5 said that he was told that it was the Respondent who gave PW3 the money after the meeting. When further cross examined, he stated that he did not see the Respondent giving PW3 the money. That according to what he was told, the money was meant to sway them to vote for the Respondent. He said he did not know how many other people PW3 gave money to.

PW5 testified that he knew Kumoyo (PW1) but he did not see him at the meeting. That when he received the money, he was shown two Chitenge materials for the Respondent which, to him, showed that he was contesting as an independent candidate.

Further, PW5 stated that when he mentioned Mundia Imbuwa he was referring to the Respondent. He explained that the mix up with the names was a mistake. Furthermore, that it was the Respondent who issued instructions for voters to use their own pens at a meeting held at Nasikona.

PW6 was Kelvin Katiba, a teacher at Mwananyanda Primary School aged 46. He testified that on 27<sup>th</sup> July, 2016 he was travelling from Mongu to Mwananyanda Primary school. Along the way, he passed through Kalamba Primary School where he found a meeting convened by the UPND Presidential Candidate, Hakainde Hichilema. In his address, Hakainde Hichilema told the people not to use pens provided by ECZ. Unfortunately, he did not hear the reason why.

PW6 testified that on 11<sup>th</sup> August, 2016, he served as Assistant Presiding Officer for Nasikona Polling Station. Around 10:00 hours, one of the Polling Assistants stationed at table 2 went outside to answer the call of nature and he sat in for him. Whilst at table 2, he gave a lady a ballot paper and she removed a pen from her pocket to cast her vote. He immediately informed the Presiding Officer, Lewis Mapena, about what he had seen. The Presiding Officer informed a police officer who was outside to inform the voters that ECZ had provided pens in the booth. There was an uproar and some people said they were not going to use the pens provided by ECZ because the Respondent told them that the pens were made by the Petitioner. PW6 said he too went outside to direct the votes that the only pens to be used were those provided by ECZ. However, that they insisted that they could not use the pens provided by ECZ because they were tainted with satanic influence. PW6 testified that he then instructed two police officers to contain the situation outside the Polling Station. He further stated that he told the Presiding Officer that he connected the incident to the meeting he found at Kalamba where people were being told not to use the ECZ pens.

It was PW6's further evidence that the voters who accepted to use ECZ pens were folding the ballot papers outwards, leaving the mark exposed. While, the others who refused to use the ECZ pens went into the booth with hidden pens.

Under cross examination, PW6 said it was HH whom he found addressing the meeting at Kalamba and not the Respondent. He also stated that he does not know the Respondent and has never

attended any of his campaign meetings. He however, stated that he could not confirm that the Respondent had nothing to do with the allegations because the voters informed him what the Respondent told them regarding the ECZ pens. He added that he told the Presiding Officer that he linked the voter's behavior to the message given to the people by Hakainde Hichilema in his address at the meeting he attended.

Further, that the lady he saw marking a ballot paper during elections was voting for a presidential and not a parliamentary candidate.

PW7 was Mufaweli Mutumba, a peasant farmer, aged 38 who told the Court that he is the PF youth Chairman for Kapungu village. It was his testimony that on 11<sup>th</sup> August, 2016, he went to cast his vote at Liliachi Polling Station where he found the issue regarding pens. Whilst on the queue, he discovered that the voters were using their own pens and not those provided by ECZ. When he inquired, he was told that the pens provided by ECZ were satanic as they were provided by the Petitioner. And that if ECZ pens were used, the mark would shift to the Petitioner. When his turn came, he was also given a pen which he used to cast his vote.

Under cross examination, PW7 said it was the mob of people he found on the queue that told him not to use the ECZ pens and not any of the candidates. Further that it was a woman and not any of the candidates that gave him the pen which he used.

PW8 was Sitali Mushimbeyi a 53 year old peasant farmer. He testified that on 28<sup>th</sup> July, 2016, the Respondent held a campaign

rally at Nasita at which he placed two flags; one for UPND and another for a 'mortar'. The Respondent arrived at the meeting place using a speed boat. The meeting was preceded by a prayer followed by a request for people who were present to stand in a queue to receive K20.00 each. PW8 testified that the Respondent said that the money was meant for the people to vote for him. That at the said meeting, the Respondent urged people to vote for him because he was one of them and that he was working with computers on the Copper belt. He also told them that he was an Induna at Kapolota village. He went on to tell them not to vote for the Petitioner because he lives in China. The Respondent also said the voters should not use the pens they will find in the booths because they were satanic as were procured by the Petitioner. Immediately the meeting ended, the Respondent went back to his speed boat where he continued giving money as before. PW8 said he remained at the meeting place watching and never received any money. It was his testimony that the Respondent said that the K20.00 notes were distributed to buy votes because the Respondent said they should vote for him.

It was his testimony that on 11<sup>th</sup> August, 2016, he served as a polling agent for PF an Ng'ala Primary School. He stated that he cast his vote and continued with his role as polling agent. That he was surprised that people had three or four pens each in their pockets. He inquired why people were carrying pens when ECZ had provided pens. They explained that the mark would move to the Petitioner's position on the ballot paper if they used the pens provided by ECZ. Then he informed a police who tried to advise the people. However, that the Respondent's campaign manager,

Muyendekwa, grabbed the officer by her collar, pushed her and warned her that she would be beaten if she continued with what she was doing. According to him, the police officer felt intimidated because she was a woman and people continued using their pens as before. PW8 also disclosed that Muyendekwa was distributing pens and telling people to vote for the 'mortar', the Respondent's campaign symbol.

It was also his evidence that trouble began when some people failed to vote after they saw how the police officer had been intimidated. Around 14:00 hours, the Petitioner went to the Polling Station to monitor the election. When the Petitioner arrived, Muyendekwa and three other people, namely Pumulo, Maisa and Katongo went to him and one of them hit him with a clenched fist on the chest. After they were separated, the Petitioner got into his motor vehicle and drove off.

In cross examination, PW8 said the document at page 3 of the Respondent's Bundle of Documents showed that the Respondent works for Professional Insurance in Lusaka. He stated that the instructions not to use ECZ pens were issued at a meeting addressed by the Respondent. However, that there was no recording of what was said at the meeting.

PW8 stated that he did not receive any money at the meeting and that he could not ascertain the number of people that received the money because there were too many. It was his evidence that it was the Respondent himself who was giving out money. He added that he did not report the matter anywhere because he did not know the procedure to follow.

Regarding the incidence of intimidating a police officer, PW8 said that the Petitioner was not present when the incident occurred. That he voted from Ng'ala Polling Station and did not see the Respondent there. He testified that when the Petitioner arrived, he was not aware whether the Petitioner's driver was armed. He stated that, although voting was suspended at some point, he was not aware that it was due to a shooting incident. According to him, the suspension occurred at the time the police officer was almost beaten. He denied that he saw the Petitioner dishing out money to voters on the queue which resulted in him being removed from the Polling Station.

Further in cross examination, PW8 said he saw the Petitioner being attacked by Katongo and his children Pumulo and Maisa. When asked if he saw anyone produce a gun during that scuffle, he denied. He went on to say that as a result of the fight, some people were scared to vote. He added that the Petitioner was attacked because he should not have been present since it was not campaign day.

In re-examination, PW8 clarified that the people present at the meeting were not shown the document at page 3 of the Respondent's Bundle showing that he worked in Lusaka. PW8 explained that the Petitioner was not campaigning when he went to the Polling Station. Further, that he did not see any gun or weapon that day.

PW9 was Lubasi Mubita, who was a Polling Assistant at Ng'ala Polling Station. His evidence was that when he was giving out ballot papers, he noticed that a woman stained her ballot paper

with ball pen ink which she had on her thumb. When he asked her what she was holding, she tried to hide the pen she had. Then he reported the incident to Sipempele, the Returning Officer. The woman narrated that they were told not to use the pen provided in the booth because they were satanic and that if they used them, they would transfer the vote to the Respondent. PW9 said they advised voters that the ink would result in a lot of ballots being rejected.

Then he saw Muyendekwa, the Respondent's campaign manager, and four people entering the Polling Station and chanting, Vote for '*Kachika!*' Vote for '*Kachika!*' Which was the Respondent's campaign slogan. A short while, the Petitioner arrived with his vehicle. Then Muyendekwa's group was joined by another person who grabbed the Petitioner's hand and hit him on the chest. The group also told ECZ officials that they had made a mistake by allowing a Satanist at the Polling Station. Thereafter, the Petitioner left the Polling Station with the help of the police.

Under cross examination, PW8 denied that there was any shooting incident at the Polling Station. He stated that it was Muyendekwa and not the Respondent who attacked the Petitioner. He added that he did not see the Respondent at the Polling Station. Further, PW9 confirmed that the lady told him that the ink from the ECZ pens would go to support the Respondent and not the Petitioner.

PW10, Mwendabai Sifunganyambe, a teacher aged 42 stated that he was a Polling Assistant at Sikana Primary School. He testified that he was assigned to take care of the ballot boxes on polling

day. Around 17:30 hours, the Presiding Officer, Nyambe Kalaluka, requested him to sit in for him as he went to answer the call of nature. As voting continued, he was surprised when he saw a lady coming out of the Polling booth with ballot papers. When he asked her, she told him that she was going outside to look for a pen. He told her that there was a pen which was provided in the booth and that she was not allowed to take the ballot paper outside. She explained that the pen in the booth failed to mark the ballot paper. When he insisted, she said she could not use the pens in the booth because they were made by the Petitioner in China. She went on to say that they were informed that if they used those pens, the mark would shift in favour of another candidate. As the argument got heated, the Presiding Officer returned and he handed over. The Presiding Officer announced inside the Polling Station and told the police officer to make the same announcement outside that voters were not allowed to use pens other than those provided in the booth. He added that voting continued smoothly.

PW11 was Mulimukwa Kalaluka, a peasant farmer aged 52. He informed the Court that he was a polling agent for PF Stationed at Kaanda Polling Station. He testified that he was accompanied by Mwiiya Siliso. While at the Polling Station, he sat with his friends when the Respondent's supporter Mwiiya Mwanagombe told them that they would be put to shame because the Petitioner would lose as he was a Satanist. That he also told them that the pens provided by ECZ would not be used by majority of the people because they were designed to transfer votes to the

Petitioner. He also told them that if anyone touched the pens, they would find themselves in China waiting for the Petitioner.

PW11 went on to testify that he left and sat at a different point. Three PF members, namely, Kamayoyo Kachana, Namakau Kashweka and Mwendabai Nalishebo followed him and informed him that all the people were saying that they should not use the pens provided by ECZ. That they should use their pens and those who did not have would be given by their friends at the Polling Station. That they also told him that if that was the case, they will not vote for the Petitioner because he was a threat to them.

PW11 testified that he confirmed that people carried their own pens when voting. He added that he particularly saw Malikiso Malikiso with his own pen.

Under cross examination, PW11 told the Court that Mwiiya Mwanangombe did not disclose where he got the information that the Petitioner would lose because he was a Satanist. He stated that he believed him even without verifying the source. He testified that he did not challenge him because he was afraid. He went further to state that when he retreated, he went to seat with other PF members who also said the Petitioner was a Satanist.

PW12 was Gilbert Mabuku, a peasant farmer aged 63 who is the PF Secretary for Roadside Branch in Siyanda. His testimony was that he attended a campaign meeting for the Respondent at Simbule village in Siyanda area which was attended by a lot of people. In his address, the Respondent told people to carry their own pens when going to vote. He also told people that the ECZ pens were procured by the Petitioner who was involved in

Satanism such that if they used them, their votes would shift to the Petitioner.

It was PW12's further evidence that on voting day, he served as a polling agent for PF at Siyanda Polling Station. During voting, he noticed that voters had carried their own pens. Before he could report, the Presiding Officer, Alice Lukena, also became aware and she announced that voters should not use any pens other than those provided by ECZ. The voters on the queue answered that they feared death from the owner of the pens, referring to the Petitioner. Despite the announcement, voters continued using their own pens which they hid in their under garments. He testified that the Presiding Officer failed to follow voters in the booth in keeping with the 'secret ballot'. She repeated the announcement regarding pens but to no avail. PW12 added that a lot of people who went to vote carried their own pens.

He further stated that he voted and used a pen provided by ECZ.

Under cross examination, PW12 testified that the Respondent was not present when the voters refused to use the ECZ pens for fear of death but his polling agents were. He, however, testified that people were voting for the candidate of their choice. He also stated that it was the Petitioner who won at that Polling Station.

He further disclosed that he felt very bad when his candidate lost but denied that he was testifying out of vengeance.

PW13 was Likando Nyambe a peasant farmer aged 21. She testified that on 7<sup>th</sup> August, 2016, she attended the Respondent's campaign meeting held under a tree in Muoyo village. In his

address, the Respondent told voters not to vote for the Petitioner because he was resident in China. The Respondent also said that the Petitioner was a Satanist who would kill them if they voted for him. The Respondent also instructed people to use their own pens when voting stating that if they used pens provided by ECZ, their votes would be transferred to another candidate. And that they would die by simply touching the said pens.

PW13 testified that the Respondent gave her a Chitenge material and a K100.00 note to lure her into voting for him.

She stated that on 11<sup>th</sup> August, 2016, she used her own pen when voting. She explained that she was afraid to touch the ECZ pens because they were satanic. She also noticed that other voters had carried their own pens.

In cross examination, PW13 stated that to her knowledge, the Respondent hails from Kapolota village which is very far from Muoyo village where the meeting was held. She said that she did not know the Respondent and that she first met him at the meeting. On the other hand, she stated that she knew that the Petitioner hails from Lilume village and that he now lives in Lusaka.

PW14 was Likando Maimbolwa, a business woman aged 33 years. She testified that on 27<sup>th</sup> July, 2016 she went to attend a campaign rally at Samba village where she found the Respondent standing by his vehicle. As she was coming from the market, she had some fish worth K50 and the Respondent bought all her fish and asked her to attend the meeting. She told him that she was a PF member but had no position in the party. The Respondent

asked her what business she was engaged in for a living. Then he gave her a K200.00 and told her to vote for him. At that time, she was alone with him when he gave her the money. She took her basin to her friend's house and returned to the meeting place. She found the Respondent addressing the audience and urging them to carry their own pens when voting. That if they did not use their own pens they would die. She stated that when she heard that the Petitioner whom she was supporting was a Satanist, she was afraid.

On 11<sup>th</sup> August, 2016, she carried her own pen which she hid in her bra. She found that many other people had also carried their own pens which was confirmation of what was said. As she was afraid, she voted for the Respondent instead of the Petitioner.

In cross examination, she testified that her preferred parliamentary candidate was the Petitioner who turned out to be a Satanist.

PW15 was Muletambo Saasa, aged 34, a Deputy Head teacher who served as Presiding Officer for Sitoya Polling Station. Her testimony was that on 11<sup>th</sup> August, 2016 around 06:00 hours she opened the Polling Station and asked voters to form a queue. She instructed voters not to carry foreign material into the Polling Station, particularly, pens and papers. After voting had commenced, she discovered that voters were carrying their own pens. She advised them to leave their pens because ECZ provided pens. She observed that the voters were removing their own pens in the booth to cast their votes. She repeated the instructions regarding pens. Then one of the voters, Muleta Akabondo, told

her that the pens provided in the booth were made by the Petitioner in China. He explained that the Respondent told him that the votes would transfer to the Petitioner if they used the pens in the booth.

PW15 testified that being the Presiding Officer, ECZ had given them a lot of pens; she replaced the pens in the booth and informed the voters accordingly. However, they refused to use the pens provided by ECZ.

Under cross examination, PW15 testified that most of the voters at Sitoya Polling Station used their own pens. That when ballot papers were sorted out, the Petitioner received some votes too. She testified that she did not know whether the issue of pens disadvantaged any candidate. Further, that she never heard the Respondent telling voters not to use ECZ pens.

PW16 was Muhau Anayau aged 29, who was the Petitioner's communications manager tasked to mobilise PF campaigns in Nalolo. His testimony was that when the Respondent was not adopted on the UPND ticket, he experienced difficulties in mobilizing supporters for his candidature. According to PW16, PF had a large following during nominations. He testified that the Respondent's agents namely, Namaya and Joseph Chiyuka, approached him after the Petitioner had filed his nomination and asked him to help them mobilise some people to support the Respondent when filing his nomination. They also invited him to meet the Respondent under a tree near the UCZ Church along the road leading to Muoyo Primary School, which was the Nomination Centre. They enticed him that in return, the

Respondent would find him a job at Professional Life Insurance where the Respondent used to work. He, however, turned down the offer. As a result of his difficulty, the Respondent filed his nomination after the ECZ scheduled time.

PW16 testified that during campaigns, they found the Respondent's campaign rally at Nasita with two flags mounted; one for UPND and another for himself. In his view, this suggested that the Respondent was campaigning under UPND when he was an independent candidate.

On 11<sup>th</sup> August, 2016, he cast his vote early in the morning and proceeded to visit other Polling Stations with the Petitioner. At Mwandi Polling Station they noticed that nearly everyone on the queue was carrying their own pen. He approached the Presiding Officer, Ziyenzi Boyd (PW2) who informed him that he tried to stop people from carrying their own pens since ECZ had provided pens but they told him that the pens were manufactured in China by the Petitioner who is a Satanist. And that if they voted for the Respondent their vote would be transferred to the Petitioner. PW2 told him that he allowed the people to enter with their own pens because he could not control the voters.

He inquired from their Polling agent, Pumulo Sishekanu (PW1) who told him that the situation was hostile because people said the Petitioner manufactured the pens provided in the booth.

It was his evidence that they proceeded to Nasikona Polling Station and found people using their own pens. He asked the Assistant Presiding Officer, Kelvin Katiba (PW6), who said that the people said that they were instructed not to use the ECZ pens

since they were supplied by the Petitioner, a Satanist and that the pens would transfer votes to him. He also inquired from Kapanda (PW3) who confirmed the allegation.

PW16 testified that they proceeded to Liliachi where they found people using their own pens. He asked Mutumba who told him that the people were told by the Respondent not to use the ECZ pens as they were manufactured by the Petitioner who is a Satanist.

Then they went to Ng'ala Polling Station. When they arrived, they went into the Polling Station where they found people carrying their own pens. He asked an ECZ official, Lubasi Mubita (PW9), who informed him that the people were refusing to use pens provided by ECZ because they were manufactured by the Petitioner who is a Satanist. When leaving the Polling Station, a crowd of people attacked him and the Petitioner and shouted *'what is this Satanist doing here!'* Then two people grabbed the Petitioner by his left and right hands on both sides and a third person hit him on the chest. PF supporters rescued them and they left.

PW16 testified that they proceeded to visit Sikana, Nambwae and Mapungu Polling Stations where they found that people carried their own pens for the same reasons.

They went to Silowana Polling Station where they found voters using their own pens. He testified that at this particular Polling Station, voters were using their own pens freely so nearly everyone had their own pen for the same reasons.

They proceeded to visit Kaanda, Namabunga and Kaungalueti Polling Stations where they found that voters were carrying their own pens when voting, citing the same reasons. Thereafter, they drove back to Mongu with the Petitioner.

It was PW16's further evidence that in the last week of June, they received a message that the Vice President would visit Nalolo Constituency and was scheduled to conduct meetings at Siyanda and Liliachi Primary Schools. They travelled to Mongu to prepare the Vice President's visit to drum up support for the Petitioner. PW16 stated that he went to a place called Hollywood 2 in Mongu dressed in PF regalia where he found the Respondent drinking. PW16 said he introduced himself and the position he held in PF during elections. That the Respondent bought him some beer and asked him why all the meetings which were addressed by the Petitioner were well attended. He explained that it was because he mobilized people well. The Respondent also told him that he had difficulties in his campaign because his meetings were not well attended. PW16 testified that the Respondent asked him to destabilise the Respondent's campaigns on promise of a job at Professional Insurance and gave him K300.00 as payment. It was his evidence that as an unemployed youth, he used the money and neglected to mobilise the meetings at Siyanda and Liliachi such that they were poorly attended.

Further in his testimony, PW16 stated that after elections, some senior PF party members at Ward level also disclosed that they had been bribed by the Respondent. These were Pumulo

Sishekanu (PW1), Kapanda Maybin Kasanga (PW3) and Mubita Akufuna (PW5).

Under cross examination, PW16 testified that he did not hear the Respondent instructing people to vote using their own pens when he visited the various Polling Stations with the Petitioner. He testified that the voters were illiterate people in villages who are sacred of Satanism or witchcraft. He added that anyone practicing Satanism or witchcraft was feared. Thus, the Petitioner's name was tarnished by accusations of Satanism. He however, had no recording to show that the Respondent made those accusations.

He testified that the UPND candidate did not call the Petitioner a Satanist or urge voters not to use ECZ pens and admitted that she got more votes without assassinating the Petitioner's character. However, PW16 insisted that the Petitioner would have emerged winner if he was not labelled a Satanist.

He stated that the K300 he was given was for him to destabilize the Petitioner's campaign and not to buy his vote.

Further, PW16 testified that the Respondent was advantaged by associating with the UPND, one of the popular parties in the Province as witnessed by previous voting patterns. He added that the Respondent wanted to lure people who were staunch supporters of UPND to vote for him. He went further to state that it was wrong for the Respondent to support any of the presidential candidates especially that he applied to stand under the party because other members would be misled that he was still their parliamentary candidate. When further questioned, he

stated that he does not know whether there is a regulation that stops a parliamentary candidate from supporting a presidential candidate. Further, that there was no complaint from UPND for using their flag.

PW16 ended by conceding that he did not attend the meeting at Nasita so he could not tell whether anyone was given money or that some PF officials were in attendance.

PW17 was the Petitioner, Enock Kaywala Mundia. He informed the Court that he was currently resident in Lusaka and that he is the Deputy Headman for Lilume village.

On allegations that the Respondent was campaigning under UPND, he testified that the UPND chose Belinda Mutanga as their candidate instead of the Respondent. On nomination day, the Respondent filed in his nomination as an independent candidate. On the same day, there was confusion when UPND supporters who wanted the Respondent to be adopted ran amok and assaulted Belinda Mutanga who ended up hospitalised. He stated that the cadres dispersed after the police intervened.

PW17 testified that after nominations, the Respondent was campaigning with UPND supporters, including, Mukololo the District Chairman for UPND, Mulonda the Constituency Chairman for UPND and Muliyunda who is a staunch UPND supporter in Nalolo. These three were arrested and later released on police bond for assaulting Belinda Mutanga. He added that he saw the Respondent conducting campaign meetings at Liliachi and on another occasion at Kaungalueti. He stated that all these

meetings were addressed by Respondent with Mulonda, Mukololo and Muliyunda who were UPND members.

It was PW17's testimony that during campaign, they found the Respondent campaigning at Nasita with two flags; one for UPND and another for himself.

PW16 testified that on polling day, he voted from Litoya Primary School. He observed that some people were carrying pens but did not ask since he was not allowed to talk to voters. He stated that he went to Lwiimba Polling Station where he also found that voters were carrying their own pens. He then called PW16 and picked him up from Muoyo Polling Station where he voted from. They drove across the Constituency to monitor how elections were being conducted.

They visited Mwandi, Litoya, Lwiimba, Nasikona and Liliachi Polling Stations, one after the other. During their visits, they found that people were carrying their own pens. He sent PW16 to make inquiries and he was informed that the voters refused to use ECZ pens due to the allegations that they were associated with him who was involved in Satanism.

They proceeded to Ng'ala Polling Station. When leaving the Polling Station, a mob of people started shouting *'what is this Satanist doing here, campaigns are over, you should not come here!* The mob charged at him; one man grabbed his left arm and another his right. Then another man hit him on his chest. He did not know who his assailants were. The scuffle continued until his supporters rescued him and they left.

They proceeded to Sikana Polling Station. However, that for fear of being attacked, he remained and sent PW6 to go into the Polling Station. He stated that PW16 reported back that the issue regarding pens had worsened. Then they proceeded to Sinungu, and later Nambwae, Mapungu, Silowana, Kaanda, Namabunga and Kaungalueti Polling Stations where they received the same reports.

Regarding the allegation that he lived in China for 27 years, PW17 testified that he lived in China from 1988 to 2012. During those years, he visited his village in Lilume every year. He told the Court that he has large pieces of land in different areas in Western Province and three mansions in Lusaka. He disclosed that he owns a quarry factory in Lusaka which may be the biggest in the country called Lilume quarry. He added that he was married with two children. According to him, there is a tendency to label anyone who is successful as a Satanist. He denied the allegations that he is a Satanist.

On allegations of bribery, PW17 testified that he could not understand why he lost because during campaigns, he was a crowd puller. He thus put up an inquiry through his communication manager PW16 who informed him that the Respondent was bribing a lot of people, including PW16 himself.

Under cross examination, he testified that before nominations, the Respondent was campaigning under UPND. He stated that he was not privy to the records of the UPND membership. He stated that the Respondent was using UPND Chitenge material and also had T-shirts written 'HH for President'. When asked whether

there is anything wrong with an independent candidate supporting any presidential candidate, he could not comment. He further acknowledged that he was not aware whether the three people who campaigned with the Respondent had resigned from UPND.

He maintained that the reason why he lost was because the Respondent assassinated his character. However, that he did not personally hear the Respondent talking about him. And that he did not hear people saying why they were not using ECZ pens. He relied on reports from his supporters.

PW17 stated that he gave an interview to the China Daily regarding his biography. He told his and success story of a poor man from Lilume village who went to China and made it, employing about 5,000 employees. He stated that he disclosed his success story to the people of Nalolo. He however, stated that if anyone associated him with China, it would not be true.

In re-examination, PW17 reiterated that the Respondent did not disassociate himself from UPND during campaigns. He added that the resignation letter does not have any acknowledgement.

That was the evidence tendered in support of the Petitioner's case.

RW1 was the Respondent, George Muhali Imbuwa. On the allegation that the declaration that he was the duly elected Member of Parliament for Nalolo Constituency was invalid, he responded that the declaration was valid because he polled the highest number of votes.

Regarding allegations that he was campaigning on UPND ticket before nominations, he testified that he was initially a UPND member until he resigned on 26<sup>th</sup> May, 2016. He referred the Court to his resignation letter in his Bundle of Documents. He narrated that prior to his resignation, he participated in the primaries for the UPND ticket and polled the highest number of votes but the UPND decided to adopt a candidate who came out fourth. He complained to the party leader Hakainde Hichilema but to no avail. He decided to resign because he felt that he was very popular at grass root level and people encouraged him to contest the election as an independent candidate.

He testified that on nomination day, he filed for nomination as an independent candidate. He stated that his candidature was not supported by any political party. Thereafter, he proceeded to organize his own campaign material in the form of Chitenges and T-shirts imprinted with the words '*vote for George Muhali Imbuwa as an Independent MP for Nalolo*'. That his T-shirts and Chitenges also had a 'mortar' which was his symbol together with his portrait. He also printed flyers of his profile and campaign manifesto. He referred the Court to the documents at pages 1 to 3 to support his evidence.

As to the allegations of vote buying, he testified that that he never gave anyone money except for members of his campaign team for mobilisation purposes. RW1 denied that he gave PW1 K600.00 and PW3 K500.00 or any one money in exchange for votes. He also denied giving out pens to anyone. He denied the allegations that at the meeting at Nasita, he gave out K20.00 notes to sway

people to vote for him. He maintained that he only gave out Chitenge materials and T-shirts to people who attended his meetings. He insisted that the treasurer, Nyumbu Chikapa, used to handle his finances and that the campaign fund was kept in a bank account.

As regards character assassination, RW1 testified that he held a meeting at Mwandi Primary School where he campaigned and encouraged people to vote for him and that he would bring development to the area. RW1 disclosed that he was a village Headman in Kapolota village in Sinungu area in Nalolo District. He stated that he schooled in Western Province and obtained a degree from UNZA in 1988. He testified that he told people that he best understood their problems because he lived among them. He denied the evidence of PW1 that he ever mentioned the Petitioner or referred to him as a Satanist or that he instructed voters not to use ECZ pens because they were supplied by the Petitioner, a Satanist. Regarding PW3's evidence, RW1 accepted that a snake fell from a tree but denied that he talked about the Petitioner thereafter.

RW1 denied the allegations disclosed by PW4 to PW8 who stated that he placed two flags at his meeting at Nasita; one for UPND and another with a 'mortar', his symbol. His evidence was that he did not know who placed the flags. He denied the allegations that he erected the two flags because he was using UPND to campaign. He added that the people who encouraged him to contest elections as an independent candidate were UPND members. That as at the date of that meeting, he was not a UPND

member. He stated that Mulonda followed him after he resigned from UPND. He went further to testify that Muyendekwa was not in his campaign team because he belonged to UPND.

He testified that he did not vote. He stated that he was in Mongu on polling day. He stated that he later visited various Polling Stations to distribute food to his Polling agents and observe what was happening. That he only used one vehicle and was accompanied by Charles Mulonda and Joseph Chiyuka. In his view, voting went on smoothly save for the few problems which occurred at Ng'ala where PF agents wanted to excluded ballot papers that were not stamped by ECZ during voting. Although the votes were in his favour, he sided with the PF as he agreed to discard them as rejected ballots.

Under cross examination, RW1 stated that he did not campaign using UPND materials after nominations. He however, conceded that a UPND flag amounted to campaign material. According to him, he did not remove the UPND flag from his campaign meeting at Nasita because he did not know who mounted them and that he did not find it necessary. He explained that some of his supporters were UPND members while others had left UPND and joined him. In his view, it is not true that the flag confused people to join him. When further cross examined, he stated that members of other political parties may have attended his meeting. When referred to page 2 of his Bundle of Documents, RW1 denied that he failed to disassociate himself from UPND on account of the message on the flier. He went further to testify that he was encouraging people to vote for HH as President.

He maintained that he resigned from UPND on 26<sup>th</sup> May, 2016 even though his resignation letter in his Bundle of Documents was not acknowledged.

He testified that he does not know the Petitioner's witnesses PW1, PW2, PW3, PW4, PW5, and PW6. He refuted their evidence that he referred to the Petitioner as a Satanist and told people not to use ECZ pens. He also stated that throughout his visits, he never came across any Polling Station where people were using their own pens to vote.

Further, that it was Muyendekwa who assaulted the Petitioner and not Mulonda, as alleged. He further stated that when he was campaigning at Ng'ala, Joseph Chiyuka (RW2) and Nyumbu (RW3) were present. He added that these two accompanied him to all meetings where it is alleged that he was giving out money or telling people to use their own pens because the Petitioner who is a Satanist supplied the pens to ECZ.

He also denied having met PW16 in Mongu at a lodge called Hollywood 2. When further cross examined, he stated that he could not remember; he could have passed through Hollywood 2.

He further denied that he bought any fish from PW14.

In re-examination, RW1 clarified that all his meetings were attended by Mulonda and Joseph Chiyuka and that no money was given out. He also explained that Muyendekwa was a UPND member who was campaigning for UPND.

RW2 was Joseph Chiyuka Chiyuka, a business man aged 35. He testified that he was among the supporters who encouraged the

Respondent to contest the election as an independent candidate after UPND adopted Belinda Mutanga. That after nominations, the Respondent formed a campaign committee in which he served as youth chairman. The other committee members were; Charles Mulonda Malimba, the Campaign Manager; Namaya Pumulo Kamonga, the Secretary and Nyumbu Chikapa Evans, who served as treasurer. They also created sub-committees in every ward to assist them. In his view, it was easy to campaign because the Respondent was popular as he was the Headman in the area and had other supporters who followed him from UPND.

RW2 stated that he always accompanied the Respondent when campaigning because he was in charge of organizing his meetings. He denied that the Respondent was ever accompanied by Muyendekwa because he (RW2) was the only campaign manager. He asserted that during the campaign meetings, the Respondent never spoke about the Petitioner and that the Respondent only addressed people on his developmental agenda and that they only gave out Chitenge materials and T-shirts. He denied the allegations of vote buying. He added that it was the committee treasurer (RW3) who handled the Respondent's money and logistics.

RW2 accepted that they found two flags at Nasita; one for the Respondent and another for UPND when they went to address a meeting Nasita. He explained that during campaigns there were other people campaigning. He highlighted that UPND was divided into two factions but that both were conducting campaigns under UPND.

On polling day, he served as the Respondent's polling agent. He visited the Polling Stations in the Eastern side of Nalolo with Charles Mulonda where they observed that the voters were using the materials provided by ECZ.

Further, RW2 testified that he knew that the Respondent was commonly known as 'bonanza' in Nalolo because he used to dish out money. He explained that 'bonanza' referred to a Chinese machine that prints out money.

In cross examination, RW2 stated that there were no other people that accompanied them for campaigns other than the committee members. He maintained that they never mentioned the Petitioner at any of their meetings.

RW2 confirmed that as their candidate was independent, they did not have enough material to give everyone. He denied PW1's evidence that the Respondent called him to his vehicle and gave him K600 because the materials were not enough. He maintained that he was always with the Respondent near his vehicle because they would park near the meeting place.

He stated that he did not know who placed the two flags that were at the meeting held at Nasita. When it was put to him that a flag with a particular political party symbol amounts to campaign material and that in their case they used the UPND flag to campaign, he denied. He stated that they did not know who put up the flags which was the reason they did not remove them. He also denied that the Respondent gave out K20,00 notes to people who attended the same meeting.

RW2 told the Court that the current Constituency Chairman for UPND is Charles Malimba Mulonda, one of the Respondent's committee members. When further questioned, RW2 said Charles Mulonda resigned from UPND. He added that he, on the other hand, did not resign from UPND because he was not a member.

He denied that they held a meeting on 7<sup>th</sup> August, 2016 at Muoyo village. He however, disclosed that their office is located at Muoyo. When questioned regarding PW13's evidence that on that day the Respondent held a meeting under a tree at Muoyo village near the Respondent's office, he refused.

He stated that on 27<sup>th</sup> July, 2016, they held a meeting at Samba village. RW2 told the Court that he could not remember whether the Respondent bought fish. He refuted the evidence of PW14 that the Respondent bought all her fish at K50.00 and gave her K200.00 to induce her to vote for him near his vehicle because he stood near the Respondent's vehicle. According to him, the Respondent was sitting on a chair at that meeting.

RW2 stated that he could not call any witnesses to confirm that the Petitioner is commonly referred to as '*bonanza*' in Nalolo.

It was RW2's evidence that the Respondent was working in Lusaka and only campaigned for three weeks. That during campaigns, the Respondent stayed in his house in Mongu. That on 24<sup>th</sup> June, 2016, he was in Lusaka at work. However, that that he did not know that on that date the Respondent had a meeting with his friend PW16 in Mongu at a lodge called Hollywood 2.

RW3 denied that on nomination day, he met PW16 under a tree near UCZ Church to mobilise more support for the Respondent. He explained that he had gone to Litoya and not Muoyo village contrary to PW16's testimony. He added that the two villages are about 15 Kilometres apart.

RW3 was Nyumbu Chikapa, who was the treasurer of the Respondent's campaign committee at the material time. He testified that he attended the Respondent's campaign meetings held at Lwiimba, Litoya, Ndandanda, Lo, Samba and Nanjucha. He denied that they ever spoke about the Petitioner at the said meetings. He insisted that they only spoke about the Respondent's manifesto. He also denied allegations that the Respondent told people that the Petitioner comes from China, that he is a Satanist and that he supplied pens to ECZ which would change their votes. That he only heard of the Satanism issue in Court. He added that at the close of every campaign meeting, they only gave out the Respondent's Chitenge materials and T-shirts.

RW3 stated that he did not attend the Respondent's campaign meeting held at Kambai on 5<sup>th</sup> August, 2016. It was his testimony that he attended the Respondent's campaign meeting held at Samba and that the Respondent's vehicle was parked close to the meeting area where he could see it. He denied the allegation by PW14 that the Respondent bought all her fish and gave her an extra K200.00 to entice her to vote for him. He testified that the Respondent's campaign funds were kept in an account under the names of Charles Mulonda and Namaya Kamonga which they

used to buy food for their members. RW3 confirmed that he was not a signatory to the said bank account and remember the account number. He also denied that they gave out any money as alleged.

Further, that on Polling day, he voted from Likuma Polling Station where he observed that voters were using the pens in the booths that were provided by ECZ.

Under cross examination, RW3 stated that he did not attend the meetings held at Mwandi, Nasikona, Nasita and Muoyo village referred to in the testimony of the Petitioner's witnesses. He confirmed that he did not know what transpired at those meetings.

Further in cross examination, RW3 told the Court he and Charles Mulonda had resigned from UPND when at the time they were campaigning for the Respondent. When further cross examined, he stated that in his view, when they began campaigning for another candidate, it meant that they had resigned from UPND.

That was the Respondent's case.

After the close of the Respondent's case, learned counsel for the Petitioner, Mr. Eyaa and Ms. Mwewa filed written submissions dated 17<sup>th</sup> October, 2016, in aid of the Petitioner's case. It was submitted that the burden of proof is on the Petitioner to prove to a standard higher than on a mere balance of probability and that the issues raised are required to be established to a fairly high degree of convincing clarity. The case of **Mabenga v. Sikota**

***Wina and others*<sup>(1)</sup>** in which the Supreme Court cited the case of ***Lewanika and others v. Chiluba*<sup>(2)</sup>** was cited as authority.

Learned counsel submitted that the first two grounds which the Petitioner has raised are as follows:

- i. "Before nomination day on 31<sup>st</sup> May, 2016, the Respondent was campaigning on the United Party for National Development (UPND) ticket but UPND adopted Mutanga Belinda instead.**
- ii. The Respondent filed for nomination as an independent candidate but continued campaigning for UPND and using UPND election materials on indication that he never left UPND as required by Article 51 of the constitution."**

It was submitted that the above grounds allege that the Respondent during the campaigns leading up to the elections of 11<sup>th</sup> of August, 2016 was campaigning for the UPND and using UPND material contrary to the intention and spirit of Article 51 of the Constitution. Further, that the Respondent was also using UPND election materials in his campaigns, particularly at his meetings.

Learned counsel submitted that Article 51 allows a person to stand as an independent candidate in an election for a parliamentary seat. However, it has an exclusion clause to the effect that two months immediately before the date of election such candidate should not be a member of any political party. Counsel argued that an accurate interpretation is that provided a candidate wants to stand on an independent ticket they must do so independently without any connection to any political party

during the campaigns so as not to confuse the minds of voters. They submitted that the Respondent confused the mind of the voters in Nalolo Constituency.

Learned counsel submitted that PW8 stated that on 28<sup>th</sup> July, 2016 the Respondent had a meeting at Nasita village at which there was a UPND flag and a flag for himself as the independent candidate showing a 'motor'. At this meeting, in this address, he went on to impress on the electorate not to vote for the Petitioner among other things. This particular evidence was not challenged through cross examination by the Respondent. Further that, the Respondent himself during his examination in chief stated that he found two flags there at the meeting place at Nasita. In cross examination he stated that he never found it necessary to remove the flags. And that the UPND has not complained when in fact not, since Belinda Moola Mutanga Lweendo has also sued him, under Cause No. 2016/HP/EP/0063.

Learned counsel argued that the Respondent had failed to disassociate himself from the UPND party because he was encouraging people to vote for the UPND despite being an independent candidate and his posters read;

*"All this shall be possible if you vote for President HH under UPND and the MP George Muhali Imbuwa in Nalolo on Independent ticket"*

Counsel added that although the Respondent said he resigned from the UPND via letter dated 26<sup>th</sup> May, 2016, it had no acknowledgment of receipt neither did it have any reply

whatsoever and as the matter stood before Court there was no proof of this resignation. Counsel contended that the Respondent by his conduct constantly rode on the popularity of the UPND which he used to his advantage to persuade the voters who thought if they voted for him, they were still supporting the party of their choice. Counsel submitted that this created an uneven playing field and the facts as testified by the witnesses prove that these defects or rather the Respondent's actions were so contrary to the Constitution and Code of Conduct to such a high degree that the voters were prevented from electing the candidate whom they preferred. Counsel argued that this affected the result which can no longer reasonably be said to represent the true free choice and free will of the majority of the voters.

Learned counsel submitted that on ground three the Petitioner alleges that several occasions prior to 11<sup>th</sup> August, 2016, during campaigns and party meetings the Respondent participated in acts of the vote buying through exchange of money for voters from residents of Nalolo Constituency contrary to Section 81 of the Electoral Process Act.

On this ground, counsel relied on the evidence of PW1, PW3, PW4 and PW5 whose evidence, they submitted, was not circumvented during cross examination, Counsel invited the Court to consider the authority of **Paul John Firmino Lusaka v. John Cheelo**<sup>(3)</sup> for persuasive value on allegations of bribery.

Learned counsel submitted that on ground four, the Petitioner claims that on several occasions prior to 11<sup>th</sup> August, 2016, during campaigns and party meetings, the Respondent

participated in acts of character assassination of the Petitioner herein through false accusations that since he had lived in China for 27 years, the Petitioner will go back to China forever after the election and that the Petitioner is a Satanist and that he is dependent on his in-law to survive and has no home. That the said allegations are contrary to Section 83 of the Electoral Process Act.

It was counsel's submission that an analysis of all the Petitioner's Witnesses reveals that there were a total of five major meetings held by the Respondent at different places as follows;

- i. *On 27<sup>th</sup> July, 2016 at Samba Village attended by PW14 and confirmed by RW2 and RW3.*
- ii. *On 28<sup>th</sup> July, 2016 at Nasita village attended by PW8 and confirmed by RW1 himself and RW2.*
- iii. *On 7<sup>th</sup> August, 2016, at Muoyo village attended by PW13.*
- iv. *On 5<sup>th</sup> August, 2016, at Nasikona village in the morning attended by PW3, 4 and 5 also confirmed by RW1 and RW2.*
- v. *On 5<sup>th</sup> August, 2016 at Mwandi in Namalilo village in the afternoons attended by PW1 and confirmed by RW1.*

Counsel submitted that the testimony of PW1, PW3, PW4, PW5, PW13 and PW14 was that at each of these meetings, the Respondent assassinated the character of the Petitioner. Further, that PW15 the Petitioner's communications manager testified that on the Polling day he drove to Mwandi, Nasikona, Liliachi, Ng'ala, Sikana, Nambwae, Makungu, Silowana, Kaanda, Namabunga and Kaungalueti Polling Stations. At all these Polling

Stations on polling day, he saw that the electorate or voters had their own pens and were voting using their own pens, a fact he established because the electorate were in fear of dying if they used ECZ pens, which according to RW1 had been supplied by the Petitioner from China.

Counsel submitted that this fact that was not circumvented during cross examination such that it was established that the Respondent had convinced the electorate that the Petitioner was a Satanist or member of the occult, that he was from China, that he supplied ECZ with the pens to be used in the Polling booths and that failure to not use one owns pen was fatal in that a voter would be initiated into Satanism and killed. Counsel contended that these statements were believed in all the aforementioned Polling Stations and villages which tarnished the character and image of the Petitioner which influenced the minds of voters, who are mostly illiterate and very cultural. Even the slightest idea of witchcraft/Satanism/occult or underworld dealings will frighten and cause misapprehensions. Counsel added that the notion of the Petitioner's Satanism was extremely widespread, the meetings at which these ideas were given to the people by the Respondent were attended by many people. This allegation swayed the minds of the innocent vulnerable voters such that the election did not have a level playing field.

Learned counsel contended that that as a result, the Respondent directly threatened the voters of Nalolo by stating that the Petitioner was going to inflict by supernatural or non-natural means physical and spiritual injury, damage, harm or loss upon

the people and as such was in direct breach of the Electoral Process Act, as has been ably demonstrated and corroborated by the witnesses. Further, that the activities of the appellant were so improper that they eroded the electoral process and induced the electorate to vote for a candidate not of their choice.

Counsel submitted that the Petitioner is on terra firma as he ably demonstrated and proved beyond convincing degree of clarity that the Respondent acted improperly by buying votes and assassinating his character which as a consequence induced the electorate to vote for him, a candidate not of their choice but by fear and threats.

Learned counsel cited the case of **Batuke Imenda v. Alex Cadman Luhila**<sup>(4)</sup> on defamation of candidates in an election. Counsel also invited the Court to consider the case of **Mateo B. Mwaba v. Anthony Kunda Kasolo**<sup>(5)</sup> on publication of false statements against a candidate in an election.

Learned counsel went further to submit that the testimonies of RW1 and his witnesses were full of inconsistencies. RW2 stated that he had moved with RW3 and other named persons in all the campaign days and meetings and that they had attended the said meetings together. RW3 stated that he on the other hand only attended one meeting which took place at Samba and could therefore not speak of what transpired at all the other meetings that took place he cannot speak at to all the other facts and testimonies.

In conclusion counsel submitted that the Petitioner had proved to a high degree of convincing clarity that the Respondent was in breach of all the aforementioned provisions of the law and prayed that the Court declares the Parliamentary seat for Nalolo Constituency as null and void.

Learned counsel for the Respondent, Mr. Mweemba, filed written submissions dated 28<sup>th</sup> October, 2016. It was submitted that this Court has no power to entertain all of the Petitioner's prayers because the reliefs are provided by Section 99 of the Electoral Process Act. He also submitted that costs are discretionary and cited the case of **General Nursing Council of Zambia v. Ing'utu Milambo Mbangaweta**<sup>(16)</sup> was cited as authority on costs.

Regarding the standard of proof of the allegations raised in the Petition, Learned Counsel relied on the cases of **Kamanga v. Attorney General and Another**,<sup>(5)</sup> **Lewanika and others v. Chiluba, supra**, **Mabenga v. Wina and others, supra**, and **Mazoka and Others v. Levy Patrick Mwanawasa and Others**<sup>(8)</sup> that the standard of proof in an election petition trial is higher than the ordinary standard of proof based on a balance of probabilities.

Learned counsel submitted that PW1, PW2, PW3, PW4, PW5, PW6 and PW8 are the witnesses who said they attended the Respondent's rallies and allegedly heard him saying the Petitioner was a Satanist, he lives in China and supplied pens to the ECZ, adding that he allegedly gave him various amounts of money to induce them to vote for him. Counsel invited the Court to note that all the above witnesses said they were PF members, holding

various party positions, and they admitted in cross examination that they were sad when their party's candidate lost the election. Counsel relied on the case of **Benson Chola and others v. The People** <sup>(9)</sup> and **The People v. George Misupi** <sup>(10)</sup> and argued that those were witnesses with an interest to serve whose evidence should be excluded.

Counsel added that all of these witnesses admitted that they had no recording of the Petitioner saying the things they accused him of saying. Counsel argued that the Court has no real evidence other than their word against the Respondent's such that it would be unsafe to simply believe the Petitioner and his witnesses without any yardstick to measure who has told the truth or otherwise.

Counsel submitted that the Petitioner's witnesses all admitted in cross examination that they had no witnesses as regards their being given cash money by the Respondent. Each one of them said he was alone with the Respondent when getting money. They purported to corroborate each other by repeating the allegations, yet each one of them claimed to have been alone when being given, without any other person witnessing. That is not corroboration. Counsel argued that since bribery is criminal in nature, there is need for corroborative evidence to prove it. He relied on the case of **Sithole v. State Lotteries Board** <sup>(11)</sup> that the standard of proof should be beyond reasonable doubt, which the Petitioner has failed to prove.

Learned counsel submitted that the remainder of the witnesses were mostly civil servants employed by the ECZ as Presiding

Officers and Polling Assistants at various Polling Stations in Nalolo Constituency. That none of them ever said they heard the Respondent saying the Petitioner was a Satanist, or witnessed him giving monies or other unlawful gifts to the electorate, either during the campaigns or on voting day. Their evidence was all based on that they were allegedly told by voters as to why (mostly) the voters were not using the pens supplied by the ECZ. Counsel argued that this is clearly hearsay evidence and it is inadmissible. He added that the Petitioner's evidence as PW16 is hearsay evidence and it is equally inadmissible because he too relied on reports he received from the other witnesses as to why the people voted the way they did and the allegations raised in his testimony.

It was also submitted that none of the Petitioner's Witnesses demonstrated how the UPND materials (if at all), disadvantaged the Petitioner, who was a Patriotic Front candidate. All of them even admitted in cross examination that the Petitioner lost to the UPND candidate as well and there was no guarantee that if the complaints they made against the Respondent had not been in place, their candidate would have won the election. They further admitted that there was no explanation why the Patriotic Front candidate lost to the UPND candidate, when the latter allegedly did not bribe the voters or assassinate his character.

Learned counsel went on to submit that the Respondent gave evidence and called two other witnesses, who were members of his campaign team. They all denied the specific instances of allegations of vote buying and character assassination made by

the Petitioner's witnesses. They said they never gave out any monies or gifts (other than their campaign materials) to the electorate adding that they concentrated on the message of bringing development to Nalolo Constituency. That they also told the Court that they had no money to give the people. On the UPND flag that was seen at one of their meetings they said they do not know who put it there, although they were supporting the Presidential candidate for the UPND and not the party generally.

Counsel further submitted that the Respondent's Witnesses also said the UPND T-Shirts worn by some people at their rally were clearly marked **"vote HH for President"**, the candidate they supported. They were not written **"vote for Muhali George Imbuwa"**. Counsel argued that the Respondent emphasized that he knew no law or regulation that stopped an independent candidate from supporting a Presidential candidate of any political party, and indeed there is none.

Learned counsel contended that the unreliable nature of the Petitioner's evidence as demonstrated the Petitioner has failed to prove his case to the requisite standard.

Regarding the argument under Article 51 of the Constitution, counsel submitted that the Respondent produced his resignation letter dated 26<sup>th</sup> May, 2016, five days before the nominations. And all the witnesses testified that he filed as an independent candidate. Counsel submitted that none of the witnesses challenged the Respondent's eligibility to stand as a Member of Parliament under Article 70 of the Constitution. The only issue was him having been a member of the UPND before nominations.

It was submitted that the Respondent used to campaign under UPND before nominations because he was a member of that party and he was canvassing for adoption as that party's candidate. After the party adopted someone else, he opted to resign and stand as an independent candidate. Indeed, having filed his nomination as an independent, it would not have made any sense for him to purport to campaign for UNPD at parliamentary level because he would have been contradicting himself, especially that he had even printed campaign materials clearly depicting him as an independent candidate.

Citing the case of **Chikuta v. Chipata Rural Council**, <sup>(12)</sup> Counsel argued that the question of the letter being acknowledged by the UPND does not arise at all since resignation is unilateral in nature, and takes effect from the moment one makes the decision. It is not dependent on the other party acknowledging or receiving it. Further, that the election having been on 11<sup>th</sup> August, 2016, he had ceased to be a member of the UPND (or any other political party) more than the prescribed sixty (60) days prior to the election.

Learned counsel contends that the issue of qualification for nomination as an independent candidate ought to have been dealt with in accordance with Article 52 (4) of the constitution which provides that *"A person may challenge before a court or tribunal as prescribed, the nomination of a candidate within 7 days of the close of nominations and the court shall hear the case within twenty-one days of its lodgement."*

Counsel argued that the Petitioner not having challenged the Respondent's nomination as provided, cannot now be heard to base his Petition on matters that happened prior to, or during the nominations.

Learned counsel further submitted that the Petitioner has not proved his case as required by Section 97 (2) and (3) of the Electoral Process Act No. 35 of 2016. It was submitted that there was instead evidence to the effect that in some Polling Stations and Wards where the Petitioner's Witnesses who allegedly received bribes from the Respondent voted from, the latter lost to the Petitioner. Counsel gave the example of PW13, Likando Nyambe, who said the Respondent lost at her Polling Station) an indication that even such isolated incidences (if at all present), did not affect the outcome of the election. He added that the results tabulated in paragraph 4 of the Petition show that the Petitioner's score was very close to that of the Respondent, an indication that each candidate had a fair share of the votes.

Counsel prayed that this Petition be dismissed with costs to be taxed in default of agreement.

Having considered the Petition, the Answer, the Affidavits, the evidence on record and submissions by Counsel, I come to the conclusion that the undisputed facts in this case are:

1. That prior to the Nominations, the Respondent, George Muhali Imbuwa, was a UPND member and campaigned to be adopted on the UPND ticket for the Nalolo Constituency elections. But instead Belinda Moola Mutanga Lweendo was adopted to stand on the UPND ticket.

2. That following UPND primaries the Respondent was not adopted under the UPND ticket and proceeded to stand as an Independent Candidate.
3. That the Petitioner and the Respondent were candidates in the Nalolo Parliamentary election held on 11<sup>th</sup> August, 2016. The two contested the elections on the Patriotic Front (PF) and independent tickets, respectively. The other candidates were Mutanga Belinda of United Party for National Development (UPND), Akayombokwa Catherine of Forum for Democracy and Development (FDD) and Imalimbila Namabunga of United National Independence Party (UNIP).
4. That the Returning Officer, Mr. Kangongo Sladen on 14<sup>th</sup> August, 2016 declared the results of the election as follows; the Respondent 5060 votes; Mutanga Belinda, 4879 votes; the Petitioner, 4455 votes; Akayombokwa Catherine, 590 votes, and Imalimbila Namabunga, 114 votes.
5. That following the announcement of results, the Returning Officer proceeded to declare the Respondent as the duly elected Member of Parliament for Nalolo Constituency.

The Petition seeks to nullify the election of the Respondent as Member of Parliament for Nalolo Constituency. The Petitioner contends that the declaration of the Respondent as duly elected Member of Parliament for Nalolo Constituency was invalid by reason of non-compliance with the provisions of the Electoral

Process Act, No. 35 of 2016 and the Procedures prescribed under the said Act.

The issue that I have to resolve is whether on the facts and evidence before me, the Petitioner has proved the allegations in his Petition to the required standard to warrant nullification of the Respondent's election as Member of Parliament for Nalolo Constituency.

The law that governs the avoidance or nullification of parliamentary elections is contained in Section 97 of the Electoral Process Act No. 35 of 2016, which provides as follows:

**“97 (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 petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—**

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

**(i) by a candidate; or**

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

**the majority of voters in a constituency, district or ward were or may have been prevented from electing the**

candidate in that constituency, district or ward whom they preferred."

(b)subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or

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

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

that—

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

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

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

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

**(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election."**

Thus, the present law under Section 97 (2) (a) requires that the alleged malpractices or misconduct must have been committed in connection with the election by the candidate or with his knowledge and consent or approval or of his election agent or polling agent. The agents being those persons appointed by a candidate pursuant to Regulations 50 and 51 of the Electoral (General) Regulations, 2006 as election agent or polling agent.

Thus, the law no longer allows the Court to nullify an election merely by finding that there were electoral malpractices, irrespective of who the wrongdoer was as long as the majority were or may have been prevented from electing their preferred candidate. That is to say, the wrong doing must be attributed to the Respondent or his election or polling agents and it must be shown that the majority were or may have been prevented from electing their preferred candidate. In addition, under Section 97 (2) (b) the Petitioner must prove that there was non-compliance with any of the provisions of the Electoral Process Act relating to the conduct of elections which affected the election results to warrant a nullification. Further, under Section 97 (2) (c), it must

be shown that the Respondent was a person not qualified for the election in order for an election to be avoided or nullified.

As regards the burden of proof, it is settled law that in an election Petition, the burden on proof lies with the Petitioner to prove his case. The Supreme Court has on several occasions made pronouncements on the standard of proof in election petitions. In the cases of **Mazoka and others v. Mwanawasa and others, supra, Lewanika and others v. Chiluba, Mabenga v. Wina and Kamanga v. Attorney-General and Another**, among others, also cited by Counsel, the Supreme Court stated that election petitions are required to be proven to a standard higher than on a mere balance of probabilities and that the issues raised are required to be established to a fairly high degree of convincing clarity. In addition, in the case of **Khalid Mohammed v. Attorney General**,<sup>13</sup> the Supreme Court held that the plaintiff cannot succeed automatically if a defence fails. Thus, the Petitioner must prove his case whatever may be said of the Respondent's case.

In view of the foregoing, I am of the considered view that in order to succeed with Petition, the Petitioner must prove the following to the requisite standard:

- (i) That the alleged illegal practices were committed in connection with the parliamentary election held on 11<sup>th</sup> August, 2016 for Nalolo Constituency;
- (ii) That the said illegal practices were committed by the Respondent or with his knowledge and consent or approval or of his election agent or polling agent; and

- (iii) That on account of the illegal practices committed by the Respondent and his election and other agents, the majority of voters in Nalolo Constituency were or may have been prevented from electing a candidate in that Constituency whom they preferred.
- (iv) Or that the Respondent was at the time of the election a person not qualified or a person disqualified for the election.

I shall now turn to consider the grounds raised by the Petitioner in the manner that they have been presented in paragraph 5 of the Petition and apply the law as set out above.

After hearing the evidence of the Petitioner and the Respondent, I have come to the conclusion that the evidence adduced by most of the witnesses was largely subjective. They were either Party members with positions in their Party structures or were Cadres. A few neutral witnesses testified whose roles were defined by the Electoral Commission of Zambia, (ECZ). The issue of credibility is therefore, paramount in this matter. The evidence before me from the two opposing camps will be viewed with great care and caution.

The Petitioner raised four grounds:

- 1. Before the Nomination day on 31<sup>st</sup> May, 2016 the Respondent was campaigning on the United Party for National Development(UPND) ticket but UPND adopted Mutanga Belinda instead;**
- 2. The Respondent filed for nomination as an independent candidate but continued campaigning for UPND and**

using UPND materials an indication that he never left UPND as required by Article 51 of the Constitution;

3. On several occasions prior to 11<sup>th</sup> August, 2016; during campaigns and party meetings the Respondent participated in acts of vote buying through exchange of money for votes from residents of Nalolo constituency; and
4. On several occasions prior to 11<sup>th</sup> August, 2016; during campaigns and party meetings the Respondent participated in acts of character assassination of the Petitioner herein through false accusations that since he had lived in China for 27 years, the Petitioner will go back to China forever after the election and that the Petitioner is a Satanist and that he is dependent on his in-law to survive and has no home.

#### **Grounds 1 and 2:**

I will deal with the grounds 1 and 2 collectively as they are intertwined. The Petitioner alleges that the Respondent during the campaigns leading up to the elections on 11<sup>th</sup> August, 2016 was campaigning for the UPND and using UPND election materials in his meetings. It is further alleged that the Respondent did not satisfy Article 51 of the Constitution. The Respondent submitted that he satisfied Article 51 of the Constitution by resigning on 26<sup>th</sup> May, 2016, five days before the nominations and that no witnesses challenged his eligibility to

stand as a Member of Parliament under Article 70 of the Constitution.

At trial PW8 and PW16 told the Court that on 28<sup>th</sup> July, 2016 the Respondent held a meeting at Nasita village where two flags, one UPND and another for the Respondent were flying side by side. RW1, also confirmed that he found the two flags when he arrived by boat from Mongu at the venue of his meeting at Nasita but that he did not know who mounted them. He added that as the boss for the meeting, he could not have erected the flags. He admitted not to have asked his supporters or officials to remove the UPND flag. Under cross examination, RW1, said some of his supporters were UPND members, but he did not think the UPND flag would confuse the electorate and that UPND had not complained about the use of its election materials, an assertion that was denied by the Respondent.

The Petitioner has submitted that RW1 testified that he had his own materials as an Independent but a closer look at the fliers revealed the following;

*"All this shall be possible if you vote for President HH under UPND and the MP George Muhali Imbuwa for Nalolo on Independent ticket"*

When asked if this was his campaign message, he answered in the affirmative and added that he was Independent but was encouraging people to vote for the UPND Presidential Candidate.

The Petitioners evidence is that though the Respondent submitted and produced a letter of resignation from the UPND

dated 26<sup>th</sup> May, 2016, the same was not acknowledged by the UPND and as such there was no proof of his resignation from the UPND, and further that the Respondent did not disassociate himself from the UPND, even though he filed in nominations as an Independent Candidate. The Respondent's submission is that the question of the letter being acknowledged by UPND did not arise, since resignation is unilateral in nature and takes effect from the moment one makes the decision and cited the case of **Joseph Gereta Chikuta V. Chipata Rural Council**, Supra.

In response, the Respondent submitted that none of the Petitioner's Witnesses demonstrated how those materials disadvantaged the Petitioner. It is the Respondent's evidence that they did not know who put up the UPND flag at their meeting, although they were supporting the Presidential candidate for the UPND and not the party generally.

The evidence on record shows that when the Respondent resigned from the UPND, he was joined by some UPND members in his campaign team. It is also not in dispute that the Respondent in his campaign message supported the candidature of the UPND Presidential Candidate, Hakainde Hichilema and other elective positions. This is confirmed in the Campaign materials of the Respondent, wherein one of them read;

*"All this shall be possible if you vote for President HH under UPND and the MP George Muhali Imbuwa for Nalolo on Independent ticket"*

RW1 also confirmed that when he resigned, some UPND members supported him and encouraged him to stand as an

independent. On his campaign trail, he was joined by some UPND members who included Mulonda, the UPND Constituency Chairman, RW2 and RW3. Their evidence however, in cross examination is that they resigned from the UPND when the Respondent filed his nomination as an Independent. It is also his evidence that he printed his own materials and used the 'mortar' as his symbol. There also evidence to the effect that indeed the Respondent had also printed his Chitenge materials for the ladies, T-Shirts for the men to be used as campaign materials. What seems to be the issue is whether the Respondent in addition to his own materials was also using the UPND campaign materials.

The Petitioner contends that the conduct of the UPND members who were campaigning for the Respondent was confusing to the electorate. The same was said of the Respondent campaigning for the UPND candidate, Hakainde Hichilema at the Presidential level.

What is clear from the record is that Respondent was not using the UPND materials during his campaign but his own and the symbol of the 'mortar'. I note from page 1-3 of the Respondent's Bundle of Documents that the Respondent's campaign posters and fliers do not support the allegation that he was campaigning as a UPND candidate. The only evidence on record is that at one of the Meetings addressed by the Respondent at Nasita, the Respondent's flags was seen flying alongside the UPND flag. Further, evidence on record is that some Members in the

Respondent's campaign team wore UPND regalia. This evidence was largely not contested.

It is worth noting that the UPND party has been in existence for a long time and has not changed its campaign symbols. I, therefore, do not agree with the submissions by the Petitioner that the electorate were confused when deciding who to vote for when the witnesses themselves testified that they knew that the Respondent stood as an independent candidate. From the foregoing, I find that the electorate were able to distinguish the UPND symbols from that of the Respondent's symbol.

Thus, the Petitioner has failed to demonstrate that the Respondent impersonated the UPND candidate as required by section 82 of the Electoral Process Act. For avoidance of doubt, section 82 that:

**"82. (1) A person shall**

- (i) A representative of a registered political party;**
- (ii) A candidate in an election.**

I, therefore, accept as a fact that Members of the UPND joined the Respondent and campaigned for him to contest the seat for Nalolo Constituency as Member of Parliament as an Independent. I also find that the said members of the UPND did join the Respondent at some meetings including those held at Liliachi and Kaungalueti. I further find that the Respondent did Campaign for Hakainde Hichilema, the UPND Candidate at Presidential level. However, I agree with the Respondent's counsel that there is no law which prevents the Respondent or members

of his campaign team from campaigning for a presidential candidate of their choice. I am fortified by the holding of the Supreme Court in **Lazarous Chota v. Patrick Mucheleka (14)** at page J29 as follows:

**"We have considered the arguments in respect of ground three of the appeal. The fact that some members of the 1<sup>st</sup> Respondent's campaign team wore PF regalia while on the 1<sup>st</sup> Respondent's campaign trail was not in dispute. RW2, Hellen Kaluba, admitted that despite being suspended from the PF, she continued wearing the PF Chitenge as a way of campaigning for Mr. Micheal Sata while at the same time, campaigning for the 1<sup>st</sup> Respondent using the 1<sup>st</sup> Respondent's symbol of an axe. The appellant contended that the conduct of the PF members who were campaigning for the 1<sup>st</sup> Respondent was confusing to the electorate. We do not agree with him. As the learned trial Judge noted, the PF symbol of the boat had been in use for a long period of time and was well known to the electorate at the time of the elections. The evidence also clearly showed that the appellant was not using the PF symbol of the boat to canvass for votes, but was using his own symbol of an axe. The appeal to the electorate was to vote for Mr. Micheal Chilufya Sata as Republican President and the 1<sup>st</sup> Respondent as Member of Parliament for Lubansenshi. The 1<sup>st</sup> Respondent's message could not, in any way be said to have been confusing to the electorate of Lubansenshi Constituency. In any event,**

**there is no provision in the electoral laws which prevented the 1<sup>st</sup> Respondent, an independent candidate or members of his campaign team, from campaigning for a presidential candidate of their choice. This ground of appeal lacks merit”**

Furthermore, I have noted the submission by Counsel for the Petitioner that the Respondent filed for nomination as an independent candidate but continued campaigning for UPND and using UPND materials an indication that he never left UPND as required by Article 51 of the Constitution. As earlier stated, it came out clearly at trial that the Respondent supported the candidature of the UPND Presidential candidate Hakainde Hichilema and campaigned together with other UPND members. Consequently, I find that the Respondent did not hold himself out as the duly nominated UPND candidate for Nalolo Constituency.

There was nothing wrong for the Respondent to campaign for adoption under the UPND ticket prior to Nomination Day. I note and accept that the Respondent resigned a few days prior to the Nomination. He successfully lodged his nomination as an independent candidate. I am of the considered view that the Respondent was validly nominated to contest the election as an independent candidate. He printed his own campaign materials in the form of Chitenge materials and T-shirts and used the ‘mortar’ as his symbol. I also find that he was at the time of the election a qualified person for the election in accordance with Article 70 of the Constitution. The Petitioner has, therefore, failed to prove that the Respondent was at the time of the election not

qualified as envisaged by Section 97 (2) (c) of the Electoral Process Act.

From what I have said above and on the authority of the **Lazorous Chota** case, I find no merit in grounds 1 and 2 of the Petition and I accordingly dismiss them.

### **Ground 3**

The Petitioner and his witnesses allege that on several occasions prior to 11<sup>th</sup> August, 2016, the Respondent during campaigns and party meetings participated in acts of vote buying through exchange of money for votes from residents of Nalolo constituency.

In support of the allegation PW1, testified that he attended a campaign meeting for the Respondent on 5<sup>th</sup> August, 2016, at Namalilo village at which Chitenge materials were being distributed, but got finished before he could receive one. It was his evidence that instead, he was given K600 to share with others by the Respondent. PW3, testified that on 5<sup>th</sup> August, 2016, he attended a meeting at Nasikona village, and was given K500 and two Chitenges imprinted with a picture of a Mortar by the Respondent. It was the witness's testimony that he shared the money with Japhet Kababa (PW4) and Akufuna Mubita (PW5) by giving them K100 each. It was his testimony that the money given to him by the Respondent was meant to induce him and his friends to vote for the Respondent. PW4, also confirmed that after attending a meeting at Nasikona village, he saw PW3 being called

by the Respondent to his Motor vehicle, and that upon his return the Respondent had money in his hands which he shared with him. Under cross examination the witness told the Court that he didn't see the Respondent giving PW3 the money. Further, PW13, and PW14 also told the Court that the Respondent paid them K100 and K200 respectively in order for them to vote for him.

The Respondent's response is that evidence adduced has not proved that even if the malpractices alleged had been committed by the Respondent, the same had swayed the minds of the majority of the voters from voting for their preferred candidate, citing the case of PW13, who testified that the Respondent lost in certain Wards where the witnesses allegedly received bribes from the Respondent but lost to the Petitioner there by not affecting the outcome of the elections.

The allegation by the Petitioner falls, under Section 81 of the Electoral Process Act, which provides that;

**“81. (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...”**

Upon examination of the allegation and testimonies in support of this allegation it becomes apparent that the issue of credibility is key in proving the allegation. From the record it is clear that there are no independent witnesses to RW1 giving money to PW1 and PW3. Instead, what is available is the evidence of PW3, a Patriotic Front Party Ward Secretary, who said that he was given K600 by RW1 as an inducement and shared it with his colleagues, PW4 and PW5. It was PW4 and PW5's evidence that they each received K100 each from PW3. However, none of the beneficiaries saw RW1 giving PW1 and PW3 the money. Thus, there are no witnesses other than the beneficiaries of the money said to have been given to PW3. Their testimonies raise credibility issues. PW3, PW4 and PW5 are all PF members. There was no evidence adduced on how RW1 selected PW3 to be a beneficiary. It has also not been established that whether there are any other people who benefitted from the money apart from PW1 and PW3 at Namalilo village and Nasikona village respectively. It has also not been shown what the effect or extent of influence the money had on the voters in Nalolo Constituency.

I, therefore, find that the evidence of PW1 and PW3 that RW1 gave them K600 and K500 in order to share with others in exchange for votes to be a concocted story revolving around the witnesses. However, I have already stated above that despite the proof of an illegal practice, the law demands that no election is nullified unless it is established that the majority of voters were prevented from electing their preferred candidate. In this case before me, there are only two alleged incidents. I do not think these cases of alleged bribery are enough to sway the majority of voters in

Nalolo constituency in order to establish that the majority of voters were or may have been prevented them from electing their preferred candidate. Therefore, I find that even if the allegation of bribery was to have been committed, it would not warrant the nullification of the election envisaged by Section 97 (2) (a) of the Electoral Process Act. Therefore, the allegation that the Respondent participated in acts of vote buying through exchange of money for votes from residents of Nalolo constituency fails and I accordingly dismiss it.

#### **Ground 4**

On this ground, the Petitioner alleges that the Respondent on several occasions prior to Election Day, during campaigns engaged in acts of character assassination of the Petitioner; that the Petitioner will go back to China after the elections since he lived there for 27 years; that the Petitioner is a Satanist; that the Petitioner is dependent on his in-law; and has no home.

The Petitioner submitted that the allegation falls under Section 83 of the Electoral Process Act. The Petitioner contends that RW1, while addressing five major meetings at Samba village on 27<sup>th</sup> July, 2016; Nasita village on 28<sup>th</sup> July, 2016; Nasikona and Mwandi villages on 5<sup>th</sup> August, 2016; and Muoyo village on 7<sup>th</sup> August, 2016, did assassinate the character of the Petitioner.

The Petitioner's Witness, PW16, Muhau Anayau's testimony was that while in the company of PW17, he visited the following Polling Stations; Mwandi, Nasikona, Liliachi, Ng'ala, Sikana,

Nambwae, Makungu, Silowana, Kaanda, Namabunga and Kaungalueti. It was PW16's evidence that while at these polling stations, he noted that the voters were using their own pens, and when he inquired from the people he was told the electorate used their own pens because they feared death if they used ECZ pens which were said to have been supplied by PW17 from China, a Satanist. And that failure to use their own pens would be fatal as the voter would be initiated into Satanism.

The Respondent has urged this Court to treat PW1, PW2, PW3, PW4, PW5, PW6 and PW8 with caution because they are PF members, therefore, they are witnesses with an interest to serve. The Respondent's further evidence is that the Petitioner has no real evidence other than their words, as compared to the Respondents words.

I note that PW1, PW3, PW4, PW5, PW8, PW13 and PW14 all testified that they attended the various meetings addressed by RW1 and his campaign team between 27<sup>th</sup> July, 2016 and 7<sup>th</sup> August, 2016, at which they assassinated the character of the Petitioner.

From the outset, I wish to state that I do not agree with the Petitioner's submission that the allegations of character assassination detailed in paragraph 5 (iv) of the Petition fall under Section 83(1) (a)(b) of the Electoral Process Act. This Section provides that:

**"83. (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..."**

My interpretation of this provision is that in 3(1) (a) it is referring to a situation where force, violence or restraint is used or threatened to be used on any person by another, while in 83 (1) (b) the provision envisages a situation where a person is being threatened with injury, damage, harm or loss whether physical, psychological, mental or spiritual through supernatural or non-supernatural means such as witch craft by a candidate. These provisions in my view do not envisage a situation such as the one in ground 4 of the Petition.

Given the circumstances of the cases, I find that the allegations fall under Section 83(1) (c) (iii) of the Electoral Process Act which is couched as follows:

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

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

**(iii) to vote or not to vote for any registered party or candidate..."**

The relevant evidence on record in support of this allegation is that of PW1, PW3, PW4, PW5, PW13, and PW14 who testified that

they attended the various meetings addressed by RW1 and heard him character assassinate the Petitioner.

PW1, testified that he attended a meeting on 5<sup>th</sup> August, 2016 at Mwandi in Namalilo village in the afternoon where Respondent addressed the meeting asking them not to vote for the Petitioner because he was a Satanist. He testified that they were asked to carry their own pens on voting day. PW2, a Presiding Officer testified that people at Mwandi Polling Station told him that they carried their own pens because the pens provided by ECZ were obtained from the Petitioner, a Satanist. PW3, PW4 and PW5 all attended the meeting at Nasikona village in the morning where they said the Respondent addressed the meeting and asked the voters not to vote for Petitioner because he was a Satanist and had supplied the pens provided by ECZ. PW6 also attended a meeting at Kalamba, where the UPND, Presidential candidate told the people not to use the Pens provided by ECZ. PW8, attended a meeting at Nasita on 28<sup>th</sup> July, 2016 addressed by Respondent who urged them not to use the pens provided by ECZ. It was his further evidence that on polling day he noted people using their own pens and that the police officer who tried to advise the people against using own pens was threatened with violence. PW13, attended a meeting addressed by RW1 at Muoyo, where he urged the voters not to vote for the Petitioner because he was a Satanist who lived in China. PW14, confirmed attending a meeting at Samba village where she heard that her candidate, the Petitioner was a Satanist. PW12, attended the meeting at Siyanda, where the message was the same.

From the evidence on record I find that the Respondent held several meetings during the campaign period, including at Samba village on 27<sup>th</sup> July, 2016; at Nasita village on 28<sup>th</sup> July, 2016; at Nasikona and Mwandi village on 5<sup>th</sup> August, 2016; at Muoyo village on 7<sup>th</sup> August, 2016, and at Kalamba and Siyanda. I further find that at these meetings, the Respondent did make statements relating to the allegations in ground four of the Petition. PW2, a Presiding Officer, at Mwandi Polling Station confirmed what other witnesses testified that people were going to the Polling Stations with their own pens on advise that the ECZ provided pens in the booths were satanic and bought by PW17 from China. PW16, recounted that on the Election Day he visited over ten Polling Stations alluded to above and observed and heard the same story that people carried their own pens for fear of Satanism.

The Respondent submitted that most of these witnesses were civil servants employed by ECZ who did not hear the Respondent saying the Petitioner was a Satanist. Having analysed the evidence and credibility of the witnesses for the Petitioner, I found the evidence of PW2, the Presiding Officer; PW4, the Health worker; PW6, the Teacher; PW9, the Polling Assistant; PW10, the Teacher engaged as a Polling Assistant; and PW15, the Presiding Officer to be credible and corroborates what other witnesses testified. I note that the Respondent and his witnesses acknowledged that the meetings took place. The Respondent himself acknowledged that at the meeting at Mwandi, a snake fell from the tree. However, the Respondent and his witnesses deliberately chose not to disclose what was actually said at those

meetings. They were not forthright in their testimony on that aspect. I find the Petitioner's witnesses to be more credible and I accept their evidence.

I am further persuaded by the decision in **Mulondwe Muzungu v. Elliot Kamwendo** <sup>(15)</sup> where it was held that in terms of credibility, the Petitioner's witnesses who were originally supporters of and campaigned for the Respondent, have the higher credibility if they are found to be truthful. I am further persuaded by the case of **Simasiku Kalumiana v. Geoffrey Lungwangwa and ECZ** <sup>(16)</sup> in which it was held that "the testimony of witnesses such as the Police Officers and Monitors during an election is more credible than that of party officials and election officers"

Thus, although PW2, PW10, PW9 and PW15 did not attend the meetings, they observed the voters' behaviour during voting and when they inquired, they were informed that they had been warned not to use the pens provided by ECZ. This was the same behaviour that was exhibited by voters at Liliachi and Kaanda Polling Stations as shown by the evidence of PW7 and PW11.

The Petitioner's evidence that the Respondent at the said campaign meetings character assassinated him largely went unchallenged in Court. I also take note that Nalolo Constituency is largely rural with people living in villages, where beliefs in Satanism or witch craft is widespread and taken seriously. Therefore, I accept the submission by the Petitioner that even the slightest idea of witch craft or Satanism or under world dealings would frighten and cause misapprehensions in the villages.

After careful scrutiny of the evidence regarding the allegations of character assassination, I note that the meetings were attended by many people, and the message spread fast through the Wards in the Constituency. Although the meetings referred to were not in all the Wards, the message had spread such that most of the voters believed it. I take judicial notice of the ECZ Register of Voters for 2016 that Nalolo Constituency has a total of 10 Wards and a total number of registered voters of about 28, 891. The evidence of the Petitioner's Witnesses including those who were Presiding Officers and Polling Assistants disclosed that the voters in various Polling Stations situated in Kambai, Makoka, Lyamakumba, Kataba, Silowana, Muoyo, Ukolo and Nanjucha Wards, representing about 8 out of the 10 Wards in Nalolo Constituency were unduly influenced because there was widespread belief that the Petitioner was a Satanist.

I find that the extent of the influence of the Respondent's campaign message against the Petitioner relating to Satanism was so widespread in Nalolo Constituency such that it influenced the majority of voters. The behaviour by most of the voters was such that they refused to use the pens provided by ECZ because they were allegedly procured by the Petitioner whom they associated with Satanism as a result of the message given to them at the various campaign rallies held by the Respondent in the Constituency. As stated earlier, Nalolo Constituency is in a rural setting where belief in witchcraft or Satanism is taken seriously. Most of the witnesses including the Petitioner's supporters disclosed that they voted in fear. I opine that the

manner in which the voters were voting may have disadvantaged the Petitioner.

From the evidence on record, I find that the Respondent and his campaign team at the various meetings he addressed, did allege that the Petitioner: was a Satanist; that he lived in China; that he had supplied the pens that ECZ was using in the booths; that the mark would shift to the Petitioner if they used the ECZ pens. I also find that said allegations were done on a large scale. I find that the allegation by RW1 that the Petitioner was engaged in acts of Satanism was widespread in Nalolo Constituency such that the majority were or may have been prevented from electing their preferred candidate. The Petitioner has, therefore, proved the allegations set out in Paragraph 5 (iv) of the Petition to a fairly high degree of convincing clarity as required by Section 97 (2) (a) as read with Section 83 (1) (c) (iii) of the Electoral Process Act.

The Petitioner having proved the allegations set out in paragraph 5 (iv) of the Petition, I declare that the parliamentary election held on 11<sup>th</sup> August 2016 for Nalolo Constituency was void. I declare that the Respondent, George Muhali Imbuwa was **not** duly elected as Member of Parliament for Nalolo Constituency.

This being a Constitutional matter, I order that each party bears own costs.

Leave to appeal is granted.

Delivered at Lusaka this 28<sup>th</sup> day of November, 2016.

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**MATHEW L. ZULU**  
**HIGH COURT JUDGE**