

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

(Civil Jurisdiction)



2016/HP/EP0050

IN THE MATTER OF:

THE PARLIAMENTARY PETITION RELATING TO THE PARLIAMENTARY ELECTIONS HELD ON 11TH AUGUST, 2016

AND

IN THE MATTER OF:

THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1, OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF:

ARTICLES 1, 2, 5 8, 9, 45, 46, 47, 48, 49, 50, 54, 70, 71, 72, AND 73 OF THE CONSTITUTION OF ZAMBIA, CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1, OF THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF:

SECTIONS 29, 37, 38, 51, 52, 55, 58, 59, 60, 66, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83, 86, 87 AND 89 OF THE ELECTORAL PROCESS ACT (ELECTORAL CODE OF CONDUCT) NO.35 OF 2016 OF THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF:

SECTION 96, 97, 98, 99, 100, 106, 107 AND 108 OF THE ELECTORAL PROCESS (ELECTORAL CODE OF CONDUCT) ACT NO. 35 OF 2016 OF THE LAWS OF ZAMBIA.

AND IN THE MATTER OF:

ELECTORAL CODE OF CONDUCT 2016

BETWEEN:

MULENGA SATA

PETITIONER

AND

GIVEN LUBINDA

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

**Before The Honourable Judge Betty Majula-Mung'omba in Open Court at Lusaka
this 23rd day of October, 2016.**

For the Petitioner: Mr. M.H. Haimbe of Malambo & Co.
 ✓ Mr. K. Mweemba and Mr. S. Mbewe of Keith
 Mweemba Advocates.
 Mr. G. Phiri of PNP Advocates.

For the 1st Respondent: Mr. P.K. Chibundi of Mosha & Co.
 Mr. T. S. Ngulube of F.B. Nanguzyambo & Co.

For the 2nd Respondent: Mr. J. Mulongo and Mr. A. Kalikiti of M.S.K
 Advocates.

For the 3rd Respondent: Mr. F. Mwale, Senior State Advocate
 Mr. M. Hamanyati, State Advocate

JUDGMENT

Cases referred to:

1. **Michael Mabenga vs. Sikota Wina, Mafo Wallace Mafiyo and George Samulela (SCZ Judgment No 15 of 2003).**
2. **Brigadier General Kenneth Kankuza and Others v Sara Sayifwanda and Another (2011/HP/EP/54).**
3. **Simasiku Kalumiana vs Geoffrey Lungwangwa and Others (2006/HP/EP/0017).**
4. **A.K Mazoka vs L. P. Mwanawasa, ECZ, Attorney General (2005) ZR 1.**
5. **A. M. Lewanika, H. E. Kamaila Dean Mungomba, SS Zulu, J. Mwaba vs FTJ Chiluba (SCZ/EP/01/03/220).**

6. *Christopher Lubasi Mundia vs Sentor Motors Limited (1982) ZR 66.*
7. *Mubita Mwangala vs Inonge Mutukwa Wina – Appeal No.80 of 2007*
8. *Brelsford James Gondwe vs Catherine Namugala – Appeal No.175 of 2012.*
9. *Matildah M. Mutale vs Sebio Mukuka and ECZ – Appeal No. 45 of 2005 (unreported).*
10. *Mlewa vs Wightman (1996) S.J. 1 (SC)*

Legislation referred to:

1. *The Constitution Amendment Act No.2 of 2016.*
2. *The Electoral Process Act No.35 of 2016.*
3. *The Electoral (Code of Conduct) 2016.*
4. *The Public Order Act, Chapter 113 of the Laws of Zambia.*

This is the election petition of Mulenga Sata (hereinafter referred to as the petitioner) who was a Parliamentary Candidate under the United Party for National Development (UPND) for Kabwata Constituency elections held on 11th August, 2016. The petitioner is challenging the election of Given Lubinda (hereinafter referred to as the 1st respondent) who was fielded by the Patriotic Front (PF) and was declared duly elected by the Electoral Commission of Zambia which is the 2nd respondent. The Attorney General later applied and was joined to the proceedings on 29th September, 2016. The petition is made pursuant to the provisions of the Constitution and the Electoral Process Act No. 35 of 2016.

The petition reveals that after the elections, the 1st respondent polled thirty one thousand three hundred and ten (31,310) votes while the petitioner polled sixteen thousand, eight hundred and fifty six (16,856) votes. Thereafter the Returning Officer from the 2nd respondent declared the 1st respondent as duly elected Member of Parliament for Kabwata Constituency.

The petition goes on to reveal that during the campaigns building up to the election date, the petitioner noticed a lot of violence in form of intimidation, assaults and injury towards UPND officials and supporters perpetrated by the PF supporters and the Police Service.

The petition alleges that the PF cadres were seen removing and destroying UPND Campaign posters and materials disadvantaging the petitioner's chances of being elected as MP. That the 1st respondent was spotted using government resources even after the judgment of the Constitutional Court that Ministers and their Deputies were illegally in office after dissolution of Parliament.

The petitioner further states that the 1st respondent while masquerading as Minister of Agriculture and Livestock offered the residents of Chilenje Mapoloto more than one thousand (1,000) plots to a new re-settlement scheme in order to entice them to vote for him.

It has been further alleged by the petitioner that during voting day PF supporters beat up UPND polling agents and monitors resulting in voter apathy from UPND members.

The petitioner also alleged that the 1st and 2nd respondent's agents involved themselves in corrupt, illegal practices and other misconducts in relation to Kabwata Constituency elections.

As a result of the foregoing, the petitioner has prayed for *inter alia*:

- i) *A declaration that the 1st respondent was not validly elected as MP for Kabwata Constituency;*
- ii) *A order of recount, verification and scrutiny of the votes cast in the said elections;*
- iii) *Any other relief and costs.*

The 1st respondent filed his answer on 22nd September, 2016 in which he denied all the petitioner's allegations.

The hearing of the petition commenced on 3rd October, 2016 wherein the petitioner called a total of eleven (11) witnesses. PW1 was Collins Malambo of Chilenje. His testimony was that on 8th August, 2016 he met the 1st respondent at a place called Ebenezar, who at the time was in a GRZ vehicle with a flag mounted thereon. Be that as it may, they exchanged greetings and PW1 asked the 1st respondent what he was doing with other peoples' National Registration Cards (NRCs) in his hands. His response was that he was there to give forms to people who wanted plots in Mapoloto. Shortly thereafter PW1 proceeded into Ebenezar hall where he found ladies in a queue filling in some forms. After this incident PW1 started off for his home and on his way he phoned Mr. Andrew Tayengwa (PW2), the UPND Campaign Manager to alert him of what he witnessed. PW1 further testified that after lunch he returned to Ebenezar and saw the 1st respondent in what he described as a corolla car.

PW1 went on to testify that on the day of election he heard people who were in the queue saying they were only going to vote for a person who had given them refreshments. Among the people he knew who were at Ebenezar were Mrs. Chindele, Mrs. Kaumba and Mrs. Zulu.

In cross-examination he categorically stated that he did not see the 1st respondent with any forms in his hands but only NRCs. He conceded that Members of Parliament (MP's) do not give plots. He confirmed seeing Mrs. Zulu and Mrs. Chindele in the queue at Ebenezar hall. When referred to page 200 of the petitioner's bundle, he confirmed that this was the form he saw with the ladies on 8th August, 2016 at Ebenezar hall. He admitted that the name Given Lubinda was not written anywhere on the forms. He also testified that there were four people in the hall who told him they were from Ministry of Lands. He further said that on the election day he moved freely inside and outside and no one chased him. He stated that he did not take down the registration number

for the two vehicles he saw the 1st respondent in. He clarified that people in the queue were saying that they would vote for the person who would give them plots.

Mr Andrew Tayangwa who was the petitioner's campaign manager during the said elections, was then called as the next witness (PW2). His testimony was that the first incident occurred on 4th July, 2016 as they were doing road shows and moving about in a convoy. On their way from Kabwata Cultural Village to Kamwala, they saw two vans filled up with police officers who started firing teargas canisters on the UPND members. PW2 went on to testify that some tear gas canisters were thrown in a canter and this caused panic and people started jumping out. In the process some UPND members sustained injuries and were eventually treated at the University Teaching Hospital (UTH).

He further testified that on 9th August, 2016, he was called by PW1 Collins Malambo and told that the 1st respondent was in Ebenezar area giving out forms to residents of Mapoloto. He drove there and found the 1st respondent had left the scene.

That from the scene he could hear people saying they would only vote for the person who promised to give them plots. He later left the place when the police came.

The second incident was on 11th August, 2016 around 18.45 hours he was at Home Craft Burma Market when he saw three vans filled with PF cadres with weapons. Whilst sitting in his car with a window half open, one of the cadres threw a stone at his window. He managed to escape whilst in panic. Amongst the people that attacked him, he was able to identify one Makaveli and a Mr. Chisha who were known as PF members.

In cross examination PW2 said that Makaveli and Mr. Chisha were not in the two vehicles that came but were already at the Community Home Craft

Center. He also stated that it was the two who issued the order to attack him. He told the court that the fracas traumatised him.

On further cross-examination PW2 testified that the police were given verbal notice of the road show. That when they went to find out from the police why they were tear gassed, the police denied having been notified. He said that whenever he tried to report to the police they threatened to lock him up in the "usual style."

When asked to clarify what he meant by the "usual style" he said that he meant that every time someone ended up being locked up during the campaign period.

Violet Soko was the next witness (PW3) who largely corroborated the story of PW2 regarding the tear gas incidence of 4th July 2016. However her version of the event was that the police fired four tear gas canisters in the canter she was in, which resulted in some UPND members jumping out of the canter thereby sustaining injuries in the process while others became unconscious. PW3 recalled that there were 15 people who were injured and were taken to the hospital. She named two people who were injured as Monica Phiri and her nephew Davis Bwalya.

She further testified that on 11th August, 2016 around 23.00 hours as they were counting votes she saw UPND members being beaten outside. She was able to identify a Mr. Chipili who was a PF member outside.

Under cross-examination, she confirmed that she would move in and out the polling station without being attacked. She denied seeing Mr. Chipili attacking Jesica Mabete. She stated that at Kabwata Cultural Centre she was not restricted by PF members or the 1st respondent.

PW3 went on testify in cross examination she did know her house number as she was just a tenant. She confirmed that at Kabwata Cultural

Village she was not restricted by PF or the 1st respondent She stated that she left the polling station around 08.00 hours on 12th August, 2016 and was not harassed by anyone.

PW4 was Autiliya Habinda of Chilenje South. She informed the court that she contested for the position of Councilor in Chilenje Ward 8 on the UPND ticket. Her testimony was that on 9th August, 2016 she was called by the Constituency Campaign Manager Mr. Tayengwa (PW2) at Ebenezar polling station. When she went there she found people filing in forms which had a stamp from Kabwata Constituency Office. When she inquired from some people she was familiar with as to what the forms were all about she was told that they were given by the 1st respondent and the forms related to land.

She further testified that she overheard the people saying they would vote for the person who would give them land and not any other person. They later left the scene after being questioned by police officers.

It was her testimony that at the beginning of the campaigns in May, 2016 they tore up UPND flags around Chris Corner also known as Chifundo Market. The UPND members who had UPND flags were physically attacked and in the process they lost their merchandise. These incidents were later reported to the police and were even covered on MUVI TV.

PW4 went on to testify that towards, month end, of May a UPND member by the name of Steinbridge Himoonga was attacked near the traffic lights at Chris corner by PF cadres. She rushed to the scene and when she reached she found 2 buses skidding off while Steinbridge was lying in a pool of blood.

She further stated that on 11th August, at Chilenje Community Hall they saw a person who looked like an ECZ official. When the person was taken to the presiding officer, it was confirmed that he was not an ECZ official. The matter was reported to Chilenje Police and the said man locked up.

In cross-examination she stated that she would not say with certainty whether the person who was impersonating as an ECZ official, was from PF or from another party. She further testified that regarding the attack on Steinbridge she did not see the people that attacked him, but was told they were PF members.

Regarding the events of 9th August, 2016 she confirmed that she did not see the 1st respondent giving out forms but was merely told by Gertrude Chindele. She denied meeting any officers from the Ministry of Lands. She further stated that she heard voices of people stating that they would vote because of plots while others were murmuring.

Regarding the incident at Chifundo Market she stated that she did not personally see anyone pulling down a UPND flag. She said that in Chilenje Ward, the police did not perpetuate any violence and were balanced in their work.

PW5 was Michelo Mudenda, a business lady of Kabwata. She informed the court that she was a polling agent for UPND at Morovian Church within Kabwata constituency. She narrated that on 11th August 2016 the polling station was opened at 06:00hours and closed at 17:00 and they did not experience any problem. She went on to explain that at 17:30 she saw a Toyota vitz car which had four men who came to the tent where the voting was being done and proceeded to tell the returning officer "mind what we are telling you". It was her testimony that the four people were wearing PF T-shirts. The four men then left the scene.

They later moved to count the ballot papers from the tent into the church. She explained that there was no electricity in the church but the ECZ officials had a bulb which lit the church. She went on to testify that when they finished moving the ballot boxes into the church the lights went off and she then saw a Zamtel van with many people come outside who proceeded into the

church. She lit a torch and one of the people who entered the church insulted her. It was her testimony that when she asked him why he was insulting her, the person insulted her again. Deciding that discretion was the better part of valour she withdrew towards a police woman. Thereafter they counted the votes peacefully after which the green van came back and collected the ballot boxes which were not sealed.

Under cross examination she said that the person who came to the tent to talk to the returning officer was neither a PF polling agent nor the 1st respondent. She further said there was no violence at the polling station and voting was conducted smoothly but that she was not happy with the way the counting was done. She confirmed signing a form for the results without being forced to do so. She stated she was not happy that the 1st respondent won as she was a UPND supporter.

On further cross examination she stated that none of the people who came in a van or corolla was from ECZ. She stated further that the consolidated results were not different from the votes which they counted at the polling station.

In re-examination she clarified that she did not complain because the 1st respondent won but because of the men who came from the van.

Gerald Moono a polling agent for UPND at St Patricks was the next witness (PW7). His testimony was basically to highlight some concerns which he had with the ECZ officials at St. Patricks polling station on the day of elections. The following were the complaints he raised:

- a) Lack of introductions before the start of voting;
- b) Shortage of Gen-12 forms to tabulate the results on;
- c) Stream 2 figures for UPND aspiring member of Parliament for Kabwata constituency were less by 8 votes while in Stream 3 the UPND presidential candidate's votes were less by 3 votes; and

- d) Arrival of unsealed ballot boxes from Lusakasa primary School of Libala which arrived in a blue canter

He went on to narrate that regarding the complaint in a) above he was given three blank Gen 12 forms by the presiding officer. The rest of the concerns were addressed in the presence of all stake holders. He went on to testify that they went back to Lusakasa School in Libala with the open ballot boxes where they did the verification and found that nothing was tampered with.

In cross examination he told the Court that he had no complaint about the results. He went on to state that the voting was well conducted and there was no incidence of violence at his polling station and no candidate was disadvantaged. On further cross examination he said he had no evidence of theft or manipulation of votes. He conceded that all the complaints raised against the ECZ officials were attended to.

PW7 was Steinbridge Himoonga of new Chilenje. He told the Court that on 30th May, 2016 he was at his shop at Chilenje Market when he was approached by a young man who asked him to go with him to erect a make shift stand for him. When they arrived at a place which is situated at the ring road traffic lights he saw two young men coming towards him who asked what the nature of business was in that area. He explained to them that he was there to erect a make shift stand.

The two young men then started poking PW7 and accusing him of selling plots in the area. He went on to narrate that shortly thereafter two buses came filled with people who putting on PF regalia. One of the people from the bus produced a taser gun and applied it on his leg. PW7 fell down. He was then beaten with a plunk, then with an iron rod. They beat him until he fainted and only woke up the hospital.

Under cross-examination, he testified that on the material day he was putting on a plain red T-shirt. He also stated that at the place he was attacked there were UPND chitenge materials and flags. He conceded that the dispute they had with the two young men who came at first was in relation to plots. He further stated that he was first hit using a plunk and fell down, that he was then struck with a taser gun while he was on the ground.

PW8 was Zelose Zulu of Chalala. This witness corroborated the evidence of other witnesses as the events of 4th July, 2016, when they were tear gassed. She also stated that she was in one of the canter when they were tear gassed, lost consciousness and fell off the canter and sustained injuries on her head and hands.

Nothing came up in cross-examination

PW9 was Monica Phiri, she equally corroborated the testimony of other witnesses regarding the incident of 4th July, 2016, concerning the tear gas incident by the police officers. She confirmed that she also got choked by the tear gas and fell off a canter. In the process, she lost a tooth and one was shaking, she sustained a big injury on her knees. That her nephew Davis Bwalya also fell down. She was later treated at the University Teaching Hospital.

Under cross-examination, she testified that she never saw the 1st respondent at the scene, and neither did she see any ECZ official, but only the police. She confirmed also that she did not see any PF cadres.

PW10 was Mulenga Sata. He told the Court that he petitioned the 11th August, 2016, Kabwata Constituency Parliamentary election because there were incidences of violence perpetuated against his supporters by members of the PF as well as intimidation by the police before and during the elections. It was his view that it was important that these issues are brought to light in order to improve our election processes. He confirmed the incident of 4th July,

2016 when they were tear gassed. His version was that on 4th July, 2016, he arranged a road show event as an opportunity to interact with the community and to campaign. This event involved a number of people and vehicles mounted with a public address system and playing of loud music.

It was the petitioner's testimony that he noticed Police Officers when the UPND group was around the Kabwata cultural village. As they left the cultural village for the next destination on the campaigns, Police Officers started firing teargas canisters at the UPND group. He testified that the vehicles they were using left Burma Road and went to join Chilumbulu Road but that the Police Officers pursued them until they reached Libala UPND office. PW10 told the court that in the process, some people fell off the moving vehicles and sustained injuries. They were later treated at the hospital.

It was his testimony that after the tear gas incident he went to Kabwata police to find out why they were tear gassed. The response from the police was that they were not given notice of the procession. When he further asked them why the PF would go for procession without notifying the police, they told him the requirement for notice does not apply to Ministers. He felt aggrieved and this created fear in their party as they could not hold meetings freely in one place for a long time.

He went on to testify that he also observed that his posters would be covered by PF posters.

In relation to the 1st respondent, he stated that his complaint was the issue of him being a Minister up until the time of elections. Further that he was a resident of Kabwata Constituency and moved around with a flag mounted on his vehicle.

Regarding the 2nd respondent his concern was with regard to the non availability of the Gen-12 forms. He accordingly prayed for the reliefs as endorsed on the petition.

Under cross-examination, he stated that he did not see any PF cadres commit violence to him or his members. He further denied seeing any PF members remove UPND posters. He admitted appearing on a radio programme where he complained about PF using his late father's image on their posters. He stated that one poster was defaced but that he does not know whether this was after his appearance on radio. He denied ever seeing the 1st respondent using government resources at any campaign rally. He further denied hearing the 1st respondent make a promise. He further stated that a Minister cannot allocate plots, but can make sure that someone gets a plot. He further testified that the figure of 1,000 plots in his affidavit was just an estimation. He further denied seeing any document bearing the name of the 1st respondent concerning plots.

He denied knowing any UPND member who did not vote because of fear. He did not receive any report of a polling agent being denied access on the polling day. He also denied receiving a report of a voter who was manipulated by the ECZ to vote for PF. He went on to deny having any evidence of the 1st respondent's votes being inflated. He further testified that did not have any evidence of corruption by the 1st respondent.

He further stated that he does not know of any misconduct or illegal practice. He further denied personally notifying the police on the incident of 4th July, 2016. He testified that his complaint was with the process, the lack of impartiality on the part of the police and that the ECZ were not making Gen 12 forms available.

He further stated that he did not have evidence of votes casts in his favour which were not given to him. He denied having any evidence that either the 1st or 2nd respondent tampered with the results. He further stated that he had no evidence that the 1st respondent used his office, government vehicle or resources in the campaign.

Regarding the Gen-12 form he testified that this was provided but inadequately so at St. Patricks polling station. He further admitted the complaint at St Patricks could not account for the disparity in the votes.

PW 11 was Grace Singo of Chilenje South, she told the Court that she conducts her business at Chris Corner, Chifundo Market within Kabwata Constituency. Her testimony was that on 23rd May, 2016 she saw a mob of people wearing PF t-shirts come to her stand which had a UPND flag. They removed the UPND flag, destroyed her things and stole some of them and later proceeded into the market where they went to attack other UPND members. It was her evidence that these people were armed with machetes, logs and stones. She further testified that she informed PW4 and proceeded to report the matter to the police.

Under cross-examination she confirmed participating in the 11th August, 2016 election where she voted for a candidate of her choice. She denied seeing the 1st respondent at the scene of the attack. She testified that during the attack they broke her stall and beat her on her back.

The first witness for the respondent was Patrick Kaluba Kangwa, the National Co-ordinator for Disaster Management and Mitigation Unit (DMMU). He told the court that the DMMU is mandated to undertake disaster management programmes and activities in order to minimize loss of life or properties in the event of emergencies and disasters. He went on to say that the DMMU is also responsible for the welfare of the internally displaced persons.

In relation to Mapoloto area he testified that this community is under threat of internal demolition as a result of the structures the community is living in.

It was his evidence that the Lusaka City Council recommended for the demolition of all structures in Mapoloto area which put the affected at risk at a

figure of about 288 households. In light of this DMMU conducted an assessment in July, 2014, where it was recommended that the affected community be resettled within the country in collaboration with Ministry of Lands. In order to achieve the aim of resettlement the effected community were made to complete application forms and that a total of 310 forms were received by DMMU on 8th and 9th August, 2016. That this exercise was carried out at Ebenezar Church and Mulele Mwana Church, both situated in Kabwata Constituency.

He further narrated that from the application forms 31 were found to be ineligible, 10 were duplications while 269 of the names were found to be within the affected community.

When asked in cross-examination why there was a stamp dated August, 2016 from Kabwata Constituency office when the 1st respondent was neither MP nor Minister at the time, he said he was not given an opportunity to make a decision on the issue by his officers. When asked further he stated that when MPs, Ministers and Councillors leave office, a professional assistant remains in the Constituency office to continue with programmes.

After considerable questioning he explained that no plots were offered on 8th and 9th August, 2016 but only application forms for resettlement were distributed and completed by the applicants.

The next respondent witness (RW2) was Racheal Malongo Mabumba, a professional assistant working at Kabwata Parliamentary Constituency office. Her evidence was that in 2008 the residents of Mapoloto came to Kabwata Constituency office to ask for resettlement considering that the land they occupied was not in good sanitary condition.

According to this witness, the office of the MP proceeded to engage Ministry of Lands, Lusaka City Council and DMMU to help facilitate the finding of alternative land. This led to the issuance of application forms for

resettlement which were completed by residents of Mapoloto on 8th and 9th August, 2016 and submitted to DMMU office. It was her responsibility to verify the list of applicants as well as the forms appearing at page 195-201 of the Petitioner's bundle. She told the court that the date stamped on the forms was intended to show that the constituency officer was involved in the process and also for purposes of verification.

She pointed out in cross-examination that the constituency office is an extension of the National Assembly which continues to run even when there is no MP. She further stated that she has authority to use the constituency stamp even during the election period as the office continues with its operations. When asked about how many days the exercise was done before the elections, she said one month.

In re-examination she maintained that forms were completed a month before the elections date.

RW3 was Mukumba Evans, head of transport at Ministry of Agriculture and Livestock. He explained that his duties at the Ministry of Agriculture and Livestock. He explained that his duties at the Ministry include allocation of vehicles to officers which are in serviceable condition to ensure that they carry out their duties effectively. He narrated that the Minister is entitled to two vehicles one being a personal to holder and the other a utility vehicle. He allocated a Toyota GRZ 783 CL V8 as personal to holder silver in colour and a Nissan Patrol registration number GRZ 884 CL, beige in colour to the Minister.

According to RW3, the 1st respondent was an official who was on leave in the month of August, 2016.

In cross-examination he did not prevaricate from his evidence and maintained that the 1st respondent was on leave during the month of August, 2016 and never returned to the office. He stated that when the term of office

elapses for a Minister the utility vehicle is immediately returned to the Ministry.

Mr. Titus Muntunga, the officer in charge of Kabwata Police Station was then called as the last witness (RW4). He testified that on 4th July, 2016 between 10 to 12 hours, he received a report from members of the public particularly motorists that UPND cadres had blocked Burma Road. He went to the scene and observed that indeed there were a lot of UPND cadres who had blocked Burma Road. He told the court that prior to this incident his office did not receive any notice of procession from the UPND. He further testified that he approached the petitioner to advise him to move away but his advice was not adhered to. He then decided to disperse the group of cadres by firing tear gas canisters at them.

After sometime when the cadres had been dispersed the petitioner approached them to try and establish why they were being tear gassed. RW4 told him that they did not receive any notice of the procession 7 days prior to the incident. He stated further that violence was perpetrated by PF and UPND cadres in the build up towards elections and gave two examples when referred to paragraph 6 of the petition.

In cross-examination he testified that when he was informed that there will be violence at a particular event, he usually advises the group to find an alternative venue or date. He conceded that the role of the police was to provide security and not to arrest people who have not attacked them. He went on to state that the police have a right to tear gas people who are conducting an illegal procession. After considerable questioning he said they managed to accomplish the mission of dispersing the cadres.

He also stated that he did not receive any report of violence caused by the 1st respondent.

On 28th October 2016, Mr. Chibundi learned counsel for the 1st respondent filed into Court lengthy submission the gist of which were as follows: on the burden and standard of proof, Mr. Chibundi submitted that the burden of proof lies on the petitioner to prove the allegations made in the petition to the satisfaction of the court. The case of **Michael Mabenga vs. Sikota Wina, Mafo Wallace Mafiyo and George Samulela** ⁽¹⁾ was cited where the Supreme Court articulated the principle that in election petitions the challenger must prove his allegations to a standard higher than a mere balance of probabilities but not as high as that required in criminal matters of proof beyond reasonable doubt. Mr Chibundi also referred the Court to other cases in which similar sentiments were expressed concerning the burden and standard of proof which include: **Brigadier General Kenneth Kankuza and Others v Sara Sayifwanda and Another** ⁽²⁾ and **Simasiku Kalaluka vs Geoffrey Lungwangwa and Others.**⁽³⁾

Counsel contended that even in the absence of a defence the petition can only succeed if evidence is adduced to a fairly high degree of convincing clarity that the proven defects and electoral flaws were such that the majority of voters were prevented from voting for a candidate of their choice. The cases of **A.K Mazoka vs L. P. Mwanawasa, ECZ, Attorney General**⁽⁴⁾ and **A. M. Lewanika, H. E. Kamaila Dean Mungomba, SS Zulu, J. Mwaba vs FTJ Chiluba** ⁽⁵⁾ were cited for this proposition.

Regarding the functions of pleadings, Mr Chibundi submitted that it is trite law that allegations of fraud, illegal conduct or misconduct have to be specifically pleaded with particulars if they are to be relied upon in a court of law. In articulating this principle he referred the Court to the cases of **Anderson Mazoka**⁽⁴⁾ and **Christopher Lubasi Mundia vs Sentor Motors Limited** ⁽⁶⁾

Mr. Chibundi further submitted that in election petitions the requirement for collaboration testimony places an extra duty on the petitioner

to call ordinary voters and not only party supporters in order for him to remove the shadow of bias attached to partisan witnesses. For this proposition reliance was placed on the case of ***Kalenga vs Mushya***.

Mr. Chibundi further catalogued a number of allegations as set out in the petition and posed the question as to what evidence had been led to satisfy the Court that the alleged acts were committed by the 1st respondent or his agents with his knowledge and also whether the said actions prevented the majority from voting for a candidate of their choice.

On the issue of violence resulting in injuries which occurred on 4th July 2016 at Kabwata cultural village, Mr Chibundi submitted that this was caused by failure of the petitioners to give the police "notice" of their campaign activities.

Regarding the attack on PW2 on the voting day but after the close of the polls at homecraft polling station Mr. Chibundi argued that the alleged incident was neither collaborated nor is it attributable to the 1st respondent or his election agents. In concluding Mr. Chibundi submitted that no evidence was led to substantiate all the allegations levelled against the 1st respondent and went on to highlight the allegations.

Counsel prayed that the petition be dismissed with costs to the 1st respondent.

Mr. Mwale on behalf of the 3rd respondent after lengthy submissions on the evidence proceeded to outline the burden of proof required in an election petition. He referred the court to the cases of ***Micheal Mabenga vs. Sikota Wina, Mafo Wallance Mafiyo and George Samulela - SCZ Judgment*** ⁽¹⁾ and ***Anderson Mazoka vs Levy Patrick Mwanawasa***.⁽⁴⁾

He submitted that all the 3rd respondent witnesses were not political party agents but where civil servants and therefore their testimonies should be

weighed more as against the petitioners' witnesses who were members or candidate of the UPND an interested party in the petition. Mr. Mwale sought relief in the case of ***Simasiku Kalumiana vs Geoffrey Lungwangwa***.⁽³⁾

Mr. Mwale went on to outline what was supposed to be proved by the petitioner against the respondent and the law. He drew the courts attention to section 97 (1) (2) (3) of the Electoral Process Act. (EPA) which sets out the grounds upon which an election petition may be challenged.

He articulated the three (3) tests which ought to be applied if an election of an MP can be nullified. The first test is if one of the candidates or indeed his or her agents acting with his or her knowledge, approval or consent engages himself or herself in corrupt practice, illegal practices or other misconduct proscribed by the EPA.

The second test is that there has been non compliance with the provisions of the EPA relating to the conduct of elections, and it appears to the High Court 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.

The third test being that the candidate at the time of the election was a person not qualified or a person disqualified for election.

According to Counsel allegations against the 3rd respondent in the petition and evidence adduced by the witnesses were supposed to be proved using the aforementioned tests. That paragraph 6 of the petition stated that there was violence perpetrated by the PF and state agents such as the police services who should not be partisan. Paragraph 9 alluded to the petitioner using government resources for his personal gain which gave the 1st respondent an unfair advantage against the petitioner and paragraph 11 stated that in addition to the 1st respondent masquerading himself as Minister of Agriculture and Livestock, on 9th August, 2016 he offered the residents of

Chilenje Mapoloto more than 1,000 plots to a new resettlement scheme as a way of enticing people to vote for him.

Mr. Mwale submitted that with regards the evidence relating to paragraph 6 of the petition, PW2, PW3, PW8, PW9 and PW10 spoke to the events that took place on 4th July' 2016. That it is not in dispute that a procession in the form of a road show was held on the 4th July, 2016 however, his contention is that it was held without prior notification being given to the police service which offended the public Order Act Chapter 113 of the Laws of Zambia. That the provisions of the Public Order Act are not suspended during political campaigns. He went on to refer the court to sections 5 (4) and 7 of the Public Order Act.

“(4) Every person who intends to assemble or convene a public meeting, procession or demonstration shall give police at least seven days notice of that person’s intention to assemble or convene such a meeting, procession of demonstration.

7. any assembly, meeting or procession:-

(a) for which a permit is required under subsection (4) of section five and which takes place without the issue of such permit; or

(b) in which three or more persons taking part neglect or refuse to obey any direction or order given under subsection (3) or (7) of section five;

Shall be deemed to be an unauthorised assembly, and all persons taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no permit has been issued, all persons taking part in convening, calling or directing such assembly, meeting or procession may be arrested without a warrant and shall on conviction be liable to a fine not exceeding one thousand five hundred

penalty units or to imprisonment for a period not exceeding six months, or to both."

Counsel did not dispute that the tear gas canisters were fired at the UPND team but explained that the evidence of RW4 clarified that this was done to disperse the crowd that was holding an illegal procession.

Counsel has argued that the use of teargas canisters was done within the confines of the public Order Act.

Turning to the allegation that the Police Service was partisan, Counsel submitted that there was no evidence led to substantiate the same and that it was abandoned by the petitioner.

Regarding the allegation in paragraph 9 of the petition on the alleged use of Government Resources by the 1st respondent he submitted that the petitioner failed to specifically connect the 1st respondent to any wrongdoing in terms of use of Government resources in campaigns. That the petitioner conceded in cross-examination that the 1st respondent was not staying in a Government house. He went on to submit that the petitioner failed to prove that the 1st respondent used government resources to be elected as MP for Kabwata Constituency and that if the petitioner would have proved, the said use of government resources was supposed to have affected the majority of the votes in the Kabwata Constituency not to vote for their preferred candidate for the petition to succeed.

The decisions in the cases of ***Mubita Mwangala vs Inonge Mutukwa Wina*** ⁽⁷⁾ and ***Brelsford James Gondwe vs Catherine Namugala*** ⁽⁸⁾ were referred to as authority for the principle that the corrupt or illegal practice or any other misconduct, it must be shown that a majority of the voters in the Constituency were or may have been prevented from electing the candidate whom they preferred.

Pertaining to the allegation in paragraph 11 of the petition on the Mapoloto Resettlement Scheme, Mr. Mwale submitted that PW1, PW2, PW4 and PW10 struggled to link the respondent to enticing voters to vote for him by allegedly offering them plots in an alleged resettlement area.

RW1 and RW2 categorically stated that the process of 8th and 9th August, 2016 was an ongoing exercise and to date no one has been offered any land. In addition it was RW1 and RW2's evidence that the 1st respondent did not play any role in this exercise but rather it was government employees or officials from DMMU and the Constituency office who implemented the exercise as the same was and is still a Government Programme.

Regarding the law on whether Government programmes before an election amounts to a corrupt or illegal practice the cases of *Matildah M. Mutale vs Sebio Mukuka and ECZ* ⁽⁹⁾ and *Akashambatwa M. Lewanika & Others vs Fredrick J.T Chiluba and Others* ⁽⁵⁾ were cited. The gist of the decisions in the afforecited cases is that Government projects do not come to a standstill during the election period and even though they may have an injustice on some of the voters they do not constitute corrupt or illegal activities.

Mr. Mwale concluded by stating that the petitioner had completely failed to prove the allegation that the 1st respondent or indeed by extension, the 3rd respondent was involved in any wrong doing by virtue of the land resettlement scheme involving the people of Mapoloto area.

He implored the court on the totality of the pleadings, the evidence on record and the authorities cited to dismiss the petitioner's case with costs to the 3rd respondent.

I acknowledge and I am assisted by the submissions by Counsel for the 1st and 3rd respondents which I have taken into consideration together with the pleadings and documentary evidence in arriving at my decision.

I will begin with the law pertaining to grounds upon which an election can be annulled which is found 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."

It is clear from the wording in Section 97 that a corrupt practice, illegal practice or other misconduct committed in connection with the election must have been done by a candidate or with the knowledge and consent or approval of that candidate's election agent or polling agent; and the majority of the voters in the Constituency were or may have been prevented from electing a candidate in that Constituency they preferred.

There are a number of authorities which have espoused this principle, to name, but a few, **Mubita Mwangala vs Inonge Wina** ⁽⁷⁾ in which the Supreme Court of Zambia said:

"In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct it must be shown that a majority of the voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred. See section 93(2) (a) of the Electoral Act No.12 of 2006....."

*It is clear to us that the corrupt practice or illegal practice or indeed any misconduct must affect the majority of the voters in a constituency. In other words, the corrupt practice or illegal practice or misconduct must be wide spread in the constituency so as to affect the majority of voters....according to PW3, RW10 gave the whole K70,000.00 to the co-wife of PW3 who was not called as a witness. One voter, therefore, cannot affect the majority of voters in a constituency. But in the present case, this one bribery act as found by the learned trial Judge cannot be said to have prevented the majority of voters voting for their preferred candidate. We did indicate in the case of **Mlewa vs Wightman (1996)** ⁽¹⁰⁾ that the court must be satisfied about the scale or type of wrongdoing. By scale, it is meant wide spread as to influence the majority of voters in the constituency not to vote for their preferred candidate.”*

In the case of **Brelsford James Gondwe vs Catherine Namugala – Appeal**, ⁽⁸⁾ the Supreme Court of Zambia held:

“It was contended by the appellant in ground two of the appeal that, the trial court fell in error when she refused to nullify the election of the respondent in light of the donations she made at various churches in Mafinga Constituency. The trial court found that the respondent made offering at the various churches in question and not donations as alleged. This was a sound finding of fact which we are not prepared to tamper with it as we did not have the opportunity the trial court had in this case. Further, the appellant did not show that the offerings influenced the majority of the voters in Mafinga Constituency. In the circumstances this ground fails.

I will now turn to consider the burden and standard of proof in an election petition such as the one before me. The burden of proof rests on the petitioner to prove all the allegations in the petition and the standard of proof

required is that which is higher than balance of probability but less than proof beyond reasonable doubt.

In **A. K. Mazoka, Lt Gen Tembo, G.K. Miyanda vs L. P. Mwanawasa ECZ Attorney General** ⁽⁴⁾ it was held;

"The degree depends on the subject matter. A civil Court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal Court even when it is considering a charge of a criminal nature, but still it does not require a degree of probability which is commensurate with the occasion.... It follows that for the petitioner to succeed in the present petition, it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affect the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters."

Other cases which articulate the same principle are: **Michael Mabenga vs Sikota Wina Mafo Wallace Mafiyo & George Samulela (SCZ Judgment)**⁽¹⁾ and **A. M. Lewanika, H. E. Kamaila Dean Mungomba, SS Zulu, J. Mwaba vs FTJ Chiluba** ⁽⁵⁾.

All other allegations such as intimidation or violence that are pleaded in the petition must be proved with the standard set of fairly high degree of convincing clarity in line with a standard set in **Mazoka & Others vs Mwanawasa & Others**.⁽⁴⁾

Having outlined the law I now move to deal with the evidence presented before me.

The determination of this petition hinges on the interpretation to be given to the evidence of the petitioner who was PW10. The petitioner's evidence was

essentially that the period preceding the elections was characterised by violence perpetrated against his supporters. He narrated an incident that occurred on 4th July, 2016 when he in the company of his supporters went on a road show in order to interact with the community and potential voters. According to the petitioner they went to a place called Chimutengo, proceeded to the market for a session of meet and greet, thereafter passed through the clinic and eventually went to the Kabwata cultural village. The petitioner explained that after he had concluded his visit as he was about to board a vehicle he noticed police presence.

Upon getting into his vehicle he observed the police firing tear gas at the vehicles which were in his procession. They decided to leave but the police continued to throw their gas canister in the canters his supporters were in. This led to some supporters jumping out of the vehicles to avoid being choked. A number of whom sustained injuries and were taken to the hospital.

The petitioner then later went to the police station to demand an explanation and the officer in-charge said they had not notified the police of the event.

The petitioner told the court that campaign posters were being removed but he personally did not witness anyone removing the posters.

He denied seeing the 1st respondent using any government resources at the campaign rally or associated with the campaign. He categorically stated that he did not see the 1st respondent use Government resources. He further denied hearing the 1st respondent making any promise or offer any plots, that he had just heard that the 1st respondent had offered numerous plots and the figure he had indicated in his affidavit of 1000 plots was a mere estimation.

He denied any knowledge of any report of a polling agent being denied access on polling day. In addition he had no knowledge of any votes being manipulated by an ECZ official to vote for PF.

He admitted he had no proof or evidence of the 1st respondents' votes being inflated. He categorically stated that he did not know of any allegations of corruption, misconduct or illegal practice attributable to the 1st respondent.

He alleged that there were votes cast which were missing but stated that he had no evidence of votes given to him and that he had no evidence of ECZ or the 1st respondent tampering with the results.

The petitioner's grievance was with the conduct of the police and described their relationship as that of cat and mouse, Tom and Jerry to illustrate that it was not a level playing field. He strongly disagreed with the aspect of notification to the police as a requirement as it was an election period and described it as being neither here nor there.

In his opinion he considered the police were partisan and used the incident of 4th July, 2016 at cultural village as one such incident to demonstrate that according to him the police indulged the PF whereas the UPND were treated differently in the campaigns.

The effect of this evidence is that he is denying all the allegations contained in the petition as I have highlighted in the earlier part of this Judgment.

The other evidence was that tendered PW1, PW2 PW3, PW4 PW5, PW6, PW7, PW8, PW9 and PW11.

The following are the allegations as presented in the petition:

VIOLENCE RESULTING IN ASSAULT AND INJURY OF PETITIONERS SUPPORTERS.

Cultural village incident:

PW2, PW3, PW8, PW9 and PW10 all sang from the same hymn book. They all gave an account of the incident at Kabwata cultural village during the

road show. That they were approached by police who fired the teargas canisters. In a bid to escape, people jumped out of the vehicles and sustained injuries. There was no evidence regarding PF perpetrating violence none of the witnesses alleged the 1st respondents' involvement. I find as fact that on the 4th July, 2016 at Kabwata Cultural where the petitioner and his supporters were conducting a road show that the police approached them and did fire tear gas canisters at them which resulted in some supports sustaining injuries. I further find as a fact that the petitioner did not notify the police about the road show. The question that begs an answer is why is there need to notify the police.

An election petition is an event contested by different political persuasions, in the conduct of their campaign leading to the election the police have an important role of maintaining law and order hence the need to notify them so that they are not only put in a position to provide the necessary policing for the event but also to control and superintend who campaigns from a particular place on a particular date and time. I am inclined to find that the police were exercising an important national duty in the maintenance of law and order. Apart from this unfortunate incident the petitioners' witnesses PW4 and PW6 described the conduct of the police as fair and balanced in their execution of duties.

Homecraft Polling Station:

PW2 alleged he was attacked. I must mention here that this attack was after voting had taken place therefore it could not have any effect on voting. In addition it was not attributed to the 1st respondent or his polling or election agent.

Ring Road incident:

This was an attack on PW7 on 30th May, 2016. It occurred at the ring road and the only identification of the perpetrators were that they were wearing

PF regalia. PW4 testified that she found PW7 after he had been attacked. There was no link of this attack to the 1st respondent. I find as a fact that PW7 was badly beaten and left unconscious by unknown assailants on 30th May, 2016.

Intimidation arising out of violence:

There was not a single witness brought to substantiate this allegation. The petitioner denied being intimidated; PW11 went on to testify that she voted for a candidate of her choice

Illegal Removal of Posters resulting in reduced visibility:

In relation to this allegation PW3 and PW11 testified. According to PW4 she only received a report that after campaigns had started on 11th May, 2016 that UPND supporters were attacked, flags were removed and goods were looted. She did not witness the incident personally. She conceded that during the campaign period not only UPND posters removed but also those of PF. PW11 was one of the persons attacked on the way and according to her the attack was perpetuated by persons wearing PF regalia. I find as a fact that all parties suffered the same fate in that their flags, posters and other campaign materials were pulled down by their opponents. The argument therefore, that the pulling down of campaign material for the petitioner thereby reducing his visibility cannot be sustained.

Illegal Acts by 1st Respondents in using Government Resources for campaigns and carrying on duties as Minister of Agriculture after the Constitutional Court Judgment of 9th August, 2016:

The petitioner (PW10) has taken exception with the continuation of the 1st respondent in office after the Constitutional Court had made a declaration the Ministers were illegally occupying their offices. However, although it was pleaded that there were illegal acts by the 1st respondent in using government resources for campaigns and carrying on duties as Minister of Agriculture after

the Constitutional Court had passed judgment on 9th August, 2016, there was no evidence led to substantiate this claim.

Illegal Act on 09/08/16 of offering more than 1000 plots to residents of Chilenje Mapoloto in a new resettlement scheme as enticement for votes:

The allegation is that the 1st respondent offered plots to over 1000 people to entice people to vote for him. The evidence of PW1 is that he only saw the 1st respondent with national registration cards and at Ebenerzer hall he saw women with forms endorsed resettlement. That he overheard people state that they would vote for Given Lubinda in light of this development. That the same sentiments were expressed on voting day. PW2 and PW4 also testified that they overheard people express similar views as well as murmuring. Given Lubinda was not seen distributing any forms. There was no witness brought to confirm that they were offered or promised a plot by the 1st respondent in exchange for votes.

RW1 and RW2 testified that the offer of the plots to Mapoloto residents was a Government Programme and the exercise of this programme had commenced in 2014.

They strongly rebutted the assertion that the exercise emanated from the 1st respondent. RW1 strongly contended that it was an on going Government Programme which he was determined that during his tenure to ensure it comes to fruition.

With regard to the allegation that Given Lubinda offered 1000 plots to Mapoloto residents, after careful scrutiny of the evidence I am satisfied that this was a Government programme which had commenced before the election period an assessment having being conducted in 2014. There was no requirement of consent or approval by the 1st respondent. Notwithstanding the fact that documents were not availed to the court by the co-ordinator of DMMU, Patrick Kaluba Kangwa. I find him to be an impeccable witness. I considered him to be a witness of truth and having observed his demeanor, I

have no reason to disbelieve him. The timing of handing out forms may appear to be unfortunate given the elections date being close by.

I am further satisfied that the number of people to benefit from the resettlement scheme was in the region of 300 and not 1000 as contended by the petitioner. The small number cannot by any stretch of imagination be considered to have influenced the voters and affected the overall outcome of the election. The political inclination of people was not in any event established. Also there was no evidence that the 1st respondent took part in the programme.

In light of what I have stated in the preceding paragraph there is no basis therefore upon which I can find the first respondent is guilty of corrupt or illegal practice warranting the nullification of the first respondent as MP for Kabwata Constituency.

Beating of Polling Agents and Monitors before and during voting day resulting in fear to vote:

No testimony was brought to substantiate this allegation and it falls on its own for lack of proof.

Illegal Acts on 11/08/16 by 2nd Respondent recruiting PF cadres as Polling Staff resulting in refusal or blocking of UPND accredited Agents and Monitors from entering the Polling Station during and after voting causing disadvantage due to lack of monitoring:

No witness was brought to substantiate the allegation of recruitment of PF cadres by 2nd respondent. Evidence from the petitioners witness PW1 and PW2 is that they had unrestricted access into and outside the polling station. Equally there was no evidence led to substantiate the pleading of hindered access. The allegation therefore flies in the teeth of the evidence.

PF cadre parading as ECZ Officer (Imposter)

The allegation was that there was a person parading as an ECZ Officer who had access to ballot papers. The only evidence led in this regard is that of

PW4, the aspiring Councillor, that upon receiving a report, the matter was reported to police and imposter was locked up in cells. She was unable to say where the imposter came from. There was no identification of his origins. No evidence led that he was a PF cadre as well as whether he had access to ballot boxes. What he did is unclear. One is made to veer into the realm of speculation or conjecture which is not permissible. Evidence of tampering must be adduced – failure to which to which it is an unproven allegation.

There was no clear evidence that the electoral officers did not comply with the proper conduct of the election. I accordingly find as a fact that ECZ officers were not guilty of any impropriety in the conduct of election in relation to the imposter or person masquerading as an ECZ official.

Carrying ballot boxes without seals by 2nd Respondent:

The only evidence adduced was that of PW6 who testified that a blue van arrived at the totalling centre from Lusakasa School which had unmarked ballot boxes.

Upon him noticing this anomaly he quickly jumped in the van and it was agreed by all the parties present that they all accompany the ballot boxes back to their place of origin to conduct a verification exercise. According to PW6 the verification was done and nothing was found amiss. There was no finding of manipulation or tampering of votes. No other evidence was led to establish how many boxes were carried without seals and the effect this had on the outcome of the election.

Non provision of Gen 12 Forms or unsigned ones:

PW6 is the only witness who adduced evidence in relation to the non availability of G.12 forms. He however conceded that after he expressed his concerns these were addressed and he was provided with the G.12 forms which he signed.

Inflation of votes in favour of 1st Respondent:

There was no evidence adduced whatsoever on this allegation.

Overall corruption, illegal practices and misconduct of Elections against spirit of Constitution:

No evidence was led to demonstrate that the voters were prevented from voting for their preferred candidate or that there were illegal practices or misconduct against the spirit of the Constitution.

I have exercised my mind over the evidence before me as well as arguments by Counsel.

I have asked myself the question; has the petitioner proved his case against the respondents using the standard set by the Supreme Court in the celebrated cases of *Akashambatwa M. Lewanika vs Fredrick Jacob Titus Chiluba*,⁽⁵⁾ *A.K Mazoka, LT General G.K. Miyanda vs Levy Patrick Mwanawasa, ECZ, Attorney-General*⁽⁴⁾ which is between the balance of probability and proof beyond reasonable doubt. Has he adduced evidence to a "fairly high degree of convincing clarity in that the proven defect and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred.?"


Having carefully analysed the evidence before me and in aligning myself with the decisions in the aforecited celebrated cases I have found that the petitioner has lamentably failed to prove the allegations even on a balance of probability even though I am mindful that the required standard is higher. The allegations of corrupt practices, illegal practice and misconduct have not been substantiated. In point of fact none of the allegations against the 1st respondent were proven to a very high degree of convincing clarity. The petitioner's evidence was fraught with bare denials of all the matters pleaded in the petition. He was unable to prove any of the allegations he had levelled against the 1st respondent, Given Lubinda and the 2nd respondent, Electoral

Commission of Zambia. Further there was no evidence whatsoever to prove that the majority voters were prevented from voting for their preferred candidate. In the face of unproven allegations I arrive at the inescapable conclusion that the election was so conducted as to be substantially in accordance with the provisions of the law.

In light of what I have stated in the preceding paragraphs I find that the entire election petition to be bereft of merit and I accordingly dismiss it. For the foregoing reasons I am inclined to find that the election was free and fair and I accordingly declare that the 1st respondent Given Lubinda was validly elected as Member of Parliament for Kabwata Constituency.

The costs of this petition follow the event to be taxed in default of agreement.

Dated at Lusaka this 23rd day of November, 2016.



Judge Betty Majula-Mung'omba
HIGH COURT