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SELECTED JUDGMENT NO. 23 OF 2018

IN THE CONSTITUTIONAL COURT
HOLDEN AT KABWE
(Constitutional Jurisdiction)

APPEAL NO. 3 OF 2017
2016/CC/A36

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

AND

**IN THE MATTER OF: SECTION 96 OF THE ELECTORAL PROCESS ACT
 NO. 35 OF 2016**

AND

**IN THE MATTER OF: KAOMA CENTRAL CONSTITUENCY
 PARLIAMENTARY ELECTION HELD IN ZAMBIA
 ON 11TH AUGUST, 2016**

BETWEEN:

AUSTIN C. LIATO

APPELLANT

AND

SITWALA SITWALA

RESPONDENT

**CORAM: Chibomba, PC, Sitali, Mulenga, Mulembe and Mulonda, JJC
 on 11th July, 2017 and 8th June, 2018**

For the Appellant: Mr. J. Zimba, Makebi Zulu Advocates

For the Respondent: Mrs. M. Zaloumis, Dove Chambers

J U D G M E N T

Sitali, JC delivered the judgment of the Court

Cases cited:

1. **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 49.**
2. **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela (2003) Z.R. 110.**
3. **Josephat Mlewa v Eric Wightman (1995/1997) Z.R. 106.**
4. **Leonard Banda v Dora Siliya, SCZ Appeal No. 95 of 2012.**
5. **Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114 of 2007.**
6. **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138.**
7. **Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13 of 2017.**
8. **Mubita Mwangala v Inonge Mutukwa Wina, SCZ Appeal No. 80 of 2007.**
9. **Brelsford James Gondwe v Catherine Namugala, SCZ Appeal No. 129 of 2012.**
10. **Attorney-General v Kakoma (1975) Z.R. 212.**
11. **Steven Masumba v Elliot Kamondo Selected Judgment No. 53 of 2017.**
12. **Giles Chomba Yamba Yamba v Kapembwa Simbao, Electoral Commission of Zambia and Attorney General, Selected Judgment No. 6 of 2018.**
13. **Kufuka Kufuka v Mundia Ndalamei Appeal No. 80 of 2012.**

Legislation referred to:

1. **The Electoral Process Act No. 35 of 2016, sections 84 and 97 (2) (a).**

This is an appeal against the judgment of the High Court by which the Court below dismissed the Appellant's election petition and declared that the Respondent was duly elected as Member of Parliament for Kaoma Central Constituency.

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The Appellant who was the Petitioner in the Court below together with the Respondent and three other individuals were candidates in the parliamentary elections held on 11th August, 2016 for the Kaoma Central Constituency seat. The Appellant was sponsored by the Patriotic Front (PF) party while the Respondent was sponsored by the United Party for National Development (UPND). The third candidate was sponsored by the Forum for Democracy and Development (FDD) Party while the fourth and fifth candidates were independent candidates.

The Respondent emerged victorious with 8,135 votes and was declared as duly elected Member of Parliament for Kaoma Central Constituency. The Appellant obtained 2,388 votes while the other three candidates shared the remaining votes cast. Dissatisfied with the results, the Appellant petitioned the High Court seeking a declaration that the Respondent was not duly elected as Member of Parliament for Kaoma Central Constituency and that the election was a nullity.

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In his petition, the Appellant alleged that the Respondent and his agents engaged in bribery and other corrupt and illegal practices relating to the polls during and after elections. He alleged that during the campaign period, the Respondent gave money to various residents of Kaoma District to influence them to vote for him or stay away from the polls altogether. That between July and August, 2016 in the run up to the election day, the Appellant gave a 50Kg bag of salt and K100.00 to a resident of Kakonge area in Kaoma Central who was with another person and the two people got K20.00 each and shared the rest of the money among the youth in the area.

He further alleged that the Respondent and his agents engaged in acts of violence against him and his supporters and members of the public to prevent them from associating with him and the PF party. The alleged acts of violence included damaging the Appellant's publicity vehicle, a Land Cruiser VX, registration number ABX 5343 by the Respondent's agents.

The Appellant alleged that the Respondent and his agents defamed him by alleging that he was a ritualist who buried money at the graveyard and that the electorate should not therefore vote for him. The Appellant alleged that as a result of the Respondent's corrupt and illegal practices, the majority of the voters in the constituency were prevented from voting for their preferred candidate and that the election should be nullified.

The Respondent filed an answer to the petition in which he denied being involved in any corrupt or illegal practices involving bribery and violence or defaming the Appellant prior to the elections as alleged by the Appellant. He asserted that his campaign was issue based and that the people voted for him because they wanted change. The Respondent asserted that it was for that reason that he was duly elected as Member of Parliament for the Kaoma Central Constituency.

At the trial of the petition, the Appellant testified in support of his petition as PW1 and called thirteen (13) other witnesses. In rebuttal, the Respondent testified as RW1 and called eleven (11) other witnesses. The learned trial Judge considered the evidence

adduced by the respective parties and stated that the petition was anchored on allegations of bribery and corruption, violence and publishing defamatory statements. The trial Judge pointed out that the burden to prove the allegations against the Respondent lay on the Appellant and that in order to succeed in his petition, the Appellant had to prove his allegations to a fairly high degree of convincing clarity and not merely on a balance of probabilities as required in ordinary civil actions. The learned Judge relied on the case of **Akashambatwa Mbukusita Lewanika and Others v Frederick Jacob Titus Chiluba** ⁽¹⁾ regarding the standard of proof in election petitions.

After analyzing the evidence adduced by the Appellant on each allegation, the learned trial Judge held that the Appellant had failed to prove all the allegations to the required standard. The learned trial Judge therefore found that the Respondent was duly elected as Member of Parliament for Kaoma Central Constituency and dismissed the petition.

Dissatisfied with the judgment of the lower Court, the Appellant appealed against it and advanced three grounds of appeal as follows:

- 1) **The learned Judge erred in law and fact when she found that the people of Kakonge were not prevented from voting for a candidate of their choice due to allegations of bribery and corruption.**
- 2) **The learned trial Judge erred in law and fact when she held that the motor vehicle belonging to the petitioner was damaged but was not damaged by the Respondent or his agents and did not say who damaged the vehicle.**
- 3) **The learned Judge erred in law and fact when she held that the statements published by the Respondent could not be extended to have any other meaning but only to illness and withdrawal as a candidate.**

The Appellant filed heads of argument in support of the appeal which Mr. Zimba, counsel for the Appellant, relied on and augmented with brief oral submissions. In arguing ground one, the Appellant submitted that the learned trial Judge erred in law and fact when she found that the people of Kakonge were not prevented from voting for a candidate of their choice due to allegations of bribery and corruption as the Respondent had engaged in acts of bribery and corruption. He submitted that whereas the lower Court found as a fact that the law set out in **Michael Mabenga v Sikota**

Wina and Others ⁽²⁾ no longer applies in view of the provisions of section 97 (2) (a) of the Electoral Process Act No. 35 of 2016 (which we shall refer to as the Act), section 97 (2) (a) should be read together with the accompanying provisions of section 97 (2) (b) and (c) of the Act. He argued that even under the new Act, satisfactory proof of any one act of corruption or illegal practice or misconduct in an election is sufficient to nullify an election.

The Appellant further submitted that this Court must answer two questions as it determines ground one of the appeal: first, whether there was any corruption or illegal activity in the run up to the 11th August, 2016 election and secondly, what was the rationale for the enactment of section 97 of the Act? In answer to the first question, the Appellant submitted that there was evidence that salt and money were given out and that the people who received the salt and money testified in Court that they received the salt and money which they shared and that they distributed the salt. The Appellant submitted that the **Michael Mabenga** ⁽²⁾ case is still good law and that any corrupt practice or illegal activity relating to an election if satisfactorily proved is sufficient to nullify an election.

In answer to the second question, the Appellant submitted that the long title of the Act reveals that the object of the Act, is inter alia, to provide for a comprehensive process for a general election and to criminalise corrupt practices and other illegal practices related to elections. He submitted that the long title of the Act and the case of **Josephat Mlewa v Eric Wightman** ⁽³⁾ and many other decided cases reveal that the rationale for the enactment of section 97 (2) (a) of the Act was that there should be no illegality or corruption in an election as this impugns the integrity of such an election. The Appellant pointed out that it is for that reason that electoral offences, including illegal practices, are proscribed in sections 81 to 95 of the Act.

With regard to ground two, the Appellant submitted that there was uncontroverted evidence adduced by PW8 that the Respondent's agents damaged the Appellant's motor vehicle after it was alleged that the Appellant was seen removing UPND posters. The Appellant submitted that the Respondent did not dispute the evidence of PW8 in the lower Court and that the lower Court should therefore have found as a fact that the Respondent's agents

damaged the Appellant's vehicle. The Appellant further submitted that the act of damaging the motor vehicle was an offence under Part VIII of the Act because violence creates conditions of duress, which duress consists of threats of bodily or other harm amounting to or tending to coerce the will of another person, and actually inducing the person to act contrary to that person's free will. The Appellant cited Black's Law Dictionary, 4th edition, which defines duress as the unlawful constraint exercised upon a man whereby he is forced to do some act that he otherwise would not have done.

The Appellant submitted that the effect of damaging the Appellant's motor vehicle was that section 83 (1) (a) of the Act which prohibits a person from directly or indirectly using or threatening to use any force, violence or restraint against any other person was contravened. The Appellant submitted that if the lower Court had properly considered the evidence he adduced relating to violence, the Court would have made a different finding of fact.

The Appellant contended that the evidence on record clearly shows that the campaign rules were abrogated and that the election was not free and fair.

The Appellant went on to submit that the issue of whether or not the majority of voters were prevented from voting for a candidate of their choice should have been inferred from the evidence before the Court and not that the Appellant should have been required to specifically lead evidence to prove that issue. The Appellant submitted that on the authority of the **Michael Mabenga** ⁽²⁾ case, the Appellant had proved the allegations in his petition to the required standard in election petitions, being above the balance of probabilities.

In arguing ground three, the Appellant submitted that the learned trial Judge erred in law and fact when she held that the statements published by the Respondent could not be extended to have any other meaning but only to illness, death and withdrawal from an election of a candidate. The Appellant submitted that a literal interpretation of section 84 (1) of the Act to restrict it to the publication of a false statement of the illness, death or withdrawal from an election of a candidate in order to secure the election of another candidate would result in absurdity. He submitted that in giving efficacy to the section, recourse must be had to the mischief

rule of statutory interpretation and that the defamation clause in relation to election petitions should be understood to extend to statements other than illness, death or withdrawal of a candidate from an election.

He argued that the provision relating to defamation should be interpreted in such a way as to address the mischief that the drafters of the law intended to cure. The Appellant submitted that the case of **Leonard Banda v Dora Siliya** ⁽⁴⁾ in which the Supreme Court stated that a person will not be allowed to go into Parliament by defaming another was still good law. He submitted that on this ground alone, the petition should have succeeded and that the election should have been nullified. The Appellant prayed that the appeal should succeed in view of his submissions and the evidence on record.

In augmenting the Appellant's heads of argument, Mr. Zimba submitted that going by the heads of argument filed by the Appellant and the Respondent, the issues that stand out relate to the interpretation of the newly enacted Electoral Process Act No. 35 of 2016. He therefore urged that this Court should give a proper

meaning to sections 81 to 95 and section 97 of the Act. He prayed that the appeal be upheld.

In opposing the appeal, the Respondent filed heads of argument which Mrs. Zaloumis, counsel for the Respondent, relied upon and, augmented with brief oral submissions. In opposing ground one, the Respondent submitted that the learned trial Judge was right in finding that the people of Katonge were not prevented from voting for a candidate of their choice due to allegations of bribery and corruption as the Appellant did not adduce any evidence to that effect. The Respondent further submitted that the Court below was on firm ground when it dismissed the allegation as the Appellant did not demonstrate to the trial Court the Respondent's alleged influence on voters in Kakonge and how many voters were so influenced.

The Respondent cited the case of **Mubika Mubika v Poniso Njeulu** ⁽⁵⁾ in support of his submission that the evidence adduced by the Appellant should have indicated widespread vilification of the Respondent and that in allegations of this nature, statistics of registered voters who attended rallies should have been given to

assist the trial Court to ascertain the extent of influence in the constituency.

The Respondent submitted that section 97 (2) of the Act clearly states the circumstances under which an election can be nullified and that in this case, the Appellant did not adduce evidence to satisfy the requirements of that provision.

The Respondent further submitted that the trial Court was on firm ground when it held that the decision in the **Michael Mabenga** ⁽²⁾ case had been overtaken by the provisions of the Act as statute law takes precedence over judicial authorities. The Respondent cited the case of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others** ⁽⁶⁾ to the effect that the primary rule of interpretation is that words should be given their ordinary, grammatical and natural meaning and that it is only if there is ambiguity in the natural meaning of the words and the intention of the Legislature cannot be ascertained from the words used by the Legislature that recourse can be had to the other principles of statutory interpretation. The Respondent argued that the words

used in section 97 (2) (a) of the Act are not ambiguous and should therefore be given their natural and ordinary meaning.

The Respondent submitted that following the enactment of the Electoral Process Act No. 35 of 2016, the **Michael Mabenga** ⁽²⁾ and **Mlewa** ⁽³⁾ cases no longer reflect the current position of the law. The Respondent submitted that ground one must therefore fail.

In opposing ground two, the Respondent submitted that although there was evidence in the Court below that a motor vehicle which was believed to belong to the Appellant was damaged, the Appellant did not adduce evidence to prove who damaged the motor vehicle. He submitted that the evidence that the Respondent was not present at the time the vehicle was damaged was not rebutted.

The Respondent further submitted that according to the evidence of RW12 who is a police officer, the Appellant's motor vehicle was allegedly damaged by Mario Zuze who was arrested, charged and prosecuted for malicious damage to property.

The Respondent submitted that the Appellant did not prove to the required standard that the Respondent or his agents damaged his motor vehicle nor did he link the suspect to the Respondent.

The Respondent argued that the law regarding the standard of proof in election petitions was settled in the cases of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba** ⁽¹⁾ and **Michael Mabenga v Sikota Wina and Others** ⁽²⁾ in which it was held that an election petition is like any other civil claim that depends on pleadings and that the burden of proof is on the challenger to that election to prove the allegations to a standard higher than on a mere balance of probabilities. And further that issues raised must be established to a fairly high degree of convincing clarity. The Respondent submitted that the Appellant did not prove the Respondent's involvement in the incident involving the damaging of the motor vehicle to the standard set in the cited cases.

The Respondent concluded his submissions in opposition to ground two by stating that the Appellant's submission that the act of damaging the motor vehicle was an offence because violence creates conditions of distress thereby inducing a person to act contrary to his will, was unfounded and lacked merit; that no evidence was adduced to prove physical constraint on any person

prior to or during the 11th August, 2016 elections in Kaoma Central Constituency. The Respondent submitted that for that reason, ground two must also fail.

In opposing ground three, the Respondent submitted that the learned Judge was right when she held that statements published by the Respondent could not be extended to have any other meaning but only to illness, death and withdrawal of a candidate from an election as section 84 (1) of the Act is not ambiguous and therefore cannot be interpreted in any other way than in its ordinary and natural sense. The Respondent cited the Supreme Court's observations in **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others** ⁽⁶⁾ where it was stated that if words of a statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense.

The Respondent submitted that the provisions of section 84 (1) of the Act are clear and unambiguous and that in this case the Appellant did not ask this Court to ascertain the mischief that the Legislature intended to cure when it enacted section 84 (1) but

rather asked this Court to extend the meaning of the provision which is clear and unambiguous in its natural sense. He submitted that the learned trial Judge was therefore on firm ground when she refused to give the clear and unambiguous words in section 84 (1) of the Act an extended meaning. The Respondent therefore urged that ground three must fail.

In conclusion, the Respondent submitted that the appeal lacks merit and must be dismissed with costs.

In augmenting the Respondent's heads of argument in opposition, Mrs. Zaloumis supported the judgment of the Court below and submitted that the alleged acts of bribery were not proven to have been committed by the Respondent or his election or polling agents. Counsel submitted that the testimony of PW2, PW3 and PW4 was not sufficient to prove that there was bribery and that the Court found that PW2 was not a credible witness as she changed her testimony midstream and her testimony regarding who brought the salt to her was contradicted by PW3.

Mrs. Zaloumis further submitted that the three witnesses did not prove to the required standard that the Appellant had engaged in acts of bribery during the campaign period.

Counsel went on to submit that although Mr. Zimba had contended that a literal interpretation of section 97 (2) (a) of the Act creates absurdity, the section actually brings sanity and fairness to the electoral process. She submitted that if elections were to be nullified on the basis of unproven allegations made against winning candidates without considering their impact on the majority of the voters in the constituency, most parliamentary seats would be declared vacant at the end of a general election. Counsel submitted that the learned trial Judge was on firm ground when she found that the Respondent won the election overwhelmingly and that none of the Appellant's allegations against the Respondent was proven by the Appellant and his witnesses. She, thus, urged us to uphold the declaration of the lower Court that the Respondent was duly elected as Member of Parliament for Kaoma Central Constituency.

In reply, Mr. Zimba submitted that the Electoral Process Act intends to bring integrity to the electoral process and that if illegal

and corrupt practices such as those alleged by the Appellant against the Respondent are allowed to exist, there will be no integrity in the process. He contended that the election in this case was marred with a lot of illegality and as such fell short of the integrity envisaged by the Electoral Process Act. He submitted that for that reason, the Respondent's election should be nullified.

We have considered the grounds of appeal, the respective parties' heads of argument and the authorities cited. We have also considered the judgment of the Court below.

Before we consider the grounds of appeal, it is necessary for us to examine the law regarding the circumstances in which an election of a candidate as a Member of Parliament, among others, may be declared void. Section 97 (2) (a) of the Electoral Process Act No. 35 of 2016 on which the petition was based provides as follows:

“(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

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

(i) by a candidate; or

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

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

A reading of the provisions of section 97 (2) (a) of the Act reveals that the election of a candidate as, inter alia, Member of Parliament can only be nullified if the person challenging the election of the candidate proves to the satisfaction of the Court that the candidate in question personally committed a corrupt or illegal practice or other misconduct in relation to the election or that the corrupt or illegal practice or misconduct was committed by another person with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent.

In addition to this, where it is proved that a corrupt or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or that of the candidate's election or polling agent, the petitioner must further prove that as a result of that corrupt or illegal practice or misconduct, the majority of the voters in the constituency, district

or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred.

In other words, it is not sufficient for a petitioner to prove only that a candidate committed an illegal or corrupt practice, or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice. In the case of **Mubika Mubika v Poniso Njeulu** ⁽⁵⁾ which we cited with approval in **Jonathan Kapaipi v Newton Samakayi** ⁽⁷⁾ the Supreme Court stated that:

“The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or might have been prevented from electing a candidate of their choice, it is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate.”

Further, in **Mubita Mwangala v Inonge Mutukwa Wina** ⁽⁸⁾ which we have cited in a number of our recent judgments, the Supreme Court 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 the majority of voters in a constituency were or may have been prevented from electing the candidate, in that constituency whom they preferred...”

In the earlier case of **Josephat Mlewa v. Eric Wightman** ⁽³⁾ the Supreme Court held that:

“The Court must be satisfied about the scale or type of wrong doing. By scale, it is meant widespread as to influence the majority of voters in the constituency not to vote for their preferred candidate.”

The above authorities aptly demonstrate the import of the majority provision under section 97 (2) (a) of the Act.

In this case, the Appellant's election petition was premised on section 97 (2) (a) of the Act. Thus, the Appellant was obliged to prove not only the commission of the corrupt or illegal practices or other misconduct by the Respondent or with his knowledge and consent or approval or that of his election or polling agent, but also that the majority of voters in the constituency were or may have

been prevented from electing their preferred candidate by that electoral offence.

We also reiterate that, in an election petition, just as in any other civil matter, the burden of proof is on the petitioner to establish the electoral offence complained of. However, the standard of proof in an election petition is higher than that required in an ordinary civil action. A consideration of Zambian jurisprudence reveals that the evidence adduced in support of allegations made in an election petition must establish the issues raised to a fairly high degree of convincing clarity. In the persuasive authority of **Lewanika and Others v Chiluba** ⁽¹⁾ the Supreme Court said this regarding the standard of proof:

“As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that Parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability.... It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity.”

In **Brelsford James Gondwe v Catherine Namugala** ⁽⁹⁾ the Supreme Court said:

“The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the

required standard in election petitions namely fairly high degree of convincing clarity.”

Thus in the present case, the evidence adduced by the Appellant in the Court below needed to have proved the allegations raised in the petition to a fairly high degree of convincing clarity and to have demonstrated that the proven electoral offences committed by the Respondent or his election or polling agents were so widespread that the majority of voters in the constituency were or may have been prevented from electing the candidate whom they preferred.

We shall therefore determine this appeal based on these principles and on the provisions of the Act.

In ground one of the appeal, the Appellant challenges the trial Court's finding that the people of Kakonge were not prevented from voting for a candidate of their choice due to allegations of bribery and corruption. The Appellant argued under ground one that the learned trial Judge was wrong to have held that the majority of voters in Kakonge were not prevented from voting for a candidate of their choice by the alleged acts of bribery and corruption because PW2, PW3 and PW4 testified that they were given salt which they

distributed to the people at the rally and that they shared the K100 which the Respondent gave to them among the three of them and used the balance to buy beer for the youths in the area. Mr. Zimba argued that according to the **Mabenga** case, the Appellant did prove the allegation that the Respondent engaged in acts of bribery by distributing salt at the rally and by giving K100 to PW3 to share with PW2 and PW4 to the required standard and that on the authority of the **Mabenga** case, that one act of bribery was sufficient to have the election of the Respondent nullified.

Mr. Zimba contended that the trial Judge should have inferred from the evidence before her that the majority of voters in Kakonge ward were or may have been prevented from voting for a candidate of their choice. He further submitted that there was no requirement for the Appellant to adduce evidence to specifically prove that the majority of voters were prevented from voting for a candidate of their choice.

In response, Mrs. Zaloumis agreed with the learned trial Judge's finding that the people of Kakonge were not prevented from voting for a candidate of their choice due to allegations of bribery

and corruption as the Appellant did not adduce any evidence to show that any voter in Kakonge ward was prevented from voting for him on the ground of the alleged bribery and corruption. And even less, that the majority of the voters were prevented from electing a candidate of their choice. Counsel stated that section 97 (2) (a) of the Act clearly states the circumstances under which an election can be nullified and that in this case, the Appellant did not adduce any evidence to satisfy the requirements of that provision.

Mrs. Zaloumis further agreed with the learned trial Judge that the case of **Michael Mabenga v Sikota Wina and Others** ⁽²⁾ which the Appellant cited related to the electoral law as it was before the enactment of the Electoral Process Act of 2016 and that the decision in that case has now been overtaken by the provisions of section 97 (2) (a) of the Act as statutory provisions override judicial precedents. She contended that the law as it is today provides for a higher threshold for the nullification of an election of a Member of Parliament.

We have considered the above submissions and the authorities cited. The question we have to determine is whether the learned

trial Judge erred when she held that the people of Kakonge were not prevented from voting for a candidate of their choice on account of the alleged corruption and bribery by the Respondent.

The evidence regarding the alleged acts of corruption and bribery was adduced by PW2, PW3 and PW4 on behalf of the Appellant. PW2 alleged that the Respondent brought a 50kg bag of salt to a rally that was held sometime in July or August, 2016 and instructed her to distribute it to the people during the rally. PW2 also alleged that the Respondent also gave K100.00 to Ben Mwila (PW3) and instructed him to share it with her and Mr Muyeba (PW4) so that they should vote for him. PW2 said the three of them got K20 each while the balance of K40 was used to buy beer for youths.

PW3, Ben Mwila, gave similar evidence to PW2 regarding the allegation that the Respondent brought a 50kg bag of salt to the rally and gave it to PW2 to distribute. PW3 however said the salt was distributed after the rally had ended. He also said the Respondent gave him K100 out of which PW2, PW4 and he, himself, got K20 each and that PW4 remained with K40 which he used to buy beer for youths in the area.

PW4, Lyomokela Muyeba, gave similar evidence to that of PW2 and PW3 regarding the issue of the 50kg bag of salt and K100 which he shared with PW2 and PW3 and said they got K20 each. He added that he bought beer for the youths with the K40 which remained and told them to vote for the Respondent. PW4 admitted in cross examination that nobody else at the rally knew about the money that was allegedly given to PW3 by the Respondent to share with him and PW2.

The Respondent, on the other hand, denied the allegation that he had given a 50kg bag of salt and K100 to PW2, PW3 and PW4 to share at a rally in Kakonge ward to influence voters to vote for him. He emphasised that his campaign was issue based and that the people of Kakonge voted for him because they wanted change. He further said his rally in Kakonge was poorly attended because when he served as an Army officer, he had participated in a Government decision to remove squatters from Army land, which action set him at loggerheads with some people in that community. The Respondent alleged that PW2 and PW3 were UPND chairlady and trustee, respectively.

Upon analyzing the evidence relating to that allegation, the learned trial Judge found that PW2 was not a credible witness as she gave contradictory evidence when she initially said the Respondent gave her the salt to distribute but later stated that Mr Mananga asked her to distribute the salt. The trial Judge also stated that the testimony of PW2 regarding who brought the salt to her was contradicted by PW3. The trial Judge further observed that although PW2, PW3 and PW4 said salt and money was given to them, the Appellant and his witnesses did not adduce evidence to show how many people got the salt and as a result did not vote for the Appellant. The trial Judge further pointed out that while PW2 said about 120 people got the salt, none of them was called to confirm that they received salt during or after the rally. The trial Judge added that no evidence was laid before her regarding how many voters there were in Kakonge, how many of them had been at the rally and how many received a cup of salt and were persuaded not to vote for a candidate of their choice.

The trial Judge also stated that if PW2, PW3 and PW4 were indeed given K100, which they shared, then only the three of them were impacted and no one else. The trial Judge further stated that no youth was called to support the allegation that beer was bought for them so that they could vote for the Respondent. The trial Judge concluded that if only three people were affected by the alleged bribe, they could not constitute the majority of voters in Kakonge ward.

We have perused the record and carefully considered the evidence of PW2, PW3 and PW4 regarding the allegations of corruption and bribery at a meeting held in Kakonge ward at which the Respondent allegedly brought a 50kg bag of salt and directed that it be distributed to the people in attendance and gave K100 to the three witnesses to share and buy beer for youths in the area so that they would vote for him.

The learned trial Judge rejected the evidence of PW2 on the ground that she was not a credible witness as she gave contradictory evidence regarding who gave her the salt to distribute and also on the ground that PW3 contradicted her evidence

regarding who brought her the salt. We cannot fault the learned trial Judge when she discounted the evidence of PW2 as she had observed the witnesses and clearly resolved the conflicting evidence adduced by the parties based on the credibility of the witnesses. It is settled law that a trial court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard the witnesses giving the evidence as was held in the case of **Attorney-General v Kakoma** ⁽¹⁰⁾.

We also agree with the learned Judge that the Appellant did not call any independent witness to testify that they were given salt at the rally or any youth to confirm that PW4 bought them beer and urged them to vote for him in exchange.

Mr. Zimba's submission that the issue of whether or not voters of Kakonge were prevented from voting for a candidate of their choice due to the alleged corrupt or illegal practices of corruption and bribery should have been inferred from the evidence before the trial Court is untenable for two reasons. First, the Appellant and his witnesses did not adduce any evidence to show that the alleged

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the majority of the people of Kakonge were or may have been prevented from electing a candidate of their choice. Ground one therefore lacks merit and is dismissed.

Under ground two, the Appellant challenges the learned trial Judge's finding that the motor vehicle belonging to the Appellant was damaged but that it was not damaged by the Respondent or his agents without saying who damaged the vehicle. PW8 testified on behalf of the Appellant that on 8th July, 2016 while he was putting up posters for his candidate, he was accused of removing UPND posters by a Mr. Mangani. Mr. Mangani called the Respondent and reported the matter. Shortly afterwards, a twin cab arrived and the people in the twin cab smashed PW8's vehicle. He drove to the police station and whilst he was making the report, the Respondent arrived at the police station and accused him of removing UPND posters. PW8 said the vehicle which was smashed was a PF motor vehicle No. ABX 5343.

In cross-examination, PW8 conceded that the Respondent was not in the twin cab and that the twin cab was not the Respondent's vehicle.

PW12 who was a police officer confirmed that he received a report from PW8 of malicious damage to property.

RW8 and RW11 testified on behalf of the Respondent regarding the damaged motor vehicle. RW8 said he accompanied the Respondent to the police station to enquire about the security measures for their leader. He said PW8 found them at the police station and that PW8 said he did not know who had damaged the vehicle.

RW11 on the other hand told the Court that the PF vehicle was damaged by PF members (and not UPND members) when they attempted to hit a UPND cadre with a short baton but missed and smashed their own vehicle. They then concocted a story that they had been attacked and reported the story to the police.

The trial Court analysed the evidence and held that the Appellant had not adduced evidence that showed that the Respondent was present when the vehicle was smashed as alleged by PW8. The Court further found that PW8 conceded that the twin cab did not belong to the Respondent and that he did not know who damaged the vehicle.

The trial Court discounted the evidence of RW11 that PF members damaged their own vehicle. She also discounted the evidence of the police officer, PW12, whom she said was a biased witness as he insisted that throughout the campaign period, he only received reports of violence perpetrated against the PF party and did not receive any reports of violence from the UPND members and supporters.

The trial Judge held that although the motor vehicle in issue was extensively damaged, the Appellant had not proved to the required standard that it was the Respondent or his agents who damaged the vehicle.

The Appellant's major argument in support of this ground was that the evidence of PW8 that the Respondent's agents damaged the Appellant's motor vehicle after it was alleged that he was removing UPND posters was uncontroverted. Further, that the trial Judge should have found as a fact that the Respondent's agents damaged the vehicle.

Counsel for the Appellant argued that violence creates conditions of duress and forces one to act contrary to his free will.

He contended that had the trial Court considered the evidence properly, she would have come to a different conclusion. He submitted that the evidence on record revealed that the campaign rules were abrogated and that the election was not free and fair.

The Respondent's argument in response was that the learned trial Judge was on firm ground when she dismissed the allegation of violence against the Respondent. That the Appellant did not adduce sufficient evidence to prove who damaged the motor vehicle and further that the evidence that the Respondent was not present when the vehicle was damaged was not rebutted. The Respondent further submitted that the Appellant did not prove that the Respondent was linked to the alleged violence or that as a result of the violence the election was affected.

We have carefully perused the evidence on the record of appeal regarding the issue of violence and particularly the evidence relating to the damage of the PF campaign vehicle. We note that the only witness who testified on the issue was PW8 who conceded in cross examination that he did not know the people who damaged the vehicle. The trial Judge, thus, in our view, was on firm ground

when she accepted that the motor vehicle was indeed damaged but that it was not damaged by the Respondent or his agents because there was no cogent evidence to support a finding to the contrary. The Appellant's contention that the trial Judge should have stated who damaged the motor vehicle in issue after she found that it was not damaged by the Respondent is untenable as the burden to prove the allegation of violence relating to the damaging of the vehicle rested on the Appellant.

It was not the duty of the trial Judge to fill out the gaps in the evidence adduced by the Appellant in support of the allegations in his petition as the trial Judge is a neutral umpire in the adversarial justice system which is practiced in our courts. The Appellant having failed to adduce evidence to support his allegation of violence by the Respondent to the required standard cannot blame the trial Judge for the lack of evidence. Ground two has no merit and is accordingly dismissed.

The third and final ground of appeal challenges the learned trial Judge's holding that the statements published by the Respondent about the Appellant could not be extended to have any

other meaning but only illness, death and withdrawal as a candidate. In arguing this ground of appeal, the Appellant contended that a literal interpretation of section 84 (1) of the Act which prohibits the illegal practice of publishing false statements in respect of a candidate would result in absurdity if the section were taken to only prohibit the publication of a false statement of the illness, death or withdrawal from election of a candidate.

Mr. Zimba argued that the provision relating to defamatory statements in relation to elections should be understood to extend to statements other than the illness, death or withdrawal from the election of a candidate. Counsel contended that if the drafters of the law intended that the false publication any other defamatory statement was permissible, they would have expressly stated so. He submitted that the provision should be interpreted in a manner which addresses the mischief that the drafters of the law intended to cure. He argued that as the Supreme Court held in **Leonard Banda v Dora Siliya**, ⁽⁴⁾ a person should not be allowed to go into Parliament by defaming another person.

The Respondent's argument in response was essentially to agree with the trial Judge that the provisions of section 84 (1) of the Act cannot be extended to have any other meaning apart from the illness, death or withdrawal from an election of the candidate as the provision is clear and is not ambiguous. That on the authority of **Mazoka and Others v Mwanawasa and Others**,⁽⁶⁾ the section should be interpreted in its ordinary and natural sense. The Respondent submitted that the trial Judge was on firm ground when she refused to give the words in the provision an extended meaning and prayed that ground three should fail.

We have considered the submissions by the learned Counsel for the respective parties. We should state at the outset that although in ground three the Appellant challenges the trial Judge's holding that the provisions of section 84 (1) of the Act cannot be extended to include the publication of defamatory statements relating to issues other than the illness, death or withdrawal from the election of a candidate, the real issue for our determination is whether or not the Appellant proved to the required standard that the Respondent published defamatory statements about him during

the campaign period. And further, whether or not the alleged publication of the defamatory statements was of such a widespread nature that they influenced or may have influenced the electorate in Kaoma Central Constituency against voting for the Appellant.

We note that in her judgment, the trial Judge observed that counsel for the Appellant in his submissions before her contended that the Appellant's allegation relating to the publication of defamatory statements had been proved because, according to him, the statement was not rebutted by the Respondent who did not call any witnesses to refute that such statements were made. The trial Judge observed that the Appellant who was then petitioner in the Court below testified that statements were made daily throughout the campaign period warning people to be wary of the Appellant as he kept money buried at the graveyard and that if they voted him into office, he would use the money meant for development projects for ritual purposes and would bury it at the graveyard.

The trial Court stated that according to the case of **Kufuka Kufuka v Mundia Ndalamei**,⁽¹³⁾ the Appellant was required to provide proof of his allegations and of the extent of influence the

allegations had on the electorate as the party who alleges, in an election petition, must prove to a standard which is higher than on a balance of probabilities.

The trial Judge observed that the case of **Mubika Mubika v Poniso Njeulu**, ⁽⁵⁾ where it was alleged that the petitioner was maligned, demonstrates how such allegations ought to be proved. That in that case, the Court found that the evidence did not indicate widespread vilification of the petitioner nor did it indicate that the majority of the registered voters were influenced against voting for the petitioner. Further, that in that type of allegation, statistics of registered voters who attended the rallies should have been given to assist the trial Court on the extent of influence in the Constituency.

The trial Judge in the present case observed that the authority of the **Mubika** ⁽⁵⁾ case was good law and that she was guided by it. The trial Judge proceeded to state that although the Appellant stated in his petition and testified that the Respondent published the alleged defamatory statements about him, he did not call any other witnesses to support his allegation. The trial Judge wondered

why if indeed the defamatory statements were broadcast every day as the Appellant alleged, he did not bring witnesses to assist the trial Court ascertain the extent of influence of the alleged defamatory statements on the voters in the constituency.

The trial Judge, thus, found, that the Appellant's testimony that he was maligned by the Respondent was not backed by any proof and that his assertion that his evidence was not assailed by the Respondent who did not call any witnesses to rebut his testimony, did not assist his case as it was incumbent upon him to prove his allegations.

The trial Judge went on to state that the allegation regarding the publication of false statements had further failed because section 84 (1) of the Act provides for only three specific instances of false publication, namely illness, death or withdrawal of a candidate from an election. The trial Judge added that she would not be drawn to extend the provisions of the section to include publication of false statements regarding other issues which are not provided for in the Act. She held that on the authority of **Mazoka and Others v Mwanawasa and Others**,⁽⁶⁾ the provision should be given

its ordinary and natural meaning as it is clear and unambiguous. The trial Judge dismissed the allegation on the ground that it had not been proven to the requisite standard.

We have examined the record of appeal and considered the submissions of learned Counsel for the parties on this ground. We note as the trial Judge correctly observed that although the Appellant alleged that the Respondent repeatedly published that he was a ritualist who buried money at the graveyard and that money intended for development projects would be used on rituals and would be buried at the graveyard if the electorate voted for him as Member of Parliament for the constituency, the Appellant did not call any independent witness to testify to hearing the Respondent's statements to that effect.

In the circumstances, we cannot fault the trial Judge when she held that the Appellant did not prove his allegation that the Respondent published defamatory statements about him. We further agree with the trial Judge that there was no evidence that there was widespread publication of the false statement to the extent where the majority of the voters in the Constituency were or

may have been influenced against voting for him. The learned trial Judge was therefore on firm ground when she dismissed the allegation as it was not proven to the required standard.

Having said that, we wish to address the specific challenge raised in the third ground of appeal regarding the learned trial Judge's holding that section 84 (1) of the Act provides only for three specific instances of publication of false statements and cannot be extended to encompass other issues which are not provided for in that section. Counsel for the Appellant argued that a literal interpretation of section 84 (1) of the Act would lead to absurdity as the drafters of the law could not have intended to prohibit only the publication of false statements relating to the illness, death or withdrawal from an election of a candidate to the exclusion of any other false statements about a candidate. He urged that we should employ the mischief rule in order to extend the meaning of the section.

On the other hand, Counsel for the Respondent argued that the section was clear and unambiguous and that it should therefore

be interpreted according to the ordinary and natural meaning of the words of the section.

Section 84 (1) and (2) of the Act provides that:

- “(1) A person shall not, before or during an election, publish a false statement of the illness, death or withdrawal from an election of a candidate at that election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not believing it to be true.**
- (2) A person who contravenes subsection (1) commits an illegal practice, unless that person had reasonable grounds for believing and did believe, the statement to be true.”**

A consideration of the words of section 84 (1) of the Act according to their natural and ordinary meaning reveals that the section indeed prohibits only the publication of a false statement of the illness, death or withdrawal from an election of a candidate with the intention of promoting or procuring the election of oneself or another candidate.

However, we hasten to state that although section 84 (1) of the Act specifically prohibits the publication of a false statement relating to illness, death or withdrawal from an election of a candidate, that situation does not give licence to a candidate in an election to malign other candidates in relation to their personal

character or conduct in order to secure his or her own election. We say so because in terms of section 97 (2) (a) of the Act, the election of a candidate can be nullified where it is proved to the satisfaction of the Court that an illegal or corrupt practice or other misconduct has been committed by the candidate in relation to the election or with the candidate's knowledge and consent or approval or that of his election or polling agent; and further, that because of the alleged corrupt or illegal practice or other misconduct the majority of voters in the constituency were or may have been prevented from electing their preferred candidate.

While the Act defines a corrupt practice and an illegal practice for purposes of elections, the Act does not expressly define what is meant by other misconduct in section 97 (2) (a) of the Act. However, the Act contains an Electoral Code of Conduct which prescribes the manner in which a person or other stakeholders in the electoral process, including candidates, must conduct themselves in connection to an election. The Code of Conduct binds candidates in an election and all other stakeholders in the elections. Specifically, section 15 (1) (c) of the Electoral Code of

Conduct prohibits making false, defamatory or inflammatory allegations concerning a person or political party in connection with an election. The section reads:

“15 (1) A person shall not –

(c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election.” (Emphasis added)

A breach of section 15 (1) (c) of the Electoral Code of Conduct is misconduct in terms of section 97 (2) (a) of the Act on the basis of which the election of a candidate as a Member of Parliament may be nullified if proved to the satisfaction of the Court.

Thus in the present case, if the Appellant had proved with cogent evidence that the Respondent had published a false or defamatory statement alleging that the Appellant was a ritualist and that the majority of the voters in the Constituency were prevented from voting for him due to the alleged misconduct, that could have been ground for the nullification of the Respondent's election as misconduct pursuant to section 97 (2) (a) of the Act.

However, as we stated earlier on in this judgment, the Appellant did not adduce any evidence to support his allegation

that he was maligned by the Respondent, and that the maligning was widespread in the constituency and so influenced the electorate from voting for him. It was on that basis that the trial Judge dismissed the allegation.

We note from the judgment of the Court below that when considering the Appellant's allegation that the Respondent published false allegations to the effect that he was a ritualist who buried money at the graveyard, and that if voted into office as Member of Parliament for the constituency he would use money intended to develop the constituency for ritual purposes and would bury it at the graveyard, the trial Judge considered only the provisions of section 84 (1) of the Act and did not look beyond that section to other provisions of the Act which prohibit the publication of false statements about a candidate in an election.

It is a cardinal rule of statutory interpretation that when interpreting the provisions of a statute, all the provisions of the statute touching on the subject in issue should be considered together and that no one provision of the statute should be considered in isolation.

In this case, a consideration of the provisions of the Electoral Process Act reveals that the publication of false statements about a candidate in relation to an election is prohibited by section 84 (1) of the Act and by section 15 (1) (c) of the Electoral Code of Conduct. The Electoral Code of Conduct which is set out in the schedule to the Act forms an integral part of the Act. Its provisions should therefore be taken into consideration when interpreting the provisions of the Act which relate to the publication of false statements about a candidate in an election. This position of the law is clearly stated in section 9 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia which provides as follows:

“9. Every Schedule to or table in any written law, together with notes thereto, shall be construed and have effect as part of such written law.”

By restricting herself to the provisions of section 84 (1) of the Act when considering the allegation by the Appellant that the Respondent published a false statement that he was a ritualist who should not be voted for by the electorate, the trial Judge took a

narrow view of the law. She therefore misdirected herself and erred in law when she held that the Act prohibits only the publication of false statements relating to the illness, death or withdrawal from an election by a candidate as provided in section 84 (1) of the Act and held that the allegation by the Appellant regarding the false publication had failed on that basis in addition to the fact that the Appellant had not proved the allegation to the satisfaction of the Court. We say so in view of the clear prohibition of the publication of false allegations about a candidate in an election in section 15 (1) (c) of the Electoral Code of Conduct.

We agree with Mr. Zimba's submission that the drafters of the Act did not restrict the prohibition of the publication of false statements about a candidate to the issues specified in section 84 (1) of the Act to the exclusion of the publication of false statements relating to the personal character or conduct of a candidate in an election.

Ground three therefore partially succeeds only to the extent that the trial Judge misdirected herself in the interpretation of the

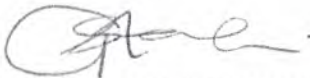
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law relating to the prohibition of the publication of false statements about a candidate in an election.

Although ground three has partially succeeded, overall the appeal has no merit and is therefore dismissed. Each party shall bear their own costs of this appeal.




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H. Chibomba,
PERSIDENT, CONSTITUTIONAL COURT



.....
A.M. Sitali,
CONSTITUTIONAL COURT JUDGE



.....
M.S. Mulenga,
CONSTITUTIONAL COURT JUDGE



.....
E. Mulembe,
CONSTITUTIONAL COURT JUDGE



.....
P. Mulonda,
CONSTITUTIONAL COURT JUDGE